Submission on

Cell Phone Silencers
Response to *Canada Gazette* Notice DGTP-002-01 under the *Radiocommunication Act*

MEDIA AND COMMUNICATION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Media and Communication Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement by the Media and Communication Law Section of the Canadian Bar Association.

Submission on Cell Phone Silencers — Response to *Canada Gazette* Notice DGTP-002-01 under the *Radiocommunication Act*

Executive Summary

The Media and Communications Law Section of the Canadian Bar Association (the Section) considers the implications of broadening the use of cell phone silencers in the context of the *Canadian Charter of Rights and Freedoms,* in particular, the right to freedom of expression in section 2(b). This commentary is in response to *Canada Gazette* Notice DGTP-002-01

The Section has restricted its comments to jamming and disabling devices that require express Industry Canada authorization, and which block or prevent wireless communications altogether within the effective range of the device (referred to as "blocking devices").

Assuming the *Charter* applies to the authorization of blocking devices by executive or administrative branches of the federal government under the *Radiocommunication Act*, the Notice raises a number of freedom of expression issues.

Is the Activity Protected Under Section 2(b) of the Charter and Is Freedom of Expression Infringed?

In general terms, the expressive activity at issue is communication on mobile telephones or pagers. This type of communication is likely to encompass the full range of human endeavour, from purely personal, to commercial and political, as well as emergency communications. Use of mobile telephones or pagers involves a conveyance of meaning, which suggests that it is likely an activity protected under section 2(b) of the *Charter*.

While not all restrictions on expressive activity are considered an infringement of freedom of expression, it would appear that the effect, if not purpose, of the government's authorization of blocking devices would be to restrict the conveyance of meaning and therefore the public's right of free expression. At the

same time, there is likely at least some basis for arguing that mobile communications are consistent with the underlying principles of individual self-fulfilment and human flourishing, as well as participation in the social, commercial and political life of the community and the pursuit of truth.

Justification under Section 1 of the Charter

Under section 1 of the *Charter*, the onus is on the government to establish that a particular limit prescribed by law is a reasonable one. The Section notes that even if the government gets past the first prong of the test, that the infringement of the *Charter* right relate to a "pressing and substantial" objective, there are serious concerns regarding the proportionality between the objective sought in authorizing such devices and the effects of such authorizations on freedom of expression.

We highlight specific concerns at each successive step of the proportionality test:

(a) Rational Connection: Each blocking device technology is currently limited to affect only those handsets with which it is compatible. Under the rational connection requirement, the infringing measure cannot be "arbitrary, unfair, or based on irrational considerations." A court could find the inability of current technology to uniformly affect all handsets and pagers within its designated area as being unfair and arbitrary.

(b) Minimal Impairment: Protocols respecting considerate use of mobile telephones and pagers are already widespread in airports, aircraft, hospitals and other public and private spaces. There is also a possibility of the radio-blocking devices having a spillover effect, affecting mobile phones and pagers outside the designated area. Finally, if blocking devices were authorized for use by any applicant and the effect was to prevent wireless communications completely within a given area, without distinguishing between permissible users and uses or without providing subscribers of mobile telecommunications services the opportunity to be notified of a call (via a vibrating signal, for example) and to take the call outside of the restricted area, the courts may be less likely to view the government action as having struck the appropriate balance of the impairment to the right of free expression of mobile telecommunications subscribers and other members of the public.

(c) Deleterious v. Salutary Effects: The authorization of blocking devices cannot distinguish between different types of communications. The blanket effect of the blocking devices means that the government cannot regulate the manner of expression via mobile telephone and pager handsets. Depending on the type of device authorised, the closer the government is to authorising a complete prohibition on communications via mobile telephones and pagers, rather than merely regulating the time, place and manner of their use, the harsher the

deleterious effects would be in comparison to the salutary effect of creating quieter public and private spaces.

Any *Charter* analysis is very fact specific, and we have outlined the considerations a court may tend to examine at each step of the analysis, rather than attempting to reach a conclusion on the matter.

