

# JURI 4826: Free Speech



# Introduction



# Critical thinking

Critical thinking is the intellectually disciplined process of actively and skillfully conceptualizing, applying, analyzing, synthesizing, and/or evaluating information gathered from, or generated by, observation, experience, reflection, reasoning, or communication, as a guide to belief and action. In its exemplary form, it is based on universal intellectual values that transcend subject matter divisions: clarity, accuracy, precision, consistency, relevance, sound evidence, good reasons, depth, breadth, and fairness..."



# Critical thinker

- raises vital questions and problems, formulating them clearly and precisely;
- gathers and assesses relevant information, using abstract ideas to interpret it effectively comes to well-reasoned conclusions and solutions, testing them against relevant criteria and standards;
- thinks openmindedly within alternative systems of thought, recognizing and assessing, as need be, their assumptions, implications, and practical consequences; and
- communicates effectively with others in figuring out solutions to complex problems.

# Critical thinking

- Critical thinking is, in short, self-directed, self-disciplined, self-monitored, and self-corrective thinking. It presupposes assent to rigorous standards of excellence and mindful command of their use. It entails effective communication and problem solving abilities and a commitment to overcome our native egocentrism and sociocentrism.

(Taken from Richard Paul and Linda Elder, *The Miniature Guide to Critical Thinking Concepts and Tools*, Foundation for Critical Thinking Press, 2008)

**1. Challenge all assumptions**

**2. Suspending judgment**

**3. Revising conclusions based on new evidence**

**4. Emphasizing data over beliefs**

**5. The neverending testing of ideas**

**6. The perspective that mistakes are data**

**7. The earnest consideration of possibilities and ideas without (always) accepting them**

**8. Looking for what others have missed**

**8**

# SCIENCE - BASED

Strategies For Critical Thinking



# Critical thinking

- What is the purpose of the text?
- What is the speaker's ethos?
- What evidence does the author give to advance their arguments?
- What is taken for granted?
- What appears as problematic and calling for explanation? Are there any fallacies or flaws in the text?
- What is the author's worldview?
- Whom do the author's arguments benefit?
- How can you deconstruct/critically evaluate the author's arguments?
- What is another perspective? What counter-arguments can you think of?
- What has been silenced or what is missing from the author's text?

# Reasons for protecting Free Speech



# Reasons for protecting free speech

- Free marketplace of ideas, which is necessary for change and innovation.
- Freedom of speech is essential to freedom of thought.
- It is essential to democratic self-government because democracy presupposes that the people may freely receive information and opinion on matters of public interest and the actions of government officials.
- Promotes minority rights.
- History teaches that the first target of government repression is never the last. If we do not come to the defense of the free speech rights of the most unpopular, then no one's liberty will be secure.

