ADVERTISING, FREEDOM OF EXPRESSION, AND THE CRIMINAL LAW

RJR-MACDONALD V. CANADA ON THE FREEDOM TO ADVERTISE

Richard Moon

THE SILENT MAJORITY SPEAKS: *RJR-MACDONALD INC. V. CANADA*

Roger A. Shiner

SMOKING GUNS: THE FEDERAL GOVERNMENT CONFRONTS THE TOBACCO AND GUN LOBBIES

Allan C. Hutchinson and David Schneiderman

THE CHARTER AND PUBLICATION BANS: A COMMENT ON *DAGENAIS V. C.B.C.*

Patrick Nugent

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RJR-MacDonald v. Canada
On the Freedom to Advertise

Richard Moon

Introduction

In *RJR-MacDonald* v. *Canada*[1] a majority of the Supreme Court of Canada decides that two provisions of the federal *Tobacco Products Control Act*[2] — the general ban on cigarette advertising and the requirement that packages carry specified health warnings — are contrary to the *Canadian Charter of Rights and Freedoms*.

I have serious concerns about both parts of the Court's judgment. My concern with the decision to strike down the advertising ban is less with the Court's departure from established practice, and in particular its practice of deferring to the legislature's judgment that a certain category of expression is harmful, than with its continuation of the behavioural approach to limits on expression adopted in its previous section 2(b) decisions. As has become its practice, the Court decides the limitations issue by considering whether there is (or the legislature thinks there is) empirical evidence establishing a causal link between the restricted expression and harmful behaviour. This behavioural or cause and effect approach allows the Court to avoid addressing more difficult and important questions about the way that advertising — and cigarette advertising in particular — affects behaviour.

My disagreement with the second part of the judgment, is simply that the mandatory warnings do not amount to compelled expression. Compelled expression is objectionable because it involves an invasion of the individual's personal sphere and an affront to his/her dignity. These concerns cannot arise in the same way when a large and artificial legal entity is required to include information on its product packaging. The owners and managers of RJR-MacDonald lost some control over the presentation of their product — of their property. But these individuals will not be printing or distributing the packages themselves. Yet even if we think that corporations (in addition to individuals) have a right not to speak, which is violated here, there are some very strong reasons for compelling the cigarette companies to come clean about the risks of smoking.

The Court's Approach to The Advertising Ban

The concurring judgments of Justices McLachlin[3] and Iacobucci[4] and the dissenting judgment of Justice LaForest[5] agree that the ban on cigarette advertising is a restriction on tobacco manufacturers' freedom of expression and, therefore, a breach of section 2(b) of the *Charter*. As well, all three judgments agree that "prevent[ing] people in Canada from being persuaded by advertising and promotion" to engage in the harmful activity of smoking, is a purpose substantial and pressing enough to justify restriction of freedom of expression under section 1. Where the judgments diverge is in the application of the rational connection and minimal impairment tests.

In the view of Justice McLachlin, the federal government has not shown that there is a rational connection between a general advertising ban and a decrease in tobacco consumption. She is prepared to find "a link based on reason" or "common sense" between lifestyle advertising and tobacco consumption, even though there is no "direct evidence of a scientific nature showing a causal link."[6] It is enough that lifestyle advertising is designed to increase overall consumption, discouraging quitting or encouraging smoking. However, she sees no basis for thinking that informational advertising and brand-name advertising have the effect of increasing or sustaining overall tobacco consumption. At most

these forms of advertising support brand loyalty or encourage brand switching. They do not encourage non-smokers to take up the habit. Indeed, such a ban "deprives those who lawfully smoke of information relating to price quality and even health risks associated with different brands."[7] In the opinion of McLachlin J., because the ban on advertising covers not just lifestyle advertising but also informational and brand name advertising, which effect brand choice and not overall tobacco consumption, it is overinclusive and fails the minimal impairment test. She notes that the government presented no evidence comparing the effects of a less intrusive ban on lifestyle advertising with the effects of a total ban.[8]

McLachlin J. accepts that a judgment about the justification of limits under section 1 must take account of the social and economic context. She also recognizes that it is difficult to draw firm factual conclusions from social science evidence predictive of human behaviour and so she accepts that deference should be shown to Parliament's assessment of this evidence. However, she insists that judicial deference should not go so far as to exclude any form of scrutiny: "the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement".[9] Otherwise, the Court will have abdicated the responsibility placed upon it to ensure that laws are consistent with the basic rights and freedoms set out in the *Charter*.

Iacobucci J., in his concurring judgment, accepts that tobacco advertising "as a whole" affects consumption, so that there is a rational connection between the ban and the goal of reducing tobacco use. However, like McLachlin J., he is unable to find any evidence showing that *all* types of advertising have this effect. Parliament had not "endeavoured to differentiate the harmful advertising from the benign advertising, before it decided to ban all advertising or sought to identify whether informational and brand-name advertising do not have the effects that the Act seeks to curb."[10] In his view, the Court should not defer to Parliament's decision to impose a general ban, when there is no evidence to show that Parliament gave any consideration to alternatives. Iacobucci J. concludes that the ban is overinclusive and cannot be justified under section 1.

In contrast, the dissenting judgment of LaForest J. stresses the need for deference to Parliamentary judgment. In his view, the Court should be reluctant to second-guess Parliament's judgment (based on internal company marketing documents and expert reports) that a general ban on cigarette advertising is necessary to prevent encouragement of tobacco use. He recognizes that, although cigarette advertising is protected under section 2(b), a lower standard of justification should apply to its limitation under section 1. Cigarette advertising is not core expression because it is motivated by profit and because it encourages people to engage in an activity that is damaging to their health.[11] As well, deference to Parliament's judgment about the proper scope of the ban is appropriate given the difficulty of establishing a causal connection between advertising and consumer behaviour. LaForest J. observes that:[12]

> [There is not] a clearly understood causal connection between advertising and tobacco consumption. This is not surprising. One cannot understand the causal connection, without probing deeply into the mysteries of human psychology.

LaForest J. believes that Parliament is in a better position than the courts "to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups."[13] As well, for LaForest J., the large advertising budgets of the cigarette companies suggests that advertising is concerned not only with maintaining brand loyalty but also with attracting new smokers and inducing existing smokers not to quit. Profits will drop off dramatically, unless the companies are able to discourage quitting and find new smokers to replace those who have died (prematurely).

THE RESTRICTION OF ADVERTISING

In all three judgments there is a recognition of the difficulty in identifying a causal connection between advertising and tobacco consumption. Each judgment relies on a combination of common sense and deference to complete the connection that social science evidence is unable to establish clearly. But the problem of proof lies at the surface of a much deeper problem with the Court's approach to limits on freedom of expression. The Court's behavioural approach suppresses entirely the role of human agency in the communication process and avoids the question of how cigarette ads effect human behaviour.[14]

All three judgments share an assumption that cigarette advertising may be restricted if it is shown to be effective in persuading its audience to smoke but that it may not be banned if it is ineffective. McLachlin J. accepts that advertisements that provide information to consumers should not be banned. The formal reason for this is the absence of social science evidence (and common sense) indicating that such ads lead to greater tobacco consumption. Informational and brand-name advertising, McLachlin J. insists, only encourage brand loyalty or switching. On the other hand, she accepts that there is a "common sense" connection between lifestyle advertising and overall tobacco consumption which supports the restriction of such ads.[15] Yet, how can it be that the justification for restricting expression is stronger when the expression succeeds in persuading its audience? Expression cannot be restricted simply because it is effective in persuading others of certain views — no matter how silly or inaccurate those views.

While the majority's decision to support the restriction of lifestyle advertising ostensibly rests on the existence of evidence showing that lifestyle advertising affects individual behaviour, and specifically that it leads to more smoking, it may be that we should see (or a commitment to freedom of expression requires that we see) this support as an implicit recognition that cigarette advertising is not the stuff of freedom of expression, because of the nature of its appeal or the way it influences behaviour. However, any questioning of the cigarette companies' claim that their advertising is informative and persuasive is buried beneath the Court's 'cause-and-effect' or behavioural discourse.[16]

The failure of the majority to question directly and openly the claim by cigarette companies that the state is interfering with their attempts to convey information to consumers about cigarettes or is suppressing discussion between themselves and their consumers about a lawful product may reflect a reluctance to assess the relative value of different forms of communication or it may simply reflect the barren state of public discourse. Because cigarette ads are (or at least have been) an ordinary part of our public discourse, which is dominated by repetitive commercial appeals to consumers, we may be slow to recognize the absurdity of the cigarette companies' invocation of a more idealized form of discourse, which involves conversation or exchange among various members of the community, and the expression of a variety of views that are meant to advance understanding of complex issues.

The dissenting judgment of LaForest J. does question the companies' reliance on this more idealized form of expression. Specifically, LaForest J. makes reference to the "sophisticated marketing and social psychology techniques" used by the cigarette companies. In his view, the character of cigarette advertising "undermines the claim to freedom of expression protection because it creates an enormous power differential between these companies and tobacco consumers in the 'marketplace of ideas'."[17]

McLachlin J. is prepared to uphold a ban on lifestyle advertising because this form of advertising has the effect of increasing tobacco consumption, and perhaps also because it is not intended to inform or persuade consumers. However, she considers that the general ban in the Act, which prohibits informational advertising (disseminating information concerning product content) and brand-name advertising (promoting one brand over another on the basis of colour design and appearance of packaging) is overinclusive. She accepts that informational and brand name ads do not encourage individuals to smoke; they simply encourage brand loyalty or brand switching. But can an ad reinforce brand loyalty without reinforcing the smoking habit or can it encourage brand switching without encouraging smokers not to quit or non-smokers to start? As LaForest J. quite reasonably suggests:[18]

> even commercials targeted solely at brand loyalty may also serve as inducements for smokers not to quit. The government's concern with the health effects of tobacco can quite reasonably extend not only to potential smokers who are considering starting, but also to current smokers who would prefer to quit but cannot.

