Freedom of Expression: Social Media Platforms

WHAT IS THE ISSUE?

Freedom of expression is the right to speak and to be heard, and to listen to the expression of others. It is core to the right to dissent and is pertinent for important discussions.

In Canada, our freedom of expression is protected when it comes to government action. No such freedom exists in relation to non-government bodies, unless they are controlled by government or are performing a government function.

With the proliferation of social media, a new platform for citizens and public officials to interact has been created. Though social media platforms are meant to be places of communication, they have also become a place of contention because of the ability to remove comments and messages, and to *block* people from seeing posts. When the party taking these actions is a government actor or an entity carrying out government actions, there could be a potential violation of free expression.

WHAT LAW GOVERNS FREEDOM OF EXPRESSION?

The right to free expression is a cornerstone of Canadian democracy and is included in our constitution.

Under Section 2(b) of the *Canadian Charter of Rights and Freedoms (Charter)*, Canadians are free to peacefully express opinions and ideas contrary to those held by government, subject only to such reasonable limits as may be justified in a free and democratic society.

The values this right is premised on include:

- The promotion of the search and attainment of truth
- The participation on social and political decision making
- The opportunity for individual self-fulfillment through expression

Expression has been defined as "any activity or communication that conveys or attempts to convey meaning".

Breaches of freedom of expression are often easily found, but they may be justified by reasonable limits. For example, hate speech is prohibited and our courts have found this to be a reasonable limitation to the right.

The test for a freedom of expression violation is as follows:

1. Does the activity in question have expressive content, thereby bringing it within 2(b) protection?
2. Does the method, location, or content of this expression remove that protection?
    - An individual is only free to communicate in such a place if the form of expression they use is compatible with the principal function or intended purpose of the place and does not deprive citizens as a whole of the effective operation of government services and undertakings
    - If the expression includes hate speech, is defamatory, and/or violates a person's privacy, there is little chance that it would be protected by the Charter
3. If the expression is protected by 2(b), does the government action in question infringe that protection, either in purpose or effect?

If a breach of freedom of expression is found it may still be justified.

The analysis for whether the limitation is justified is commonly referred to amongst the legal community as the "Oakes Test" (named after the court case in which the Supreme Court of Canada first laid it out).

It requires an examination into the nature of the violation by asking the following questions:

1. Is there a pressing and substantial objective?
2. Is the means proportional?
    a. Is it rationally connected to the objective?
    b. Is there a minimal impairment of rights?
    c. Is there proportionality between the infringement and the objective?

If a violation is found and it is not justified under the Oakes test then the court will declare the offending law invalid or, if the violation is not based on a law, the court may provide a remedy to the person whose freedom of expression was unjustifiably curtailed.

If the limitation is found to be justified under the Oakes test, then the action limiting expression will be upheld by the court as constitutional.

APPLICATION OF THE LAW TO SOCIAL MEDIA PLATFORMS

In the modern era, courts have observed that social media has become a valuable public forum, comparable to a digital public square with a potentially unlimited audience.

Courts have yet to weigh in on how freedom of expression applies to various social media platforms, but it is likely only a matter of time.

Three twitter users filed a Charter challenge against the Mayor of Ottawa in 2018 after they were blocked from seeing and interacting with his account. He subsequently unblocked them and issued an apology without the matter making it to a court room.

We believe that government social media accounts on platforms such as Facebook, Twitter, and YouTube are an online equivalent of government property and are therefore spaces in which people should be free to exchange opinions, debate ideas and praise or criticize the government.

When it comes to social media accounts of individual people in government—as opposed to accounts belonging to government entities—the question of whether the Charter applies will likely turn upon the nature and content of the official's account and whether it is used for public or private purposes.

WHAT CAN I DO ABOUT IT?

If you believe your right to freedom of expression has been violated, you can do the following:

1. Contact us at the BC Civil Liberties Association. In certain case, we may be able to write a letter to the government agency or actor to remind them of their duties and obligations under the Charter.
2. Depending on the facts of your case and you're your financial resources, you may be able to bring a Charter challenge against the government agency or actor in court. Please note that this is a costly and time-consuming process. Before you bring a Charter challenge, you should consult with a lawyer. The BC Civil Liberties Association does not represent people in these cases and does not provide referrals to other lawyers.