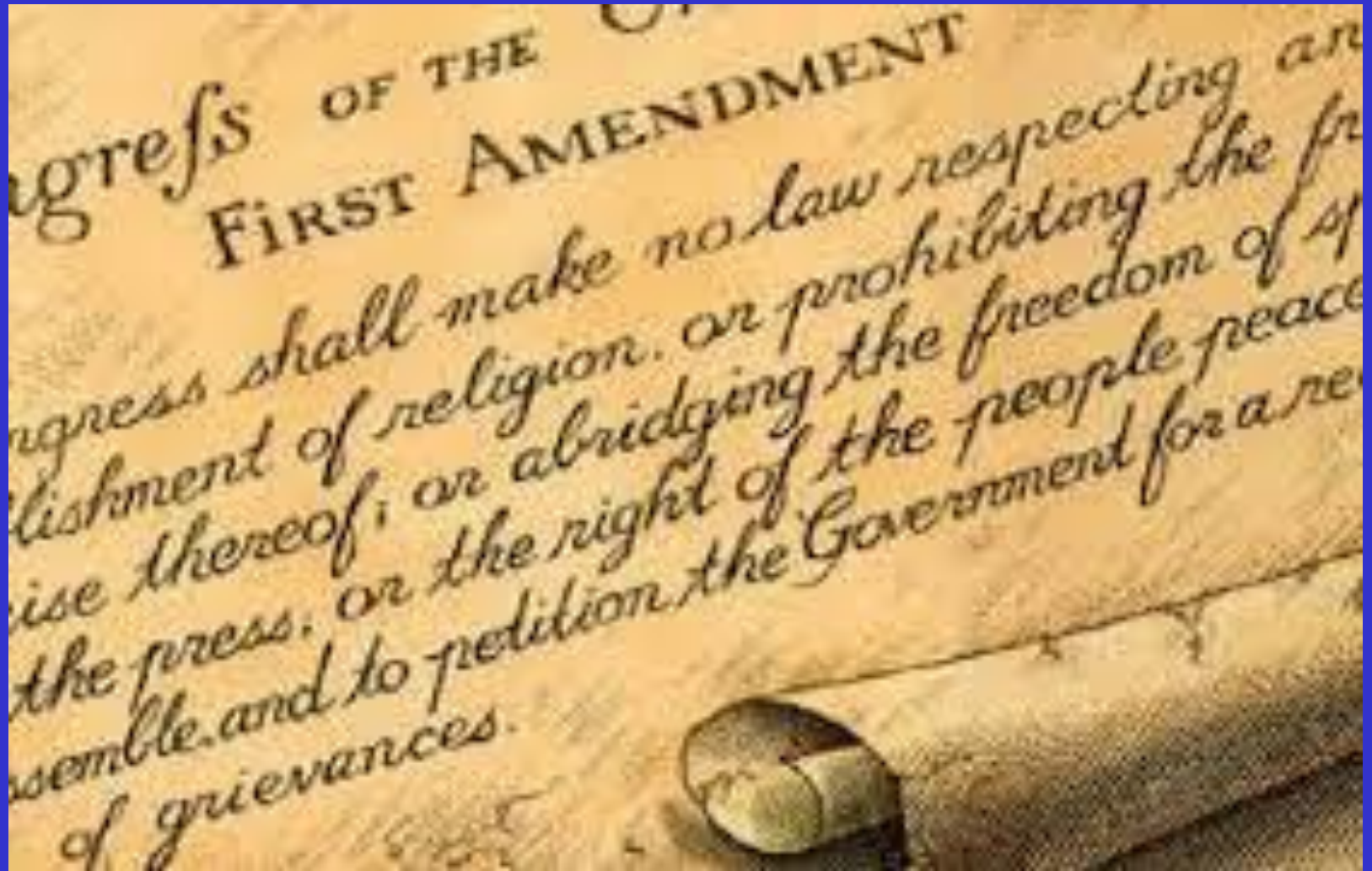
# Reasons for protecting free speech

- Many unpopular ideas in the past became conventional, generally accepted ideas later.
- When freedom of speech is under attack, it sends the message that telling the truth can put you in danger, which leads to self-censorship.
- Controlling speech empowers government officials to decide what speech is acceptable and what is not. This grows the size of government and reduces liberty.



# United States: Free Speech

Congress OF THE  
FIRST AMENDMENT  
Congress shall make no law respecting an  
establishment of religion, or prohibiting the fr  
ise thereof, or abridging the freedom of sp  
the press, or the right of the people peace  
semble, and to petition the Government for a re  
of grievances.



# US First Amendment

- Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.



# US

- Free speech leads to an open marketplace of ideas, where –practically- no expression is restricted.
- The best response to harmful speech is through debate that lets different ideas freely challenge it.



# Government neutrality

- A central tenet of the First Amendment is that the government must remain neutral in the marketplace of ideas (*Dennis v. United States*).
- The government must allow citizens to engage in the "free trade in ideas," based on the notion "that the best test of truth is the power of the thought to get itself accepted in the competition of the market (*Hustler Magazine, Inc. v. Falwell*).
- The basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, and free debate of ideas will result in the wisest governmental policies.

# ★★★ THE FIRST AMENDMENT ★★★



It's home to some of America's most important freedoms. These rights are the pillars of our democratic government.

## THE BILL OF RIGHTS

First on the list of additions to the Constitution, the First Amendment is often at the center of some of our country's most spirited debates.



3  
Tj

**"Our liberty depends on the freedom of the press, ..."**

Thomas Jefferson, 1786

# 1st

**Separation**  
of Church & State?



Americans continue to debate what this exactly means, especially in the context of education.