McLachlin J. says very little in her decision about informational cigarette ads. This is hardly surprising. Informational cigarette advertising seems little more than a theoretical possibility. After all what can the cigarette manufacturers say about their product? The only example ever given of an informational ad is one that informs smokers about the tar levels of particular cigarette brands. But as many have pointed out, this sort of advertisement could be seen as deceptive inasmuch as it suggests that smoking lower tar cigarettes is not unhealthy.[19]

Similarly, it is not clear what the category of brand name advertising encompasses. My suspicion is that brand name advertising has an impact on consumer behaviour either because it is in truth a subtle form of lifestyle advertising, associating a brand name with certain lifestyles, values or feelings, or because it draws on the background of other lifestyle ads that construct an image for the product. Without such a background the simple repetition of a brand name would be unlikely to have much effect on consumer behaviour.

The Court's decision to strike down the general ban on the ground that it is overinclusive, assumes that there is a reasonably clear distinction between lifestyle advertising, which can be restricted by the state, and informational and brand advertising, which cannot be restricted. However, if we think that these categories are difficult to distinguish and that most advertising is not concerned with rational persuasion, then we should question the assumption that cigarette advertising deserves any form of protection under the *Charter*.

THE COURT'S APPROACH TO THE MANDATORY WARNINGS

The judgment of McLachlin J., representing the majority view on this point, holds that the requirement that manufacturers include specified health warnings on cigarette packaging violates section 2(b) because it compels the manufacturers "to say what they do not wish to say" and "in a way that associates them with the opinions in question." [20] McLachlin J. accepts that the reasons for requiring manufacturers to include these warnings are substantial enough to justify limitation under section 1 of their 'right not to speak'. However, she believes that because the warnings are not attributed to the government (and the manufacturer is prohibited from displaying any message on the package other than brand name, trade mark, and state-required information), some consumers might mistakenly think that they are voluntary statements made by the cigarette companies: "some may draw [the inference] that it is the corporations themselves who are warning of the danger."[21] Since, in her view, a warning attributed to the government would be no less effective than an unattributed warning, the requirement is more intrusive than is necessary and so cannot be justified under section 1 as a minimal impairment on the freedom.

COMPELLED EXPRESSION

Why is attribution of the health warnings so important? As LaForest J. points out in his dissenting judgment, everyone who reads these packages knows that the warnings are compelled by legislation and are not voluntary statements by the manufacturers.[22] But this is so in most cases of compelled expression. Generally, when an individual is compelled to express him/herself, the audience is aware that the message has been compelled and is not the speaker's own. The central objection to compelled expression is not that the individual will be identified with the views of others but is rather that she/he will suffer the indignity of having to speak or write words or express views that are not her/his own.

In the United States, the paradigm compelled expression case is *West Virginia* v. *Barnette*, which involved the suspension from school of children who, for religious reasons, refused to salute the flag as required by a School Board resolution.[23] The U.S. Supreme Court holds that the resolution is contrary to the First Amendment. The flag salute is an expression of loyalty that individuals should not be compelled to make. Mr. Justice Jackson states that:[24]

> If there is a fixed star in our constitutional constellation, it is that no official, high or petty can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.... We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The 'invasion' seems significant in this case because of the very personal character of an expression of national pride and loyalty. The invasion is greater perhaps because the children had chosen not to salute the flag for religious reasons.

In the *Barnette* case, the School Board may have hoped that the attitudes of the children would be altered by the repeated expression of national pride. More likely, though, the Board simply thought that American children should show respect for the flag and should be forced to show respect if they refused to do so voluntarily.[25] If the children had given way

and agreed to participate in the flag salute, the teachers and students witnessing the salute would have known that it was not done voluntarily. The School Board resolution is objectionable not because people might think that the flag salute by these students reflects their sincere opinions. It is objectionable because it requires an individual to present him/herself publicly in a way that is not true to his/her own beliefs. The wrong is the indignity of having to affirm publicly views that are not your own.

Compelled expression is wrong because an individual's communication (what she/he says or writes) is closely linked to his/her sense of self and to his/her place in the community. Our ideas, feelings and, more broadly, our identity, take shape in public expression — by being expressed in a public language and presented to others who respond or react to them. Because the public articulation of ideas and feelings is so critical to the individual's identity, to the emergence of his/her personality, any interference with his/her expression, either in the form of censorship or compulsion, is experienced as an invasion of the self. Compelled expression is invasive even though, in many or most cases, the audience knows that the views expressed are not the actual views of the speaker or, at least, are not views the speaker has him/herself chosen to express.

If compelled expression is objectionable because it is experienced by the individual as an invasion of his/her personal sphere — or an interference with his/her 'freedom of mind' — then a large and artificial legal entity, such as a corporation, cannot have the same claim as an individual to be free from compulsion to communicate.[26] Certainly the owners of large cigarette companies do not have to suffer the indignity of having to speak or write views that are not their own. They will not be printing or distributing the packages themselves. At most, the requirement that health warnings be included on cigarette packages is an expropriation of their property or a reduction of their control over the product.

In the earlier decisions of *Ford* v. *Quebec*[27] and *Slaight Communications* v. *Davidson,*[28] the Supreme Court of Canada finds that the state has compelled expression contrary to section 2(b) but that this interference with the freedom is justified under section 1. It may be significant that in one case the required expression is commercial in character and in the other case it relates to business operations. Concerns about individual dignity that underlie the right not to speak cannot be as strong when commercial expression is involved or when a corporation is subject to compulsion. As well, the significant control that economically powerful actors sometimes have over information or over important channels of communication, may provide strong reasons to compel expression.

AN OBLIGATION TO DISCLOSE

Even if we saw this law as requiring the companies to express views that are not their own, why should cigarette manufacturers not be required to publicly acknowledge or disclose the risks of smoking? The majority judgment assumes that the state's purpose in requiring the manufacturer to place warnings on packages is simply to ensure that other voices are heard in the smoking debate — voices that inform consumers about the risks of smoking. Or at least their assumption is that this is the only purpose that could legitimately support the warnings requirement. However, the requirement might better be understood and defended as an attempt to get the cigarette manufacturers to come clean about the risks of smoking. One of the Act's purposes is "to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products."

Imposing such an obligation on cigarette manufacturers seems more than justified, in light of all their efforts to suppress information about the fatal consequences of smoking. Canadian law requires disclosures of many different kinds. The law requires house sellers to reveal latent defects, drug manufacturers to disclose risks and side-effects, and doctors to inform their patients of the risks of different procedures. It would seem strange if a manufacturer, vendor or doctor objected to these disclosure requirements on the ground that the information about product or procedure risks was not attributed to the government.

The idea that health warnings on cigarette packages are objectionable because they are not attributed to the government assumes that they are contestable statements of opinion — an assumption that cigarette manufacturers have worked long and hard to reinforce. Attribution matters only if we think that these health warnings are just the views or opinions of the government and that it is unfair when they are passed off as the views of the manufacturer. Indeed, if the majority is correct that manufacturers must

have the freedom to dissociate themselves from the warnings, then surely the manufacturers should also be free to include on the packaging a contradiction of the warning.

LaForest J., in his dissent, rejects the companies claim that they must have the right to "engage in counterspeech". He recognizes that warnings "do nothing more than bring the dangerous nature of these products to the attention of consumers". He sees the purpose as "simply to increase the likelihood that every literate consumer of tobacco products will be made aware of the risks entailed by the use of that product". In his view, these warnings have "no political, social or religious content" and so are very different from the statements of opinion that are the focus in most compelled expression cases.[29]

CONCLUSION

The judgment is no great victory for the cigarette companies. Parliament can re-enact an advertising ban that is slightly narrower in scope and a requirement that packages include health warnings that are attributed to the government. Indeed it may be that the Act will remain in force for a year, while Parliament considers its alternatives. Although a majority of five judges thought that the law was unconstitutional, one of the five, Iacoboucci J., thought that the declaration of invalidity should be suspended for a year to enable Parliament to draft a constitutionally valid advertising ban.[30]

Drafting a narrower ban — specifically a ban on lifestyle cigarette advertising — may present some difficulties. LaForest J. recognizes that evasion of a ban directed only at lifestyle advertising may be relatively easy. He observes that "in countries where governments have instituted partial prohibitions upon tobacco advertising such as those suggested by the appellants, the tobacco companies have developed ingenious tactics to circumvent the restrictions". Evasion is possible because the category of lifestyle advertising is so difficult to define. For this reason, a ban on such advertising is likely to be vague. Yet, having struck down the general ban as overinclusive and criticized Parliament for not having distinguished between different forms of advertising, the Court would be acting in bad faith if it were to strike down a prohibition directed exclusively at lifestyle advertising on the ground that it is too vague.

