

A PROPOSAL FOR A CANADIAN GOVERNMENT SPEECH DOCTRINE

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How does section 2(b) law deal with factual scenarios entailing a close connection between government and expression, such that the public reasonably believes the speech in issue emanates from the government and not from a private individual? Foundational principles suggest section 2(b) has internal limits that prevent private speakers from co-opting the government's voice. This paper reviews section 2(b) doctrine and reveals that existing law does not adequately facilitate consideration of this government nexus, resulting in confusion in lower courts on how to approach these factual scenarios. Drawing on American sources, this article proposes a solution: introduction of a "government speech doctrine." Such a doctrine, properly modified to take into account the unique Canadian context, could bring conceptual clarity to this area of law.

TABLE OF CONTENTS

I.	INTRODUCTION	955
II.	THE SECTION 2(B) FRAMEWORK AND THE GOVERNMENT NEXUS GAP	958
	A. <i>BAIER</i>	959
	B. <i>MONTRÉAL</i>	960
	C. CONFUSION IN LOWER COURTS	961
III.	THE AMERICAN EXPERIENCE	965
IV.	PROPOSAL	968
V.	CONCLUSION	970

I. INTRODUCTION

In May 2016, a flag with a cartoon fetus and the words “[p]lease let me live” flew outside Prince Albert’s City Hall.¹ The City had authorized the flag-raising as part of the annual “Celebrate Life Week” organized by the Prince Albert Right to Life Association.² For nearly a decade, the City had raised the flag under its courtesy flag program, which it used to recognize and promote community events. But, that year, the flag was met with protestors who objected to the City’s “endorsement” of the anti-abortion viewpoint.³ The mayor defended the flag-raising at the time, but the following year, the City declined to raise the flag with the cartoon fetus and encouraged the Right to Life Association to submit “a more neutral design.”⁴ The Right to Life Association sought judicial review of the City’s decision

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¹ “Pro-Life Flag Flying at Prince Albert’s City Hall Sparks Protest,” *CTV News Saskatoon* (10 May 2016), online: <saskatoon.ctvnews.ca/pro-life-flag-flying-at-prince-albert-s-city-hall-sparks-protest-1.2896908?cache=yrhfnlytgrjawe>.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*; Jason Kerr, “Final Flag Flown From Courtesy Flagpole,” *Prince Albert Daily Herald* (31 May 2018), online: <paherald.sk.ca/final-flag-flown-from-courtesy-flagpole/>.

and, in response to the legal challenge, Prince Albert ended use of the courtesy flagpole by the public altogether in May 2018.⁵ This is just one of many flag-raising rows that have popped up around the country in the last few years.⁶

Flag-raising is one of similar factual scenarios which concern this article: how do and should courts treat expression that entails a close connection to the government, such that listeners or viewers may reasonably believe the expression emanates from the government? For example, take our opening scenario. The expression — both the physical flag itself and the act of raising it — occurs on government property to which public access is highly restricted; the state has historically used and continues to use this mode of expression to communicate to its citizens; and, the flag is physically close to the seat of governance.⁷ All of these factors might lead viewers to believe the flag is in fact the government's message, rather than that of a private anti-abortion group. Indeed, at least some members of the public in Prince Albert believed the flag represented the government's stance and took issue with it for exactly that reason: because their government was thought to be expressing a view at odds with women's rights under the *Canadian Charter of Rights and Freedoms*.⁸

This article investigates section 2(b) law that governs scenarios in which a private claimant seeks to communicate using a mechanism closely connected to government, such that the public may reasonably perceive the message as emanating from the government. Existing Supreme Court of Canada case law does not specifically address this issue, nor has the problem received academic attention.⁹ In this article, I explore this doctrinal gap and consider potential ways to resolve this uncertainty.

What difference does (and ought) this nexus to government make to expression cases? We might think that this nexus should matter quite a bit to the reasoning in and resolution of cases. After all, it would be strange if section 2(b) doctrine allowed private individuals to, in effect, put words in the government's mouth or co-opt the government's "voice." The notion that section 2(b) could require governments to take on or amplify private messages

⁵ *Prince Albert Right to Life Association v Prince Albert (City)*, 2020 SKCA 96 at paras 11–12; Kerr, *ibid*.

⁶ See also Phil Tank, "Council Rejects Flag Raising, Proclamation by Pro-Life Group," *Saskatoon Star/Phoenix* (18 December 2018), online: <thestarphoenix.com/news/local-news/council-rejects-flag-raising-proclamation-by-pro-life-group> (Saskatoon, SK, 2018, controversy over an anti-abortion flag); The Canadian Press, "New Brunswick Village Lowers 'Straight Flag' After Public Backlash," *The Star* (22 October 2018), online: <www.thestar.com/news/canada/2018/10/22/nb-village-faces-backlash-after-council-raises-straight-flag.html> (Chipman, NB, 2018, controversy over "straight flag"); Aleksandra Sagan, "Pro-Life Flag Won't Fly at Kelowna City Hall Following Public Outcry," *The Globe and Mail* (22 August 2012) S1 (Kelowna, BC, 2012, controversy over pro-life flag); Judy Trinh, "How an EX-RCMP Officer Raised an Anti-Abortion Flag at Ottawa City Hall," *CBC News* (12 May 2017), online: <www.cbc.ca/news/canada/ottawa/antiabortion-march-for-life-flag-city-hall-1.4111433> (Ottawa, ON, 2017, controversy over pro-life flag); Tyler Harper, "Nelson Council Scraps Banner, Flag Policy," *Nelson Star* (15 May 2019), online: <www.nelsonstar.com/news/nelson-council-scraps-banner-flag-policy> (Nelson, BC, 2019, controversy over pro-life banner); "Christian Flag Raising Criticism in Legislature," *CBC News* (22 March 2016), online: <www.cbc.ca/news/canada/newfoundland-labrador/christian-flag-raising-criticized-1.3502756> (St. John's, NL, 2016, controversy over Christian flag); Matt Robinson, "Flag Ceremony Not Meant to Offend, Organizer Says," *The Vancouver Sun* (14 October 2016) A2 (Vancouver, BC, 2016, controversy over Chinese flag); Joyanne Pursaga, "Councillor Opposes Kosovo Flag-Raising Event," *Winnipeg Free Press* (15 February 2020), online: <www.winnipegfreepress.com/breakingnews/2020/02/14/councillor-opposes-kosovo-flag-raising-event> (Winnipeg, MB, 2020, controversy over Kosovo flag).

