The Limitation on s.2(b), Freedom of Expression, in Relation to Dissemination of Misinformation

by

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CRIMINAL JUSTICE

We accept this thesis as conforming
to the required standard

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ABSTRACT

This thesis explores the possible limitations relating to s.2(b) of the *Canadian Charter of Rights and Freedoms* (*the Charter*); the section concerning freedom of expression. Specifically, this thesis examines how the Supreme Court of Canada (SCC) has interpreted this section regarding the sharing of misinformation. To this end, this thesis examines SCC decisions post-1982 to understand the Justices' logic when navigating issues of false news. This thesis follows a qualitative, hermeneutic case analysis methodology under the psychological theoretical basis of the "dual-process" theory to best understand a person's motivation when disseminating misinformation. Doing this, this thesis reviews SCC cases which fulfilled the requirements as laid out in the methodology chapter. The results indicate that SCC is unwilling to use the powers of government to silence statements of misinformation due to the potential chilling effect for a minority population's freedom of expression. On the other hand, specific wording in the *Charter* exempts private actors from being bound to the s.2(b), therefore leaving open the possibility of civil lawsuits. This thesis is scholarly significant as it informs the public discussion regarding private platforms like Facebook, Instagram, and Twitter to moderate speech on their platforms. Furthermore, this distinction between civil and criminal action has implications for the range of sanctions available for any potential offender.

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PREFACE

In late 2019, during the last half of my undergraduate degree of Criminal Justice at Mount Royal University, my education was upended by the COVID-19 pandemic. This meant that my classes quickly moved online to allow for two weeks to "bend the curve". Obviously, these two weeks grew into two years as the pandemic worsened. As the pandemic grew, so did the falsehoods about its nature and possible cures. This included statements that injecting disinfectant intravenously could cure the disease, or that the virus was no worse than the common flu, or that masks are ineffective at preventing spread (McGraw, 2021). All of these lies invariable resulted in a small percentage of individuals acting on the advice, and either exasperating the pandemic, or dying as a result.

Furthermore, at the same time, Canada's southern neighbours were in the middle of a very tense election. This was the 2020 election, which pitted Democrat Joe Biden versus Republican Donald Trump. Over this period, there were countless news stories which proclaimed some fundamental irregularities with the 2020 election, with the overall attempt to paint the election as fraudulent and that the only valid winner would be Donald Trump. Regardless, Joe Biden won the election with an elector count of 306 to Donald Trump's 232 (National Archives, 2021). Despite this, Donald Trump went all over national TV making claims that the 2020 election was illegitimate and *inter alia* that he should remain as president. This all exploded on January 6, 2021, where a group of protestors stormed the US capitol hoping to prevent the certification of Joe Biden's victory (Luke, 2021).

Watching these events unfold at the same time showed me that misinformation, when propagated and shared long enough, can earn a form of credibility. And this presents a risk, not only to a person's health but also to the institutions of democracy that we've come to enjoy in Canada. Therefore, the purpose of this thesis was to explore what kind of legal ramifications are available for those individuals who willingly traffic in falsehoods. And, to understand the

limits within Canadian law regarding misinformation. The goal is to present evidence to best understand how the Supreme Court of Canada interprets a person's right to expression under s.2(b) of the *Canadian Charter of Rights and Freedoms*. And what limitations, if any, exist under this section of *Charter* for the distributing of misinformation.

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GLOSSARY ACRONYMS

SCC	Supreme Court of Canada
Charter	*Canadian Charter of Rights & Freedom*
CCC	*Canadian Criminal Code*
s. 1	Section 1 of the *Charter*: "*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"*
s. 2(b)	Section 2(b) of the *Charter*: "*Everyone has the following fundamental freedoms…(b)Freedom of thought, belief, opinion and expression…"*
s. 32(1)	Section 32(1) of the *Charter*: *"the Charter applies (a) to the Parliament and government of Canada in Respect of all matters within the authority of Parliament including all matter relating to the Yukon Territories and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province"*

CHAPTER I: INTRODUCTION

"The state of men without civil society (which state we may properly call the state of nature) is nothing but a mere war against all; and in that war all men have equal right unto all things…" (Hobbes, 1642)

I-1) Chapter Overview

Freedom of expression is central in any functioning democracy. Sadly, as demonstrated during the COVID-19 pandemic, inaccurate information shared under the facade of reputable news has become commonplace. As people consume this inaccurate information, it leaves the door open for potential and significant social harm. What exasperates the issue is the propensity for those who disseminates this misinformation to claim their acts are protected under s.2(b) of the *Canadian Charter of Rights and Freedoms*. But in cases where misinformation results in tangible harm, there must exist some legal recourse.

The objective of this thesis is to establish what limitations on misinformation already exist, and to also explore how an expression potentially could be exempted from protection under s.2(b) of the *Canadian Charter of Rights and Freedoms* (*Charter*). To this end, this thesis analyzes previous Supreme Court of Canada (SCC) decisions to establish any similarities between cases where an infringement of freedom of expression was justified. In doing so, this thesis utilizes a qualitative hermeneutic case study format of secondary data when comparing SCC decisions. Moreover, this thesis employs the psychological theoretical lens of the dual process theory to discuss why people share misinformation (Pennycook & Rand, 2019). There is then an exploration of existing literature on instances where the SCC has limited freedoms under the *Charter.*

I-2) Background

Canadian legal scholars commonly must dispel the popular belief that the *Charter* is absolute. In fact, s.1 of the *Charter* allows for "reasonable limits" that infringe on our rights

(Government of Canada, 2021, p. 47). The landmark case of *R v. Oakes* (1986) serves as the guide when determining whether an infringement is justified under s.1. Despite this, there exists a gap in the knowledge regarding if those limitations can be applied to instances of misinformation. As evident from the COVID-19 pandemic, if even a small portion of society consumes false information, it can result in needless illness and even death. Therefore, this thesis attempts to fill this gap in the knowledge by highlighting how the SCC has limited *Charter* rights, with specific attention to cases where the SCC has limited s.2(b) of the *Charter.* As explored in the literature review, landmark SCC s.2(b) decisions specifying limits on expression, followed by examples of justified limitations on s.2(b), and ending with an examination of how social media has contributed to the epidemic of misinformation.

I-3) Research Question

What criteria, if met, could exempt expressions of misinformation from protection under s.2(b) of the Charter?

I-4) Rationale and Significance

I-4-a) Rationale

The rationale for this thesis relates to the increasing accounts of misinformation specific to medical information and the politicization of public health concerns. Living through the COVID-19 pandemic, it is concerning to see the large proliferation of misinformation across the internet; especially regarding medical misinformation being shared by individuals with no credentials in the medical field. When such misinformation is circulated by thousands of people, it unfortunately can result in a significant number of people ignoring science-based health advisors. Despite this, some may claim they are allowed to say whatever they want because of s.2(b) of the *Charter*. This thesis will examine this assertation using legal analysis.

The concern of misinformation extends well beyond just public health, they can have a profound impact on civil society and democracy. A noted contemporary example is the January

6, 2021 insurrection at the US Capital Building in Washington D.C, USA (Luke, 2021). This insurrection was fuelled by the belief that Donald Trump had won the 2020 election and that Joe Biden was an illegitimate president; a falsehood proven by numerous election audits and court reviewed proving the contrary (Schwartz & Layne, 2021, para. 4). Nevertheless, this belief was strong enough to motivate thousands of individuals to storm the US Capitol; resulting in the death of at least one officer, the injuring of multiple others, and the death of at least one insurrectionist (Hermann & Hsu, 2021). Luckily, because of the acts of a few brave officers (special mention to officer Eugene Goodman) the insurrection was thwarted (Honderich, 2021, para. 18). Watching this situation unfold, to see so many people animated by a cause that has been debunked numerous times is worrisome. And it is terrifying to see one of the longest-standing democracy almost overthrown on a belief inspired by incorrect information. Therefore, there is a need to establish the limits on expression as to prevent any speech that could undermine Canada's democracy.

