

A Constitutional Analysis of the Proposed Ban on Non-Reproductive Human Cloning: An Unjustified Violation of Freedom of Expression?

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I. Introduction

Like all other Canadian legislation, in order to be valid law, the provisions of Bill C-13, *An act respecting assisted human reproduction*,¹ must be consistent with the terms of Canada's Constitution, and, in particular, must not unjustifiably infringe upon the individual rights and freedoms set out in the *Canadian Charter of Rights and Freedoms*.² With this fundamental legal principle in mind, this paper will focus on one of the many questions which may arise regarding the constitutionality of the bill: namely, does the prohibition of Non-Reproductive Human Cloning³ unjustifiably violate freedom of expression?⁴ The primary purpose of this paper is not to resolve this question but rather is to identify the main issues and concerns which are implicated by this query and to thereby determine whether a reasonable constitutional challenge could be mounted against the NRHC Ban on the basis of s. 2(b) of the *Charter*.

II. The Process of Charter Analysis

The structure of the *Charter* requires a court to undertake a two step analysis whenever legislation is challenged on the basis of an alleged *Charter* breach. The first step is to determine if the law in question violates a substantive *Charter* right. If a *Charter* right is not infringed, the

legislation is constitutionally valid. If a *Charter* right is infringed, however, the court moves on to the second step of the analysis, which is to determine whether the violation is "reasonably and demonstrably justified in a free and democratic society" pursuant to s. 1 of the *Charter*.⁵ Applying this two-step analysis to the question of whether the NRHC Ban unjustifiably violates freedom of expression, a court would have to determine:

- Whether the NRHC Ban infringes on freedom of expression, and, if so,
- Whether the NRHC Ban is a reasonable and demonstrably justified limit on freedom of expression.

III. Does the NRHC Ban Infringe Freedom of Expression?

Section 2(b) of the *Charter* guarantees to every individual the right to freedom of expression.⁷ In defining this right, the Supreme Court of Canada has held that the right is violated by any law whose purpose or effect is to restrict expression. Thus, in order to determine whether a given law violates a complainant's right to freedom of expression, a court must first find that the complainant's activity constitutes expression and second that the law in question, either by its purpose or by its effect, restricts that expression.⁸



Does NRHC Constitute Expression?

To date, the Supreme Court of Canada has not ruled on whether NRHC or any other form of scientific or medical research constitutes “expression” under s. 2(b) of the *Charter*.⁹ In general terms, however, the Supreme Court has defined “expression” to include any activity which “conveys or attempts to convey meaning” and which is “non-violent.”¹⁰ The Court has taken this broad, content-neutral approach to the s. 2(b) right because of the Court’s understanding that freedom of expression is constitutionally protected for the purpose of allowing people to seek and attain truth, to participate in “social and political decision-making”, and to pursue “individual self-fulfilment and human flourishing.”¹¹ As long as communicative activity relates to one of these underlying principles, the Supreme Court has held that even expression of little moral value, such as hate propaganda¹² and pornography¹³, is protected under s. 2(b). Given these broad, content-neutral parameters for freedom of expression, it appears that NRHC would fall within s. 2(b)’s protection unless:

- NRHC is an non-communicative activity; or
- NRHC is an activity which is violent.

According to the s. 2(b) test established by the Supreme Court of Canada, the moral worth or value of NRHC or the content of any messages conveyed by NRHC should not be a consideration in determining whether the NRHC Ban infringes on freedom of expression.

A. Is NRHC an Activity which Attempts to Communicate a Meaning?

While the Supreme Court of Canada has generally given a very broad definition to expression, the Court has recognized that not every activity will fall within this definition because not all activities are communicative. As an example, the Supreme Court has pointed out that the activity of parking a car would ordinarily not be protected under s. 2(b). If, however, a person parked a car in a particular area for the purposes of protesting a parking restriction, the activity would convey a message and therefore would constitute expression.¹⁴ The question, then, is whether NRHC is an activity which conveys a meaning or message.