⁷ *Shurtleff v Boston*, 2022 US Lexis 2327, slip opinion at 6–10 (Breyer J) [*Shurtleff*].

⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

⁹ I could find no Canadian academic articles specifically on this topic.

departs from our usual understanding of section 2(b) as a negative right that prohibits government interference with individual expression. If individuals could co-opt the government into speaking on their behalf, effective governance becomes difficult, if not impossible, and state neutrality — the idea that the state does not promote one individual's conception of the good life over another's — is imperiled.¹⁰ So, it is surprising that section 2(b) doctrine currently does not obviously enable judges to consider the presence or relevance of the nexus between message and government. While two legal doctrines — *Montréal (City) v. 2952-1366 Québec Inc.*¹¹ and *Baier v. Alberta*,¹² both of which are discussed in more detail below — narrow section 2(b)'s reach with respect to certain locations or platforms, these doctrines were created and refined in circumstances where the expression was clearly identifiable as emanating from a private individual. As such, these doctrines are not designed to address the sort of scenario discussed in this article, and, unless modified, they do not adequately permit judges to evaluate the significance of the nexus between government and message.

Using four lower court decisions, I illustrate how this doctrinal gap causes conceptual confusion and inconsistency. The judges in these four cases intuit that public perception of government as speaker matters, but without a doctrine of government speech or an alteration to *Baier* or *Montréal*, the judges are uncertain how to assess this factor.

I then look at the American response to this problem. The Supreme Court of the United States has adopted a doctrine of government speech which immunizes certain speech from First Amendment review. I examine several representative cases and discuss challenges and criticisms that have arisen in that context. While American jurisprudence on free speech differs from the Canadian approach, the American doctrine, appropriately modified, could serve as a potential template for the Canadian judiciary.

Finally, I put forward two possible suggestions that would bring needed conceptual clarity to this area. One of these suggestions, to which I devote most of my attention, is a Canadian government speech or government communication¹³ doctrine. I discuss how the doctrine might be applied and how it would operate before turning to anticipated objections to my proposal.

¹⁰ For the purposes of this article, I ask readers to accept that there must be some constitutional space in which the government is able to communicate to its citizens without running afoul of section 2(b). I hope in a future article to set out a more robust justification and constitutional basis for this authority. For the purposes of this article, however, it is sufficient for my purposes to point to the necessity of government communication for effective governance as a basis for recognizing some constitutional authority for government speech. I observe that even opponents of the American government speech doctrine accept the necessity of government communication: see G Alex Sinha, "The End of Government Speech," *Cardozo L. Rev.* 44 [forthcoming in 2023] at 9. The real concern in this paper is a doctrinal one: the identification of a gap in existing Supreme Court jurisprudence and the suggestion that a newly minted government speech doctrine could resolve the confusion this gap creates.

¹¹ 2005 SCC 62 [*Montréal*].

¹² 2007 SCC 31 [*Baier*].

¹³ "Government communication" might be a preferred term, in recognition that the government does not have free speech rights in the way private individuals have free speech or expression rights: see G Alex Sinha observing that "state action is qualitatively different from private action.... [T]he government does not speak at all": Sinha, *supra* note 10 at 28.

II. THE SECTION 2(B) FRAMEWORK AND THE GOVERNMENT NEXUS GAP

I begin by expanding on my claim that section 2(b) does not require the government to take on or amplify messages of private individuals, hence the need to identify public perception of government as speaker as a relevant factor in section 2(b) cases. Supreme Court of Canada jurisprudence confirms that section 2(b) is primarily a negative right, which protects individuals' expression from state interference.¹⁴ It does not usually take positive form, or, in the words of Justice L'Heureux-Dubé, it "prohibits gags, but does not compel the distribution of megaphones."¹⁵ It follows logically, then, that section 2(b) does not include an obligation on government to communicate private messages as though they are the government's own. As a practical matter, the state often communicates with its citizens: think of street signs, government websites, and publications on how to navigate its administrative and regulatory regimes. The modern administrative state could hardly function if section 2(b) allowed private individuals to insist that the government also convey their message with the government's stamp of approval.¹⁶ Further, the principle of state neutrality might be jeopardized if section 2(b) required governments to relay private citizens' messages as though those messages were the government's own. Liberal theory holds that, in order to best foster the autonomy of its citizens, the state ought to be neutral with respect to different conceptions of "the good life."¹⁷ Citizens seeing such government messages might believe that the government is preferring certain values or beliefs over others. Thus, given the predominant understanding of section 2(b) as a negative right, practical implications for governance, and the principle of state neutrality, I suggest that when the public reasonably perceives the government is the source of a message, the claimant does not have a section 2(b) claim to have their message communicated in the manner or via the mechanism in issue.

In the paragraphs that follow, I argue existing section 2(b) doctrines were not created with this particular problem in mind. As a result, this factor is not accounted for by current doctrines. I begin with a review of the basic section 2(b) framework. Typical expression claims are governed by *Irwin Toy Ltd. v. Quebec (Attorney General)*.¹⁸ A claimant must first establish that their behaviour falls within the scope of section 2(b), which safeguards activity which "conveys or attempts to convey meaning."¹⁹ Then, if the claimant establishes the government has interfered with expression in purpose or effect, the burden shifts to the government to show the infringement is justified under section 1 of the *Charter*. *Irwin Toy* and the 'typical' expression case deal with private claims against government censorship or

¹⁴ See e.g. *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at para 16 [*Toronto*].