If there is a victory in this case, it is for a rigid and formal approach to freedom of expression adjudication — an approach that does not even begin to come to grips with the commercial domination of public discourse.❑

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Endnotes

1. (1995), 127 D.L.R. (4th) 1 (S.C.C.) (all further SCC references are to paragraph numbers).
2. *Tobacco Products Control Act* S.C. 1988 (35-36-37 Elizabeth II) c. 20.
3. Sopinka and Major JJ. concur with McLachlin J. on the freedom of expression issues.
4. Lamer C.J.C. concurs with Iacobucci J. on the freedom of expression issues. Iacobucci J. says that he agrees with many of Justice McLachlin's general conclusions.
5. Cory, L'Heureux-Dubé and Gonthier JJ. concur with LaForest J. on the freedom of expression issues.
6. Para. 155.
7. Para. 170. McLachlin J. says: "It extends to advertising which arguably produces benefits to the consumer, while having little or no conceivable impact on consumption. Purely informational advertising, simple reminders of package appearance, advertising for new brands and advertising showing relative tar content of different brands — all these are included in the ban. Smoking is a legal activity yet consumers are deprived of an important means of learning about product availability to suit their preferences and to compare brand content with an aim to reducing the risk to their health (para. 162)."
8. The government had declined to disclose studies it had carried that considered alternatives to a total ban on advertising. For McLachlin J. this weighed against the government's argument that the ban was not overinclusive.
9. Para. 129. According to McLachlin J.: "Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge. This would be to undercut the obligation on Parliament to justify limitations which it places on Charter rights and would be to substitute *ad hoc* judicial discretion for the reasoned demonstration contemplated by the Charter (para. 134)."
10. Para. 188.
11. In the view of LaForest J., "the harm engendered by tobacco and the profit motive underlying its promotion, place this form of expression as far from the 'core' of freedom of expression values as prostitution, hate mongering or pornography, and thus entitle it to very low degree of protection under section 1 (para. 75)."
12. Para. 66.

13. Para. 68.

14. McLachlin J. states: "The causal relationship between the infringement of rights and the benefit sought may sometimes be proved by scientific evidence showing that as a matter of repeated observation, one affects the other. Where, however, legislation is directed at changing human behaviour, as in the case of the *Tobacco Products Control Act*, the causal relationship may not be scientifically measurable (para. 154)."

15. Para. 158.

16. I have argued in "The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication" 45 University of Toronto Law Journal 419 (1995) that the Court oscillates between a discourse of freedom and rationality (in its application of section 2(b)) and a behavioural or causal discourse (in its application of section 1.) Difficult questions about the role of social and economic power are ignored in the rationalism of section 2(b) or buried in the behaviourism of section 1.

17. Para. 76.

18. Para. 84. LaForest rejects the companies' argument that their advertising was directed solely at preserving or expanding brand loyalty among smokers and not at expanding the tobacco market by inducing non-smokers to start: "brand loyalty alone will not, and logically cannot, maintain the profit levels of these companies if the overall numbers of smokers declines (*ibid.*)."

19. LaForest J. makes the point: "Although the appellants argue that informational advertising allows smokers to make informed health choices by giving them information about tobacco product content and thereby permitting them to choose tobacco products with lower tar levels, they submit no evidence that such products are actually healthier, nor logically could they, since the evidence seems to point in the opposite direction; such products are no safer than high tar products and serve mainly to induce smokers who might otherwise quit to keep smoking 'lighter' brands (para. 108)."

20. Para. 172. Section 17(f) of the Act authorizes the Governor-General in Council to adopt regulations prescribing content etc. of health messages.

    The *Tobacco Products Control Regulations* SOR /93 - 389 section 11 provides that every tobacco product must include one warning from a list that includes the following:

    (i) Cigarettes are addictive;
    (ii) Tobacco smoke can harm your children;
    (iii) Cigarettes cause fatal lung disease;
    (iv) Cigarettes cause cancer.
    etc.

21. Para. 172.

22. Para. 115. LaForest J. states that: "Simply because tobacco manufacturers are required to place unattributed warnings on their products did not mean that they must endorse these messages, or that they are perceived by consumers to endorse them. In a modern state, labelling of products, and especially products for human consumption, are subject to state regulation as a matter of course. It is common knowledge amongst the public at large that such statements emanate from the government, not the tobacco manufacturers. In this respect, there is an important distinction between messages directly attributed to tobacco manufacturers, which would create the impression that the message emanates from the appellants and would violate their right to silence, and the unattributed messages at issue in these cases, which emanate from the government and create no such impression (*ibid.*)."

23. *West Virginia State Board of Education* v. *Barnette* 319 U.S. 624; 63 S.Ct. 1178 (1943).

    The resolution required a "'stiff-arm' salute, the saluter to keep the right hand raised with palm turned up while the following was repeated: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one nation, indivisible, with liberty and justice for all" (*Barnette* at 628).

    "Failure to conform is 'insubordination' dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is 'unlawfully absent' and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution ..." (*Barnette* at 629).

24. *Barnette* at 642.

25. Mr. Justice Jackson in *Barnette*: "It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture of barren meaning" (at 633).

26. As LaForest J. states: "The Charter was enacted to protect individuals, not corporations. It may, at times it is true, be necessary to protect the rights of corporations so as to protect the rights of the individual. But I do not think this is such a case ...." (para. 116).

27. [1988] 2 S.C.R. 712

28. [1989] 1 S.C.R. 1038.

29. Para. 116. LaForest J. does "not accept the distinction sought to be drawn by the Attorney-General that here the statement is one of fact, not of opinion" (para. 114).

    But this is something he says at the section 2(b) stage of his analysis, when he is considering whether there was compelled expression. At the section 1 stage he does seem to take account of this distinction. For example he says that these warnings:

    > do nothing more than bring the dangerous nature of these products to the attention of consumers. Given that the objective of the unattributed health message requirement is simply to increase the likelihood that every literate consumer of tobacco products will be made aware of the risks entailed by the use of that product, and that these warnings have no political, social or religious content, it is clear that we are a long way in this context from cases where the state seeks to coerce a lone individual to make a political, social or religious statement without a right to respond (para. 116).

30. This is complicated a little by the judgment of Cory J. Although he finds that the advertising ban and the warnings requirement do not violate the *Charter*, Cory J. says that if these provisions are found to be invalid, he agrees with Iacobucci J. that the declaration of invalidity should be suspended for a year (para. 121).

THE SILENT MAJORITY SPEAKS: *RJR-MACDONALD Inc.* V. *CANADA*

Roger A. Shiner

After the Supreme Court announced its decision in *RJR-MacDonald*,[1] striking down certain provisions of the *Tobacco Products Control Act*,[2] the more sensationalist media implied that the Court had encouraged us all to go out and smoke ourselves and others to death. More thoughtful media reports predicted no sudden inundation of the airwaves and the newsprint with exultation in the delights of filling one's lungs with nicotine, and they were correct. Only a micrometer or two below the level of the actual holding itself is a mass of reasoning which brings little joy to the successful appellant tobacco manufacturers.

The holding is complex. Seven of the nine judges wrote opinions. Only L'Heureux-Dubé J. and Gonthier J. were silent, and in dissent. Seven members of the Court affirmed the valid enactment of the legislation under Parliament's criminal law power, though McLachlin J. restricted her opinion to advertising bans and mandatory health warnings, rather than support the broader interpretation of the power favoured by the other six. Only Sopinka and Major JJ. disagreed. All nine judges agreed that the legislation constituted an infringement of freedom of expression as guaranteed by section 2(b) of the Charter, as indeed the Court's current capacious approach to the interpretation of that sub-section makes inevitable.[3] They did not, however, do so in complete harmony. Three different aspects of the Act were at issue: the imposition of an advertising ban, the prohibition of trademark usage beyond tobacco products, and the mandatory health warnings. The dissenting four (La Forest, L'Heureux-Dubé, Gonthier and Cory JJ.) found that only the first two aspects constituted an infringement of freedom of expression. The majority found that the mandatory health warnings also constituted an infringement.

When it came to section 1 analysis under the *Oakes* test,[4] all nine judges agreed as a minimum that the objective of reducing tobacco-associated health risks by reducing advertising-related consumption and providing warnings of dangers is an important government objective. Several judges accepted different broader phrasings of the objective. With one exception, all nine judges agreed that there was a rational connection between the objective and the consequences of the impugned sections of the Act. The exception concerned section 8, limiting the use of tobacco trademarks on anything other than tobacco products. McLachlin J. and her two associates denied a rational connection in the case of that section. With regard to the criterion of minimal impairment, wider divisions appear. The four dissenters accepted that the infringement of freedom of expression constituted by the Act was indeed minimal. A majority of five judges did not. This difference of opinion turned out to be the decisive disagreement for the purposes of the final decision to strike down the impugned sections of the Act.

It is therefore clear that the decision is far from a ringing endorsement of the constitutional right of tobacco producers to purvey manipulatively to the young and vulnerable instruments of self-destruction. A clear majority of the Court are prepared to criminalize tobacco advertising. All of the Court back as a valid governmental objective the control of tobacco advertising. All of the Court accept that the kind of regulation the Act contains is rationally connected to that objective. Though the issue was not much discussed directly, there is plenty of indication that the deleterious effects of the Act on the tobacco manufacturers' freedom of expression is unlikely to be held to outweigh the effects of not having the legislation. All that remains is for new legislation to be introduced which will satisfy the majority that the impairment is minimal, and the Court should be

satisfied. There are plenty of hints as to how such acceptable legislation might read. If the government cannot devise legislation appropriate for reintroduction, that can hardly be blamed on the Court.

So much for the raw data on the decision. The reasoning employed is of some interest, and I will spend the rest of this Note discussing that. First, let me distinguish two perspectives from which one might assess the Court's opinions. The first is an 'internal' perspective — one which examines a new piece of institutional history in relation to past institutional history, and looks for changes and movements in the historical patterns of thought. The second is an 'external' perspective — to examine and assess the Court's reasoning from an independent jurisprudential point of view. The second perspective considers the coherence of the reasoning, its success, according to McLachlin J., as an 'application of the processes of reason'.[5] The first might be called the lawyer's perspective, and the second the philosopher's. Since I am by trade a philosopher, no prizes for guessing the perspective I shall pick. After all, the Court itself aspires to be judged by such standards.