Many of the Founders believed that a free press was essential to our republic.



The Printing Press

Freedom of  
expression  
**1791**

## Symbolic speech

Some speech isn't spoken aloud. Burning the American flag and burning draft cards have been treated differently by the Supreme Court.

## Tinker v. Des Moines

"Students do not shed their constitutional rights at the schoolhouse gate."

## What speech is protected?

The Supreme Court has ruled on many cases involving free speech.



## Schenck v. U.S.

"... free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

The **5 Freedoms** →  
found in the First Amendment



Religion



Speech



Press



Assembly



Petition

# periodicpresidents.com

*"We study history, periodically."*

# US First Amendment

- Public forums (traditional and designated)
  - Strong protection.
  - No gov. viewpoint discrimination
  - Content-neutral restrictions on time, place, and manner.
  - Strict scrutiny, i.e., restrictions are allowed only if they serve a compelling state interest and are narrowly tailored to meet the interest.
- Limited forums
  - Discrimination against classes of speakers or types of speech, e.g. school open only to students.
- Non public forums
  - Reasonable discrimination against content is possible but no viewpoint discrimination.

# US First Amendment

- **Prior restraint** is not permitted, unless the publication can cause a direct and immediate danger to the United States.
- **Captive audience:** permitted.
- **Libel:** a tort governed by state law. Proof of actual malice is required for an award of damages for libel involving public official or public figure.
- **Defamation:** (i) a false statement purporting to be fact; (ii) publication or communication to a third person; 3) at least negligence; and 4) damages, or some harm to the reputation. Truth is a complete defence.
- **Advocacy of illegal action:** if it incites imminent lawless action, it is unprotected.
- **Fighting words:** words that incite an immediate breach of peace. Clear and present danger. (unprotected)

# US First Amendment

- **Commercial speech: it is less protected.**
  - the speech must concern lawful activity, and the speech must not be misleading.
  - the alleged governmental interest in regulating the speech must be substantial.
  - the regulation must directly advance the governmental interest asserted.
  - the regulation must not be more extensive than is necessary to serve the interest.



# US First Amendment

- **Obscenity. Unprotected according to the following test.**
  - whether ‘the average person, applying contemporary community standards’ would find that the work, ‘taken as a whole,’ appeals to ‘prurient interest’;
  - whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
  - whether the work, ‘taken as a whole,’ lacks serious literary, artistic, political, or scientific value.



# International Law



# International Law

- Universal Declaration of Human Rights
- International Covenant on Civil and Political Rights



# International Law

- Universal Declaration of Human Rights
  - Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers (art. 19).



# International Law: ICCPR

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals.

# International Law: ICCP

- It includes deeply offensive speech.
- Speech may be restricted by law:
  - (i) the limitation must be provided for in law;
  - (ii) it must pursue a legitimate aim; and
  - (iii) it must be necessary for a legitimate purpose.



# Canadian Law



# Charter of Rights and Freedom



## CANADIAN CHARTER OF RIGHTS AND FREEDOMS



# Charter

- The core values which free expression promotes include self-fulfilment, participation in social and political decision-making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political and economic environment. (*RWDSU v Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC)

# Charter

- s. 2 Everyone has the following fundamental freedoms:
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

It protects any activity that conveys, or attempts to convey, a meaning. This covers a very wide scope, including (for example) speaking, writing, artwork, dancing, clothing choices and tattoos. It includes all forms of expression so long as they do not include violence or threats of violence.

# Test

- Free expression seeks to uphold the truth, encourages political and social participation, and promotes self-fulfillment (Quebec v. Irwin Toy).

## Test

1. Did your words or actions convey, or attempt to convey, a meaning or a message?
2. Does the method or location of expression remove it from s. 2(b) protection?
3. Did the purpose or effect of the government action restrict your ability to convey that meaning?

# Test

**Did your words or actions convey, or attempt to convey, a meaning or a message?**

An activity is expressive if it attempts to convey meaning (talking, singing, clothing choices, signs on one's property, artwork, or gestures).



