

## On the Charter, Freedom of Expression, and Scientific Research

By: Stephen Armstrong

**Provision Commented On:** Section 2(b), *Canadian Charter of Rights and Freedoms*, [Part I of the Constitution Act, 1982](#), being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11

Does section 2(b) of the *Canadian Charter of Rights and Freedoms* protect the freedom of scientific research? Is conducting an experiment an expressive act? These are important questions as Canadians face a world increasingly dominated by rapid scientific advancement. Recently, [the US Senate](#) and the US National Academy of Sciences have each called for greater research into geoengineering ([Committee on Geoengineering Climate, National Research Council, \*Climate Intervention: Carbon Dioxide Removal and Reliable Sequestration\* \(Washington: 2015, The National Academies Press\) at 107](#)). Such measures are the harbingers of an age in which humans are acquiring the capability to control the Earth's climate the way a sculptor shapes his clay. Against this backdrop, the need for governance of geoengineering research at both the international and national levels is clear. However, any state measures to restrict or regulate research in Canada must conform to the supreme law of the land. In this post, I will explore arguments for and against the protection of scientific research under the free expression guarantee contained in the *Charter*. While strong criticism against inclusion of research as expression exists, I ultimately conclude that the *Charter* likely protects freedom of scientific research within the freedom of expression guarantee.

### *Charter* Applicability

As a preliminary issue in any *Charter* analysis it is always necessary to determine whether the impugned action is subject to *Charter* scrutiny. Legislation is of course subject to the *Charter*. However, as scientific research stands at the apex of this discussion, decisions made by universities and other arms-length research or fund-granting bodies are also relevant. The question of whether the *Charter* applies to universities is itself the subject of significant jurisprudence and commentary (See *Pridgen v University of Calgary*, [2012 ABCA 139](#), but also see *BC Civil Liberties Association v University of Victoria*, [2016 BCCA 162](#), and for ABlawg commentary see [here](#), [here](#), [here](#), and [here](#)). The inquiry into applicability of the *Charter* is an inherently fact driven one. As I aim to discuss freedom of expression and research in a more abstract sense, I have only raised the issue of *Charter* applicability to flag it for the reader and will now move on.

### The Scope of 2(b)

Does scientific research fall within the scope of section 2(b) of the *Charter*? Section 2(b) reads: "Everyone has the following fundamental freedoms...freedom of thought, belief, opinion and expression..." When interpreting the content of a *Charter* right it is important to keep in mind that such rights are to be accorded a generous, purposive, and liberal interpretation (*Hunter v Southam Inc.*, [\[1984\] 2 SCR 145 at paras 17-20](#)). The leading case on freedom of expression is *Irwin Toy v Quebec (Attorney General)*, [\[1989\] 1 SCR 927](#). In a joint decision, then Chief

Justice Brian Dickson, with Justices Antonio Lamer and Bertha Wilson, set the scope of the free expression guarantee to encompass all non-violent activity which is intended to convey a meaning (*Irwin Toy* at paras 42-43). The Court also highlighted the core principles underlying the free expression guarantee, which were described as truth seeking, encouraging participation in social and political decision making, as well as self-fulfillment and human flourishing (*Irwin Toy* at para 54).

Note that the *Irwin Toy* definition of expression merely requires the *intention* to convey meaning, which is different from a requirement that someone else actually receives and understands the meaning. This point has been reaffirmed in subsequent cases, and the law is clear that a claimant alleging an infringement of their right to freedom of expression need not show the act of expression actually conveyed a message to anyone. The *intention* to convey meaning is the key (*Canadian Broadcasting Corp v Canada (Attorney General)* [2011 SCC 2 at para 34](#) and *R v Sharpe* [2001 SCC 2 at para 108](#)). Another point of interest is that expression includes more than the spoken or written word. Expression includes the arts, physical acts or gestures, and may even include such mundane acts as parking a car (*Irwin Toy* at paras 42-43). In conclusion, expression includes all non-violent activities intended to convey a meaning.

### **Application of the Law: Is Research Expressive?**

Applying the law to the issue of scientific research, the question becomes whether research or experimentation is expressive. In the US and Canada this issue has been the subject of a lively academic debate among legal scholars. Before diving into that debate, it is necessary to provide a rough definition of “scientific research”. One overly wordy definition emphasizes that scientific research is “the systematic collection or generation of empirical data...and the utilization of unbiased and rigorous modes of testing, analysis, and evaluation to draw inferences and conclusions about those data” (Barry P. McDonald, “Government Regulation or Other ‘Abridgements’ of Scientific Research: The Proper Scope of Judicial Review Under the First Amendment” (2005) 54 Emory LJ 979 at 989). A more concise definition conceives of science as “knowledge that is testable and refutable” ([Report of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed: The Right to Enjoy the Benefits of Scientific Progress and its Applications, UNHRC, 20<sup>th</sup> Sess, Agenda Item 3, UN Doc A/HRC/20/26 \(2012\) 3 at 7](#)). These definitions indicate that science is to be equated with knowledge and scientific research is a means of producing that knowledge.