On one hand, NRHC may be seen as a non-communicative activity because the process is devoid of any inherent

meaning or ability to convey meaning. This perspective suggests that meaning, in terms of scientific results, may be derived from a completed experiment but that the physical procedure itself does not communicate a message. According to this argument, NRHC becomes expression only when the results of the experiment are written down, verbalized or otherwise disseminated. From this viewpoint, the NRHC Ban does not violate freedom of expression because the prohibition relates only to the physical act of creating a human clone¹⁵ which is distinct from any resulting expressive act. A

corollary to this argument is the notion that the NRHC Ban does not prohibit research in particular, but prohibits only one process or experiment which may be related to particular medical or scientific research. In other words, the NRHC Ban does not limit research *per se*, but only one element of research.

On the other hand, however, it may be argued that, while NRHC is not always necessarily communicative, this process *is* inherently communicative when undertaken for the purposes of scientific or medical research (which, presumably, is the case with most NRHC). While recognizing that not all physical processes or activities convey a meaning, this approach acknowledges that research in general, and scientific research in particular, is ordinarily conducted in response to an inquiry: a hypothesis. The physical experiment or activity (in this case, the NRHC process) is undertaken for the specific purpose of resolving the inquiry or testing the hypothesis: in other words, for the purpose of communicating a meaning or a message to the researcher. The experiment conveys this information to the researcher regardless of whether the experiment’s results are recorded or disseminated. Further, in the case of scientific or medical experiments, such as NRHC, the messages which a researcher seeks to convey by the physical process of experimentation arguably advances one or more of the underlying purposes of s. 2(b), such as the pursuit of truth, self-fulfilment and societal advancement.¹⁶

Further, by choosing to conduct a particular type of experiment as a means of testing his or her inquiry, a scientist is arguably expressing beliefs or communicating ideas about medical or scientific matters. In this context, the NRHC process or any other scientific experiment is more than a medium of expression: it is part of the scientist’s communication of ideas. If, for example, a scientist decides to test his or her hypothesis about cell growth by using only certain types of cells, the scientist may be conveying the message that the hypothesis is applicable only to certain

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cells, that the use of other types of cells is unethical or immoral, or that the hypothesis is most easily demonstrated by the selected cell group. In short, the experiment or process which a scientist chooses to test his or her hypothesis may itself communicate a message. In the case of NRHC, researchers employing this process may be communicating a belief that NRHC holds the key to curing particular illnesses or ailments.

In short, although NRHC may not initially present as a communicative activity, the communicative element of this activity becomes readily apparent when NRHC is considered in the appropriate context of scientific or medical research. In any event, even if the NRHC process itself is not communicative, it may be reasonably argued that research processes, like NRHC, are logically inseparable from the obviously expressive activity of recording or disseminating the results of such procedures. Again, the key is to view the NRHC process in its proper context of responding to a scientific inquiry. We would likely have a difficult time concluding that a prohibition on Galileo's desire to watch the passage of the stars to answer his questions about the universe would not engage his right to freedom of expression. As a method of scientific inquiry, is NRHC any different?

Although Canadian courts have not yet ruled on whether scientific or medical experiments constitute expression, the idea that research in general and scientific or medical research in particular is expressive finds support in some recent comments by members of the Supreme Court of Canada. For example, in *Keegstra*, Justice McLachlin (as she then was) stated that one of the purposes of freedom of expression in our society was the maintenance of "the benefits to be gained from the pursuit of truth and creativity in science, art, industry and other endeavours."¹⁷ She also expressed concern about the chilling effect which legislation might have on the freedom of expression and stated that "[s]cientists may well think twice before researching and publishing results of research suggesting difference between ethnic or racial groups . . . These matters go to the heart of the traditional justifications for protecting freedom of expression."¹⁸ On another occasion, Chief Justice McLachlin identified "some of the values protected by the guarantee of free expression" as including "medical research."¹⁹ Consequently, while some basis may exist for arguments to the contrary, there certainly seem to be reasonable grounds upon which Canadian courts could conclude that NRHC for scientific or medical research is protected under s. 2(b) of the *Charter*.

B. Is NRHC a Violent Activity?

On numerous occasions,²⁰ the Supreme Court has stated that violent activity is not protected by s. 2(b) of the *Charter*. The Supreme Court has, however, not provided a clear definition of violent activity, other than to say that, for the purposes of s. 2(b), violence is "expression communicated directly through physical harm."²¹ Given this ambiguous definition, it may be argued that NRHC is not protected by freedom of expression because NRHC necessarily involves a violent act: namely, the intentional destruction of an embryo.²² The difficulty with this argument, however, is that it equates destruction of an entity (be it property or life) with violence. Can destruction occur through non-violent means? Another option would be for the court to fit NRHC within a narrower definition of violence by equating the destruction of the embryo with murder. This result seems unlikely, however, given the Court's unwillingness to date to provide an embryo or a fetus with "life" status under the law.