I-4-b) Significance

As the internet and world becomes more intertwined, the dissemination of news, both true and false, will inevitably grow alongside. Therefore, it is critical our elected lawmakers establish legal limitations on the deliberate spread of false ideals. With a population of over 38 million people, if even 1% of the population believed and acted on some detrimental misinformation, that could present a dangerous situation for 380,000 people (Statistics Canada, 2021). Therefore, if members of the public are aware that they may be held legally accountable for purposely permeating disinformation, they may think twice before they share.

I-5) Scope and Structure

I-5-a) Scope

To best understand the limits on *Charter* rights, there must be a charter to analyse. Thus, the scope of this thesis will be limited to SCC decisions after 1982. This thesis mostly considers

cases addressing s.2(b) challenges (freedom of expression). However, additional cases outside the scope of freedom of expression are also explored to better understand the ability of the SCC to limit individual freedoms. Hence, the SCC has the ultimate authority in interpreting *Charter* rights. But any thesis would be remiss without an acknowledgment of it's limitations.

An important limitation on this thesis concerns the purpose of the contents therein. The purpose of this thesis is to explore the constraints in the legal defense of s.2(b) when charged with a crime under Canadian statue. The point of the thesis is ***not*** to imply that any person who shares misinformation accidentally is guilty of some crime. Instead, this thesis can be applied after a person has been charged with some offense and attempts to litigate that he/she can not be held accountable because of their freedom of expression under s.2(b).

I-5-b) Structure

Establishing thematic similarities between s.2(b) cases requires an examination of jurisprudence. Beginning with a review of the relevant literature and landmark SCC decisions, this thesis specifically examines entrenched case law tests such as the tests found in *Oakes* (R v. Oakes, 1986) and *Irwin Toy* (Irwin Toy v. Quebec, 1989). Afterwards, a further examination of already accepted limitations on freedom of expression. And finally, the literature review will conclude with a discussion as to how the internet has contributed to the spread of misinformation.

After the literature review, the theoretical foundation of this thesis is provided. To best do this requires briefly stepping outside the field of criminology to the field of psychology. Specifically, the theoretical chapter will assess Pennycook & Rand's (2019) article studying the dual process theory in relation to believing misinformation. The theoretical section addresses how different methods of reasoning affect one's susceptibility to fake news. It is important to understand the dual process theory, as it will determine how likely someone is to

believe fake news, and consequently, how likely they are to disseminate fake news (Pennycook & Rand, 2019).

Afterwards, an explanation as to why a hermeneutic case analysis research method was used to answer the research question is afforded. Moreover, the methodology chapter goes further in depth as to why this thesis uses a purposive sampling technique. The methodology chapter further goes into detail as to why a particular characteristic was chosen from any case.

I-6) Chapter Summary

Freedom of expression is central to a functioning democracy, but it does have limits. The purpose of this thesis is to explore what legal characteristics could remove protections under s.2(b) of the *Charter,* relating to freedom of expression. This will be achieved by using a hermeneutic case study methodology by collecting and examining previous SCC decisions of issues of expressive freedom. By doing so, this thesis attempts to establish thematic consistencies which can inform legal practitioners in the future when another issue of expressive freedom inevitably comes up. But before the establishment of those similarities, it is logical to begin with the most fundamental precedent in Canadian law.

CHAPTER II: LITERATURE REVIEW

II-1) Chapter Overview

The idea that Canadian *Charter* rights are infringeable to many within Canadian society is reprehensible. Therefore, it is important to begin with the basics of Canadian *Charter* jurisprudence. From this an examination of landmark SCC decisions that defined s.1 and s.2(b) of the *Charter* is provided. This begins with an explanation of *R v. Oakes* (1986) and its impacts for s.1. Then move into discussions about *Ford v. Quebec* (1988) and *Irwin Toy v. Quebec* (1989) and how these two cases defined s.2(b) of the *Charter*. Afterwards, an exploration of already-existing limitations on s.2(b), such as hate speech, child pornography and threats of violence is outlined. Finally, the literature review concludes with an analysis of how social media platforms have contributed to the epidemic of misinformation. At the end of the literature review, it should be clear that the SCC can (and has) limited an individual's s.2(b) *Charter* rights.

II-2) First Main Theme

Since many in Canada do not know that *Charter* rights are infringeable, it must be explained as how this came to be. Therefore, the first case analysed is the 1986 case of *R v. Oakes*. This case explores s.1 of the *Charter*, which reads: "*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"* (Government of Canada, 2020, para. 1). These "reasonable limits" are defined in a 4-step test outlined in *R v. Oakes* (1986). This case then laid the groundwork for future cases that would otherwise be a violation of the *Charter*, such as *Ford v. Quebec* (1988), during which the baseline for '*freedom of expression*' under the *Charter* is identified, and *Irwin Toy v. Quebec* (1989) which further refined this baseline into a 2-step test. At the end of the first theme, the logic of the SCC when limiting individual expressive freedoms should be clear.

II-2-a) R v. Oakes (1986)

The case of *R v. Oakes* (1986) centres around a contention of s.11(d) of the *Charter*. s. 11(b) confirms every person's right to be presumed innocent until proven guilty in an independent and impartial tribunal (Government of Canada, 2020). In his case, David Edwin Oakes was found in possession of eight vials of hashish oil (a prohibited substance under the *Narcotics Control Act* [*NCA*] at the time), and $619.25 (R v. Oakes, 1986, p. 110). Oakes was charged in possession of a controlled substance, and it was assumed under the *NCA* he was in possession with intent to traffic. Despite Oakes' claim the hashish oil was for personal use (p. 114). This 'reverse onus' required Oakes to bears the burden of proof to prove he *was not* trafficking. This presented an infringement of Oakes' s.11(d) right to presumed innocent. The question then, for the SCC, whether the reverse onus of the *NCA* constituted a "reasonable limit" under s.1 of the *Charter*.

To answer this question, the SCC Justices created a four-part test to determine whether a legislation is a "reasonable limit" under s.1 of the *Charter*. But before analysis of this test, it is important to establish that the infringement must be "prescribed by law", meaning that the infringement must exist in the form of legislation, policy, regulation, etc. Essentially, the infringement must be by government action. The steps of the *Oakes* test are as followed: 1) what is the substantive and pressing need/objective of the legislation. 2) Is there a rational connection to the needs and means employed? 3) is the legislation minimally impairing? (does the legislation infringe no more than necessary). 4) is there a favourable balance between the pros and cons of the infringement? (R v. Oakes, 1986, pp. 135-140) If, and only if, a piece of legislation 'passes' all four steps sufficiently, then it is deemed that an infringement presents a "reasonable limit" under s.1 and would still be considered constitutional. In Oakes' case, the reverse onus clause failed at the 'rational connection' and it was deemed s.8 of the *NCA* was unconstitutional and struck down. This case was ground-breaking in that it established the SCC

test to limit *Charter* protected rights and freedoms. And these limitations would be further explored regarding the s.2(b) case of *Ford v. Quebec* (1988).

II-2-b) Ford v. Quebec (1988)

In February 1982, Valerie Ford sought a declaration from the Quebec Superior Court that s. 58, s. 69, and ss. 205-208 of the *Charter of the French Language* were "inoperative and of no force of effect (Ford v. Quebec, 1988, p. 714). Specifically, s. 58 of the *Charter of the French Language* states all signs in Quebec must be shown exclusively in French, and s. 69 requires that only the French name of any business be displayed in Quebec. While ss. 205-208 address the potential penalties for contravening the *Charter of the French Language.* At the Superior Court, the Justices decided s. 58 was the only section contravening s.2(b). This caused the Attorney General for Quebec to file an appeal to the SCC. On the other side, Valerie Ford also appealed the decision because of "failure of the Superior Court to declare ss. 69 and 205 to 208 inoperative" (p. 714).