Freedom of expression is placed where it is in the *Charter*, in part, because of its prominent place in the panoply of liberal democratic values. Most political theorists, however, have not regarded it as a fundamental intrinsic value, but rather as a value with a unique and special contribution to human personal and political flourishing. The Court itself has given its own official version of this contribution. Dickson C.J.C. expressed the values promoted by freedom of expression as 'the quest for truth, the promotion of individual self-development [and] the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged'.[6] The difficulty in subsuming tobacco advertising under section 2(b) of the Charter is that, like other recent hard cases,[7] tobacco advertising *prima facie* has nothing to do with any of those three values.

Faced with such a difficulty, courts may respond one of two ways.[8] Either they may argue that the lack of connection with central freedom of expression values means that the form of expression in question does not come under the relevant constitutional provision. Or they may argue that such forms of expression do come under the provision, but must receive relatively little weight when balanced against other values. Our Supreme Court, taking full advantage of the opportunity offered them by the division of argumentative labour between section 1 and section 2(b) of the Charter, has hitherto opted for the latter alternative. Regulation of commercial expression has been regarded as interference with freedom of expression, but as capable of justification through section 1 analysis because commercial expression is not at the core of free expression. The decision in *RJR-MacDonald* is interesting because there are signs that attention now is being paid to the alternative approach.

As one would expect, the signs are found mostly in the dissenting opinion of La Forest J.; he did, however, have the support of three other members of the Court. The most obvious sign was his willingness to argue that mandatory unattributed health warnings on packs of cigarettes do not constitute a breach of the tobacco manufacturers' section 2(b) right of freedom of expression.[9] La Forest J. accepted the principle, well established in free expression jurisprudence, that to be required to say something one does not wish to say is as much an interference with freedom of expression as to be prevented from saying something one does wish to say. All the same, he did not accept that argument here. His reason is that one cannot reasonably infer merely from the appearance of certain words on a cigarette package that they are an expression of opinion by the manufacturer of the cigarettes. As he went on to argue, government warnings on dangerous products are a fact of contemporary life. No one regards the skull and crossbones on a bottle of poisonous liquid as an expression of opinion by the manufacturer of the liquid. So why is not the same true for warnings on tobacco products?

This looks like a plausible line of argument, and one which the Court might innocently accept. But, in fact, it has enormous ramifications for the coherence of the Court's approach to the interpretation of section 2(b). As noted above, the Court has deemed that anything with meaning is covered[10] by section 2(b). But if that is true, then the unattributed health warnings certainly have a meaning, and under the Court's usual approach there would be no question about their being covered by section 2(b). So the implication of La Forest J.'s argument is that not everything with a meaning is expression within the scope of section 2(b). That thought goes right against the existing drift of the Court's thinking.

Things are not quite that simple. There are indications that La Forest J. may not be thinking

anything so revolutionary. He may be thinking that unattributed health warning are not covered by section 2(b), not because they are not 'expression' within the meaning of section 2(b), but because they are no one's expression. Such thinking needs some care. Consider other cases in which the Court has accepted that required expression is an infringement of freedom of expression. In *Slaight*,[11] a company was required by a labour arbitrator to write a letter of reference a certain way. In *Moore*,[12] a forced retraction after a libel suit was similarly deemed an infringement. In each of these cases, only the guileless suppose that the company or the newspaper are really sincere in such expressions. The requirement to publish is justified for reasons of fairness and justice, and it is not necessary that the expressions are sincere. If the unattributed health warnings are supposedly different, as La Forest J. suggests, why are they different?

Perhaps the thought is that, unlike words in a signed letter or in a newspaper with a masthead, the warnings hang in space as words of a language without a speaker, as the skull and crossbones symbol hangs without a painter. Now, we can in fact think of linguistic expressions which we understand in that way, as having a sense and reference merely in themselves as expressions in a language. Consider the case of the American feminist artist Jenny Holtzer. Her art consists of apt sentiments of one kind or another displayed in different ways in public places. To run across a Holtzer piece without knowing anything about the artist is to run across an expression of opinion which seems indeed to be disembodied. You know (or at least you think you do) that it is someone's opinion; but you don't know whose, and you understand, laugh at or object to the sentiments expressed regardless. In 1982 'FATHERS OFTEN USE TOO MUCH FORCE' appeared on a public billboard in Times Square.[13] It would not necessarily be assumed that the sentiments are being expressed by the owner of the billboard or any other assignable entity. Nor would one assume that 'RAISE BOYS AND GIRLS THE SAME WAY', installed in 1987 at Candlestick Park in San Francisco,[14] was an opinion expressed by the Giants or the 49ers or the city of San Francisco or anyone else. Consider also sayings on T-shirts; we appreciate those independently of concerning ourselves with whose expression they are.

Even if parallels like these make plausible the claim that unattributed health warnings are no one's expression, why would that fact make a difference? U.S. courts, at least, have not found it odd for linguistic objects themselves to be defendants in free expression cases where there are difficulties in arraigning actual persons.[15] There is no precedent for the idea that it has to be established whose expression it is before something can count as expression within the scope of section 2(b). If, indeed, La Forest J. is relying on the above claim, more and better argumentation is needed than the opinion contains.

Arguably, his opinion does not rest on the above claim. The real argument La Forest J. seems to be making is this: We all know that freedom of expression as a constitutional value has to do with certain kinds of things — the Court's official values, for example.[16] It is absurd to think that every single time anything happens with a meaning, rights under section 2(b) of the Charter are called into play. A lot of what is done with language is simply regulation of human life which does not have anything to do with freedom of expression. Look at the labelling of dangerous products, for example. We humans are language users. There are ways of keeping us away from things that aren't possible for dogs and cattle. We can understand symbols and sentences. To that end, governments can warn us of dangerous products by means of symbols and sentences rather than electric fences. That's all that's going on with Drano, and all that's going on with cigarettes.

I would agree entirely with such a diagnosis of the facts. But where is the room for that line of argument in the Court's official position on coverage under section 2(b)? Essentially, the argument brings to bear on the question of whether a given expression is covered by section 2(b) external facts about the kind of expression, the circumstances of the expression, and so forth. But to do that is to fill out, or put in context, the meaning of the expression. It is to apply a content-related test for whether the expression is an expression of the kind covered by section 2(b). Exactly such an approach to the interpretation of section 2(b) is excluded by the Court's view that anything which conveys meaning is expression within the scope of section 2(b).

It is hard to construe La Forest J.'s argument as anything other than a repudiation of the Court's current view. That impression is strengthened, I believe, by other parts of the opinion. I noted above that the Court currently regards commercial expression as within the scope of section 2(b), but of low value when it comes to balancing tests under section 1. By now, the Court's jurisprudence has

identified several forms of expression as of 'low' value — commercial expression, violent expression, hate propaganda, pornography, solicitation by a prostitute — and the time might seem ripe to try to pull these individual decisions together into a coherent jurisprudence. La Forest J. seems to be attempting exactly that in his dissent in *RJR-MacDonald*. The appropriate part of his opinion deserves consideration in detail. I therefore quote at length:[17]

> In my view the harm engendered by tobacco, and the profit motive underlying its promotion, place this form of expression as far from the "core" of freedom of expression values as prostitution, hate mongering, or pornography, and thus entitle it to a very low degree of protection inder section 1. It must be kept in mind that tobacco advertising serves no political, scientific or artistic ends; nor does it promote participation in the political process. Rather, its sole purpose is to inform consumers about, and promote the use of, a product that is harmful, and often fatal, to the consumers who use it. The main, if not sole, motivation for this advertising is, of course, profit. ... The sophistication of the advertising campaigns employed by these corporations, in my view, undermines their claim to freedom of expression because it creates an enormous power differential between these companies and tobacco consumers in the 'market-place of ideas'.

The argument these lines contain is a jurisprudentially ambitious one. It is also in its present form a conflation of several different points. McLachlin J.'s rejection of his argument profits from the conflation. It remains to be seen whether a suitably refined version of his position would be open to the same objections.

Four different claims can be distinguished in the above passage:

1) An activity may forfeit [some level of] constitutional protection because it is harmful.

2) An activity may forfeit [some level of] constitutional protection because it is carried out for the profit motive.

3) An activity may forfeit [some level of] constitutional protection because it concerns a suspect value — promotion of hate, of sex, of inequality, of a harmful product.

4) An activity may forfeit [some level of] constitutional protection because it exploits an enormous power differential in the market-place of ideas.

Clearly, each of these four ideas is unrelated to each of the others as they stand. Each, however, has its roots in decisions of the Court concerning freedom of expression in the last decade. I shall explain.

(1) The first reason has its roots in *Dolphin Delivery*,[18] a case concerning the limits on expression in the form of picketing. There the Court declared that 'threats of violence or acts of violence' would not be covered by section 2(b).[19] The Court has reiterated the claim three times since then as regards acts of violence,[20] although it has returned threats of violence back under the umbrella.[21] If the paradigms for excluded violent acts are murder, rape, or hitting a peace officer with a rock, then tobacco advertising does not seem 'harmful' or 'violent' in that sense. It seems at best analogous to a threat of violence. Since, however, tobacco manufacturers go to considerable lengths to conceal the harmful consequences of tobacco consumption in their advertising, even that parallel looks dubious. The claim by the government that the health of its citizens is a very important value to put in the scale against freedom of expression at the stage of section 1 analysis is surely cogent. But 'health' does not figure prominently among the values traditionally served by freedom of expression, and so that a particular expression may have harmful consequences for one's health if its meaning is taken to heart seems a weak reason for claiming that it cannot be expression within the meaning of section 2(b).