Does the Ban, in Purpose or Effect, Infringe on Expression?

Assuming that NRHC constitutes expression, the next question to be resolved under s. 2(b) of the *Charter* is whether the Ban, in purpose or effect, infringes on expression. If the purpose of the Ban is to "control attempts to convey a meaning,"²³ then the Ban clearly infringes on freedom of expression. Thus, if the Ban's objective is to restrict the scientific or medical information provided by NRHC, the Ban clearly violates freedom of expression.²⁴ If, however, the Ban's objective is to prevent harms arising from the physical, non-communicative aspects of NRHC, then the Ban infringes s. 2(b) of the *Charter* only if the message which is incidentally suppressed relates to the core values of "pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing."²⁵ Viewed in the context of bona fide scientific or medical research, NRHC appears to reflect these values. Thus, if NRHC constitutes expression, the Ban violates s. 2(b), if not in its purpose, certainly in its effect.

IV. If the NRHC Ban Violates Freedom of Expression, is the Violation "Reasonably and Demonstrably Justified"?

If a Court did conclude that the NRHC Ban violates freedom of expression, it would then have to determine whether the violation is justified under s. 1 of the *Charter*. According to

the Supreme Court of Canada, a law which violates a *Charter* right nevertheless constitutes valid legislation as a “reasonable limit . . . in a free and democratic society” under s. 1 of the *Charter* if the following requirements are met:²⁶

- The objective of the law is pressing and substantial, and
- The means used to achieve the objective are proportional in that:
 - The measures imposed by the law are rationally connected to the law’s objective, and
 - The law impairs the *Charter* right as little as possible to achieve the objective (i.e. the *Charter* right is minimally impaired), and
 - The effects of the measures limiting the right or freedom are proportional to the objective: that is, there is a balance between the deleterious and salutary effects of the law.

Obviously, all of the elements of the Section 1 Test are dependent upon the purpose and objective of the legislation under consideration.

The overall goal of the Section 1 Test is to determine whether the purpose of a given law justifies or merits the extent of the *Charter* breach caused by that law. Accordingly, whether a s. 2(b) breach by the NRHC Ban is justifiable under the Section 1 Test depends heavily upon a court’s characterization of the Ban’s purpose or objective. In *Charter* matters, the Court identifies the legislative goal based on all of the available evidence on point, which can include a variety of sources, including the content of the legislation itself, committee reports, Parliamentary debates and related government documents.

A. Is there a pressing and substantial objective underlying the NRHC Ban?

Unfortunately, at this point it is difficult to determine what objective a court would likely assign to the NRHC Ban. In imposing a complete ban of NRHC, s. 5 of the bill clearly establishes the government position that NRHC is completely unacceptable in Canadian society, but the section in question does not indicate why NRHC is not acceptable. In lieu of a legislative preamble, s. 2 of the bill sets out a number of principles relating to the values underlying the bill as a whole,²⁷ but none of these values is expressly linked to the NRHC Ban.²⁸ Nevertheless, based on the provisions of s. 2 of the bill in conjunction with the Report of the Standing Committee on Health²⁹, the identifiable objectives underlying the NRHC Prohibition appear to include one or more of the following:

- the protection and promotion of human health
- the protection and promotion of human safety
- the prevention of trade in the reproductive capacities of women and men
- the protection and promotion of human dignity, individuality and diversity.

What remains unclear is whether the Ban seeks to achieve these goals by preventing the discovery of scientific information through the NRHC process or by preventing physical harm which may arise from the NRHC process itself.

Assuming that a Court accepted any or all of the above goals as underlying objectives of the NRHC Ban, it would certainly conclude that these objectives are pressing and substantial. Human health, safety, dignity, and the protection of these qualities by preventing commodification of human tissues are laudable goals for any legislation. Accordingly, a Court may uphold these general concerns as sufficiently pressing and substantial objectives of the NRHC Ban and move on to consider the proportionality phase of the Section 1 test on the basis of these general objectives. Alternatively, a court could conclude that, while health, safety and human dignity are all worthy concerns, these goals are so general that they could be used to justify almost any legislation. Taking this view, a court could refuse to conclude that these considerations are pressing and substantial objectives underlying the NRHC ban unless the government clearly explains how these interests are jeopardized by NRHC. On one hand, this result might be characterized as the court making a policy decision about the worthiness of the government’s objectives. On the other hand, however, this result might be better characterized as the court simply finding that the government has not provided a well-defined objective, irrespective of the importance of the objective as stated.