At the Supreme Court, the Justices ruled unanimously the s.2(b) should be interpreted broadly & liberally and is not limited to political expression or speech (Ford v. Quebec, 1988, p. 767). Rather, s.2(b) protects all kinds of expression, including artistic, political, cultural, and commercial. At trial, the Justices agreed with the stated purpose of s.58 & s.69 to protect the identity of the French language and culture. However, the absolute prohibition of any language besides French was too broad to constitute a "reasonable limit" under s.1 of the *Charter*. Therefore, the impugned legislation failed at the "minimal impairment" step of the *Oakes* test. For the purpose of this thesis, the main takeaway from the case of *Ford v. Quebec* (1988) is the Supreme Court's cohesive view that s.2(b) protects all kind of expressive content. This broad interpretation paved the way for future cases of s.2(b), such as the case of *Irwin Toy v. Quebec* (1989) and how the SCC defined the case law test for s.2(b).

II-2-c) Irwin Toy v. Quebec (1989)

Shortly following *Ford v. Quebec* (1989), the Quebec government would find itself in court again, this time the plaintiff was the Irwin Toy Corporation. At the Quebec Superior Court, the Irwin Toy corporation attested that ss. 248 & 249 of the *Consumer Protection Act* were out of the jurisdiction of the Quebec government ("*Ultra Vires")*. For clarity purposes, ss. 248 & 249 prohibited advertising directed towards those under 13 years of age, as it was argued by the state that children are not well equipped to address the persuasive measures of advertising. On the other hand, Irwin toy challenged that this prohibition interfered with their s.2(b) rights to freedom of expression and could unduly impact their potential revenue. The Superior Court of Quebec dismissed the case, which caused Irwin Toy to appeal. At the Appeals Court, the justices agreed with Irwin Toy that ss. 248 & 249 violated their s.2(b) rights and that it was not justifiable under s.1 of the *Charter* (Irwin Toy v. Quebec, 1989, p. 929). This in turn, resulted in the Attorney General of Quebec appealing the decision to the SCC.

At the SCC, the Justices agreed with the Appeal's Court Justice that ss. 248 & 249 did violate Irwin Toy's s.2(b) rights. However, this violation was ruled justifiable under the 1986 *Oakes* test. The SCC Justices acknowledged that the legislation could impact Irwin Toy's revenues, however this impact was minimal as it still allowed advertising to parents or other adults (Irwin Toy v. Quebec, 1989, p. 933). From this case, the SCC Justices developed a 2-part test to determine whether expressive content falls within the sphere of protected expression of s.2(b) of the *Charter*. Firstly, the *Irwin Toy* test requires that the plaintiff/claimant demonstrates that their activity either conveys or attempts to convey expressive meaning. This is a subjective aspect, as it requires that the speaker of the expressive content has some idea or content they seek to express. And this expressive content or idea does not have to be in line with societal values (Irwin Toy v. Quebec, 1989, p. 968). Secondly, the *Irwin Toy* test analyses whether the purpose ***or*** effect of the government action restricts, or attempts to restrict, freedom

of expression. This 'purpose ***or*** effect' standard is important, as it establishes that either the intent, or the result, to restrict expressive freedom by government action is enough to bring a potential case before the court (Irwin Toy v. Quebec, 1989, p. 972). Therefore, this test developed from *Irwin Toy v. Quebec* (1988) provides a very robust protection for expressive freedom from government interference. If a claimant can prove the affirmative in both steps of the *Irwin Toy* test, the case then goes on to the *Oakes* test to see if such infringement is a justified limit.

II-3) Second Main Theme

At this point, it should be clear that the idea of an absolute right under the *Charter* is incorrect. Instead, the SCC has on several instances limited an individual's expressive freedom in the interest of preserving democratic values. To better explain this, this thesis evaluates three separate cases in which the SCC ruled a justified limit on an individual's s.2(b) right. Firstly, there is the case of *R v. Keegstra* (1990) regarding issues of hate speech. Secondly, is *R v. Khawaja* (2012), which addresses violence and threats of violence. Finally, *R v. Sharpe* (2001) addresses child pornography. The goal of this section is to provide support for the idea that the SCC has limited individual freedoms in the past, and that misinformation could treated in a similar fashion.

II-3-a) R v. Keegstra (1990)

James Keegstra was a high school teacher in rural Alberta, where he repeatedly communicated statements defamatory of those of the Jewish faith. Keegstra continually made comments asserting that Jews are innately evil and sought to upend society (R v. Keegstra, 1990, p. 713). He went so far to say "Jews created the Holocaust to gain sympathy" (p. 714). Keegstra expected his students to recreate these statements on examines, lest their grades suffer. In 1982, Keegstra was dismissed from his position as a teacher and in 1982, was charged under S.319(2) of the *Canadian Criminal Code* (*CCC*), which address unlawful promotion of

hatred towards an identifiable group. After a failed attempt to quash the charges, Keegstra was convicted at the trial level, which he appealed on the grounds his s.2(b) rights were violated. The Appeals Court accepted this argument, and then the Crown appealed to the SCC.

At the SCC, the majority justices decided that, while s.319(2) did infringe Keegstra's s.2(b) right, such infringement was justified under s.1 of the *Charter*. In their decision, the majority wrote that while the comments made by Keegstra are reprehensible, they do not "fall within the ambit of a possible s.2(b) exception concerning expression manifested in a violent form" (R v. Keegstra, 1990, pp. 698-699). And as such, were afforded protection under the sphere of s.2(b), so long as the comments were not accompanied by violent acts. The question for the SCC, is whether s.319(2) constituted a "reasonable limit" under s.1 of the *Charter*. The majority would say that s.319(2) *is* a reasonable limit, as the objective of promoting racial unity in Canada was rationally connected to the means of preventing hate speech promotion. Furthermore, the SCC would say that s.319(2) was a proportional response to parliament's objective, and that it does not unduly burden a person's s.2(b) right. Finally, the SCC decided that the deleterious effects of prohibiting hate speech were far outweighed from the beneficial effects of its prohibition. At the end, the SCC eventually decided that, while Keegstra's s.2(b) right to expressive freedom was infringed, the infringement was justified under s.1 of the *Charter* following analysis through the *Oakes* test (1986).

II-3-b) R v. Khawaja (2012)

The concept at the core of *R v. Khawaja*, is whether acts, or threats of violence are covered under s.2(b) of the *Charter*. After becoming infatuated with the acts and philosophy of Osama Bin Ladin, Mohammad Momin Khawaja began offering support to terrorist cells abroad and even attended a small training camp in Pakistan. Khawaja went as far to design a detention device for a supposed U.K bomb plot (*R v. Khawaja*, 2012, p. 556). He was charged under various terrorism sections of the *Canadian Criminal Code*, which prohibited providing

material support to terrorist activities. At the trial court, the Crown prosecutor failed to establish beyond a reasonable doubt that Khawaja had knowledge of the U.K bomb plot, so the Judge found him guilty of the lesser-included offenses and sentenced him to 10½ years in prison. On appeal, the defence for Khawaja argued S.83.01(1)*(b)*(i)(A), which required that the terrorist activity was "in whole or in part 'for a political, religious or ideological purpose, objective or cause'" (referred to as the "Motive Clause") was an infringement on Khawaja's s.2(b) *Charter* rights (*R v. Khawaja*, 2012, p. 556). The Ontario Court of Appeal dismissed Khawaja's appeal but allowed the Crown's cross-appeal for life imprisonment for constructing a detonator for a deadly purpose (R v. Khawaja, 2012, p. 557). From here, Khawaja appealed to the SCC.