(2) The second reason given by La Forest J., the profit motive, is just a mistake of judgment on his part. There is strong support in the jurisprudence of both the U.S. Supreme Court and the Supreme Court of Canada for the proposition that the mere fact that an expression is made for profit cannot exclude it from freedom of expression. The reasoning is patent. Political speakers are often paid for their speeches; news media make money from reporting them; yet those speeches contribute to the democratic process. Artists and broadcasters of all kinds make money from artistic expression, and so on. McLachlin J. was

right to condemn this theme in La Forest J.'s opinion.[22] All the same, one can see where La Forest J. might have got the idea that the profit motive was a relevant consideration. Consider this passage which he quotes from Dickson C.J.C. in *Reference Re ss.193 and 195.1(1)(c)*:[23]

> The activity to which the impugned legislation is directed [sc. solicitation] is expression with an economic purpose. It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.

The second sentence states a plausible claim. But the first sentence states something quite different, and beside the point. What makes the claim in the second sentence plausible is the combination of 'an economic transaction of sex for money' — sex and money together. The second sentence does not underwrite any assertion that the profit motive in itself pushes an expression away from the 'core' of freedom of expression. But the conjunction of the (true, after all) first sentence with the second implies that it is the economic character, or the profit motive, in itself which is the relevant feature of solicitation for freedom of expression purposes. La Forest J. clearly picked up on this false implication.

La Forest J., in using the economic character of commercial expression as a reason for giving it lower value, appealed to another source as well — McLachlin J.'s opinion in *Rocket*.[24] There she wrote that:[25]

> The expression limited by this regulation is that of dentists who wish to impart information to patients or potential patients. Their motive for doing do is, in most cases, primarily economic. Conversely, their loss, if prevented from doing so, is merely loss of profit, and not loss of opportunity to participate in the political process or 'the market-place of ideas', or to realize one's spiritual or artistic self-fulfilment. This suggests that restrictions on expression of this kind might be easier to justify than other infringements of section 2(b).

She went on to argue that the impugned expression (dentists's advertising) enhances the ability of patients to make informed choices, and that the choice of a dentist must be counted as a relatively important consumer decision. The limitations of this argument were well exposed by La Forest J. Insofar as it is cogent at all, it relies on the increased odds that the person needing a dentist will be able to choose one which suits his or her predicament best — that his or health will be improved by the choice. As La Forest J. pungently responded:[26]

> No such argument can be made with respect to tobacco advertising. This type of expression serves to promote an activity which, in contrast to dentistry, is inherently dangerous and has no redeeming public health value.

I believe that the fact situation in the first major U.S. Supreme Court case establishing a doctrine of commercial speech, *Virginia Board*,[27] constituted a most misleading precedent. The issue there, analogous to *Rocket*, concerned health — the freedom of pharmacists to advertise that they sold low-price generic drugs. It was preceded by *Bigelow*,[28] which similarly concerned advertisements addressing the availability of legal abortions. The U.S. Court seems to have been misled by the obvious public importance of such advertisements into locating the source of the good in a general freedom of commercial expression, rather than in the availability of those particular advertisements. The Supreme Court of Canada followed dutifully in *Rocket*. But, as La Forest J. here emphasized, *RJR-MacDonald* exposes the weakness of the argument.[29]

I will leave the third argument aside momentarily, and go on to (4), the reference to inequality. The appearance of this value in La Forest J.'s opinion is to be praised. As he was at pains to point out, this value does not materialize out of thin air. Precedent exists in Supreme Court opinions for regarding the creation or promotion of inequality as a constitutional value in the area of section 2 fundamental freedoms. Chief of these precedents is perhaps the remarks of Dickson C.J.C. in *Edwards*:[30]

> In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

La Forest J. quoted this passage approvingly.[31] Dickson C.J.C. himself, elsewhere in *Slaight*,[32] quoted too his own comment in *Oakes*[33] that 'the

inherent dignity of the human person' and a 'commitment to social justice and equality' are 'underlying values essential to our free and democratic society'. As La Forest J. emphasized, freedom of commercial expression typically protects corporations, not individual human persons. If dignity is the issue, then it is not clear that a corporation has 'dignity' in that sense:[34]

> In my view, it cannot be seriously argued that the 'dignity'of the three large corporations whose rights are infringed in these cases is in any way comparable to that of minority group members.

The contradiction involved in a court dedicated to 'the inherent dignity of the human person' granting constitutional protection to the activities of major corporations has been noted before by commentators.[35] However, it has not before received such argumentative prominence in a Supreme Court opinion on freedom of expression.

(3) Let us return to the third argument made by La Forest J., that an activity may forfeit [some level of] constitutional protection because it concerns a suspect value. I believe this to be the really important argument. The justification for constitutional protection of free expression can only be 'top-down'. Despite the Supreme Court's current official view, 'expression' is a constitutional term of art. Citizens make a politico-moral choice of which (in a general sense) expressive or speech activities they choose to regard as 'expression' in that technical sense which brings those activities within constitutional protection. The justification for that choice must be rooted in principled political morality. The Court's current approach[36] is anything but principled. It consists of allowing everything to count as 'expression', and creating a series of *ad hoc* arguments under section 1 analysis to serve as the basis for the final decision. The Court needs to follow here the lead provided originally by Dickson C.J.C. and now by La Forest J., and take seriously the thought that constitutional protection for free expression is justified by the relation between such protection and the promotion of three central values — the search for truth, robust self-government, and individual self-expression and self-realization. The Court should follow its own precedent, found in its approach to the interpretation of section 15 on equality,[37] and use the values served by free expression as grounds for interpreting the scope of section 2(b), for demarcating what can count as 'expression' at all. Then the Court will not have to be involved in vain calculations of the 'distance' of a form of expression from the 'core' in order to determine its constitutional status.

The issues here are deep ones having to do with the internal architecture of the Charter itself. It was well remarked in the early days of the Charter that:[38]

> It cannot be correct that the substantive rights and freedoms should be given their most expansive meaning on the ground that all control is supposed to lie in section 1, while, at the same time, section 1 is to be construed stringently because it is overriding an infringement of a substantive right or freedom.

Currently, however, the Supreme Court errs in the opposite direction, at least with regard to freedom of expression. They are far from construing section 1 stringently. Indeed there is much written about the need to be flexible and contextual in carrying out the balancing called for by section 1. But section 2(b) is also being given the most expansive meaning possible. So there is no control of jurisprudential or constitutional principle anywhere in the Court's approach to freedom of expression. Control comes only from the exercise of judgment by individual members of the Court. Whatever one's view of the integrity of the Court, that is reason for disquiet.

Even a brief look at other aspects of the Court section 1 analysis in *RJR-MacDonald* reveals the potential difficulties. The 'contextual approach' was most recently glorified by McLachlin J. in *Rocket*,[39] and La Forest J. quoted her eloquence here.[40] He did so in the course of arguing that the 'contextual approach' leads to upholding the *Tobacco Products Control Act*. McLachlin J. herself, as mentioned, wanted to strike down the relevant sections of the Act. So what was her response to this use of her own ideas? It amounted to nothing more than: 'There are contexts and contexts, and when I said "contextual", I didn't mean "contextual".'[41] The net effect of La Forest J.'s contextual approach in *RJR-MacDonald* is deference to the legislature. McLachlin J. objected to the degree of *de facto* deference which La Forest J.'s holding implied. But she did not, and cannot, argue that his holding is substantively wrong. She can only argue that she sees the context, and the degree of deference to the legislature appropriate for that context, differently from the way that he does. That way of phrasing the disagreement is all that the contextual approach allows, and it will not help to

build up a body of serious and coherent jurisprudence on constitutional questions.

The downside of flexibility is also evident in the discussion of whether the Act contains but a minimal impairment of the section 2(b) freedom. Again, McLachlin J. and La Forest J. did little more than push buttons to vote. La Forest J. began from the benchmark of total ban on smoking, from which mark the total ban merely on certain forms of advertising looks like a minimal impairment. McLachlin J. began from a benchmark of a totally free marketplace of ideas, from which point the total ban on certain forms of advertising looks like a great deal more than a minimal impairment. Each of them quoted in support McLachlin J.'s assertion in *Comité* that 'a limit prescribed by law should not be struck out merely because the Court can conceive of an alternative which seems to it to be less restrictive'.[42] Of course La Forest J. thought that to strike down the Act is to do exactly that, while McLachlin J. eschewed any such thought.

My point is not to argue for a strict approach to the balancing called for by section 1. Because of the wide scope of the full set of Charter rights and freedoms themselves, such a huge variety of issues turn out to be justiciable under the section that rigidity is impossible. My point is to show how flexibility towards section 1 analysis, when combined with an indiscriminate approach to the interpretation of section 2(b), produces an area of constitutional litigation wrapped in jurisprudential mist — where landmarks can be seen but dimly, and it is easy for the Court to lose its way. *RJR-MacDonald* is an excellent supporting illustration, since the two main contesting opinions, on the points on which they most substantively disagree, have no resources to deploy in reasoning, but can only in the style of a school-yard argument trade slogans and generalities.