However, in the Section's view, the Notice raises freedom of expressions issues that are not easily resolved. In particular, broadening the authorization of blocking devices that totally block communications on affected mobile telephone or pager systems within the affected area to any person, private or public (assuming the *Charter* applies to authorization of blocking devices on private property), without restrictions on the types of spaces and persons eligible to operate such devices, presents challenging issues at almost every step of a *Charter* analysis. There are concerns regarding the proportionality between the objective sought by the government in authorizing such devices and the effects of such authorizations on freedom of expression. Despite annoyances or inconvenience their use may cause, mobile telecommunications are now viewed as a necessary part of the daily functioning of many people in their personal, social and commercial endeavours.

I. Introduction

The Media and Communications Law Section of the Canadian Bar Association (the Section) is pleased to have the opportunity to respond to Industry Canada's invitation to comment on *Canada Gazette* Notice DGTP-002-01, *Public Discussion on Cell Phone Silencers (Devices Capable of Interfering with or Blocking Mobile Telephone Communications)* (the Notice). Industry Canada has asked whether the public interest would be served if the present occasional authorization of cell phone silencers, for law enforcement and public safety purposes, were to be broadened for wider niche market and location-specific applications.

In these comments, the Section considers the implications of broadening the use of cell phone silencers in the context of the *Canadian Charter of Rights and Freedoms* and, in particular, the right to freedom of expression in section 2(b).

II. Preliminary Observations

In its Notice, Industry Canada refers to five different types of cell phone silencers or "jamming" devices:

- Blocking devices that prevent pagers and mobile phones from transmitting or receiving calls by means of a jamming signal.
- Intelligent Disablers, which, through a signal detection function confirm that a mobile phone is in a quiet zone and prevent the establishment of communication.
- Intelligent Beacon Disablers, which disable a phone's ringer, turn down its volume or switch the phone to vibrate only mode.
- Direct Receive and Transmit Jammers, which interact with the operation of local mobile phones in proximity to break or unhook the communications link.
- Passive jamming devices, which operate in a defined space/room to prevent the transmission or reception of radio signals within the shielded space.

In addition, we understand that there may be other devices capable of detecting and alerting other users or building owners of the existence of nearby pagers and mobile telephones.

The Section has restricted its comments to jamming and disabling devices that require express Industry Canada authorization, and which block or prevent wireless communications altogether within the effective range of the device. This includes devices that disable the operation of mobile telephones and pagers, and those that interfere with and thereby block use of the radio spectrum to which mobile telephones and pagers are tuned. We refer to the devices within the scope

of our comments as "blocking devices". We understand that some devices under consideration in the Notice may perform functions other than merely blocking or preventing wireless communications. Our comments do not address the use of passive jamming devices (such as Faraday cages) or intelligent beacon disablers, which disable the ringer on a mobile telephone or switch the ringer to a vibrate function, but a similar *Charter* analysis could also be applied to the authorization of such devices.

Finally, the purpose of this submission is not to consider the legality of the uses to which mobile telephone and pagers are currently authorized. Rather, it is to identify the *Charter* issues that arise if Industry Canada determines that the blocking devices considered in the Notice should be authorized for broader applications than those authorized for law enforcement or public safety purposes.

III. Application of the *Charter of Rights and Freedoms*

The threshold legal issue raised by the Notice is whether the broader authorization of blocking devices, as proposed, would be subject to the *Charter of Rights and Freedoms*. The Section's analysis suggests that the authorized use of blocking devices could be the subject of a challenge under the *Charter* under certain, if not all, circumstances.