The Supreme Court of Canada collectively voted to dismiss Khawaja's appeal. The Court did recognize that the "motive clause" does have elements of expression, however the nature of the expression exempted it from protection under s.2(b). The SCC ruled that acts or threats of violence are excluded from freedom of expression protections under the *Charter* (R v. Khawaja, 2012, p. 558). They found that acts of counselling, conspiracy or being an accessory after the fact in events of terrorism were so innately tied to the acts of violence that it fell outside the protections of s.2(b). Moreover, the Justices stated that S.83.01(1)*(b)*(i)(A) still allowed for the expression of non-violent ideologies. And that the legislation was written in such a manner to be respectful of diversity. However, the Court stated that s.83 could in the future capture some "protected activity", and in such case, it would be up s.1 to determine a reasonable limitation (p. 559). Therefore, the case of *R v. Khawaja* it is demonstrative that the SCC have ruled acts/threats of violence are outside of freedom of expression protection.

II-3-c) R v. Sharpe (2001)

John Robin Sharpe was charged with a total of 4 charges under s.161.1 of the CCC for the possession, and possession for the purpose of distributing child pornography (R v. Sharpe, 2001, p. 46). Sharpe brought a preliminary motion questioning the legitimacy of s.163.1(4),

saying that the prohibition on child pornography violated his freedom of expression. This defence worked both at the Trial Court and the Appellant Court. With the Justices in both trials deciding that s.161.1 did violate Sharpe's s.2(b) rights, and this infringement was not justified under s.1 of the *Charter*. The Crown appealed this finding to the SCC. The Supreme Court allowed the appeal and permitted the case to go back to trial, after some modifications to the law.

The Supreme Court of Canada would find themselves in an intellectual dilemma. On one hand, the court recognizes that child pornography falls within the "continuum of intellectual and expressive freedom protected by s.2(b)" (R v. Sharpe, 2001, p. 48). On the other, even the accused acknowledged that the harm to children justified some criminal penalties against it. The question, therefore, is whether s.161.1(4) is too expansive and prohibits "an unjustifiable range of material" (p. 48). The majority would rule it does, saying that the legislation has a pressing and substantial objective in s.161.1(4) in protecting children from material that may be of "reasoned risk of harm" to children. And the prohibition of possession of children pornography was rationally connected to this objective (R v. Sharpe, 2001, pp. 48-49).

The sticking point for the majority was the minimal impairment step. Specifically, the Court drew issue with written or visual material that are held exclusively by the accused and are for personal use; and material that does not depict any unlawful conduct. The Court would later add more clarification around "unlawful conduct" , including that it must have consent and does not involve "exploitation or abuse of children". The Court likened it to the idea of a "teenage couple" (R v. Sharpe, 2001, pp. 111-112). The SCC would send the issue back to the trial court with two exceptions to s.161.1(4). Firstly, an exception for "self-created expressive material" which included any written or visual material created and held exclusively by the accused. And secondly, "private recordings of lawful sexual activity", which included

materials with lawful sexual activity held exclusively by the accused (p. 111). Back at the trial court, Sharpe was convicted on the possession for images of child pornography but was acquitted on the charges of the written material (CBC, 2002). While some may say the courts erred in letting Sharpe off on the written material, it is important to remember that the SCC upheld the prohibition against those materials that are at a "reasoned risk" of harm to children, and as such, represented a justified limitation on an individual's s.2(b) freedom.

II-4) Third Main Theme

Since it is established that under Canadian law, the SCC has the authority to limit individual expressive freedoms, and that the court has done so repeatedly in the past. There needs to be an exploration of the current state of misinformation and how it has exploded in recent years. This begins an analysis of scholarly articles that explain how social media and critical thinking are related. Then there is be an exploration of the presence of misinformation within the "Meta-verse", with a comparison to Twitter.

II-4-a) Social Media and Critical Thinking

It is paramount to understand a person's capacity for critical thinking in relation to news on social media, as it is necessary to discern fact from fiction. In Ku et al.(2019) article, the researcher sought to understand the relationship between social media news and critical thinking ability in Hong Kong's adolescent (grade 7-12) with a sample size of 1505 (p.3). In their study, the researchers distinguished between two methods of thought: The "heuristic" method, which is best understood as one's intuition, rapid sub-conscious thought. And the "analytic" method, which is the more "demanding of cognitive resources". The authors mention that "heuristics are negatively associated with critical thinking, resulting in erroneous or biased judgements and belief." (Ku, et al., 2019, p. 2). Ku et al. (2019) would further define the motivation behind gathering news on social media in a similar, dichotomous fashion. The first category being referred to as: "news-internalizing", where an adolescent seeks out news

for its informative sake. And "news-externalizing", where an adolescent seeks out news to make some social communication.

In their study, the authors found that a majority of the studied sampled got their news from social media, with Facebook and YouTube leading the way. Furthermore, those individuals within the "news-internalizing" category were better critical thinkers then those within the "news-externalizing" category (Ku, et al., 2019, pp. 6-9). What's more, those who sought out news for the information's sake were more likely to be aware of the way social media algorithms factors into one's personalized feed, and how this personalized feed influences one's "echo chamber" (p.3). However, the adolescents within the study consistently under preformed in terms of evaluating the quality of the evidence within the news article. What this study shows us, is that those who use social media to obtain contemporary evidence, are often better critical thinkers then those who use news articles on social media as talking points. But in general, the studied sample struggled with evaluating the evidence within a news article on social media, and the ability to come to a reasoned conclusion.

II-4-b) The Role of the "Metaverse" with Misinformation

Ever since December 1st, 2021 Facebook and all its subsidiaries (including companies like Instagram & WhatsApp) merged into a larger company known as: Meta. This has since been referred to as the "Metaverse" (Reiff, 2021, para. 4-9). Therefore, to best explore the whole of the Metaverse it is necessary to break it into parts. The three parts of interest for this thesis are: Facebook, Instagram, and WhatsApp, as the other three companies concern logistical and virtual reality services. As for Facebook's role in sharing misinformation, one study found that, for 83 scientifically legitimate US Facebook pages, there were 330 Facebook pages dedicated to conspiracy theories (Zollo & Quattrociocchi, 2018). Moreover, Zollo & Quattrociocchi (2018) stated that about misinformation on Facebook:

> Our findings show that users usually exposed to conspiracy claims are more likely to jump the credulity barrier: indeed, conspiracy users are more active in both liking and commenting troll posts. Thus, even when information is deliberately false and framed with a satirical purpose, its conformity with the conspiracy narrative transforms it into credible content for members of the conspiracy echo chamber. (p.13)

Any question of Facebook's involvement in sharing misinformation should have been answered. But Facebook is not the sole perpetrator of this phenomenon, as other social media platforms like Instagram and WhatsApp also bear some responsibility.

As for Instagram, it is important to understand the nature of misinformation on the platform as its user-base grows faster than even Facebook (Constine, 2018). A study by Mena et al., (2020) tried to understand how the presence of trusted endorsement effects message credibility on Instagram (pp 3-4). In their study, Mena et al., (2020) found the implementation of a trusted personality was more effective in legitimizing misinformation then the number of likes on a post (p. 6). This suggests that popular public figures bear greater responsibility in ensuring the information they are endorsing has a factual basis. Finally, regarding WhatsApp, researchers noted visual misinformation ("Image Misinformation") was extensive in public WhatsApp political groups (Garimella & Eckles, 2020, p. 3). In the early months of 2019, the number of images containing some degree of misinformation quadrupled the number of images containing accurate information (p. 4). However, the researchers also noted their difficulty due to the "semi-closed nature of the platform" (p.1). In all, it should be demonstrative that the "Metaverse" has been instrumental in the dissemination of misinformation. But social media platforms excluded from the Metaverse deserve attention as well.