The Court needs to take up the challenge presented by the important parts of La Forest J.'s opinion, and formulate a principled view of the scope of section 2(b) freedom of expression based on a coherent picture of the contribution made by freedom of expression to human flourishing.❑

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Endnotes

1. *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1995] S.C.J. 68 (all further S.C.C. references are to paragraph numbers).

2. SC 1988, c.20.

3. 'Activity is expressive if it attempts to convey meaning': *Irwin Toy* v. *Quebec (Attorney-General)* (1989), 58 D.L.R. (4th) 577 at 606 (S.C.C.), per Dickson C.J.C.: 'I am of the view that section 2(b) of the Charter protects all content of expression irrespective of the meaning or message sought to be conveyed': *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man)* (1990), 56 C.C.C. (3d) 65 (S.C.C.), per Lamer J. (as he then was) at 108. I criticize this approach elsewhere: 'Advertising and Freedom of Expression' (1995) 45 Univ of Toronto L.J. 179 at 190-1.

4. *R.* v. *Oakes* (1986), 26 D.L.R. (4th) 200.

5. Cf. *RJR-MacDonald* at para. 127, per McLachlin J.

6. *R.* v. *Keegstra* (1990), 61 C.C.C. (3d) 1 at 51.

7. Hate propaganda (*Keegstra, ibid.*), pornography (*R.* v. *Butler*, [1992] 1 S.C.R 452) solicitation by a prostitute (*Reference re ss. 193 and 195.1(1)(c), supra* note 2).

8. Freedom of expression absolutism ('Congress shall make NO, and I mean NO, law ...') is a third option, but it does not surface much in Canada.

9. Para. 113ff.

10. By 'covered' I mean 'comes within the scope of'. Coverage is different from protection; whether something is protected by the Charter will be a matter of section 1 analysis as well as the scope of the relevant other section. The important distinction between 'coverage' and 'protection' is due to F.F. Schauer, *Freedom of Speech: A Philosophical Enquiry* (New York: Cambridge U.P.) at 89-90.

11. *Slaight Communications Inc. (Operating as Q107 FM Radio)* v. *Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.).

12. *Moore* v. *Canadian Newspapers Co. Ltd. et al* (year) 60 D.L.R. (4th) 113 (OHC).

13. Sponsored by the Public Art Fund.

14. Sponsored by Artspace, San Francisco.

15. Cf. e.g., *US* v. *One Book Called 'Ulysses'*, 5 FSupp 182 (1933) (SDNY), affirmed 72 F2d 705 (2nd Cir) (1934); *US* v. *12 200Ft Reels*, 413 US 123 (1973).

16. See text associated with note 6, *supra*.

17. Paras. 75, 76.

18. *Retail, Wholesale & Department Store Union, Local 580 et al* v. *Dolphin Delivery Ltd* (1986), 33 D.L.R. (4th) 174 (S.C.C.).

19. *Dolphin Delivery, ibid.* at 187, per McIntyre J.

20. *Irwin Toy, supra* note 3 at 607; *Reference Re ss. 193 and 195.1(1)(c), supra* note 3 at 109; *R.* v. *Keegstra, supra* note 7 at 24.

21. *R.* v. *Keegstra, ibid.* at 26 (per Dickson CJC).

22. Cf. para. 171.

23. *Reference Re ss. 193 and 195.1(1)(c), supra* note 3 at 74.

24. *Rocket* v. *Royal College of Dental Surgeons of Ontario* (1990), 71 D.L.R. (4th) 68 (S.C.C.). One source of amusement in La Forest J.'s opinion is the extent to which he uses quotations from earlier opinions by McLachlin J. in arguing against her opinion in *RJR-MacDonald.* I will mention two further instances later.

25. *Ibid.* at 79.

26. Para. 108.

27. *Virginia State Board of Pharmacy et al* v. *Virginia Citizens Consumer Council Inc et al*, 425 US 748 (1976).

28. *Bigelow* v. *Virginia*, 421 US 809 (1975).

29. I have suggested elsewhere that in both the U.S. and Canada all of the early commercial speech/expression cases had misleadingly idiosyncratic fact situations which made the decision to strike down the restriction on expression independently appealing. Cf. Roger A. Shiner, 'Freedom of Commercial Expression', in W.J. Waluchow, ed., *Free Expression: Essays in Law and Philosophy* (Oxford: Clarendon Press, 1994) 91-134 at 100-105.

30. *R.* v. *Edwards Books & Art Ltd* (1986) 35 D.L.R. (4th) 1 at 49 (S.C.C.); repeated by him in *Slaight, supra* note 11 at 423.

31. Para. 116.

32. *Slaight, supra* note 11 at 427.

33. *Oakes, supra* note 4 at 225.

34. Para 110. He is contrasting the instant case with the protection given to speaking a language in such cases as *Ford* v. *Quebec (Attorney-General)* (1988), 54 D.L.R. (4th) 577 (S.C.C.) and *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

35. Allan Hutchinson, 'Money Talk: Against Constitutionalizing (Commercial) Speech' (1990) 17 Can. Bus. L.J. 2-34; Wayne A. MacKay, 'Freedom of Expression: Is It All Just Talk?' (1989) 68 Can. Bar Rev. 713; Lorraine E. Weinreb, 'Does Money Talk? Commercial Expression in the Canadian Constitutional Context', in David Schneiderman, ed., *Freedom of Expression and the Charter* (Toronto: Thomson Professional Publishing, 1991) 336-357; Roger A. Shiner, *supra* note 29.

36. An approach which is fuelled by the misguided (if originally well-intentioned) desire to be flexible and contextual — but that is another story. See Shiner, *supra* note 29 at 125-128.

37. See *Law Society of British Columbia et al* v. *Andrews et al* (1989), 56 D.L.R. (4th) 1 at 10 (S.C.C.).

38. *Re Cromer and BC Teachers' Federation* (1986), 29 D.L.R. (4th) 641 (BCCA) at 652, per Lambert J.A.

39. *Rocket, supra* note 24 at 78.

40. Para. 71.

41. Cf. paras. 133-134.

42. *Comité pour la République du Canada* v. *Canada*, [1991] 1 S.C.R. 139 at 248.

SMOKING GUNS: THE FEDERAL GOVERNMENT CONFRONTS THE TOBACCO AND GUN LOBBIES

Allan C. Hutchinson and
David Schneiderman

They rode into Ottawa wearing sharp suits and carrying expensive briefcases, accompanied by a posse of well-placed lobbyists and high-priced lawyers. It was a put-up or shut-up showdown between multi-national tobacco companies, RJR-MacDonald and Imperial Tobacco, and the Canadian government. With the eyes of the world upon them, it was constitutional high noon in Ottawa's Supreme Court corral. In dispute was the ability of the federal government to curtail the corporate speech of tobacco companies aimed at inducing consumption of the principal cause of cancer in North America. But there was much more at stake. In the shadow of the tobacco lobby was the equally powerful gun lobby. The fate of gun control legislation passing through Parliament would be threatened by any decision in favour of the tobacco legislation.

As we now know, the tobacco lobby was successful in its efforts to set aside the most restrictive aspects of the *Tobacco Products Control Act*. Much of the commentary on the *RJR-MacDonald*[1] has concentrated on the Charter dimensions of that decision, particularly the implications for the regulation of commercial speech generally. In this comment, we want to take a different focus and concentrate on the federalism implications of the case — the extent of the federal criminal law power. The federal government's 'exclusive' jurisdiction under section 91(27) has always been a difficult and dynamic category of power to circumscribe: its scope is potentially limitless and can subvert the division of powers between the federal and provincial legislatures. With succinct understatement, Justice Estey was close to the mark when he noted that "criminal law is easier to recognise than to define."[2] In seeking to set some guidelines and limits, the courts have tended to swing between unrealistically narrow and broad interpretations. Striking a considered and consistent balance has proved an elusive task for the courts. As the most recent effort in this process of delineation and definition, *RJR-MacDonald* gives a progress report on where the Supreme Court is and where it might be going. However, as with so much earlier case law about the criminal law power, there is more smoke and mirrors than anything else.

SMOKE AND MIRRORS

The federal government's power under section 91 to prohibit and regulate commercial advertising came under serious threat in *RJR-MacDonald*. The sobering reality of that threat is dramatized by the disagreement amongst all levels of courts about the source of the federal power to prohibit and regulate tobacco advertising. At the Quebec Superior Court, Chabot J. held that the federal government did not have the power to enact a prohibition on tobacco advertising or require mandatory health warnings; no authority could be found under the federal criminal law power or the 'national dimensions' branch of the peace order and good government power. The Quebec Court of Appeal thought differently. It unanimously held that the federal government could enact the *Tobacco Products Control Act* under the national dimensions branch of POGG. According to the Court, the problem of tobacco consumption in Canada has reached such proportions as to be of national concern, having the singleness, distinctiveness and indivisibility that distinguishes matters of national concern from matters of local provincial concern. The Act, however, could not be justified under the federal criminal law power as tobacco consumption and its promotion by advertising did not have "an affinity with a traditional criminal law concern."[3] The Supreme Court of Canada, Justices Sopinka and Major dissenting on this point, agreed with the Quebec Court of Appeal that the Act was a

valid exercise of federal power, but under the federal power to make criminal law; they declined to offer an opinion on its constitutional validity under the POGG power.