It is difficult to predict which approach the court would employ in reviewing the NRHC Ban.³⁰ Arguably, since the burden of justifying the Ban falls to the government, the court should reject the Ban if the government does not provide clear evidence of the precise nature of the public health, safety and human dignity concerns addressed by the Ban. As the discussion below suggests, proceeding to an analysis of the proportionality aspect of the Section 1 Test on the basis of the elusive objectives of health, safety and human dignity alone places the court in the position of deciding a difficult matter of public policy—that is, whether NRHC should be permitted in Canada—rather than evaluating the policy choice of government in light of *Charter* values.

B. Are the Means Used to Achieve the Legislative Objective Proportional?

The proportionality element of the Section 1 Test is difficult to apply without knowing how a court would characterize the legislative objective. Assuming, however, that the court accepted the above noted general objectives of preventing harm to human health, safety and dignity, several observations may be made regarding the applicability of each aspect of the proportionality factor to the NRHC Ban.

Rational Connection

The rational connection component of the Section 1 Test asks “whether the legislative garment has been tailored to suit its purpose”³¹ and is not “arbitrary, unfair or based on irrational considerations.”³² The rational or causal relationship between the purpose of the law and the measures employed by the law need not be scientifically proven, but can be established on the basis of a reasonable or logical connection.³³ If a court held that the legislative objective was associated with public safety or human dignity, the rational connection requirement would likely be easily met by the NRHC Ban simply because of the nature of the materials at issue in NRHC. That is, human safety and dignity issues are inherently raised by and rationally connected to the use of human tissue, embryos, and DNA for research purposes. If a court held that the objective was to prevent commodification, however, the NRHC Ban might not so readily satisfy the rational connection criteria. A complete ban on research in any area does not seem carefully tailored to the concern of the market which might be created by the research.

Minimal Impairment

The minimal impairment element of the Section 1 Test asks whether the measures employed by the legislation remain respectful of the *Charter* right by not impairing the right more than necessary to achieve the legislative objective. Again, this part of the proportionality analysis is heavily dependent on the legislative objective assigned to the NRHC Ban. The question of whether the Ban minimally impairs freedom of expression must be addressed in light of the purpose behind the Ban. Whatever the identified purpose of the Ban is, however, a court would also have to contend with the fact that the NRHC Ban completely prohibits NRHC in all cases and for all purposes. In other words, in order to find that the Ban satisfies the minimal impairment requirement, a court would have to be satisfied that the legislative objective can only be achieved by a total denial

of freedom of expression. In order to draw this conclusion on a very generally worded purpose such as “public safety” or “human dignity,” the court would have to involve itself in making the fundamental policy decision that any use of human clones for research purposes inherently infringes on human safety and dignity. This goes beyond the court concluding that public safety and human dignity issues are implicated in NRHC and requires the court to conclude that expression via NRHC must be completely prohibited in order to protect public safety and human dignity. If the objective were more narrowly defined as the prevention of commodification of human embryos or tissue, the minimal impairment criteria would still be difficult to satisfy since there are likely many ways of addressing the commodification concern without completely banning scientific research. If the objective is to protect public safety, human dignity and commodification issues arising from human reproductive cloning, however, yet another argument may be made that this goal can only be achieved by incidentally prohibiting NRHC research activities.