Is research, the act of producing knowledge, performed with the intention to convey a meaning? Some scholars see the activity of conducting research as intrinsically expressive, equating it to speech, dance, or art, and argue that it is a form of expression deeply intertwined with its meaning to the point where form and content are inseparable (Barbara Billingsley & Timothy Caulfield, “The Regulation of Science and the Charter of Rights: Would a Ban on Non-Reproductive Human Cloning Unjustifiably Violate Freedom of Expression?” (2004) 29 Queen’s LJ 647 at 663-665). A researcher only conducts an experiment for the purpose of obtaining information. It is not a deed devoid of meaning. The act of experimentation produces a recordable result. This result is the meaning intended to be conveyed to the researcher by her act of experimentation. Thus, the argument goes, research is an expressive activity covered under the test laid out in *Irwin Toy*. In short, this line of reasoning argues that research is inherently expressive and thus falls within section 2(b) of the *Charter*.

This view has been criticized as ignoring “the fact that inquiry is not itself communication” because “[i]nquiry is aimed at seeking information, not conveying meaning” (Jocelyn Downie,

Jennifer Llewellyn & Francoise Baylis”, A Constitutional Defence of the Federal Ban on Human Cloning for Research Purposes” (2005) 31 Queen’s LJ 353 at 361). What this critique boils down to is that, since it is the researcher alone who conducts the experiment and receives the results, the act of experimentation is not expressive. No meaning is conveyed.

With respect, I would argue that this criticism is born of a narrow view of expression that cuts against the grain of the Supreme Court’s jurisprudence on the matter. In *Canadian Broadcasting Corp* (at para 34), Justice Marie Deschamps, speaking for a united Court, reaffirmed that a section 2(b) claimant does not need to show that the activity actually conveyed a message with a meaning. What must be shown is that the act was performed to convey a meaning. In *Sharpe* (at paras 107-115), Chief Justice Beverley McLachlin stated plainly that self-created works intended solely for private use by their creator fall within the ambit of section 2(b). It was the constitutional guarantee of free self-expression that moved the Chief Justice to read in a private-use exception to the *Criminal Code* prohibition on child pornography in *Sharpe*, which was recently upheld in *R v Barabash*, [2015 SCC 29](#). To conclude, the criticism that the act of conducting research is not expressive because a message is not communicated to others appears to be unsupported by authority.

A secondary argument in favour of interpreting research as expressive activity is that, by the very act of choosing and performing a particular research method or research area, a scientist is implicitly signalling to society that she thinks this area is important, needs attention, or is the best way to solve a problem (Billingsley & Caulfield, “Regulation of Science” at 665-667). In the context of geoengineering, merely choosing to conduct atmospheric aerosol injection testing or ocean iron fertilization testing may send the message to decision makers and to the public that the climate change situation is dire.

An obvious criticism of this argument is that a scientist does not choose an area or method of research for the primary purpose of sending a symbolic message to society. Rather, as stated above, such research is performed primarily to produce knowledge. If such implied meanings fell within the scope of section 2(b), there would be no end to the slippage as seemingly all activity would slide down the slope into the scope of freedom of expression. This is a valid criticism, as allowing secondary symbolic meanings to colour the intention of a person’s actions would create an unworkable standard for defining an expressive act. It may be acceptable to acknowledge that a person may perform an act with more than one purpose in mind, however this line of reasoning takes this principle one step too far. Almost anything a person does could arguably have a symbolic meaning. The scope of the free expression guarantee would be expanded to the point where section 2(b) would become meaningless and the only questions to be decided would be whether the impugned government action was justifiable. To conclude, the very act of performing a particular form of research may be symbolically expressive. However, this line of reasoning is open to the valid criticism that it would have a far too expansive effect on the scope of section 2(b).

Two additional lines of argument for including scientific research in the free expression guarantee originate from American scholars. One view is that experimentation is a critical part of the scientific method, which is highly connected to the “market place of ideas” in a historic, structural, and purposive manner (Roy G Speece, Jr & Jennifer Weinzierl, “First Amendment Protection of Experimentation: A Critical Review and Tentative Synthesis/Reconstruction of the Literature” (1998) 8 S Cal Interdisc LJ 185 at 213). The second view, which is similar to the first, posits that experimentation is uniquely facilitative of highly valued thought, and should therefore be protected (Speece & Weinzierl at 218). At their core, both arguments view

experimentation as a pre-condition for scientific speech (i.e. communicating the results of scientific research), rather than viewing research itself an expressive act.

The notion that research is an essential pre-condition for the communication of highly valuable expression is intuitively powerful. Chief Justice McLachlin has remarked in *obiter* that “publishing scientific research is valuable, and prohibitions on it have an impact on the right to free expression in a serious manner” (*Canada (Attorney General) v JTI-Macdonald Corp*, [2007 SCC 30 at para 52](#)). It is plain and obvious that section 2(b) protects a person’s right to publish scientific information. Keeping in mind that *Charter* rights are to be accorded a generous, liberal, and purposive interpretation, the purpose of protecting the right to publish scientific information would be undermined if the means (or pre-conditions) by which such information is obtained was not also protected. Therefore, the argument goes, research ought to be a protected form of expression, alongside publishing the results of research. The Chief Justice adopted a similar line of reasoning when she held that even the mere possession of expressive material engages freedom of expression because “the possession of such material allows us to understand the thought of others or consolidate our own thought” (*Sharpe* at para 25). In its essence this is a pre-condition argument. A right to freedom of expression would be meaningless without also protecting access to the means of expression.