¹⁵ *Haig v Canada (Chief Electoral Officer)*, [1993] 2 SCR 995 at 1035 [*Haig*].

¹⁶ *Walker v Texas Department of Motor Vehicles Board*, 2015 US Lexis 4603 at 8 [emphasis omitted] [*Walker*]:

Were the *Free Speech Clause* interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization?

¹⁷ Andrew D Mason, "Autonomy, Liberalism and State Neutrality" (1990) 40:160 *Philosophical Q* 433 at 433.

¹⁸ [1989] 1 SCR 927 [*Irwin Toy*].

¹⁹ *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at para 27 [*Vancouver Transportation*].

restrictions on time, place or manner of communication. Given that *Irwin Toy* reflects the primary view of section 2(b) as an individual, negative right, infringed by government action, it does not deal with circumstances where a nexus between the government and the message leads to perception that the message is issuing from the government.

While the scope of section 2(b) is broad, it does not extend to all expressive conduct. For example, section 2(b) does not protect violence or “threats of violence.”²⁰ Two doctrines further narrow section 2(b)’s reach even in the context of non-violent expression. The first doctrine, *Montréal*, excludes from constitutional protection individual expression in nominally “public” spaces, if free expression in those locations would undermine the values underlying section 2(b).²¹ The second doctrine, *Baier*, governs positive rights claims, imposing additional hurdles on claimants seeking access to government platforms. These doctrines hive off certain expressive activity from section 2(b), limiting the scope of protection in recognition of other compelling social interests, namely recognition of the government’s authority and competence to determine the proper use of public space, and the proper expenditure of public resources in facilitation of private individuals’ speech.²² Thus, while these doctrines serve to limit section 2(b), they do not address the limits on free expression implicated by accepting the proposition that private individuals cannot co-opt the government’s voice. These doctrines were not created with this scenario in mind, nor do they factor the public perception of the source of the message into their analyses. Below, I explain in more detail *Baier*’s and *Montréal*’s predisposition to confusion in this regard.

A. *BAIER*

Section 2(b) generally does not impose on the government an obligation to support speech or allocate resources to this end.²³ However, the Supreme Court of Canada has affirmed that section 2(b) may exceptionally require the government to take action to facilitate expression.²⁴ To establish a positive rights claim, a claimant must prove that “by denying access to a statutory platform, the government has substantially interfered with freedom of expression or acted with the purpose of doing so.”²⁵ Given this onerous standard, positive rights claims will rarely be successful.²⁶

This framework, established in *Baier* and modified in *Toronto*, is engaged when “a claimant seeks to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression.”²⁷ Thus, for example, *Baier* applied to a claim for a particular ward arrangement during a municipal election.²⁸ Similarly,

²⁰ *R v Khawaja*, 2012 SCC 69 at para 70.

²¹ *Vancouver Transportation*, *supra* note 19 at para 39, quoting *Montréal*, *supra* note 11 at para 74.

²² Benjamin J Oliphant, “Positive Rights, Negative Freedoms, and the Margins of Expressive Freedom” in Emmett Macfarlane, ed, *Dilemmas of Free Expression* (Toronto: University of Toronto Press, 2022) 130 at 134; Richard Moon, “Out of Place: Comment on Committee for the *Commonwealth of Canada v Canada*” (1993) 38:1 McGill LJ 204 at 208–209 [Moon, “Committee”].

²³ *Toronto*, *supra* note 14 at para 16.

²⁴ *Ibid* at para 17.

²⁵ *Ibid* at para 26.

²⁶ *Ibid* at para 27.

²⁷ *Ibid* at para 22. Prior to this clarification in *Toronto*, positive rights claims were generally understood to arise in cases of underinclusive schemes: *ibid* at paras 18–20.

²⁸ *Ibid* at paras 36–42.

teachers put forward a positive rights claim when they challenged legislation prohibiting them from running for school trustee positions.²⁹

Though there may be some overlap between *Baier*-type scenarios and scenarios in which the public perceives the government is speaking, the two situations are not coextensive. Sometimes, an individual will seek access to a statutory platform (a *Baier*-type situation), and that platform may also be associated with the government in the public's mind; but other times, listeners will clearly grasp that the speaker is sharing a private message via a government platform. In other words, public perception that the government is speaking does not automatically flow from a speaker using a statutory platform. In fact, in every positive rights case considered by the Supreme Court of Canada, the claimant has always been clearly identifiable as a private individual or organization. In *Haig*,³⁰ the claimant wanted to vote in a referendum; the advocacy group in *Native Women's Association of Canada v. Canada*³¹ sought inclusion in constitutional negotiations; in *Baier*, school employees desired to stand for election as school trustees; and in *Toronto v. Ontario*, potential candidates believed newly drawn electoral boundaries negatively impacted their expression rights.³² In no case did an issue about the public perception of the message's source arise. Thus, under the Supreme Court's current approach, the fact the public believes the government is the speaker is not an indicium that the positive rights framework of *Baier* applies.

To summarize then, the concerns underlying the positive rights framework — how should courts oversee resource allocation determinations by government³³ and when should courts override decisions to exclude some private individuals from certain government created platforms — differs in kind and not just degree from the concerns about the significance of public perception that a message emanates from the government.

B. *MONTRÉAL*

Montréal provides that individuals may not have a section 2(b) right to expression in nominally public spaces if free expression in that location undermines the values section 2(b) protects. The doctrine, originating in *Committee for the Commonwealth of Canada v. Canada*,³⁴ is geared at balancing use of public space for expression and other uses of space.³⁵ The current test, as stated in *Vancouver Transportation*, directs judges to consider the “historical or actual function” or “other aspects of the place [that] suggest ... expression within it would undermine the values underlying free expression.”³⁶ *Montréal* is directed to rationalizing use of public space and determining which values win out when private individuals' expression inconveniences or interferes with non-expressive uses of public

²⁹ *Baier*, *supra* note 12 at paras 3–7.