Why such confusion among so many and so learned judges about the ambit of the federal criminal law power? Apart from and in addition to the overall indeterminacy of constitutional law, the confusion can be traced back to the decisions of the late nineteenth century Privy Council. By circumscribing the federal regulation of trade and commerce to no one specific trade in *Parsons* and denying jurisdiction to the federal government to prohibit trade other than in the exceptional circumstances that give rise to the exercise of the POGG power, the Privy Council curtailed federal ability to control important economic levers through the trade and commerce power.[4] But as long as an enactment concerned prohibitions with penal consequences attached,[5] the criminal law power could serve as the convenient vehicle for every kind of regulation, economic or otherwise — laws prohibiting combinations and price discrimination were justified early in the twentieth century[6] and, later in the century, those prohibiting resale price maintenance and the continuation or repetition of an illegal combinations were upheld under the criminal law power.[7] This state of affairs inspired Bora Laskin to write in the third edition of his case-book that "[r]esort to the criminal law power to proscribe undesirable commercial practices is to-day as characteristic of its exercise as has been resort thereto to curb violence or immoral conduct."[8]

So expansive was this power that the federal government was driven to invoke the criminal law power even to regulate the insurance industry[9] and to prohibit the production of margarine. In the *Margarine Reference* case, the Supreme Court of Canada decided that enough was enough and tried to place some limits on the criminal law power. In a famous judgment, Justice Rand sought to narrow the unrestricted scope of the criminal law power to those laws that had a "criminal public purpose." He maintained that such ends were served by laws which had as their purpose "public peace, order, security, health, morality" because these were the "ordinary though not exclusive ends served" by the criminal law.[10] Decades later, the criminal law power still retains pivotal importance as the repository of much that was denied the federal government under its general power over trade and commerce.[11] Nevertheless, it is hard to reach any other conclusion than that Rand's 'triple-p' formula — prohibition + penalty + purpose — only starts off any rigorous doctrinal analysis; it does not and cannot complete the task without much more.

In *RJR-MacDonald*, the Supreme Court was asked by the tobacco manufacturers to find the *Tobacco Products Control Act* beyond federal competence as being largely in the nature of economic regulation within the scope of provincial jurisdiction. The Court refused the invitation, accepting that the criminal law could justify federal intervention in the powerful tobacco manufacturing industry by hampering its alluring packaging and prohibiting its advertising campaigns.

Writing for the majority of the Court, Justice La Forest concluded that the restriction of advertising and the requirement of mandatory labelling qualified as an exercise of the criminal law power. The pith and substance of the Act — that process of identifying the dominant purpose of legislation which drives the constitutional analyses in division of powers cases — was identified as a concern with public health.[12] Health is not an enumerated head of power, but is rather a subject matter of divided jurisdiction over which the provinces and the federal government have an interest. Indeed, Justice Rand had earlier confirmed health as one of the ordinary ends served by the criminal law, that of safeguarding the public from "injurious or undesirable effect."[13] According to La Forest J., the scope of the federal power to create criminal legislation with respect to health matters is broad, and is "circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil."[14] That is, the law must not be a colourable attempt to intrude into the realm of provincial jurisdiction. By way of example, La Forest J. argues that a law would be colourable if it pertained only to a particular industry (*Parsons* and *Labatt*) or only to the regulation of advertising generally (*Irwin Toy*). He considered these both to be areas of provincial concern.

It could not be said that this was a colourable intrusion into provincial jurisdiction. According to La Forest J., the law's underlying concern was not the regulation of advertising because it then "surely would have enacted legislation applying to advertising in more than one industry."[15] On the other hand, if the concern was the regulation of the tobacco industry as an industry, he was of the view that "it would surely have enacted provisions that relate to such matters as product quality, pricing and labour

relations."[16] In somewhat circular fashion, the Court held that it was not advertising generally because the Act applied to only one industry and it was not regulation of one industry because it did not concern aspects of production in that industry. To bootstrap his argument, Justice La Forest explained that Parliament chose not to prohibit the tobacco industry itself (by outlawing consumption, for example) for the simple reason that it was "not a practical policy option at this time."[17] Applying a mix of *realpolitik* and behavioural science, La Forest J. explained that, as cigarettes are a highly addictive product and over one-third of Canadians smoke, a prohibition on consumption likely would be resisted. Prohibition could lead, as it did earlier in the century to an increase in "smuggling and crime."[18] Given the complex social problems created by tobacco consumption (this provides the lead-in to La Forest J.'s deference to Parliament in his discussion of least restrictive alternatives), "innovative legislative solutions are required to address them effectively."[19] The effectiveness of this legislative solution, however, is not one which the Court would broach in its federalism review: "the goal in pith and substance analysis is to determine Parliament's underlying purpose in a enacting a particular piece of legislation; it is not to determine whether Parliament has chosen that purpose wisely or whether Parliament would have achieved that purpose more effectively by legislating in other ways."[20]

Justices Major and Sopinka expressed disagreement with the majority view in respect of the ban on tobacco advertising. While the requirement of product warnings could be justified under the federal criminal law power, the advertising ban could not be as it did not concern a "typically criminal public purpose."[21] In a significant modification of Rand's formulation in the *Margarine Reference*, the two dissenters proposed a narrow test for determining whether a subject was in pith and substance a matter for the criminal law: the activity to be suppressed "must pose a significant, grave and serious risk of harm to public health, morality, safety or security."[22] The type of commercial speech targeted by the Act did not meet the test of gravity and seriousness in endangering public health.

Furthermore, the dissenting judges disagreed with the majority on two further points — the validity of ancillary regulation and the relevance of exemptions. On the first issue, La Forest J. had written that activities ancillary to an 'evil' could be prohibited even though the underlying evil remains unregulated. Relying on similar ancillary prohibitions on prostitution and assisted suicide, the majority found it constitutionally unimpeachable, even though Parliament had taken a "circuitous path" to accomplish the goal of lessening tobacco consumption. In contrast, the minority could see no analogy between the criminalization of activities that follow in the wake of prostitution or assisted suicide and tobacco consumption. According to Major, "[t]obacco advertising is in itself not sufficiently dangerous or harmful to justify criminal sanctions,"[23] disregarding the fact that it is the suppression of tobacco consumption that is the targeted evil and not simply commercial speech. On the second issue, the minority found that the exemptions in the Act accorded to publications and broadcasts from outside of Canada suggested that the Act was in the nature of economic regulation rather than criminal law. If 65% of the Canadian magazine market would still include tobacco advertisements, despite the prohibition, how could a criminal prohibition be justified simply by virtue of an advertisement's Canadian origins?[24] The majority replied by referring to the rule of interpretation that a law does not lose its criminal character merely because it contains exemptions; this was the case, for instance, in Canada's former criminal code prohibition on abortions outside of accredited hospitals.[25] The minority, suggesting that the federal POGG power might provide appropriate authority for the advertising ban, preferred not to "come to any conclusion on this point" in view of their agreement with the majority that, in any event, the Act failed under the Charter.[26]

The upshot of *RJR-MacDonald* is that, while there are very real problems with banning tobacco advertising entirely so long as tobacco remains a legally available substance, the Supreme Court has confirmed that the federal government is well within its jurisdiction and rights to ban tobacco consumption and to place some Charter-warranted restrictions on tobacco advertising.[27] Moreover, the victory for the tobacco lobby has been bought at a high price for the gun lobby. It now seems almost certain that the Supreme Court will reject any constitutional challenge to the new *Firearms Act* based on the division of powers. When the smoke clears, it will be seen that the tobacco lobby has shot the gun lobby where it hurts most.

GUNS AND ROSES

The government has introduced gun control legislation in the form of the new *Firearms Act*.[28] As well as amending various sections in Part III of the *Criminal Code*, the Act provides for a comprehensive licensing system for those persons possessing or wishing to possess firearms that are not prohibited or restricted. To this extent, the Act builds on a set of existing and constitutionally-valid rules that prohibit or restrict the possession of certain firearms. In future, the possession and sale, import or export, of all firearms will be subject to control and regulation. The stated purpose of the legislation is to increase public safety and control crime by ensuring that all firearms — potentially dangerous and life-threatening devices — are registered. The Act does not prevent the ownership of firearms, but requires that they be registered and controlled. In light of the fact that there are roughly 1400 firearm deaths each year,[29] the measures appear to be modest and reasonable, bringing Canada in line with laws in most other countries. Indeed, the *Firearms Act* is considered by the gun control lobby to be too timid in the face of havoc wreaked by people using guns.

To no one's surprise, the gun lobby has resisted the introduction of the *Firearms Act* with all the political and legal might that it can muster. Their central contention is that there is no established correlation between the ownership of firearms and a propensity to commit crimes and that registration will only interfere with the proprietary rights of law-abiding citizens and not prevent the use of illegally-obtained firearms in criminal activities. Apart from the many policy and social arguments that it has sought to deploy, the gun lobby has argued strenuously that this legislation is unconstitutional in origin and content. Its initial position has been that such legislation falls outside the federal government's legitimate authority under section 91(27) and more properly falls under provincial jurisdiction. As best as can be gathered, its contention is that, while the restriction and prohibition of guns may at times be criminal in nature and, therefore, validly federal in jurisdiction, the imposition of a licensing and registration scheme is traditionally a matter of 'property and civil rights' and, therefore, falls under exclusive provincial authority. Whatever (dubious) merit this argument might have previously held now seems to have been effectively scotched by the Supreme Court's decision in *RJR- MacDonald*.

Prior to the decision in *RJR-MacDonald*, the constitutional position seemed to be reasonably well-established.[30] The federal government has the clear authority to legislate under its criminal law power to prevent as well as to control crime. For instance, in the 1981 case of *Pattison*, the Alberta Court of Appeal upheld the validity of the federal law which provides for the seizure of firearms in the interests of public safety:[31]

> The legislation may be preventative of crime.... When the object is to reduce the incidence of injury or death to the citizens of the country by the type of violence made possible by the destructive power of a firearm, it becomes clearly within the legislative competence of the Government of Canada under the head of criminal law to so enact.