# Test

## Does the method or location of expression remove it from s. 2(b) protection?

- **Method:** Violence, and threats of violence, are not protected.
- **Location:** Not all public places are protected by section 2(b). It protects locations where freedom of expression would be expected, and which does not conflict with the purposes of section 2(b), i.e., **democratic discourse, truth-finding, and self-fulfilment**.
  - Is the historical or actual function of the place compatible with free expression?
  - Are there any other aspects of the space which indicate that allowing free expression would undermine the core values of freedom of expression under the *Charter*?

# Test

## Did the purpose or effect of the government action restrict your ability to convey that meaning?

- If the *purpose* of the government action or legislation is to limit expression, it will violate s. 2(b). For example, a law that forbids wearing the colour red in public parks has a restrictive purpose.
- If a law is purely aimed at the physical consequences of an activity, its purpose does not contradict 2(b).
  - A law that prohibits distributing pamphlets restricts expression, because it seeks to control a person's ability to communicate a message. On the other hand, a law that prohibits littering may adversely impact the distribution of pamphlets, but its purpose is aimed at consequences (littering), not the expression itself.
- Even if the purpose of government action or legislation is aimed at something other than expression, it may still violate 2(b) if the effect impacts your freedom of expression.

# Right to silence

- Freedom of expression also protects the right not to express oneself.
- Freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do” (Slaight Communications Inc. v. Davidson, 1989).
- Forced or compelled expression can constitute a restriction of section 2(b) (Slaight Communications; RJR-MacDonald Inc.; National Bank of Canada v. Retail Clerks’ International Union, 1984). The compelled speech doctrine means that the government cannot force an individual or group to support certain expression. It prevents the government from punishing a person for refusing to articulate, advocate, or adhere to the government’s approved messages.

# Right to silence

- The freedom of expression necessarily entails the right to say nothing or the right not to say certain things (RJR).



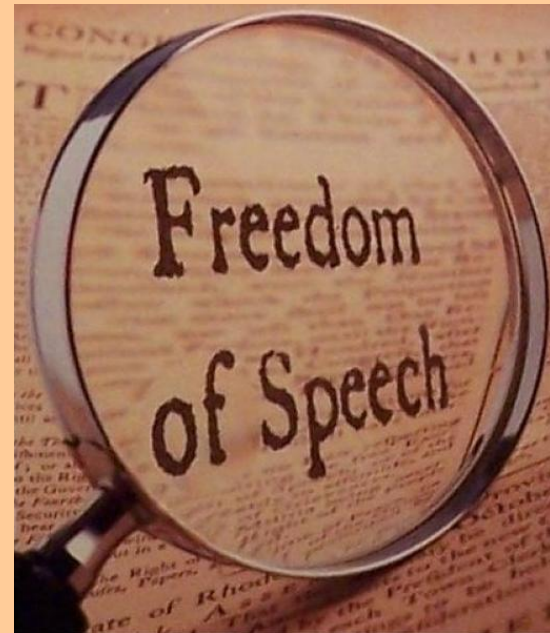
# Positive rights

- Freedom of expression usually only requires that the government refrain from interfering with the exercise of the right.
- In general, it is up to the government to determine which forms of expression are entitled to special support and where the government chooses to provide a platform for expression, it must do so in a manner consistent with the Charter.
- Positive rights only applies where a class of claimants is excluded from a specific government-created platform of expression.

# Reasonable limits on freedom of expression

Restrictions on hate speech are vital to the protection of minority communities from the harm that such speech causes.

- Hate speech laws.
- Hate crimes.
- Obscenity.
- Defamatory libel.
- Counselling suicide.
- Perjury.
- Fraud and misrepresentation, and impersonation.
- Glorification of terrorism.



# Crimes and Free Speech

## Hate Propaganda

- Advocating genocide.
- Public incitement of hatred.
- Wilful promotion of hatred.
  
- Conversion therapy.



# Advocating genocide

- 318 (1) Every person who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term of not more than five years.
- any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,
  - killing members of the group; or
  - deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

# Public incitement of hatred

- Every one who, by communicating statements in any public place, incites hatred against any identifiable group **where such incitement is likely to lead to a breach of the peace** is guilty.
- The Supreme Court has found that the harm caused by hate propaganda is not in keeping with the aspirations to freedom of expression or the values of equality and multiculturalism contained in sections 15 and 27 of the Charter

# Wilful promotion of hatred

Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty.