³⁰ *Haig*, *supra* note 15.

³¹ [1994] 3 SCR 627 [NWAC].

³² In *Toronto*, *supra* note 14, the City was a party to the suit, but the expression rights advanced were those of the candidates as individuals, not the government's expression.

³³ See Oliphant, *supra* note 22 at 140–41.

³⁴ [1991] 1 SCR 139 [*Committee for the Commonwealth*].

³⁵ See Moon, “Committee,” *supra* note 22 at 206.

³⁶ *Vancouver Transportation*, *supra* note 19 at 39, quoting *Montréal*, *supra* note 11 at para 74.

space.³⁷ The *Montréal* doctrine does not require assessment of who the public believes the speaker is nor does it tell us how this factor would be assessed.

All the locational cases before the Supreme Court have involved claimants who were clearly identifiable as private individuals seeking access to certain public spaces for purposes of expression. *Committee for the Commonwealth*³⁸ dealt with pamphleteers in airports; in *Ramsden v. Peterborough*,³⁹ a musician promoted his concerts via posters on telephone poles; *Montréal* involved a bar's loudspeaker playing music on the street; and in *Vancouver Transportation*,⁴⁰ groups sought to pay for ads to appear on public buses. The claimants were readily identifiable by observers as private individuals expressing their own messages; there was no risk their speech could be mistaken for the government's.

It is possible *Montréal* could be adapted to address the problem of private communication perceived to emanate from the government. The *Montréal* doctrine is aimed at assessing the functionality of public space: can this public space still be used by the public for non-expressive purposes, if free expression is allowed here? It is not an implausible extension of the doctrine to incorporate concerns around public perception of the government as speaker: would free expression in this space interfere with the function of this space, which is to communicate the government's message? While this problem did not drive the development of *Montréal*, reorientating the test to take into account this concern would not undermine the *raison d'être* of the doctrine.

But adjusting *Montréal* in this manner may create more headaches than it solves. For example, when does “functionality” require assessing government nexus or public perception and when does it not? Given that the Supreme Court has not yet phrased “functionality” in such a way, we lack the template to know how a *Montréal* analysis might look in this sort of scenario. Even if *Montréal* could be tailored to this circumstance, additional parameters and criteria would need to be developed to make it serviceable. The tidier solution, I suggest, is a separate doctrine.

C. CONFUSION IN LOWER COURTS

Four lower court decisions illustrate the conceptual confusion caused by this doctrinal gap. These four decisions deal with speech having a close nexus to government. The judges intuit that the government angle matters to resolution of these cases — the connection to government is mentioned in all of them — but the inconsistent nature of the decisions suggest that existing doctrines do not enable judges to properly and consistently evaluate the significance of this factor. Despite factual similarities, the judges reach different conclusions on which doctrines apply and whether and how government nexus matters. While the ultimate outcome is the same in all the cases — no section 2(b) claim is successful — this suggests that, despite doctrinal confusion, judges implicitly agree that no section 2(b) rights

³⁷ See Richard Moon, “Does Freedom of Expression Have a Future?” in Macfarlane, *supra* note 22, 15 at 29.

³⁸ *Supra* note 34.

³⁹ *Ramsden v Peterborough (City)*, [1993] 2 SCR 1084.

⁴⁰ *Supra* note 19.

attach in circumstances where the public perceives the message originates from the government.

Two of these recent cases dealt with section 2(b) challenges to policies prohibiting offensive personalized licence plates. In both cases, the licence issuers' policies were upheld, though the reasons for doing so differed. In *Troller v. Manitoba Public Insurance Corporation*,⁴¹ Justice Lanchbery of the Queen's Bench of Manitoba, at it then was, applied *Montréal* rather than *Baier*. Finding a history of expression on personalized plates and observing that the government had invited public participation, he found licence plates passed the *Montréal* test and constituted protected locations of expression. However, he found the prohibition on offensive language justified under section 1.⁴²

In *Grabher v. Nova Scotia*,⁴³ Justice Jamieson of the Nova Scotia Supreme Court also applied *Montréal*. However, she found licence plates fell outside the scope of section 2(b). She reasoned that licence plates, which are highly regulated in display and design, lacked a history of free expression and were predominantly used for identification by government authorities.⁴⁴ Her decision was upheld by the Court of Appeal.⁴⁵

Both Justice Lanchbery and Justice Jamieson cited the American case of *Walker*,⁴⁶ so they were clearly aware of the government speech doctrine in the US, though neither opted to adopt outright such a doctrine. Rather, the justices seemed unsure how to evaluate the significance of government nexus and reached different conclusions on whether it should be accorded weight. Justice Lanchbery in *Troller* gave the factor essentially no consequence, observing that the fact that the personalized message was on government property did not mean the government was endorsing the statement.⁴⁷ He did not address the concern that the public could mistakenly *think* the government had endorsed the statement. In contrast, the prospect of government endorsement loomed large in *Grabher*. Justice Jamieson found it significant that the plate was essentially a government ID when she found section 2(b) did not apply. Further, when she turned to section 1 in the alternative and considered the first stage of *R. v. Oakes*⁴⁸ — whether the government has a sufficiently important objective to warrant limiting rights — she observed the plate's message could be mistakenly perceived as coming from the government, which, she found, constituted a sufficiently compelling reasoning for regulation.⁴⁹ The inconsistent treatment of government nexus in these cases, which involve essentially the same factual matrix, underscores that current doctrines do not clearly and adequately allow justices to take into account public's perception of the message's source.