II-4-c) The Role of Twitter with Misinformation.

One of those social media platforms outside the Metaverse is Twitter, and its role in the dissemination of misinformation cannot be understated. Rosenberg et al., (2020) sought to

understand Twitter's role in sharing medical information and found a mixed bag. On one hand, Twitter does attempt to monitor misinformation and provide rapid access to conventional medical platforms (journals, textbooks) and can provide positive role model to its user base. On the other hand, hysteria blossomed on the social media platform. With many users equating the COVID-19 pandemic with an apocalypse, and this hysteria also contributed to worsening rates of mental health, self-harm, and suicide. And those "medically conventional" sources can have difficulty translating knowledge so that it is comprehensible to the public, and functionable for public policy (pp. 418-420).

Furthermore, Rosenberg et al., (2020) found the 45th president of the United States, Donald J Trump, stood as one of the most prolific amplifiers of misinformation over Twitter. In one tweet, Trump touted the efficacy of drugs such as hydroxychloroquine and azithromycin as potential treatments against COVID-19 (Rosenberg, Syed, & Rezaie, 2020, p. 418). Trump's influence cannot be understated, as comments like that even required nurses in Ontario, Canada, putting out a notice stating that there is no evidence to support hydroxychloroquine and azithromycin ability to treat COVID-19 (Registered Nurses' Association of Ontario, 2020). It is important to understand how authority affects misinformation, because when incorrect information is shared by a position of high authority, it can grant the false information credibility. And when platforms like Twitter allow unfettered access to unconfirmed information based on authority instead of scientific rigor, it make the misinformation harder to remove.

II-5) Chapter Summary

To a legal layman it should be clear that Canadian *Charter* freedoms are not unlimited. Since *R v. Oakes* (1986) the Courts have defined what "reasonable limits" exists for Canadian rights and freedoms. This limitation would be better defined in *Irwin Toy v. Quebec* (1989) in its relation to s.2(b) of the *Charter*. Of importance to note, the Courts have repeatedly limited

individual expressive freedoms for the sake of society, such as in *R v. Keegstra* (1990) and *R v. Khawaja* (2012). Furthermore, the ability of social media to influence one's critical thinking, and their tendency to host misinformation makes them of critical importance regarding the thesis question. The next question is *why* people share misinformation. For this, the attention turns to Pennycook & Yang's (2019) theory of dual process reasoning.

CHAPTER III: THEORETICAL APPROACH

III-1) Chapter Overview

This thesis briefly ventures outside of the field of the criminology to the neighbouring field of psychology. Specifically, this chapter focuses on Pennycook's and Rand's (2019) article articulating the difference between classical and motivated reasoning regarding people's susceptibility to partisan fake news. After outlining the elements of Pennycook's and Rand's (2019) theory to establish its theoretical framework, there is an explanation of why this theory was necessary for consideration. By understanding a person's cognitive function, one can better assess an individual's culpability when disseminating misinformation.

III-2) Overview of Theoretical Approach

Pennycook and Rand (2019) explained the dual process theory as "human cognition can be characterized by a distinction between autonomous, intuitive (System 1) processes, and deliberative, analytic (System 2) processes" (p.40). The question at the core of Pennycook's and Rand's (2019) article is whether an individual buys into fake news due to a motivated cognitive reasoning process, or due to an instinctual reasoning process. To do this, the authors defined two groups: intuitive and deliberative, based on their performance on a Cognitive Reflection Test (CRT) (pp. 40-42). After this, the sample groups were given a series of fake and real news stories, both politically consistent and inconsistent with the subject's political views, and were told to assess the accuracy of the article. The objective in their study, was to determine which one of these "systems" made one more susceptible to believe partisan fake news articles.

Stemming from the study, Pennycook & Rand (2019) found that the propensity to believe false information was more common among those classified as "intuitive" thinkers. The authors state that "Cognitive reflection does *not* increase the likelihood that individuals will judge politically consistent fake news headlines as accurate […] more analytic individuals

rated fake news as less accurate regardless of whether it was consistent or inconsistent with their political ideology" (p. 41). This demonstrates that irrespective of a person's political association, a Motivated, System 2 reasoning is not associated with believing fake news. On the flipside, that means that those who *do* tend to believe fake news are doing because of their Instinctual (System 1) response. This means those individuals who believe false news and who consequently share this misinformation are not doing so because of a deliberative cognitive process, rather because of an "off the cuff" response. As Pennycook and Rand (2019) put it quite succinctly: "the evidence suggests that people fall for fake news because the *fail* to think, not because they think in a motivated or identity-protective way" (p.47).

III-3) Rationale for Using the Chosen Theoretical Approach

The reasoning behind the decision to use the dual-process theory, is it can inform our understanding of an accused's *mens rea*. In Canadian criminal law, there are two elements that a Prosecutor must prove to secure a conviction. First, there is *actus rea*, which roughly translates to "*the guilty act*". Essentially this is just the criminal act itself. The second element is *mens rea*, which translates from Latin to "*the guilty mind*". This component addresses the mental state of the accused and whether they could formulate the intent to commit a criminal act. The reason why it is important we understand a person's thought process when sharing misinformation, is so we can better understand if they had the intent (or the *'mens rea'*) to affect harm or some criminal act. Therefore, an individual may be culpable depending on if they actively considered the detriments of the misinformation, or if they share it on a whim. One limitation with using this theoretical approach is the disconnect from criminological literature. However, since criminology is an interdisciplinary field that pulls elements from various faculties, this disconnect is not obtrusive.

III-4) Chapter Summary

The Canadian legal system is utmost concerned with the intent of the accused as the Courts strive to not punish the morally innocent. Therefore, it is paramount to understand an individual's cognitive process when sharing misinformation so that we can assess the accused's *mens rea*. In their study, Pennycook and Rand (2019) discovered that individuals who share false news are doing so through instinctual reasoning, and not though deliberative reasoning. In essence, these individuals have a reduced intent to cause harm. Considering this, it can be understood what *Charter* protections are afforded to those individuals. To do this, this thesis will outline the methodology needed to obtain relevant data for examination.

CHAPTER IV: METHODOLOGY AND RESEARCH DESIGN

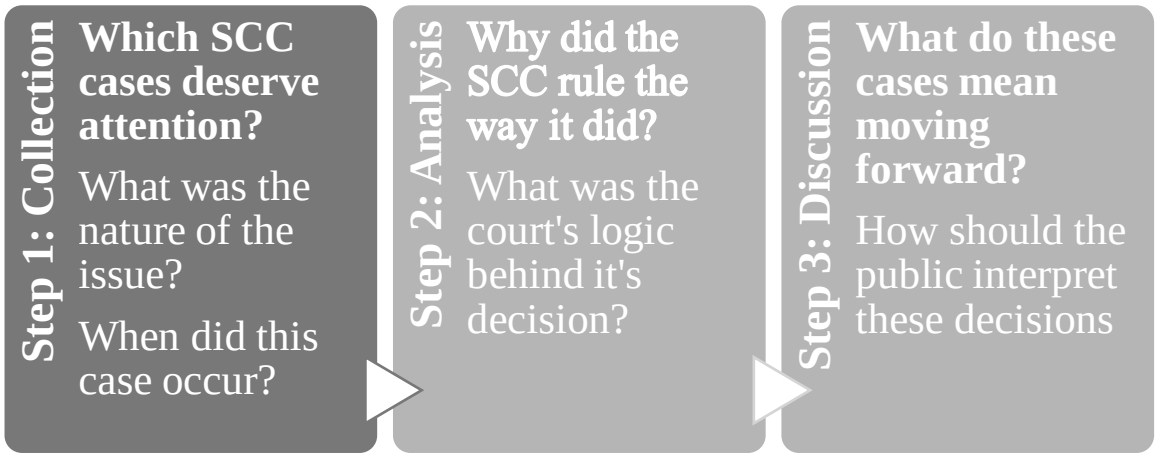
IV-1) Chapter Overview

For research to be credible, it requires a methodology so that the research may be replicated. This thesis will follow a qualitative, hermeneutic research methodology. The goal of this thesis is to identify what limitations may exist on a person's expressive freedom rights when disseminating misinformation. This chapter begins with an overview of the methodology used to obtain data which will lead into a in-depth elaboration, including an explanation of why this methodology was chosen. Afterwards, an analysis of the data that was collected will be conducted.