## Defences

- If he establishes that the statements communicated were true;
- if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
- if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

# Glorification of terrorism

- Every person who counsels another person to commit a terrorism offence without identifying a specific terrorism offence is guilty.



# Conversion therapy

- Everyone who knowingly causes another person to undergo conversion therapy, including by providing conversion therapy to that other person

A practice, treatment or service designed to

- change a person's sexual orientation to heterosexual;
- change a person's gender identity to cisgender;
- change a person's gender expression so that it conforms to the sex assigned to the person at birth;
- repress or reduce non-heterosexual attraction or sexual behaviour;
- repress a person's non-cisgender gender identity; or
- repress or reduce a person's gender expression that does not conform to the sex assigned to the person at birth.

# Oakes test

- All rights and freedoms guaranteed by the Charter are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
- Once an infringement of a Charter right has been established, the courts must decide whether the violation by the government or other institution to which the Charter applies can be considered justified.

# Oakes test

- **1.** The government must establish that the law under review has a goal that is both “**pressing and substantial.**”
- **2.** The court then conducts a **proportionality analysis** using three sub-tests.
  - **a.** The government must first establish that the provision of the law which limits a *Charter* right is **rationally connected** to the law’s purpose.
  - **b.** Secondly, a provision must **minimally impair** the violated *Charter* right. A provision that limits a *Charter* right will be constitutional only if it impairs the *Charter* right as little as possible.
  - **c.** The law’s proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be.

# Other laws

- Human Rights Acts prohibit publishing or displaying material that expresses an intention to discriminate, implies discrimination, or intends to incite others to discriminate.
- Broadcasting Act (abusive comments that expose individuals or groups to hatred on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or disability).
- Customs (prohibition of the importation of hate propaganda).



# Canadian Bill C-229

- It amends the Criminal Code to broaden the provisions relating to hate propaganda by making it an offense to publicly display, sell, or offer for sale visual representations that promote or incite hatred or violence against an identifiable group.
- It specifically names symbols of hate such as the Nazi, KKK, Confederate States of America symbols of hate.



# Quebec



# Quebec Bill C-229

- Bill 96 requires students to take more French classes in English colleges, and impacts areas from court hearings to hiring.
- In 1977, Bill 101 made French Quebec's everyday business language, and obligated children of immigrants to attend elementary and high school in French, leading to the departure of many English speakers.
- Bill 96 opens the door to lawsuits against stores that fail to serve customers in French, one expert says. Previously, Quebecers refused service in French complained to the province's language watchdog.

# Quebec Bill C-229

- **HIRING BILINGUAL**
  - Employers must now make a reasonable effort to avoid making other languages besides French a job requirement. This could make it harder for hospitals, for example, to offer services to patients in another language.
- **MORE FRENCH PAPERWORK**
  - Contracts would need to be provided to consumers in French even if the parties wanted it in English, raising translation costs. Court proceedings would now have to be in French for businesses, Fallon said.
- **SERVICES FOR IMMIGRANTS**
  - Immigrants would not be able to access most government services in a language other than French six months after their arrival. The Quebec government has said healthcare would be exempt from the new law.

# Quebec Bill C-229

- Hiring bilingual
  - Employers must now make a reasonable effort to avoid making other languages besides French a job requirement. This could make it harder for hospitals, for example, to offer services to patients in another language.
- More French paperwork
  - Contracts would need to be provided to consumers in French even if the parties wanted it in English, raising translation costs. Court proceedings would now have to be in French for businesses, Fallon said.
- Services for immigrants
  - Immigrants would not be able to access most government services in a language other than French six months after their arrival. The Quebec government has said healthcare would be exempt from the new law.

# Quebec Language Laws

- **Business Names**
  - All businesses that sell products or services in Quebec must have a French business name.
- **Employee Language Rights**
  - All workers in Quebec have the right to work in French.
  - Employers can't fire or refuse to hire workers just because they don't know English or another language well enough.
- **Communications with Employees and Workplace Signs**
  - Employers have to use French in written documents meant for their staff in general, including messages posted in the workplace. But they can write to an individual employee in English or another language upon their request.
  - There can be a version of these official documents and messages in English or another language, as long as the French stands out at least as much.