One criticism of the pre-condition argument is that, if the scope of freedom of expression is so broad as to include every necessary pre-condition required for individuals to express themselves, virtually every conceivable action will be covered by the free expression guarantee (Downie, Llewellyn & Baylis, “Human Cloning for Research Purposes” at 361). Perhaps eating food and drinking water will be necessary pre-conditions to expression, as one cannot express oneself if one dies of starvation or dehydration. This is a slippery slope argument which should not be accepted. Research has a historically and logically close facilitative connection to scientific discovery and scientific communication (Speece & Weinzierl, “Protection of Experimentation” at 217). This sets research apart as a uniquely necessary pre-condition and can surely serve as a basis for differentiating everyday human needs from essential pre-conditions required to vindicate the rights and freedoms enshrined in the *Charter*. The point is likely moot however, as I have argued above that research itself should be considered an expressive act covered under 2(b).

There is also a line of cases in Canada holding that freedom of expression protects listeners as well as speakers (*Edmonton Journal v Alberta (Attorney General)*, [1989 SCC 133 at para 85-86](#) and *Canadian Broadcasting Corp* at paras 29-31). Typically, these cases involve the state restricting the ability of the media to access certain public goings-on, such as court proceedings. The reasoning for upholding the media’s right to access is that it protects the public’s right to receive information about pressing matters of the day, particularly concerning public institutions (*Edmonton Journal* at para 85). Scientific research casts a wide net and doubtless includes information about matters of pressing importance to the public. Stretching this line of reasoning to a novel situation, the journalist who gathers information at a courthouse about a trial and then relays that information to the public may be analogous to the scientist who collects data from an experiment and then communicates the results in a publication. Thus, including research within the scope of the free expression guarantee would protect the public’s right to receive valuable scientific information of pressing importance.

One may also imagine the researcher herself as the “listener”, taking in the information from the experiment, which takes the place of “speaker”. This analogy gains more plausibility depending on the type of research undertaken. If the experiment involves only the researcher interacting

with the natural world and interpreting the results, this is more likely distinguishable from the type of listeners imagined in the *Edmonton Journal* line of cases. However, if the research is of a social nature, perhaps involving interviews with human subjects, there is clearly a person-to-person communication occurring there. In such a case, the argument for distinguishing scientific research from *Edmonton Journal* loses strength. In conclusion on this point, I acknowledge that this would be a novel application of the “right to listen” line of reasoning and would thus likely stretch the case law beyond where a judge may be willing to take it.

International covenants and human rights obligations to which Canada is a signatory may act as interpretive aids in scoping out the content of a *Charter* right or freedom (See *Baker v Canada (Minister of Citizenship and Immigration)*, [\[1999\] 2 SCR 817 at paras 69-70](#) and *Saskatchewan Federation of Labour v Saskatchewan*, [2015 SCC 4 at paras 64-65, 68-71](#)). Article 27 of the *Universal Declaration of Human Rights*, [GA Res 217 \(III\)A](#)(1948), states that “everyone has the right to...share in scientific advancement and its benefits”. Article 19 also ensures the right to freedom of expression, including the freedom to “...seek, receive and impart information...”. The same language protecting the seeking of information as expression is included in Article 17 of the *International Covenant on Civil and Political Rights*, [19 December 1966, 999 UNTS 171 art 17 \(entered into force 23 March 1976, accession by Canada 19 May 1976\)](#). Article 15 of the *International Covenant on Economic, Social, and Cultural Rights*, [16 December 1966, 999 UNTS 3 art 15 \(entered into force 3 January 1976, accession by Canada 19 May 1976\)](#) recognizes the right of everyone to enjoy the benefits of scientific progress and its applications, while also protecting “the freedom indispensable for scientific research and creative activity.” These agreements are not binding in domestic Canadian law, however they do colour the courts’ interpretation of the *Charter*. These international covenants and declarations point inevitably towards the protection of research and experimentation under the freedom of expression.

## Conclusion

Section 2(b) includes in its scope any non-violent activity that is intended to convey a meaning. Research, as a means of seeking out knowledge, may be understood as an inherently expressive activity. Multiple international covenants and declarations prize scientific advancement and research as a right not to be interfered with by the state. Further, a scientist’s choice of experiment may purposefully act as a symbolic message to society. However, this argument may expand the scope of section 2(b) beyond what is practical or desirable. Additionally, research may be seen as a historically connected and logically linked pre-condition to the creation of scientific speech, which is to be cherished and guarded jealously from state interference. Finally, freedom of expression includes a “right to listen” or to receive information, which may include a freedom to generate information (i.e. research results) to be received, though this would be a novel use of the doctrine. Overall, there is ample ground on which to conclude that the scope of section 2(b) likely includes scientific research.

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