The starting point in analyzing the potential application of the *Charter* is section 32, which provides, in part, as follows:

> **32.**(1) This *Charter* applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; …

In the seminal decision on the scope of the *Charter's* application, *RWDSU v. Dolphin Delivery Ltd.* [1986] 2 S.C.R. 573, McIntyre J., writing for a unanimous Supreme Court of Canada, articulated the principle as follows (at 598):

> It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation. It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom. Action by the executive or administrative branches of government will generally depend upon legislation, that is, statutory authority. Such action may also depend, however on the common law, as in the case of the prerogative. To the extent that it relies on statutory authority which constitutes or results in an infringement of a guaranteed right or freedom, the *Charter* will apply and it will be unconstitutional.

The sale or use of blocking devices other than under a technical certificate and licence is currently restricted in Canada by virtue of sections 4, 9 and 10 of the *Radiocommunication Act.* In other words, the government would have to do one (or more) of the following, pursuant to powers granted under the *Radiocommunication Act,* to permit the sale or use of blocking devices in Canada on a broader scale, as proposed in the Notice:

- issue a radio authorization pursuant to section 5(1)(a)(i);
- enact a regulation under section 6(1), exempting users or operators of blocking devices that are properly classified as "radio apparatus" under the Act from the requirement to obtain a radio authorization. We note that the Department is not considering licence-exempt status for blocking devices in the context of this Notice;
- issue a technical acceptance certificate pursuant to section 5(1)(a)(iv) to ensure compliance with the section 4(2) requirement that one or more blocking devices, being "interference-causing equipment", be manufactured, imported, distributed, leased, offered for sale or sold in accordance with such a certificate; and
- establish technical standards under section 6(1)(a) applicable to interference causing equipment to satisfy the requirements of section 4(3) that interference-causing equipment for which technical standards have been established be manufactured, imported, distributed, leased, offered for sale or sold in compliance with such standards.

The analysis in *Dolphin Delivery* suggests that any of these measures to broaden the authorized sale or use of blocking devises could trigger the application of the *Charter*, in that it would involve conduct by the executive or administrative branches of the federal government under the *Radiocommunication Act*.

A. Authorized Jammer Use on or in Public Versus Private Property

Paragraph 3(b) of the "Invitation to Comment" section of the Notice asks whether there is any distinction to be made "between the use of these devices in private places as opposed to public places." This question is relevant to the issue of the application of the *Charter*.

It would be useful to start by defining the characteristics of the different spaces in which the Department could authorize the use of blocking devices:

- Government-owned land or other property to which members of the public have a general right of access (*e.g.* parks, public roads and sidewalks, public transportation vehicles);
- Government-owned land to which members of the public do not have a general right of access (*e.g.* government offices, judges' chambers);
- Privately-owned land to which members of the public have a general right of access (*e.g.* shopping malls, restaurants, theatres); or
- Privately-owned land to which members of the public do not have a general right of access (*e.g.* certain business offices, private residences, private "members only" clubs).

In the first two scenarios above, where either a federal or provincial minister or their delegate operates a jamming device pursuant to an authorization from the Department, *prima facie*, the *Charter* applies.

It is less clear whether the *Charter* applies where a private person applies for a licence or other authorization to operate a blocking device and having obtained such authorization, operates a device that effectively prevents communication on mobile telephones and pagers within the confines of the private property in question. The *Charter* does not extend to purely private actions. In the context of freedom of expression, in *Committee for the Commonwealth of Canada* v. *Canada* [1991] 1 S.C.R. 139 McLachlin J. articulated the following principle at p. 228:

> Freedom of expression does not, historically, imply freedom to express oneself wherever one pleases. Freedom of expression does not automatically comport freedom of forum. For example, it has not historically conferred a right to use another's private property as a forum for expression. A proprietor has had the right to determine who uses his or her property and for what purpose. Moreover, the *Charter* does not extend to private actions. It is therefore clear that s. 2(b) confers no right to use private property as a forum for expression.