# Quebec Language Laws

- **Serving the Public**
  - All businesses must be able to serve the public in French. But they can normally serve a non-French speaking consumer in that person's language. Business to business must be in French.
  - Telemarketing and voice-mail greetings and messages must include a French version if they are used in Quebec.
- **Public Signs and Advertising**
  - In some cases, only French can be used. This is the case, for example, of advertising on busses and on some large billboards.
  - Other types of signs and advertising, French can be used along with English or another language, as long as the French is clearly more predominant (twice as big).
  - Signs and advertising for cultural products or activities and advertising in non-French media can be only in English or another language.

# Quebec Language Laws

- **Products and Packaging**
  - Anything written on a product sold in Quebec, or on its package, or in documents included with the product must be in French. Translations in one or more other languages can be included with the French.
- **Written Publications and Documents**
  - Catalogues and brochures, order forms, receipts and warranties must be in French. A translation is permitted.
  - Standard-form contracts must also be in French. There may be a translation if a consumer asks for it.
- **Menus and wine lists must be in French. There can be a translation (French must be predominant).**
- **Toys and Games**
  - Toys and games, including computer games, which involve using language (for example, talking-dolls and Xbox games), can be sold in Quebec only if a French version is available.

# Quebec Language Laws

- Software and Information Technology
- Business Websites
- Social Media
  - The rules for business websites (above) also apply to social media accounts. If a customer posts a comment on social media in a language other than French, the business can reply in this language. However, if the customer posts in French, the business must reply in French.



# Alberta Human Rights Act



# Alberta Human Rights Act

- Discrimination re publications, notices
- 3(1) No person shall publish, issue or display or cause to be published, issued or displayed before the public any statement, publication, notice, sign, symbol, emblem or other representation that
  - (a) indicates discrimination or an intention to discriminate against a person or a class of persons, or
  - (b) is likely to expose a person or a class of persons to hatred or contempt .

because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons.

# Canadian bill

- The Government believes in supporting a safe, inclusive, and open online environment and proposes an approach to regulating social media and combating harmful content online.
- The bill will be part of an overall strategy to combat hate speech and other harms.
- As part of this overall strategy, the Government introduced Bill C-36 to provide legal remedies for victims of hate speech and hate crimes. Bill C-36 proposes to: amend the Canadian Human Rights Act to enable the Canadian Human Rights Commission and the Canadian Human Rights Tribunal to intake, review, and adjudicate hate speech complaints; and amend the Criminal Code to provide a definition of ‘hatred’ for the section 319 hate propaganda offences and create a new peace bond designed to prevent the commission of hate propaganda offences/hate-motivated crimes.

# Canadian bill

## Background

- Individuals and groups use social media platforms to spread hateful messaging. Indigenous Peoples and equity-deserving groups such as racialized individuals, religious minorities, LGBTQ2 individuals and women are disproportionately affected by hate, harassment, and violent rhetoric online.
- Hate speech harms the individuals targeted, their families, communities, and society at large. And it distorts the free exchange of ideas by discrediting or silencing targeted voices.
- Social media platforms can be used to spread hate or terrorist propaganda, counsel offline violence, recruit new adherents to extremist groups, and threaten national security, the rule of law and democratic institutions.
- The Government of Canada is committed to confronting online harms while respecting freedom of expression, privacy protections, and the open exchange of ideas and debate online.