IV-2) Overview of Methodological Approach

Studying legal precedence requires the ability to collect, analyse, and condense historical court decisions. Therefore, this methodology will be qualitative in nature (University of McGill, n.d.). This thesis will use a hermeneutic case analysis of case law gathered from SCC databases that occurred after 1982 (University of Southern Carolina, 2021, para. 4). Using the Supreme Court of Canada and Canlii websites, key terms such as misinformation, false news, spreading, publication, dissemination, scope, appliciablity, and *Charter* were searched. Using this methodology along with a case study design, this thesis examines select court decisions to highlight court decisions specific to misinformation and *Charter* protections. Furthermore, since any chosen case contains unique circumstances that provide additional context for the SCC to consider, this thesis utilizies a purposive sampling technique to select which cases to examine (Campbell, Greenwood, Prior, Shearer, & Walkem, 2020, p. 663). The design of this methodology is to take otherwise complex court language, and to break it down into a manner that would be comprehensible to the public.

Figure 1: Example of Study Phases, Issues, and Steps



IV-3) Description of Methodology

A case study format involves in-depth exploration of a few choice examples (University of Southern Carolina, 2021, para. 6). However, a "hermanautic" analysis may seem more abstract. As defined in Liamputtong (2019), "hermanautic analysis requires reviewing and interpreting historical documents" (p.10). Since the job of the SCC is to analyze historical laws and interpret what law makers intended with a law, it is logical to analyze their decision in a likewise fashion. Since every case before the SCC has unique characteristics, this methodology will use a purposive sampling technique to select cases (Campbell, Greenwood, Prior, Shearer, & Walkem, 2020, p. 653). Furthermore, the SCC will not rule on a case where the legal questions were already answered. Hence, every case must be examined individually.

The operationalization within this thesis will be two-fold. Firstly, 'misinformation' will be defined as "false or inaccurate information that is deliberately created and is intentionally or unintentionally propagated". This draws from Wu's et al. (2019) article "*Misinformation in Social Media: Definition, Manipulation, and Detection".* This definition will encapsulate various types of misinformation, such as: False news, Rumour, Spam, etc. (p. 80). This definition provides a foundation for conceptualizing what is meant by 'misinformation'. As for

'*Charter* protections', this will be operationalized using the aforementioned *Oakes* test from the case of *R v. Oakes* (1986). This test will establish whether an infringment on a charter-protected right is considered a "reasonable limit" under S.1 of the *Charter*. These two definitions put together allow for a concrete understanding of what is meant when referring to 'misinformation' and '*Charter* protections'.

IV-4) Collection, Analysis and Limitations of Data

The data for this thesis was obtained through various websites that offer access to SCC decisions, including Canlii.org and Lexum.ca. All selected cases took place after 1982, as this was the year the *Charter* was implemented. Since this is secondary data available to the public at no cost, no ethics approval was required. The data was obtained through these resources using key terms to help distinguish between cases that are, and are not, beneficial to the research question. As for the analysis, this will involve an in-depth examination of the court's rationale for it's decision.

Regarding the limitations of this data, because the data was obtained *exclusively* from SCC decisions, decisions made by lower courts are omitted. Reaching the SCC requires a large amount of money and time to properly compile an argument. And since many citizens either lack the funds or the desire to argue all the way to the SCC, it is possible cases with legitimate claims where not reviewed by the SCC. Despite this, the proposed data collection methodology is still legitimate because SCC precedence overrides the lower courts decisions. Therefore, any decision inconsistent with the desires of the SCC could simply be overruled if necessary.

IV-5) Chapter Summary

This thesis follows a qualitative, hermeneutic case study of Supreme Court of Canada decisions post-1982 selected through a purposive sampling system (Liamputtong, 2019). The justification for the methodology concerns the similarities between this methodology and the way the Court practices. As the SCC continually interprets various pieces of legislation, it is

logical to analyse their decisions in a likewise fashion. One limitation on this study is that it excludes any lower decisions that did not make it up to the SCC, however this limitation is minimal as the SCC overrides lower court decisions. With the methodology established, the collection of data can begin.

CHAPTER V: DATA ANALYSIS AND RESULTS

V-1) Chapter Overview

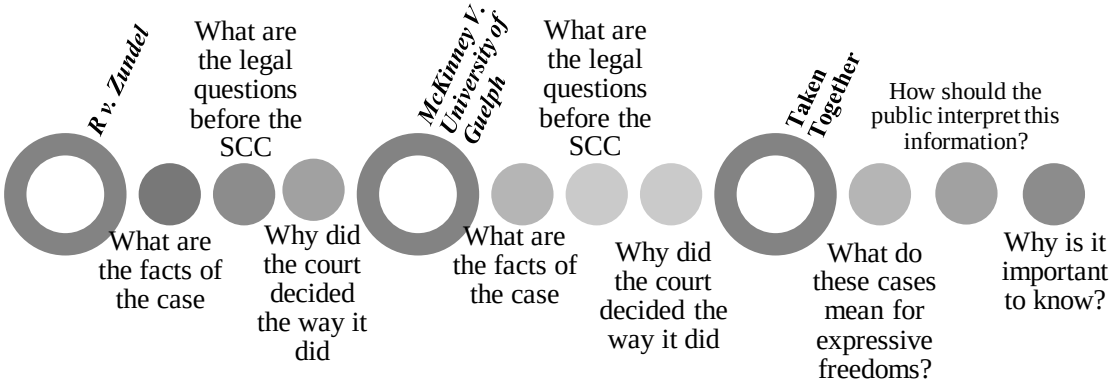
Stemming from the analysis of s.2(b) SCC decisions, it was found the SCC offers a high degree of expressive freedom protections, but not absolute. This is demonstrated through the 1992 case of *R v. Zundel*, which effectively answers the research question. Recall the objective of this thesis was to understand "*What criteria, if met, could exempt expressions of misinformation from protection under s.2(b) of the Charter?".* When the case of *R v. Zundel* (1992) is taken together with the case of *McKinney v. University of Guelph* (1990), it shows that the SCC does provide protections for expressive freedoms, but not in *every* situation. The research suggests that SCC offers expressive freedom protections from criminal prosecution, but not civil prosecution. So, it is not so much the "criteria*"* that may or may not exempt protections, rather it is the mode of persecution. This chapter will begin with an analysis of *R v. Zundel* (1992) and the main points of this case, and then move on to an examination of *McKinney v. University of Guelph* (1990). This information will then be centralized into the central findings, before ending with a chapter summary.

V-2) Data and Information Analysis

V-2-a) Collection of Data and Information

Data was obtained through Canlii.org using various combinations of the aforementioned keywords. Cases for examination were shortlisted depending on if they occurred after 1982. The cases selected depending on whether they addressed misinformation or the applicability of the *Charter*. From this, two distinct cases made themselves prominent: 1) *R v. Zundel*, which concerned the wilful promotion of false news, and 2) *McKinney v. University of Guelph*, which addressed the limitations of *Charter*-protected rights. These two cases provide enough information to answer the research questions.