Effects v. Objective

The final component of the Section 1 Test requires a court to perform a cost/benefit analysis of the impugned legislation. The question being asked is “whether the *Charter* infringement is too high a price to pay for the benefit of the law”?³⁴ Once again, this component of the Section 1 Test is dependent upon the identified objective of the legislation. Assuming again that a court accepts the general objectives of human safety, health and dignity as the underlying objectives of the NRHC Ban, the question for the court is whether these objectives justify completely prohibiting freedom of expression via NRHC research. Trying to perform the balancing required by this phase of the Section 1 Test in light of such very general objectives borders on the absurd. The extent to which these general objectives can be achieved by the Ban is unknown but the Ban’s denial of freedom of expression is total. A principled constitutional analysis would suggest that the legislation should fail this component of the test if the underlying objectives of the legislation are to address the loosely stated concerns of human safety and dignity. Again, the only way for a court to conclude that this balancing component of the Section 1 Test has been satisfied in the face of such generally stated objectives appears to be for the court to adopt a policy position that NRHC inherently infringes upon human dignity or to simply defer to the government’s decision on this point. Either way, the court would not be involved in a principled application of constitutional law but would rather be delving into policy considerations.

IV. Conclusion: Is a Good Question One Without a Clear Answer?

As the foregoing discussion demonstrates, current constitutional law principles regarding s. 2(b) and s. 1 of the *Charter* are not easily applied to the NRHC Ban found in *Bill C-13*. With respect to the s. 2(b) analysis, the difficulty arises primarily because of the absence of precedent Canadian case law ruling on the relationship between research activities and the freedom of expression. The difficulty regarding the s. 2(b) analysis is a matter which can be resolved by the court applying its understanding of freedom of expression to research procedures. Whatever answer the court comes to on this issue, however, I suggest that the best decision would be one which takes into account the purpose of scientific or medical research: that is, the goal of answering a question or proving a hypothesis. By contrast, the difficulty with applying the Section 1 Test arises primarily from a deficiency in the facts rather than in the law. Specifically, the Section 1 Test is difficult to apply because the goal behind the NRHC Ban is not clear. Given that s. 1 imposes an onus on the government to reasonably and demonstrably justify its legislation, the courts are well placed to find that this burden is not met if the government can only supply vague objectives which are loosely connected to the total NRHC Ban. Accepting imprecise objectives on this point will involve the court in making fundamental decisions of social policy or in deferring completely to the legislators. In any event, if a good question is characterized by the fact that its answer is complex and not easily determined, then, from a constitutional law perspective, the question of whether the NRHC Ban unjustifiably violates s. 2(b) of the *Charter* is a very good question indeed.

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This paper was made possible only through the assistance of others. The author gratefully acknowledges the research funding provided by the Stem Cell Network, the research assistance provided by P. Saradhi Puttagunta, and the support of Professor Timothy Caulfield on a number of matters relating to this project. Professor Caulfield is also credited with bringing this intriguing constitutional question to my attention. Thanks also to Professor Peter Carver for his insightful comments on a draft of this paper.

1. 2d Sess., 37th Parl., 2002, [*Bill C-13*]. This bill was originally introduced as *Bill C-56*, 1st Sess., 37th Parl., 2002 but died on the Order Paper when session ended.

2. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. The requirement that all legislation in Canada must comply with the terms of the Canadian Constitution in order to be valid is codified in s. 52(1) of the *Constitution Act, 1982*, which states:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

3. The prohibition in question is contained in s. 5(1)(a) of the bill, *supra* note 1. Section 5(1)(a) bans the creation of a human clone, which is defined in s. 3 of the bill as “an embryo that, as a result of the manipulation of human reproductive material or an in vitro embryo, contains the same nuclear deoxyribonucleic acid sequence as is found in the cell of a living or deceased human being, foetus or other embryo.” This definition means that the s. 5(1)(a) prohibition applies to both the creation of clones for reproductive purposes (reproductive human cloning) and for experimental medical purposes (a process which has alternately been labelled “non-reproductive human cloning,” “therapeutic human cloning,” and “somatic cell nuclear transfer”). In this paper, I intentionally address the ban only as it relates to experimental medical human cloning, which I will refer to as non-reproductive human cloning or “NRHC.” I have chosen the term NRHC because this label seems to most accurately describe the cloning process at issue, while avoiding the emotional connotations of the “therapeutic human cloning” title (which arguably implies that the science will necessarily lead to medical therapies) and the apparent lack of emotional connotations arising from the technical “somatic cell nuclear transfer” title. I will refer to s. 5(1)(a)’s ban of NRHC as the “NRHC Ban” or the “Ban.”
4. Several points should be noted with respect to the manner in which this question will be addressed in this paper.