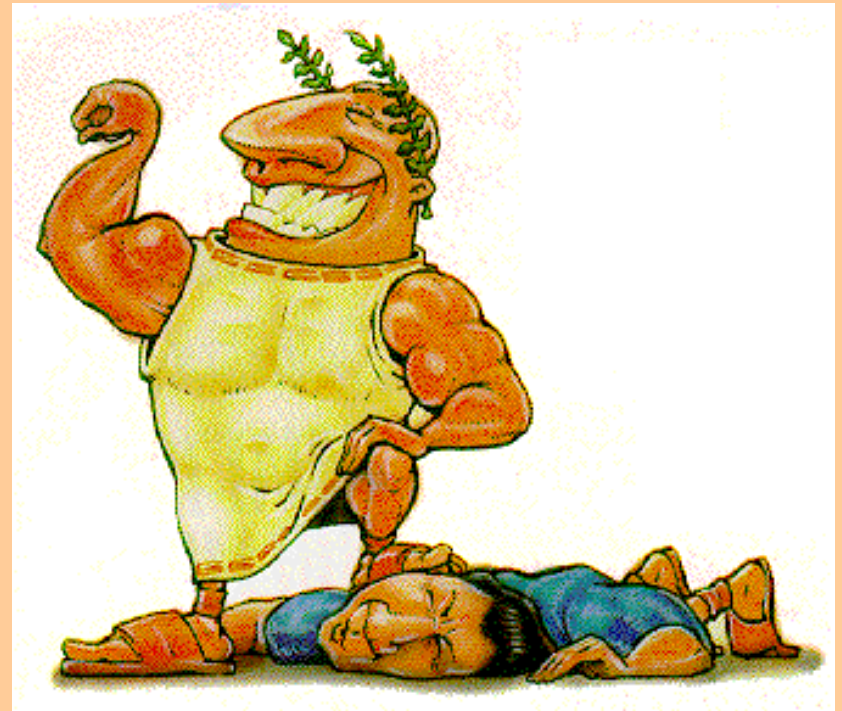
# Canadian bill

- New legislation would apply to online communication service providers (private communications and telecommunications service providers are excluded).
- The legislation would target five categories of harmful content:
  - terrorist content;
  - content that incites violence;
  - hate speech;
  - non-consensual sharing of intimate images; and
  - child sexual exploitation content.
- The Government would prescribe mandatory reporting of Internet child pornography by Internet service providers.
- The new legislation would set out a statutory requirement for regulated entities to take all reasonable measures to make harmful content inaccessible in Canada.



# The 6 steps of the tyrant's playbook

- Seize Power
- Crush Your Rivals
- Reign Through Terror
- Control the Truth
- Create a New Society
- Rule Forever



# The 6 steps of the tyrant's playbook

- **Seize Power**

- In order to become a tyrant, it is important that you are able to seize power and obviously keep it. Dictators do well to encircle themselves with close relations, usually family. The same goes for CEOs. Putting strangers on a board usually changes things at greater risk for a CEO.

- **Crush Your Rivals**

- If you plan to become a tyrant, you need to know how to crush your rivals.
- To crush your enemies, see them driven before you, and to hear the lamentation of their women.

- **Reign Through Terror**

- Become a tyrant by taking control and reigning through terror. For example, during the French Revolution, the guillotine became the primary symbol of the reign of terror. It was being used to execute thousands and thousands of people.

# The 6 steps of the tyrant's playbook

- **Control the Truth**
  - It is important that you take control of the truth if you want to become a tyrant. Most dictators managed to pull this off being in control of the media. They usually spread good and positive messages about themselves.
- **Create a New Society**
  - If you become a tyrant, you have to create a new society. Preferably one that is secluded from the outside world. One where no one would be allowed to enter or leave the country without permission.
- **Rule Forever**
  - If you have become a tyrant, you probably want to keep things this way. Korea does this with its nuclear weapons program. That way no one dares to touch you or your nation, because they would be too afraid of a nuclear strike.