⁴¹ 2019 MBQB 157 [*Troller*].

⁴² *Troller, ibid*, entailed review of an administrative decision, thus *Doré v Barreau du Québec*, 2012 SCC 12 and *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 applied.

⁴³ *Grabher v Nova Scotia (Registrar of Motor Vehicles)*, 2020 NSSC 46 [*Grabher*].

⁴⁴ *Ibid* at para 60.

⁴⁵ *Grabher v Nova Scotia (Registrar of Motor Vehicles)*, 2021 NSCA 63.

⁴⁶ *Walker, supra* note 16 cited by *Troller, supra* note 41 at paras 35, 80; *Grabher, supra* note 43 at paras 77–78.

⁴⁷ *Troller, ibid* at para 63.

⁴⁸ [1986] 1 SCR 103.

⁴⁹ *Grabher, supra* note 43 at paras 122–25.

The third case is *Alberta March for Life Association v. Edmonton (City)*.⁵⁰ Since 2014, the City of Edmonton had considered requests by community groups to light up High Level Bridge (a local traffic monument) in colours selected to reflect the group or event in question.⁵¹ Alberta March for Life Association applied to have the bridge lit during its annual anti-abortion march in the City.⁵² The City rejected the application, referencing its governing policy in which it reserved “the right to deny requests that do not merit public support, have a risk of polarizing the community, or are mainly personal, private, political, or commercial in nature.”⁵³ The Alberta March for Life Association argued that the Policy violated section 2(b).⁵⁴

Justice Feth found that the Association was making a positive rights claim and thus fell under the *Baier* framework rather than *Montréal*. In support of his conclusion that the bridge was “not a space generally accessible by members of the public for their own expression,”⁵⁵ Justice Feth relied on “the lighting platform’s purpose, the limited means of the medium, and the public’s understanding of the platform.”⁵⁶ Regarding the first factor — the purpose of the light display, he referenced the City’s control over the platform and its use of lighting ceremonies to recognize events or people, acting as a “‘voice for Edmonton,’ which ‘helps to represent Edmonton to national and international audiences.’”⁵⁷ He concluded that “the lighting installation is a medium for the City’s communications to the local community and the world beyond, much like its website, social media platform and news releases.”⁵⁸ The City used the lighting for honour and recognition, and “no one is entitled to receive the City’s recognition.”⁵⁹ On the second point, Justice Feth emphasized the City’s control over the bridge lighting and the connection between the City and the message. He wrote:

[C]ivic resources are utilized at the City’s expense, in a prominent location, after selection by the City’s administration, for the purpose of demonstrating public support and celebrating community spirit. In these circumstances, the display emanating from the City’s platform reasonably suggests government support or government recognition of broad public support.⁶⁰

Third, and finally, Justice Feth observed that “the bridge is widely recognized within Edmonton as a municipal asset and the Light the Bridge project is well-known and generally understood within the community as a platform operated by the City that honours or promotes various events, causes and individuals.”⁶¹ Having found that the March for Life Association sought a positive entitlement to a government platform, he concluded that the group had failed to meet the *Baier* criteria.⁶²

⁵⁰ 2021 ABQB 802 [*Alberta March for Life Association*].

⁵¹ *Ibid* at para 3.

⁵² *Ibid* at paras 4–5.

⁵³ *Ibid* at para 9, citing the City’s bridge lighting policy.

⁵⁴ *Ibid* at para 11.

⁵⁵ *Ibid* at para 57.

⁵⁶ *Ibid* at para 58.

⁵⁷ *Ibid* at para 60, citing the City’s bridge lighting policy.

⁵⁸ *Ibid* at para 61.

⁵⁹ *Ibid*.

⁶⁰ *Ibid* at para 66.

⁶¹ *Ibid* at para 70.

⁶² *Ibid* at paras 72–86. Justice Feth also considered, alternatively, whether the problem should be analyzed under the *Montréal* framework and concluded that the bridge lighting was not a protected location of expression under that test.

Justice Feth's reasons for finding this scenario was governed by *Baier*, rather than by *Montréal*, relate to the close connection between the message and the state. Interestingly, however, these factors are not found in the Supreme Court case law as relevant to distinguishing positive rights cases from other cases. Positive rights cases have typically involved challenges to under-inclusive regimes⁶³ — regimes to which some private individuals have a right of access, but others are denied access. Justice Feth, while identifying the public does not have general access to this regime, seemingly concludes that is because the bridge is the government's 'voice.' This makes it unlike the other *Baier* scenarios, where the platform is merely restricted to some private individuals and not available to others: in contrast, Justice Feth finds that the platform is not available to *any* private individuals.⁶⁴ Nor is this like the situation in *Toronto*, where a group sought a change to a statutory platform.⁶⁵ Identifying a government nexus tells us nothing about the statutory change being sought. In other words, given the state of current law, one would not expect a judge, in finding a claimant was bringing a positive rights claim, to mention the nexus between the expression and the government's voice, but that ends up being the focus of Justice Feth's decision. Indeed, underlying his reasoning seems to be a conclusion that this is really a case of government speech, but he does not expressly state this because, of course, no government speech doctrine currently exists in Canadian law.

Finally, *Vietnamese Association of Toronto v. Toronto*⁶⁶ dealt with section 2(b) and flag-raising. For many years, the City of Toronto had raised the former flag of South Vietnam on its courtesy flagpole at the request of the Vietnamese Association of Toronto — a non-profit group representing members of the City's Vietnamese population — to honour a culturally significant day for that community.⁶⁷ However, in 2005, the City indicated that only the national flag of Vietnam could be raised going forward.⁶⁸ The group applied for judicial review of that decision, alleging, among other arguments, that the refusal violated section 2(b) of the *Charter*.⁶⁹ The Ontario Superior Court of Justice found that section 2(b) was not engaged. Applying the test from *Montréal*, Justice Swinton, writing for the majority, observed:

The flagpole is not like an airport or a public street to which the public has unimpeded access.... The flagpole is of a different nature, and its use is regulated, because the flags flown can and without question are perceived, rightly or wrongly, as the expression of the City's perspective and approval.⁷⁰

The Court seemingly believed the expression emanated from the government, which weighed against finding a section 2(b) right.