On the other hand, if the Department were to authorise the use of blocking devices in relation to private land, the requirement that such use be authorized under the *Radiocommunication Act* may arguably take the use of blocking devices beyond the realm of a purely private act. Under the *Radiocommunication Act,* Industry Canada regulates the use of radio spectrum in Canada, a scarce public resource. Under the current legislative framework, no private or public entity could install and operate a blocking device in the absence of an authorization from the Minister under section 5(1), regardless of whether such use occurs on private or public property. It is arguable that the operation of a blocking device under statutory authority may render the *Charter* applicable even in relation to private property. The *Charter* has been applied to restrictions on the freedom of expression of persons seeking access to private land (see *Canadian Mobile Sign Association v. Burlington (City)* (1994), 21 O.R. (3d) 33, leave to appeal to S.C.C. dismissed March 19, 1998; *Stoney Creek (City) v. Ad Vantage Signs Ltd.* (1997), 149 D.L.R. (4th) 282; *Urban Outdoor Trans Ad, a Division of Slaight Communications Inc. v. Scarborough (City)*, [2001] O.J. No. 261 (QL) (C.A.); *Ontario (Attorney General) v. Dieleman* (1994), 20 O.R. (3d) 229, 117 D.L.R. (4th) 449 (Gen. Div.); and *Miron v. Trudel*, [1995] 2 S.C.R. 418, where the *Charter* was held to apply to a contract for automobile insurance between two private parties, the insurer and the insured, because the terms of the contract were regulated by statute).

In the case of authorization and use of blocking devices on public land, the *Charter* is likely to apply. The application of the *Charter* to the authorization of blocking devices on private land is as yet unsettled, and may be subject to *Charter* scrutiny.

IV. Compliance with Section 2(b) Freedom of Expression

The next analytical step is to determine whether the activity at issue is protected under section 2(b) of the *Charter*.

A. Is the Activity Protected Under Section 2(b)

The Supreme Court of Canada's judgement in *Irwin Toy Ltd. v. Quebec (A.G.)* [1989] 1 S.C.R. 927 is the leading case on section 2(b) of the *Charter.* The analysis from *Irwin Toy* first requires a determination of whether a plaintiff's activity falls within the sphere of conduct protected by freedom of expression. The test for whether an activity constitutes expression is whether it aims to convey a meaning. This definition is very broad and very few activities have been held to fall outside of its purview, once it is established that the aim of the activity is to convey meaning (the most notable exception being expression that takes a violent form).

In general terms, the expressive activity at issue under the Notice would be the ability of a mobile telephone or pager user to engage in radio-based communication unimpaired by the operation of a blocking device authorized for manufacture, sale and operation pursuant to the *Radiocommunication Act*. The communication is likely to encompass the full range of human endeavour, from purely personal, to commercial and political, as well as emergency communications.

In *Canada (Canadian Human Rights Commission) v. Taylor* [1990], 3 S.C.R. 892 Dickson C.J.C. found (at p. 914) that it is impossible to conceive of an instance where the "telephonic communication of matter" could not be said to involve a conveyance of meaning. This suggests that communicating on a mobile telephone or pager is likely an activity protected under section 2(b) of the *Charter,* in that it involves the conveyance of meaning.

Charter jurisprudence recognises that not all human activity will fall within the scope of guaranteed free expression: *Irwin Toy*. In particular, in the *Committee for the Commonwealth of Canada* case, all seven judges appear to have agreed that certain non-violent expression on certain public property would fall outside of the scope of section 2(b). However, the analysis to determine whether a restriction on freedom of expression on public property falls within the scope of section 2(b) is unsettled, as three different approaches were adopted by Justices Lamer, L'Heureux-Dubé and McLachlin, respectively. In a subsequent Supreme Court judgement considering a restriction on section 2(b) rights relative to public property, *Ramsden v. Peterborough (City)* [1993] 2 S.C.R. 1084, Iaccobucci J. writing for a unanimous court, noted the existence of the three separate approaches in the Co*mmonwealth* case, without determining which of the three should be adopted.