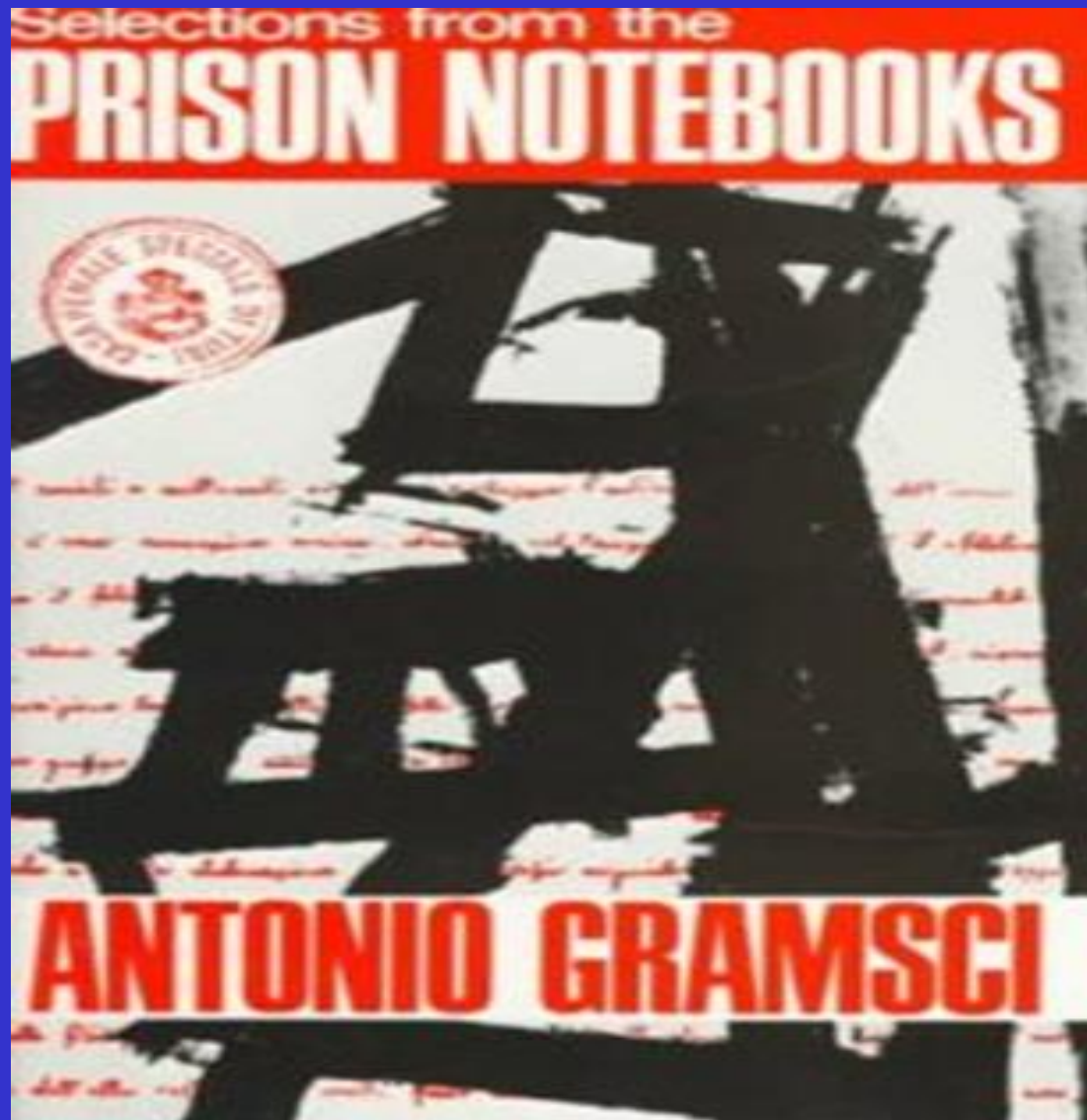
# Hegemonic discourse



# Hegemonic discourse

- Hegemony is the “cultural, moral and ideological” leadership of a group over allied and subaltern groups.
- Hegemony is a form of social control exercised primarily through a society's superstructure.
  - Consent to the rule of the dominant group is achieved by the spread of ideologies—beliefs, assumptions, and values—through social institutions such as schools, churches, courts, and the media, among others.
- It is based on the equilibrium between consent and coercion.
- Gramsci first noted that in Europe, the dominant class, the bourgeoisie, ruled with the consent of subordinate masses. The bourgeoisie was hegemonic because it protected some interests of the subaltern classes in order to get their support.

# Hegemonic discourse



# Hegemonic discourse

- Human beings had a high degree of agency in history: human will and intellect played a role as fundamental as the economy.
- The task for the proletariat was to overcome the leadership of the bourgeoisie and become hegemonic itself.
- Only a hegemonic group that has the consent of allies and subalterns can start a revolution, which would mean that it is necessary to establish proletarian hegemony before the socialist revolution.
- Organic intellectuals are the dominant group's 'deputies' exercising the subaltern functions of social hegemony and political government.”
- Their “function in society is primarily that of organizing, administering, directing, educating or leading others.” The organic intellectuals, who must be unrelated to the intellectuals of the bourgeoisie, must organize and mediate in the formation of the national-popular collective will.