⁶³ Prior to *Toronto*, *supra* note 14, an "underinclusive statutory scheme" was seen as "the hallmark of a positive rights claim": *Baier*, *supra* note 12 at para 37. However, the majority in *Toronto* indicated that positive rights claims were not limited to underinclusive regimes: *Toronto*, *ibid* at paras 18–20.

⁶⁴ *Toronto*, *ibid* at para 61.

⁶⁵ *Ibid*.

⁶⁶ [2007] 282 DLR (4th) 134 [*Vietnamese Association*].

⁶⁷ *Ibid* at paras 1–5.

⁶⁸ *Ibid* at paras 2–6.

⁶⁹ *Ibid* at para 12.

⁷⁰ *Ibid* at para 19. While this case pre-dates *Baier*, *supra* note 12, Justice Swinton cited *NWAC*, *supra* note 31, to find that the government has "no obligation to provide a particular platform of expression to groups or individuals": *Vietnamese Association*, *ibid* at para 20.

The justices in these four cases were alive to the real possibility that the message in issue would be attributed to the government. Intuiting that these cases involved special questions, in no case did a justice employ the standard *Irwin Toy* case; one justice preferred *Baier* and in the other three cases, the justices adopted *Montréal* but differed on its application to similar facts.⁷¹ This inconsistency arose, I suggest, because neither *Baier* nor *Montréal* properly capture what is distinct about problems entailing potential government communication. Until a new government speech doctrine is articulated (or the *Baier* or *Montréal* doctrines adjusted), lower courts will continue to struggle with how to approach these sorts of cases. A new framework on government speech will bring welcome clarity and consistency. What would a doctrine that centres the connection between speech and government look like? To answer that, I turn to the American experience.

III. THE AMERICAN EXPERIENCE

I start by observing that American and Canadian free speech jurisprudence differs, and, accordingly, the American approach could not be imported without modifications that take into account the unique Canadian context. However, the American experience, I suggest, provides a useful starting point for judges considering the development of a somewhat similar Canadian doctrine to address the existing doctrinal gap.

Perhaps surprisingly, the government speech doctrine has a young history in the US. It was first explicitly recognized by the Supreme Court of the United States in 1991 and has been repeatedly affirmed since then.⁷² Under the doctrine, when the government is the speaker, the First Amendment does not limit the government's speech nor does it compel the government to speak: the government is free to convey what messages it chooses and to not convey other messages, without being subject to free speech constraints.⁷³ In contrast, when the government creates a public forum for speech by private individuals, the government is not permitted to censure viewpoints it dislikes.⁷⁴ To understand how the doctrine has operated in the US, I discuss in more detail three cases: *Summum*, *Walker*, and *Shurtleff*.

First, in *Summum*, the City of Pleasant Grove displayed in a public park monuments donated by private individuals.⁷⁵ A group sought to donate its own statue and have it displayed; the City declined.⁷⁶ The group argued that public parks are a "traditional public forum" and thus the City, by refusing their statue, was engaged in forbidden viewpoint discrimination.⁷⁷ The United States Supreme Court rejected this argument, finding that display of such monuments was "government speech and . . . not subject to scrutiny under the

⁷¹ In *Alberta March for Life Association*, *supra* note 50, Justice Feth considered *Montréal*, *supra* note 11, in the alternative; *Baier*, *supra* note 12 predated *Vietnamese Association*, *ibid*, by two months.

⁷² *Rust v Sullivan*, 500 US 173 (1991); *Legal Services Corporation v Velazquez*, 531 US 533 (2001); *Johanns v Livestock Marketing Association*, 544 US 550 (2005); *Pleasant Grove City v Summum*, 544 US 460 (2009), slip opinion [*Summum*]; *Walker*, *supra* note 16; *Matal v Tam*, 582 US 218 (2017); *Shurtleff*, *supra* note 7.

⁷³ *Walker*, *ibid* at 5; US Const amend I [First Amendment]. The government is not permitted to engage in religious speech however: See *American Civil Liberties Union of Ohio Inc v City of Stow*, 29 F Supp 2d 845 (ND Ohio 1998).

⁷⁴ *Summum*, *supra* note 72 at 6; Jason Zenor, "Viewpoint Endorsement Equals Viewpoint Neutrality? The Circular Logic of Government Speech Doctrine" (2018) 46:1 Cap UL Rev 1 at 9; First Amendment, *ibid*.

⁷⁵ *Summum*, *ibid* at 460–61.

⁷⁶ *Ibid*.

⁷⁷ *Ibid* at 461.

*Free Speech Clause.*⁷⁸ The majority relied on several factors in reaching this conclusion: the long history of such governmental displays; people reasonably view such monuments as expressions by the government; governments are selective about which donated monuments they will accept and display; and parks have physical space limitations, meaning that a city could not display every monument donated to it.⁷⁹ If a government could not choose which monuments to accept and display, it would be forced to close the park to monuments altogether, a result that struck the US Supreme Court as untenable.⁸⁰

Consider also the 2014 case of *Walker*. Texas allowed private individuals to submit designs for specialized licence plates.⁸¹ The Department of Motor Vehicles could approve the design, making it available for use by the public.⁸² The respondent's proposed design included the Confederate Flag, which the Department rejected on grounds of offensiveness.⁸³ The group alleged a First Amendment violation.⁸⁴ In rejecting the claim, Justice Breyer for the majority found that speciality licence plates were government speech. Justice Breyer relied on three factors in reaching this conclusion. First, licence plates "long have communicated messages from the States."⁸⁵ Second, "license plate designs 'are often closely identified in the public mind with the [State].'"⁸⁶ On this point, he noted that plates were "essentially, government IDs," which were owned by the State and whose display and disposal were controlled by the State.⁸⁷ He also observed that the concept of state endorsement was essential to understanding the relationship between the government, the licence plate, and private individuals:

[A] person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because Texas's license plate designs convey government agreement with the message displayed.⁸⁸

Third, Justice Breyer relied on the fact that the State "maintains direct control over the messages conveyed on its specialty plates."⁸⁹ Designs had to be approved by the board, which had previously rejected other designs.⁹⁰ He observed that "[t]his final approval authority allows Texas to choose how to present itself and its constituency."⁹¹ While physical space limitation had been important in *Sumnum*, the fact that such a constraint was not present here did not affect the outcome.⁹²

⁷⁸ *Ibid* at 460.

⁷⁹ *Ibid* at 463–66, 469–70.

⁸⁰ *Ibid* at 470.

⁸¹ *Walker*, *supra* note 16 at 1–3.

⁸² *Ibid*.

⁸³ *Ibid* at 3–4.

⁸⁴ *Ibid* at 4.

⁸⁵ *Ibid* at 16.

⁸⁶ *Ibid* at 17, citing *Sumnum*, *supra* note 72 at 472.

⁸⁷ *Walker*, *ibid* at 18.

⁸⁸ *Ibid* at 18–19.

⁸⁹ *Ibid*.

⁹⁰ *Ibid*.

⁹¹ *Ibid* at 19–20.

⁹² *Ibid* at 20.

In the most recent case from the United States Supreme Court, *Shurtleff*, a private individual sought to have a “Christian flag” raised on Boston’s courtesy flagpole.⁹³ The City, which had until this point approved all flag-raising requests, refused, out of fear that granting the request would violate the Establishment Clause.⁹⁴ Justice Breyer, writing for the majority, rejected the City’s argument that flag raising was government speech in the circumstances of the case, but rather found the City had created a “public forum,” meaning that it could not discriminate on the basis of Shurtleff’s “religious viewpoint.”⁹⁵ Importantly, Justice Breyer synthesized existing jurisprudence into a test for identification of government speech. The task, he observed, calls for a “holistic inquiry” and not “rote application of rigid factors.”⁹⁶ He listed three factors: “the history of the expression at issue; the public’s likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression.”⁹⁷

The American experience provides us with two significant insights into the challenge of crafting a government speech doctrine. First, the cases confirm that distinguishing government speech from private speech can be challenging. American academics have also observed that the dividing line between government speech and private speech in a public forum is evasive.⁹⁸ However, the problem is not insurmountable. A majority of the Court has now settled on a multi-factorial, contextual assessment to identify government speech. Legal doctrines are often grey at the edges, but provided the doctrine allows legal actors sufficient scope for discussion, prediction and analysis, it is not unacceptably vague or contrary to the rule of law. Indeed, many Canadian expression doctrines, like *Baier* and *Montréal* themselves, require multi-factorial, contextual assessments.

Second, American academics have worried that the doctrine enables offensive, possibly unconstitutional, government speech while also undermining free speech protections for private individuals. For example, academics have suggested that the doctrine could immunize racist or hateful government speech from constitutional review⁹⁹ or be used to circumvent the Establishment Clause, thus allowing the State to favour a religion.¹⁰⁰ As I will explain in the following section of this article, these concerns do not carry weight if the doctrine is appropriately modified to the Canadian context. G. Alex Sinha has argued that First Amendment protections are threatened by the government speech doctrine because of a logical inconsistency at the heart of the concept: “the notion that the First Amendment does not apply when the government speaks simply precludes the possibility that a statute or

⁹³ *Shurtleff*, *supra* note 7 at 1.

⁹⁴ *Ibid* at 12; First Amendment, *supra* note 73. See also Justice Kavanaugh’s and Justice Gorsuch’s opinions in *Shurtleff*, *ibid*.

⁹⁵ *Ibid* at 9–10.

⁹⁶ *Ibid* at 14.

⁹⁷ *Ibid*.

⁹⁸ See e.g. Daniel J Hemel & Lisa Larrimore Ouellette, “Public Perceptions of Government Speech” [2017] Sup Ct Rev 33 at 34; Clay Calvert, “The Government Speech Doctrine in *Walker*’s Wake: Early Rifts and Reverberations on Free Speech, Viewpoint Discrimination, and Offensive Expression” (2017) 25:4 Wm & Mary Bill Rts J 1239 at 1243; Wayne Batchis, “The Government Speech-Forum Continuum: A New First Amendment Paradigm and Its Application to Academic Freedom” (2019) 75:1 Ann Surv Am L 33 at 52–54.

⁹⁹ See e.g. Richard C Schragger, “What Is ‘Government’ ‘Speech’? The Case of Confederate Monuments” (2020) 108:4 KY LJ 665.

¹⁰⁰ See Steven H Goldberg, “The Government Speech Doctrine: ‘Recently Minted,’ But Counterfeit” (2010) 49:1 U Louisville L Rev 21 at 52–55.

regulation could ever violate the First Amendment.”¹⁰¹ This reading of the doctrine — which views statutes and regulations as “government speech” immune from section 2(b) review — would be illogical given our constitutional framework, in which state action is subject to limitations imposed by constitutionally protected rights. Nor would this understanding solve the problem that requires adoption of the doctrine in the first place: namely, how to treat private speech with a close nexus to government such that the speech is perceived as the government’s speech.

IV. PROPOSAL

I have made the case that current doctrine does not adequately allow for consideration of the connection between government and message, which has led to confusion in lower courts. One possible solution was mentioned earlier in this article: the *Montréal* doctrine could be modified to take this factor into account.