The resolution of this uncertainty may have an impact on the range of public property in relation to which a challenge to the use of blocking devices under the *Charter* will proceed to the next stage of the analysis. Similarly, if the *Charter* is determined to apply to the authorization of blocking devices on private property, a like doctrine may need to be developed in relation to expressive activity on private property.

B. Is the Purpose or Effect of the Government Action to Restrict Freedom of Expression

The second step of the *Irwin Toy* analysis of section 2(b) is to determine whether the purpose or effect of the government action is to restrict freedom of expression. If the government's purpose is to single out meanings which are not to be conveyed — to restrict the content of expression — then a section 2(b) violation is generally established. If the government's purpose is to restrict the content of expression by limiting the forums in which it can be made, this also results in the application of section 2(b).

Where the government aims to control the physical consequences of expression (usually by restricting the time, place and manner of the expression), the purpose itself does not offend the *Charter*. The issue then becomes whether the effect of the government action is to restrict the plaintiff's free expression.

Plaintiffs alleging that the effect of government action infringes section 2(b) bear the onus of demonstrating that their activity is consistent with one of the values underlying the section: seeking and attaining the truth; participation in social and political decision-making, which is to be fostered and encouraged; and individual self-fulfilment and human flourishing, which ought to be cultivated in an essentially tolerant, welcoming environment for the sake of those who convey meanings and those to whom the meanings are conveyed. (*Irwin Toy, supra* at p. 976).

Based on the Notice, the purpose of broadening the authorized use of blocking devices would arguably not be directed at the conveyance of particular meanings. Rather, the purpose would be to allow for "quiet zones" in public or private areas that would be free from the noise caused by mobile phone operation and use.

Thus, it would appear that plaintiffs challenging a broadened authorization of blocking devices by alleging a section 2(b) *Charter* violation would be required to demonstrate that the effect of an authorized blocking device impaired their ability to convey meanings related to the underpinnings of the guarantee of free expression. This question would have to be assessed in light of the particular facts, but there is likely at least some basis for arguing that mobile communications are consistent with the underlying principles of individual self-fulfilment and human flourishing, as well as participation in the social, commercial and political life of the community and the pursuit of truth.

In sum, the analysis of whether broadening the authorization of mobile phone jammers would infringe or even be subject to section 2(b) of the *Charter* will be fact-specific. Amongst other variables, the analysis may depend on whether the property on or in which the blocking device is authorized is private or public.

V. Justification under Section 1 of the *Charter*

If the authorization of blocking devices limits the right of free expression (and assuming the *Charter* applies to the authorization of blocking devices on private property), the next question is whether that limitation is reasonable and demonstrably justified in a free and democratic society under section 1 of the *Charter*.

A. Is it "prescribed by law"

Are possible limitations on freedom of expression that may be prescribed by the government in connection with mobile telephone and pagers a limit "prescribed by law?" The term "prescribed by law" in section 1 was defined in *R. v. Thomsen*, [1988] 1 S.C.R. 640 at 650-51 *per* Le Dain J. as one that is "expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limits may also result from the application of a common law rule." To the extent that use of a blocking device requires an authorization from Industry Canada under section 5(1) the *Radiocommunication Act*, it would appear that the limitation on freedom of expression is one prescribed by law.

B. Reasonable limit

With the reasonable limit test under section 1, the government must demonstrate on a balance of probability, "through evidence supplemented by common sense and inferential reasoning", that the measure in question meets the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 and refined in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *Thomson Newspapers Co. v. Canada (Attorney General),* [1998] 1 S.C.R. 877 (the Oakes test). The requirements of the Oakes test are that:

- the goal must be "pressing and substantial";
- the means used to achieve the goal must be proportionate to the objective:
- rationally connected to the objective;
- carefully tailored to avoid excessive impairment of the *Charter* guarantee; and
- productive of benefits that outweigh the detriment to the *Charter* guarantee.