First, my intent is to deal with the question strictly from the perspective of constitutional law. My inquiry is limited to an assessment of whether the NRHC Ban is constitutionally sound in light of s. 2(b) of the *Charter*. My comments should not in any way be taken to address the larger policy questions of whether the Ban or NRHC itself is desirable, necessary, ethical or moral.

Second, whether the Ban unjustifiably violates freedom of expression under s. 2(b) of the *Charter* is by no means the only constitutional matter which may be implicated by *Bill C-13* as a whole or by the NRHC Ban. The focus of this paper on freedom of expression and the NRHC Ban is not intended to diminish the significance of any of these other constitutional questions. Indeed, a court finding on the s. 2(b) issue would not preclude a *Charter* challenge on other grounds (Tim Caulfield and I hope to address some of these other grounds in a future paper. In the meantime, for further discussion of Canadian constitutional issues relating to the NRHC Ban, see S.A. Muscati, “Therapeutic Cloning and the

constitution—A Canadian Perspective” (2001) 22:1 Health Law in Canada 7). Moreover, this paper will focus solely on s. 2(b)’s protection of freedom of expression, leaving for another day the question of whether s. 2(b)’s protection of “thought, belief and opinion” may also be engaged by the NRHC Ban.

Finally, of all the potential *Charter* challenges to the Ban, I have chosen to focus this paper on the s. 2(b) question because this issue seems prime for a constitutional challenge. The possibility of medical therapies arising from NRHC makes the NRHC Ban a lightning rod for many of the conflicting social, ethical, scientific and legal values implicated by the bill as a whole. Further, the work of NRHC researchers would immediately be affected by the bill and these researchers are therefore likely to be one of the first groups to raise constitutional questions about the bill’s validity. For these researchers, concerns for academic freedom will likely be paramount.

5. The second step of the analysis is mandated by s. 1 of the *Charter*, *supra* note 2, which provides in full as follows:

The Canadian *Charter* of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

6. For further discussion of this general area as well as some of the specific points raised in this paper, see Muscati, *supra* note 4 at 15-16.
7. Section 2(b) of the *Charter*, *supra* note 2, provides that:

Everyone has the following fundamental freedoms:

- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

8. *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at para. 55 [*Irwin Toy*].
9. Nor has this issue been decided by any lower level Canadian court.

Although American law is not binding on Canadian courts, it is often instructive. In this regard, it is interesting to note that to date the issue of whether scientific research is protected by freedom of speech has not been ruled on by the Supreme Court of the United States. With respect to the American law, however, several commentators have suggested that the Bill of Rights should be interpreted as providing at least a qualified protection for scientific research in general and for NRHC research in particular. See for example M.B. Hsu, “Banning Human Cloning: An Acceptable Limit on Scientific Inquiry or an Unconstitutional Restriction of Symbolic Speech?” (1999) 87 *Geo. L.J.* 2399; R.G. Spece & J. Weinzierl, “First Amendment Protection of Experimentation: A Critical Review and Tentative Synthesis/Reconstruction of the Literature” (1998-1999) 8 *S. Cal. Interdisc. L. J.* 185; and J.A. Robertson, “The Scientist’s Right to Research: A Constitutional Analysis” (1977-1978) 51 *S. Cal. L. Rev.*

1203. For a contrary view, see e.g. G.L. Francione, “Experimentation and the Marketplace Theory of the First Amendment” (1987-1988) 136 *U. Pa. L. Rev.* 417.

10. *Irwin Toy*, *supra* note 8 at paras. 41- 42.
11. *Ibid.* at para. 53.
12. *R. v. Keegstra*, [1990] 3 S.C.R. 697 [*Keegstra*].
13. *R. v. Butler*, [1992] 1 S.C.R. 452.
14. *Irwin Toy*, *supra* note 8 at para. 41. In the words of the Court:

Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s. 2(b) challenge would proceed.