Figure 2: Example of Study Phases, and Steps



V-2-b) Analysis of Data and Information

To ensure the data was relevant, an examination of case briefs was undertaken. The desire was to further narrow down what cases would be appropriate to answer the research question. However, since legal challenges have many aspects; and numerous legal questions can arise from any one case. Each of the cases presented here will be explained broadly, then condensed to the core questions pertaining to this thesis. Therefore, the cases will begin with an explanation of the facts of the case, then a description of the legal challenges posed by the plaintiff/accused, Finally, the answer of the SCC and their rationale. This data presents the logic behind the organization responsible for the protection of *Charter* rights. In general, the data shows that the SCC is hesitant to use the powers of government to curtail free speech, but that does not protect individual citizens from civil liability regarding the statements they make.

V-3) Results from Analysis

V-3-a) R v. Zundel

The first case under examination is the trial of *R v. Zundel* (1992) and the accused's publication of "false news". The case arises out of the accused's addition of a foreword and postscript on a document titled "*Did Six Million Really Die?"*. The document attempts to argue that it was not established that six million Jewish people died during the Holocaust. The

original document (minus the foreword and postscript) was originally authored by Richard Verral, an editor for the Neo-Nazi British National Front newspaper within a genre dubbed "*revisionist history"*, which purports to review historical evidence in a critical fashion. To make this information more palatable to the general public, the foreword argues that the Holocaust must be flatly denied and makes several "false allegations of fact". Some of these allegations include that *The Diary of Anna Frank* was fictious, and the gas chambers were built after the war by Russian Forces (pp. 732-744). For his addition of the foreword and postscript, Zundel was charged in contravention of s.181 of the *CCC* which states:

> *Everyone who wilfully publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.* (p. 743)

At trial, Zundel was convicted and immediately appealed to the Ontario Court of Appeal, which sent the case back to trial for errors on admittance of evidence. Zundel would be convicted again, where he would appeal again to the Ontario Court of Appeal where his conviction would be upheld again. From the Ontario Court of Appeal, Zundel would appeal to the SCC.

Referring to *Irwin Toy v. Quebec* (1989), the first question before the SCC was whether s. 181 has the purpose ***or*** effect of curtailing free expression. The Court agreed unanimously that s.181 has the purpose of preventing expression, specifically expression of false information. The division in the Court was whether this constituted a reasonable limit under s.1 of the *Charter*. Most of the Court believed that it was unreasonable limit. As outlined in *R v. Oakes* (1986), the first question is what the "pressing and substantial" objective of the legislation, and to do this the SCC examined why s.181 was enacted in the first place. The Court eventually settled on the purpose being to prevent slanderous lies against nobles of the state (p. 733). Because of this, the SCC were unable to find a modern "pressing and substantial"

objective that justified the existence of s.181. The Court went on to say that it is not the SCC responsibility to reimagine, or redefine legislation that Parliament has drafted, rather it is the SCC role to enforce the written law. Based on this, the majority decided that s.181 failed at the first step of the *Oakes* test. However, the SCC would continue. Saying that, even if, s. 181 had a contemporary-relevant objective, the phrase "…likely to cause injury or mischief to a public interest…" is so broad that almost any piece of misinformation could qualify. Hence, s. 181 failed again at the minimal impairment step of the *Oakes* test. Therefore, the SCC held on a 6-3 decision that s. 181 is unconstitutional.

The main crux of the majority's decision is that s.2(b) protects *all* kinds of expression, including those minority opinions which may be seen as false or reprehensible by the mainstream. And since the Canadian Government has much more resources at its disposal than the individual person, using the force of the government to silence voices deemed incorrect would have a chilling effect on expressive freedoms. But recall this only prevented Zundel from being held *criminall*y responsible for his acts, which is a different standard from being held *civilly* responsible.

V-3-b) McKinney v. University of Guelph

As shown in *R v. Zundel*, s.2(b) protects individuals from governmental repercussions regarding disseminating misinformation, but how does this translate to civil law? For this, there is a need to determine the scope of the *Charter* in context of civil prosecution, such as in *McKinney v. University of Guelph* (1990). While this case does not address issues of s.2(b), it does address the scope of the *Charter*. The case before the SCC represented a collection of professors at various universities across Canada against their respective university. Each university had a mandatory retirement policy when a faculty member reached the age of 65. The appellants sought a declaration from the SCC that this mandatory retirement policy violated their s. 15 *Charter* rights (McKinney v. University of Guelph, 1990, p. 231). Under s.

15, every person has equal benefit and protection under the law without discrimination based on either enumerated grounds, or analogous grounds; one of these enumerated grounds included age (Andrews v. Law Society of British Columbia, 1989, p. 145).

When making their decision, the Supreme Court of Canada referred heavily to s.32(1) of the *Canadian Charter of Rights and Freedoms*. From the Canadian Justice Laws website (2021), it states that s.32(1) of the *Charter*:

> *… applies (a) to the Parliament and government of Canada in Respect of all matters within the authority of Parliament including all matter relating to the Yukon Territories and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province*. (p. 58)

Noticeably, the wording of s.32(1) explicitly addresses governments at all levels but does not include any mention of private institutions. The SCC states that this exception was intentional. They agreed that the *Charter* is necessary to protect individual rights and liberties from governmental action. And that while some private actions may "offend individual rights, [they] can either be regulated by government or made subject to human rights commissions". Moreover, they recognized that non-governmental institutions (such as universities) are capable of their own internal regulation and implementation of policies.

While some policies may warrant judicial review, most still fall within the purview of the private institutions. Furthermore, the majority on the court agreed that while some institutions may receive funding from levels of government, and those institutions may serve a public purpose, that is not sufficient to classify the institution as part of the government. As to do so, the institution would need to be part of either the legislative or executive branch of government (McKinney v. University of Guelph, 1990, p. 232). Hence, in a vote of 5-2, the SCC ruled that because of the wording of s.32(1), this deliberately excludes the acts of private

institutions from the ambit of *Charter* protections. Therefore, this means that acts or policies of private associations are not held to the standard of the *Charter*.

V-4) Central Findings from Analysis

The main take away from the evidence provided is that while the *Canadian Charter of Rights and Freedoms* may guarantee a person's expression freedom from governmental interference, it does not provide immunity. The wording of s.32(1) of the *Charter* carves out the exception that private actions are not covered by the *Charter*. And with the SCC's declaration that this exception was deliberate, it provides a strong argument that non-governmental bodies may be free to regulate speech in their own capacity. That means bodies like Twitter, Facebook and Instagram are permitted, under Canadian Law, to regulate speech on their platforms within the confines of the law (Zollo & Quattrociocchi, 2018). Moreover, this provides evidence that s.2(b) does not provide a protection from civil litigation. As lawsuits filed by private citizens would be exempt under s.32(1), and this is noteworthy as the standard in civil trials is markedly lower than in criminal trials. In all, the evidence from *R v. Zundel* (1992) and *McKinney v. University of Guelph* (1990) supports the proposition that s.2(b) does not shield one from the prospect of civil liability.

V-5) Chapter Summary

The SCC decisions of *R v. Zundel* (1992) and *McKinney v. University of Guelph* (1990) demonstrates the *Charter* protected rights only goes so far as to prevent governmental interference with a person's expressive freedoms. *R v. Zundel* (1992) shows how the SCC is hesitant to use the powers of government to silence those views regarded as "false". As the SCC states, s.2(b) protects most kinds of expression from government interference, even those views that are considered reprehensible or offensive. As for *McKinney v. University of Guelph* (1990), it emphasized s.32(1) of the *Charter* which articulated that the *Charter* applies only to acts of government, provincial, federal, or territory. This wording carves out the private sector

from being bound to the scrutiny of *Charter* rights. Therefore, while s.2(b) provides protection from governmental sanctions, it does not provide protection from civil sanctions. And this will have implications that will be explored in the next chapter.