Another possible solution is to adopt a new government speech doctrine, using the American one as a starting template. In this section, I set out what a Canadian doctrine might look like and how it might operate. The doctrine would require judges to inquire whether the message could be reasonably perceived as the government’s as opposed to that of the private individual bringing the claim. If so, application of the doctrine will serve to exclude the expression in issue from the ambit of section 2(b). Because there is no section 2(b) right to have the government speak as you would like it to, the government speech doctrine acts as an internal limit on section 2(b).

How should government speech be identified or, in other words, when will the doctrine apply? In my view, Canada, like America, ought to adopt a multi-factorial contextual test, using multiple factors as a way of assessing public reasonable perception of the message’s source. These factors might include:¹⁰²

- (1) Express or formal acknowledgment, for example: a press release from “the government”; a resolution by Parliament.
- (2) Degree of restriction on access and/or the process for selection. A high degree of control over the platform or expression may indicate government, rather than private, speech.
- (3) Expert or empirical opinion on public perception.¹⁰³
- (4) Location. Something inherent in the space might suggest government communication, for example, expression on public buildings or in city hall or on government-linked platforms (like government websites).

¹⁰¹ Sinha, *supra* note 10 at 14 [emphasis omitted].

¹⁰² Combinations of these factors and variations on them can be found in different cases and in academic writing: see e.g. *Shurtleff*, *supra* note 7; *Summun*, *supra* note 72; Helen Norton, *The Government’s Speech and the Constitution* (Cambridge: Cambridge University Press, 2019).

¹⁰³ See e.g. Hemel & Ouellette, *supra* note 98 who argue that survey data should be used to assess who the public believes is speaking.

- (5) Other connection to government. This might take the form of government funding, government support, or carrying out a governmental function.

Some of these factors will be more useful than others when determining the perceived source of communication. For example, relying on location by itself would be problematic: much private speech occurs in governmental locations (protests outside city hall, for example) and people can, and do, appreciate the distinction between private speech and public locations. However, there may be some locations — like flag poles — that are so innately connected to control, ownership, and communication by government that the public perceives messages emanating from that location as “government.” A judge would be required to balance the factors and determine if, when taken together, the circumstances demonstrate a strong nexus to government such that the public would reasonably perceive the government to be the source of the message. While contextual tests can entail uncertainty, judges are familiar with their use in Canadian constitutional law, meaning such a test should not present special problems. Recall that American courts have opted for just such a multi-factored approach.

As discussed earlier, one concern in the American context is the uncertainty of limits on the government speech doctrine. Does it immunize hateful or racist government speech; or, does it allow the government to promote or favour religions, acting as a runaround of the Establishment Clause of the First Amendment? While a doctrine of government speech is needed for the purposes of doctrinal consistency, adopting such a doctrine simultaneously requires recognition that the state has some constitutional authority to communicate with its citizens. However, the problems experienced in the American context do not have resonance for us. Canadian law provides some clear limits on government speech. First, because the doctrine is being adopted to solve a section 2(b) problem, government speech acts only as a tool to understand the limits of section 2(b) rights; it has nothing to say about other *Charter* rights nor does it limit other *Charter* rights. Other *Charter* provisions would continue to apply to government activity. This means that the government under section 2(a) cannot favour a religion, given the state’s duty of religious neutrality; nor can it discriminate against enumerated or analogous groups, given section 15. Second, interpretative doctrines that shape the development of constitutional doctrines — like unwritten principles and *Charter* values — will impose limitations on the reach of government speech. Values like equality and unwritten principles like multiculturalism may place limits on government engaging in racist or exclusionary speech, for example. Finally, the ballot box — that imperfect tool of change — remains an option for citizens to express their disapproval of hateful, exclusionary, or inappropriate government speech.¹⁰⁴

Finally, American scholars have expressed concern about the expansion of government speech at the expense of First Amendment Rights.¹⁰⁵ Would the doctrine work in Canada to undermine free expression rights? I believe a narrow doctrine provides conceptual clarity without narrowing expression rights. After all, in none of the lower court decisions reviewed above were section 2(b) rights found. While the judges were not clear on the path to that

¹⁰⁴ See e.g. *Walker*, *supra* note 16 at 5. But see also Schragger, *supra* note 99 at 693.

¹⁰⁵ See e.g. Zenor, *supra* note 74 at 2–3; Mark Strasser, “Government Speech and Circumvention of the First Amendment” (2016) 44:1 *Hastings Const LQ* 37 at 38, 60.

conclusion, they were certain of the outcome: there were no section 2(b) rights. Government speech doctrine only clarifies that path; it does not widen it.

In arguing that the doctrine can be kept narrow in Canada, it is important to recognize the uniquely American pressure to expand the government speech doctrine. The rule against viewpoint discrimination is rigid and allows for no attention to the content of the speech in determining whether it should be suppressed. American judges might be incentivized to expand government speech to avoid this rigid rule. In Canada, section 1 permits government interests to be weighed against the right to expression in a contextual proportionality weighing. A Canadian government speech doctrine would not have the same pressures to expand, because judges have an opportunity at the section 1 stage to evaluate the merits and nature of the restriction on expression. Thus, it is not obvious that the government speech doctrine would be invoked frequently or interpreted broadly in Canada.

V. CONCLUSION

In the pages above, I have argued that section 2(b) jurisprudence contains a gap when it comes to factual scenarios that involve close connection between the government and the message, such that the public reasonably believes the message emanates from the government rather than a private individual. These factual scenarios have received inconsistent legal treatment by lower courts, confirming conceptual confusion in the existing doctrine. I have argued that this uncertainty could be resolved by adopting a government speech doctrine, which would bring conceptual clarity to section 2(b) jurisprudence and assist in consistent and clear resolution of these cases. A narrowly crafted doctrine will avoid undermining free expression rights in Canada, while offering transparency and coherence in judicial decision-making.