Placing each stage of the section 1 analysis within the appropriate factual context is critical. At the first stage, which requires a court to establish the objective of the measure, an understanding of the social problem which the measure addresses is necessary. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through close attention to detail and factual setting.

i) Pressing and Substantial Objective

Identifying the government's likely objective in authorising use of blocking devices is not easily done, since Industry Canada is now merely seeking to evaluate the different options. The Notice suggests that Industry Canada is facing the

> …challenge of balancing the needs of some, for a preserved quiet zone in their private environment or in public places like restaurants and theatres etc., with the concerns of the wireless service industry regarding the impact of these devices on the delivery of public mobile services. Added to this balance of needs, are radio blocking device manufacturers/distributors and entrepreneurs who wish to establish a broader market for these devices.
>
> In identifying the objective of the government action, one must look to the harm or mischief the government is attempting to address. The objective must then be stated as it relates to the infringement of the *Charter*. The Supreme Court in *Vriend v. Alberta*, [1998] 1 S.C.R. 493 stated that the objective that must satisfy the "pressing and substantial" test is the objective not of the statute overall, but of the infringing limitation in that statute or section.

If Industry Canada were to license or otherwise authorise the use of blocking devices, then the objective of such action could be stated at varying levels of generality, depending on the parameters for issuing such authorizations. The objective would have to be stated differently if, for example, the policy were to issue licences:

- to any person who wished to install such a device;
- only to hospitals, airports or gas station facilities on the basis of mitigating harm to public health or safety;
- to owners or tenants concerned with better assuring the security of private boardrooms or other private or public places; or
- to law enforcement authorities on a case by case basis.

The Notice appears to seek comment on the ramifications of all the policy options, including the broadest possible option. If Industry Canada adopts the broadest possible option of licensing anyone who wished to operate a blocking device within the confines of their property, the most likely objective would be avoiding the nuisance and annoyance of mobile telephone and pager ringers and mobile telephone conversations in private spaces and certain public spaces. If the policy is to issue authorizations for the use of blocking devices only in certain locations such as hospitals or airports, or to persons seeking to preserve the privacy or security of their premises, the use of blocking devices may be associated with some public safety objective specific to those contexts.

Once the government objective is identified, the first step of the *Oakes* test requires that the "…objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important." This requires two elements to be satisfied. First, a court will consider whether the objective can be said to be pressing and substantial. "Trivial" objectives will not warrant s. 1 protection. Second, the objective,

however important, must be reconciled with the values of a "free and democratic society." The objective, therefore, cannot be antithetical to the values enshrined in the *Charter*.

There seems to be nothing "antithetical" to *Charter* values in the government facilitating the use of blocking devices. The state's desire to secure other interests against interference from the noise and physical intrusions that accompany expression has been recognised in the past in both Canadian jurisprudence and academic commentary as being a legitimate objective: Archibald Cox, Freedom of Expression (1981) at 59-60, cited by McLachlin J. in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Ramsden v. Peterborough (City),* [1993] 2 S.C.R. 1084. In *Ramsden,* the Supreme Court of Canada held that the objective of a ban on the posting of posters on municipal property was to avoid littering, aesthetic blight, traffic hazards, and hazards to persons engaged in the repair and maintenance of utility poles and that this objective was pressing and substantial. The noise accompanying the use of mobile telephones and pagers could be described in terms of "audio litter".

However, based on the public comments on the Notice, it would appear to some parties that the harm caused by use of mobile telephones and pagers is best classified as an annoyance or nuisance. If the government adopts a broad licensing policy, a court may have difficulty identifying a harm to which the objective is directed. No obviously identifiable group of vulnerable or disadvantaged persons stand to benefit from this measure — persons bothered by the noise and annoyance caused by the operation of mobile telephones and pagers are probably not a traditionally disadvantaged group. Common sense dictates that a certain amount of noise must be tolerated at least in public spaces (whether publicly owned or privately owned to which access is normally granted to the public). For these reasons, and although there are few cases in which Canadian courts have refused to recognize the importance of the legislative objective, a court may find that this component of the test has not been met.

ii) Proportionality between Objective and Means

Assuming that the government is able to demonstrate that a pressing and substantial objective underlies its authorization of blocking devices in question, it then has to demonstrate the proportionality between the importance of the objective of the measure and the means to achieve that objective. The proportionality test is made up of three steps, which we refer to as the "rational connection", "minimal impairment" and "deleterious v. salutary effects" tests.