CHAPTER VI: DISCUSSION

VI-1) Chapter Overview

After combing through SCC decisions relating to freedom of expression and the scope of the *Charter*, two cases stand out: *R v. Zundel* (1992) and *McKinney v. University of Guelph* (1990). Taken together, these cases demonstrate that while the *Charter* acts as a constraint on governmental action, it does not work the same way for civil action (Hunter et al. v. Southam Inc., 1984, p. 146). This means that while the government may not be able to sanction individuals for expressing misinformation, the private citizen could potentially. This impacts the range of sanctions that are possible if the court deems them appropriate. This chapter will begin with a return to the research question to explore whether the question was adequately answered. Then move on to how this thesis connects to the existing literature of SCC decisions. This chapter will explore the implications that may exist from how the SCC has interpreted s.2(b) of the *Charter*, and how this affects the possibility of sanctions. The discussion will conclude with a summary before moving into the concluding chapter.

VI-2) Addressing the Research Question

The objective of this thesis initially was to understand what criteria, if met, may exempt a piece of misinformation from expressive freedom protection under s.2(b) of the *Canadian Charter of Rights and Freedoms*. Well, it appears that the answer to the question is less about the characteristics of misinformation, but rather the method of prosecution. *R v. Zundel* (1992) demonstrates that the act of disseminating "false news", on its own, is protected from governmental sanctions. However, the wording of s.32(1) states that this protection does not extend to civil litigation. Now, it is possible the content of the misinformed statement may constitute a violation of another established statue (for example, the case of *R v. Keegstra* (1990)), but the pure act of disseminating misinformation is immune from governmental

interference. But it is still liable for civil damages, granted the plaintiff can prove harm warranting judicial intervention. This distinction between civil and criminal penalties will have more implications that are addressed later in the chapter.

VI-3) Relation to Existing Research and Scholarship

One way the content in this thesis contributes to the public discourse on misinformation is that it highlights the difference in public and private moderation of expression. This distinguishment allows platforms like Facebook and Twitter to moderate speech as they are private entities, and thus, exempt under s.32(1). This is important to understand as many citizens accuse platforms like Facebook of violating their constitutional rights for taking down posts that does not follow their policies. But the truth is, is that private businesses are allowed to constrain speech made on their platforms. Furthermore, the evidence provided from *R v. Zundel* (1990) demonstrates how the SCC is reluctant to use governmental powers to silence views that deviate from mainstream views. This should be reassuring as it shows the individual rights of citizens are of utmost concern to the SCC justices, and the justices do not infringe on these rights easily.

VI-4) Implications

The implications from this thesis mostly concerns the sanctions available, and the requisite burden of proof. As previously mentioned, the SCC is hesitant to use the legal powers of criminal prosecution to silence expression, and that is because of the unique punishments available to the government. For example, the threat of imprisonment is only available for criminal prosecution, not civil prosecution. But sanctions such as monetary damages (fines) are still available in civil trials. This means that a person is not likely to see the inside of a prison cell for disseminating misinformation, but they can still be held to account in different ways. Once again, s.2(b) does not provide a shield from civil prosecution. It is important to note that civil law requires a smaller burden of proof then criminal law. In criminal law, the

burden the Prosecutor must past to ensure a conviction is "beyond a reasonable doubt", whereas the burden of proof in civil trials is "on a balance of probabilities". This means that, that a plaintiff as a "lower bar" to clear to ensure a successful trial. So even if one is found not guilty in a criminal trial, they may still be held to account in a civil trial.

VI-5) Chapter Summary

The distinction between private and public moderation of expression is a subtly many find elusive. Yet, as highlighted in *R v. Zundel* (1990) and *McKinney v. University of Guelph* (1992), this distinction has can have large implications. The research question was inaccurate in attempting to ascertain what criteria may exempt expression from s.2(b) protection. As it is not the characteristics of speech that may exempt expression from protection, but rather the method of persecution. The analysis results connect to other literature as it informs the discussion of private companies mediating speech on their platforms. As well, it demonstrates the judiciary's reluctance to tread on individual liberties. Finally, this separation between private and public mediation of speech has implications for the type of punishment an offender may receive, as well as how easy it is for the complainant to make his/her case. Therefore, it should be known that while s.2(b) may protect one from criminal prosecution, it does not alleviate the possibility of civil prosecution.

CHAPTER VII: CONCLUSION

VII-1) Chapter Overview

This thesis was meant to examine the limits that exist regarding freedom of expression under s.2(b) of the *Charter* regarding the expression of misinformation. In answering this question, this thesis examined *R v. Zundel* (1990) and *University of Guelph* (1992). To round out this thesis, this chapter will briefly return to the original research question and how it evolved. Then, there is a reiteration of the some of the limitations of this thesis, as well as other considerations. The chapter will then explore some possible avenues for future research. Finally, this chapter will conclude with a chapter summary that reexplores all the ground that was covered in this thesis.

VII-2) Addressing the Research Question

The initial research question for this thesis sought to understand what kinds of characteristics of expression that the court finds objectionable enough to warrant a removal of *Charter* protections. This question was mismatched for the data that was retrieved. Instead, the data suggests that the characteristics of expression are less relevant than the method of prosecution. The words of s.32(1) of the *Charter* states that protection of *Charter* rights only applies to pieces of legislation passed by governments. This means that private actions are not covered under s.32(1). Furthermore, the decision in *R v. Zundel* (1990) highlights how the court is hesitant to use the powers of government to step on any speech, including those pieces of expression composed of "false news". But the exception under s.32(1) still leaves open the possibility of civil action being taken against the utterer of misinformation.

VII-3) Limitations and Other Considerations

One of the biggest limitations to this thesis concerned the court cases that were selected. Appearing before the SCC can be quite expensive, so this limits the kinds of plaintiff that can afford to argue all the way to the SCC. Therefore, it is possible that cases with legitimate

arguments for/against expression of misinformation never made it to the SCC. Hence, since the analysis of the data in this thesis was constrained solely to SCC decisions, such cases that never made it to the SCC were not collected. Despite this, the methodology was appropriate as any decision that is made at the lower courts that is inconsistent with the ruling of the SCC would be overruled in favour of the SCC.

VII-4) Suggested Future Research

Some of the best avenues for future research could investigate a quantitative analysis of individuals who understand the implications of s.1 of the *Charter*. Since it would provide a more in-depth, analytic understanding of whether the public understands the implications of s.1. And how these implications may impact their enjoyment of their rights. Furthermore, another fruitful future research could concern the how often the defence of freedom of expression is utilized in civil trials. This would provide further evidence as to whether the public understands the separation of *Charter* rights and private actors under s.32(1). These two questions taken together could paint a better picture regarding how the average Canadian citizen interprets the *Charter*, and how that might be different from the SCC's interpretation.

VII-5) Chapter Summary

The point of this thesis was to examine what legal limits existed for the dissemination of misinformation. This thesis examined Supreme Court of Canada cases to understand the ability of the Court to limit freedom of expression under s.1, as well as pre-existing limitations of expressive freedoms. In accordance with a dual-process theoretical basis, this thesis employed a qualitative, hermeneutic case analysis of SCC decisions on s.2(b) post 1982. Doing this, this thesis collected two cases: *R v. Zundel* (1992) and *McKinney v. University of Guelph* (1990). When interpreted together, these cases demonstrate that the SCC is unwilling to use criminal law to silence "False news". However, s.32(1) expressly states that the protections laid out in the *Charter* only extend to government actions, not civil actions. Therefore, this

removes certain sanctions for the dissemination of misinformation, but not all. Hence, it is the hope that with this knowledge in mind, combined with the ease of sharing articles on social media, Canadians would be more cautious when recklessly sharing articles with questionable content.

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