15. Again, “human clone” is being used here in the context of NRHC only and not in the context of reproductive human cloning, although the bill uses the term to refer to both of these processes. See note 3.
16. This point is not weakened by the argument that a scientist may act alone in performing NRHC and that the process is therefore inherently uncommunicative because it does not engage more than one person. First, as a practical matter, scientific and medical research today is ordinarily conducted by teams who communicate with each other about the NRHC process and the inquiries around this process concurrently or simultaneously with conducting NRHC experiments. Second, as a matter of law, the Supreme Court of Canada has previously suggested that expression can be engaged by a purely personal act if that act has meaning for the person performing it. For example, in *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paras. 107-109 [*Sharpe*], the Supreme Court of Canada acknowledged the possibility of writings and drawings being protected by s. 2(b) of the *Charter* even where the writings and drawings would only be seen by the creator. In fact, the Court seemed to be particularly concerned for the preservation of freedom of expression in circumstances where the expression is a manifestation of private thought. In *Sharpe*, *ibid.* at para. 108, the Court remarked:

Indeed, it is a fine line that separates a state attempt to control the private possession of self-created expressive materials from a state attempt to control thought or opinion. The distinction between thought and expression can be unclear. We talk of “thinking aloud” because that is often what we do: in many cases, our thoughts become choate only through their expression. To ban the



possession of our own private musings thus falls perilously close to criminalizing the mere articulation of thought.

Thus, the fact that NRHC might be undertaken in private or in isolation does not appear to bar a finding that the activity is communicative.

17. *Supra* note 12 at para. 181. McLachlin J. (as she then was) wrote the dissenting opinion in *Keegstra*, but agreed with the majority of the Court in the finding that the legislation in question violated freedom of expression.
18. *Ibid.* at para. 322.
19. *Sharpe*, *supra* note 16 at para. 60.
20. See e.g. *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573; *Irwin Toy*, *supra* note 8; *Re ss. 193 and 195.1 of the Criminal Code (Prostitution Reference)*, [1990] 1 S.C.R. 1123; *Keegstra*, *supra* note 12; and *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3 (QL).
21. *Keegstra*, *ibid.* at para. 37.
22. Since the Supreme Court has not limited its exclusion of violent expression to physical harm to people as opposed to property, currently this argument apparently can be made regardless of whether an embryo is characterized as a person, a foetus, a living entity, a mass of cells, or any property item.
23. *Irwin Toy*, *supra* note 8 at para. 47.
24. For further discussion regarding the possible objectives of the Ban, see Section IV.A. of this paper.
25. *Irwin Toy*, *supra* note 8 at para. 53.
26. These requirements were initially set out by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103 at paras. 69-71 [*Oakes*]. The need to balance the deleterious and salutary effects of the impugned law was added as a refinement to the final requirement by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at para. 93. (Hereafter these requirements will be collectively referred to as the “Section 1 Test”).
27. Section 2 of the bill provides as follows:
The Parliament of Canada recognizes and declares that
 - (a) the benefits of assisted human reproductive technologies and related research for individuals and for society in general can be most effectively secured by taking appropriate measures for the protection and promotion of human health, safety, dignity and rights in the use of these technologies and in related research;

- (b) the health and well-being of children born through the application of these technologies must be given priority in all decisions respecting their use;
 - (c) while all persons are affected by these technologies, women more than men are directly and significantly affected by their application;
 - (d) the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies;
 - (e) trade in the reproductive capacities of women and men and the exploitation of children, women and men for commercial ends raise health and ethical concerns that justify their prohibition; and
 - (f) human individuality and diversity, and the integrity of the human genome, must be preserved and protected.
28. For the purposes of the Section 1 Test, the relevant objective is that of the impugned legislative provision and not the overall objective of the legislation as a whole. See *RJR-MacDonald v. Canada*, [1995] 3 S.C.R. 199 at para. 144 [*RJR*].
 29. See Canada, Standing Committee on Health, *Assisted Human Reproduction: Building Families* (December, 2001) at 10 wherein the Committee states that NRHC “should be banned as it is unsafe and commodifies the embryo.”
 30. Recently, this same difficulty materialized in the Supreme Court of Canada’s decision in *Sauve v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66 (QL) wherein the Court considered whether withholding the vote from persons imprisoned in correctional institutions for sentences of two years or more could be justified under s.1. In a 5-4 ruling, the majority of the Court concluded that the government’s broad objectives of enhancing respect for the law and enhancing criminal sanctions were too vague and symbolic to justify the *Charter* infringement. The dissenting four judges concluded that the court should show deference to a reasonable social or political philosophy reflected in the government’s general objectives.
 31. *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713 at 770.
 32. *Oakes*, *supra* note 26 at para. 70.
 33. *RJR*, *supra* note 28 at paras. 156-158.
 34. P. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Thomson Canada, 1997) at 35-39.