(a) Rational Connection

The court must be satisfied that the infringing measure is rationally connected to its objective. The authorization of blocking devices will inhibit all communication using mobile telephones and pagers within the affected area. There is little doubt that whatever the objective, be it to reduce the disruption caused by mobile telecommunications or to increase the safety or security of particular places, the authorization of blocking devices is rationally connected to the objective.

However, as noted in the public comments on the Notice, the limitations of the various technologies are such that no one technology will be effective in silencing all handsets using the various mobile telephone and pager systems. Each disabling device technology affects only those handsets with which it is compatible. Under the rational connection requirement, the infringing measure cannot be "arbitrary, unfair, or based on irrational considerations." A court could find the inability of current technology to uniformly affect all handsets and pagers within its designated area as unfair and arbitrary. The fewer handsets affected by the authorised disabling devices, the harder it will be to demonstrate a rational connection between the infringing measure and the objective.

(b) Minimal Impairment

The government must demonstrate that the means employed to address the objective impair the right or freedom as little as possible. While the test originally required that the means imposed that infringe upon the right or freedom be the least drastic possible, the minimum impairment requirement has evolved to allow for a certain "margin of appreciation" that lowers the threshold of the minimum impairment requirement. A court will attempt to determine whether the measures impair the right or freedom as little as reasonably possible. The infringement needn't be the least restrictive means of achieving the government's end, it merely has to "fall within a range of reasonable solutions to the problem confronted." (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at 342).

In general, the regulation of the time, place and manner of expression can constitute minimal impairments of the right to free expression. For example, in *Canadian Mobile Sign Association v. Burlington (City)* (1997), 149 D.L.R. (4th) 292, a city by-law that regulated the time, place, manner and number of mobile signs was upheld. On the other hand, a total prohibition on the use of mobile signs was struck down as not minimally impairing the rights of a provider of mobile sign advertising services: *Stoney Creek (City) v. Ad Vantage Signs Ltd.* (1997), 149 D.L.R. (4th) 282. Thus, where government action represents a rational attempt to strike a balance between the rights of one group and another by regulating the time, place and manner of expressive communications, the courts are less likely to intervene.

Nonetheless, the infringing measures may fail this stage of the proportionality test if the government is not able to demonstrate why a significantly less intrusive measure was not employed where it would have achieved the same objective.

From a common sense perspective, a far less intrusive means to reduce the disruption caused by the ringing and beeping of mobile telephones and pagers would be in the form of signage or other request that patrons place phone calls elsewhere and turn their handsets to vibrate. These protocols are already widespread in airports, on aircraft, in hospitals and other public and private spaces. Although we do not know how effective these conventions are in practice, the Notice notes that public awareness campaigns to promote voluntary phone etiquettes "have demonstrated some level of success for mobile phone users and non-users alike."

The government action at issue may fail the minimal impairment test because its effect may be felt beyond authorised private and public spaces. According to McLachlin C.J., in the Supreme Court's recent ruling in *R. v. Sharpe* [2001], 1 S.C.R. 45 at 101, "[i]f the law is drafted in a way that unnecessarily catches material that has little or nothing to do with the [objective], then the justification for overriding freedom of expression is absent". At present, there is a possibility of a spillover effect from the radio-blocking devices, affecting mobile phones and pagers outside the designated area. If the authorization of radio-blocking devices results in silencing mobile telephones and pagers in adjacent areas, be they private or public places, then the infringing measure would catch material not related to the objective. The court would evaluate whether the quantity of material or expression captured by "spillover" allowed the infringement on freedom of expression still to be characterised as reasonable.

Finally, if blocking devices were authorized for use by any applicant and the effect was to prevent wireless communications completely within a given area, without distinguishing between permissible users and uses or without providing subscribers of mobile telecommunications services the opportunity to be notified of a call (via a vibrating signal, for example) and to take the call outside of the restricted area, the courts may be less likely to view the government action as having struck the appropriate balance between the impairment to the right of free expression of mobile telecommunications subscribers and other members of the public.

(c) Deleterious v. Salutary Effects

The third stage of the proportionality analysis was originally formulated by Dickson J. in *Oakes,* as a means of ensuring general proportionality between the measure and the pressing and substantial objective. More recent cases have reformulated the third stage of the proportionality analysis to give it a distinct scope and function. In *Dagenais*, at 889, Lamer C.J. rephrased the third part of the Oakes test as follows:

> [t]here must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights of freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures. [emphasis in original] Under this prong of the test, the court will consider the deleterious effects of the *Charter* infringement and weigh them against the benefit to which the infringement is to give effect.

The courts have repeatedly ruled that expression has varying degrees of value. The core values underlying freedom of expression are the importance of seeking and attaining the truth, participation in social and political decision-making and self-fulfilment. The greater the connection between the expressive activity and the values underlying freedom of expression, the more severe are the effects of its limitation. A court assessing this step of the test would attempt to identify the nature of expression captured by the limitation.

A good deal of the public commentary on the Notice is from individuals wanting to maintain lines of communication with loved ones for the purpose of safety, some was from individuals with a need to be reached for professional or commercial reasons at all times, and others from emergency services staff wanting to be able to enjoy public places while "on call". The nature of expression conveyed by mobile phones and pagers use in public places ranges from personal to commercial. Commercial expression is regarded as an important and fundamental tenet of a free and democratic society, along with political, artistic and other forms of expression. However, the limitation of expression related to commercial endeavours is generally regarded as less serious than that more closely tied to the core values.

Concerns arising from the application of this final prong of the test would arise from the inherent limitations in the current technology. The authorization of blocking devices cannot distinguish between different types of communications. The blanket effect of the blocking devices means that the government cannot regulate the manner of expression via mobile telephone and pager handsets. Depending on the type of device authorised, the closer the government is to authorising a complete prohibition on communications via mobile telephones and pagers, rather than merely regulating the time, place and manner of their use, the harsher the deleterious effects would be in comparison to the salutary effect of creating quieter public and private spaces. It has been suggested, however, that certain intelligent beacon system disablers may allow 911 emergency calls in a given physical space.

For the time being, the primary way the government would be able to restrict the freedom impinging effects of blocking devices would be to proscribe limits to the physical areas in which they may be used. However, evidence of to the ability of

the blocking devices to limit their effect to the desired space would have to be led to assess the spillover effects on freedom of expression.

VI. Conclusion

The purpose of this submission has been to identify the *Charter* issues in authorizing blocking devices. We have considered the initiative contemplated in the Notice in light of the guarantee of free expression contained in section 2(b) of the *Charter*.

Any *Charter* analysis is very fact specific, and we have outlined the considerations a court may tend to examine at each step of the analysis, rather than attempting to reach a conclusion on the matter.

However, in the Section's view, the Notice raises freedom of expressions issues that are not easily resolved. In particular, broadening the authorization of blocking devices that totally block communications on affected mobile telephone or pager systems within the affected area to any person, private or public (assuming the *Charter* applies to authorization of blocking devices on private property), without restrictions on the types of spaces and persons eligible to operate such devices, presents challenging issues at almost every step of a *Charter* analysis. There are serious concerns regarding the proportionality between the objective sought by the government in authorizing such devices and the effects of such authorizations on freedom of expression. Despite annoyances or inconvenience their use may cause, mobile telecommunications are now viewed as a necessary part of the daily functioning by many people in their personal, social and commercial endeavours.

We thank the Department for providing the opportunity to comment on the Notice.