Also, the courts have made clear that it is entirely legitimate for the federal government to create regulatory offences (as opposed to so-called 'true' crimes[32]) that are ancillary to the exercise of its criminal law power. Furthermore, the fact that criminal laws are not part of the *Criminal Code* is not determinative; the nomenclature of the legislation is not decisive in matters of constitutionality.

If the federal government's jurisdiction to enact the *Firearms Act* was ever open to any doubt, it has been almost entirely swept away by the Supreme Court in *RJR-MacDonald*. The majority of the Court, in confirming that the criminal law power is plenary in nature, broad in definition, flexible over time, and catholic in substance, held that the challenged *Tobacco Products Control Act* had an underlying public purpose — the containment of the detrimental effects caused by tobacco consumption — that was criminal in nature. The fact that Parliament had not criminalised the ultimate 'evil' of tobacco consumption was not at all determinative: "it would be absurd to limit Parliament's power to legislate in this emerging area simply because it cannot as a practical matter impose a restriction more specifically aimed at the evil."[33] Although the Act did not serve a purpose that was traditionally or commonly considered to be criminal, the federal government's criminal law power enabled it to create new crimes. Accordingly, if the ban on tobacco advertising could be validly criminalised on the basis that it helped to protect Canadians' health from smoking, there seems little reason to believe that the licensing of gun ownership

to protect Canadians' safety from firearm injuries could not equally be validated as an exercise of the criminal law power. Insofar as the smoking of tobacco threatens people, then it must also be so for the use of firearms.

But perhaps even more telling is the opinion of the dissenting minority in *RJR-MacDonald*. Mindful that their judgments were driven by an overriding concern to ensure that the criminal law power is not used indiscriminately by the federal government to bring anything and everything within its constitutional mandate, the words and arguments of Justices Sopinka and Major offer weighty support for the validity of the *Firearms Act*. They held that the definitional heart of the federal criminal law power is to be found in the authority to prohibit conduct which poses "a significant and serious risk of harm to public health, safety or security."[34] Although they held that tobacco advertising was too far removed from the injurious effects of tobacco use to fall within the scope of the criminal law power, it seems reasonable to assume that they would find that the connection between gun control and injurious conduct was not so remote. In an important aside, Justice Major opined that the only ancillary matters that have and can fall within the scope of the criminal law power are those where the core activity "concerns matters which have traditionally been subject to criminal sanctions and pose significant and serious dangers in and of themselves."[35] Whatever the case may be with the smoking of tobacco, the possession and use of firearms continues to be a conventional matter of criminal regulation.[36]

Of course, the full extent of the criminal law power can only be appreciated and assessed when the use of that power to invalidate provincial legislation is canvassed. It is only when the courts take as broad an interpretation of the federal government's criminal law power in actions to challenge provincial legislation as they do in validating federal legislation that there is real cause for alarm. If the criminal law power is treated as expansively when provincial law is being challenged as when federal legislation is being defended, there is good reason to doubt the wisdom of the Supreme Court's in *RJR-MacDonald*. Such an interpretation would exert a considerable centripetal and unwelcome force on the balance of constitutional jurisdiction. However, in recent years, the Supreme Court's treatment of the criminal law power to curtail provincial legislation has continued to accommodate the reasonable exercise of provincial powers in areas that are commonly perceived to be criminal in nature and scope.[37] Relying upon the provinces power under section 92(15) to impose "punishment by fine, penalty or imprisonment," the courts have tended to uphold provincial penal legislation; concurrent and overlapping jurisdiction is alive and well in some areas of criminal regulation. Moreover, the courts have not been quick to regard the existence of similar federal and provincial schemes to regulate anti-social conduct as bringing the paramountcy doctrine into play.[38]

In *Morgentaler* (No. 3), the Supreme Court struck down a provincial law that required certain designated medical procedures, including abortion, to be performed in hospitals. The province claimed that this measure was intended to prohibit privatization in order to maintain high-quality health care and was, therefore, within the province's constitutional jurisdiction. In a unanimous decision, the Supreme Court determined that the legislation's real purpose was to "suppress the perceived harm or evil of abortion clinics"[39] and held it to be an invalid incursion into the federal government's criminal law jurisdiction. At the heart of Sopinka's judgment for the Court was the insistence that, while the establishment and enforcement of a local standard of morality does not necessarily invade the field of criminal law, "interdiction of conduct in the interest of public morals was and remains one of the classic ends of the criminal law."[40] The effect of this very strong judgment is to jar the general belief that, provided that a province has a viable claim to jurisdiction under a valid head of provincial power, there is plenty of room for concurrent jurisdiction in matters concerning social regulation. However, in light of the Supreme Court's emphatic judgment in *RJR-MacDonald*, the judgment in *Morgentaler* may prove to be more of an aberration, driven more by the Court's irritation at a province's duplicity in trying to slip one by the courts and the constitution, than the beginning of a new trend in criminal law doctrine.

In many ways, the gun lobby's challenge to the *Firearms Act* on federalism grounds is speculative and the least likely to succeed; it represents a small part of a larger scatter-gun approach that seems committed to firing anything that constitutionally moves. The gun lobby's efforts to target those provisions of the Act that touch on *Charter* matters seem closer to the target, but they still likely are outside of its constitutional range and argumentative fire-power. For instance, the contention that section 7's guarantee of life liberty and security of the person can be used to ground some kind of American-style right to bear

arms is fanciful in the extreme; if anything, section 7 can be viewed as protecting people from guns rather than enhancing gun ownership. Also, the gun lobby and their lawyer's claims that sections of the *Firearms Act* infringe people's rights to be safe from "unreasonable search and seizure" and from "cruel and unusual treatment or punishment" are difficult to sustain. Regarding the former claim, the courts have held that it is not unreasonable to allow spot-check inspections to be carried out in relation to regulated activity so as to monitor compliance with appropriate safety or health standards.[41] There is particular concern about the ability to inspect residential dwellings and, in this regard, the Act makes those inspections, absent a judicially-authorized search warrant, illegal without reasonable notice and the consent of the occupant. Regarding the latter claim, while the courts have been solicitous to protect people from the imposition of minimum sentences where the sentence might be "grossly disproportionate" to the criminalised conduct, they have not condemned out-of-hand the imposition of minimum sentences where the context is serious enough.[42] Moreover, even if the gun lobby's arguments prevailed on these matters, it would not jeopardize the whole legislation, but only particular severable parts of it.

The most pressing and deserving constitutional argument being made by the gun lobby against the *Firearms Act* concerns its potential infringement of aboriginal and treaty rights that are entrenched by section 35. It is clear that many Aboriginal people who have a constitutionally-protected right to hunt also have the right to possess a firearm for that purpose. The pertinent question, following the *Sparrow* decision,[43] is whether the impediments to exercising these constitutional rights are justifiable as reasonable regulations that are warranted by a "compelling and substantial objective" and interfere with the particular right as little as necessary. This difficult to judge, but the federal government's efforts to engage in consultations with affected Aboriginal groups and its willingness to make special arrangements to administer the licensing system as it involves Aboriginal peoples will go much of the way to satisfying the constitutional requirements of section 35. Nevertheless, although concern for the position of Aboriginal groups is admirable, one cannot help but be a little suspicious of lobbyists who 'convert' to the aboriginal cause only when it is in their own best interests to do so: fair-weather friends are no friends at all.

PARTING SHOTS

In conclusion, therefore, it can be reported that the Canadian government lost in their shoot-out with the tobacco lobby, at least temporarily. Nevertheless, there are indications that victory might have been won at too high a price; having won the battle, the tobacco lobby might actually have put themselves in danger of losing the war. In manner of speaking, it might be choking on its own success; the decision might galvanise a weak government to take a stronger stand. However, it might be that, in the constitutional showdown between Ottawa and the tobacco lobby, one of the federal stray bullets hit the unsuspecting gun lobby and caught them unawares. The decision in *RJR-MacDonald* has strengthened the government's hand in silencing the outraged cries of the gun lobby — the *Firearms Act* will likely not fall for want of federal jurisdiction. Smoking guns, indeed.❑

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Endnotes

1. *RJR-MacDonald* v. *A.G. Canada* (1995), 127 D.L.R. (4th) 1 (S.C.C.); (1993), 102 D.L.R. (4th) 289 (QCA); and (1991), 82 D.L.R. (4th) 449 (QSC) (all further S.C.C. references are to paragraph numbers).

2. *Scowby* v. *Glenndinning*, [1986] 2 S.C.R. 226 at 236 per Estey J.

3. (1993), 102 D.L.R. (4th) 289 at 341-42.

4. See *Citizens Insurance Company* v. *Parsons* (1881), 7 A.C. 96 and *A.-G. Ont.* v. *A.-G. Can.*, [1896] A.C. 348.

5. Any prohibited act with penal consequences attached, wrote Lord Atkin in *PATA*, qualifies as a valid exercise in criminal law. See *Proprietary Articles Trade Association* v. *A-G Can.*, [1931] A.C. 310 at 324.

6. *PATA*, *ibid.*; *A.G.B.C.* v. *A.-G. Can.*, [1937] A.C. 368.

7. *R.* v. *Campbell*, [1965] S.C.R. vii.; *Goodyear Tire and Rubber Co.* v. *The Queen*, [1956] S.C.R. 303.

8. *Laskin's Canadian Constitutional Law*, 3rd ed. (Toronto: Carswell, 1966) at 851.

9. *Insurance Reference*, [1916] 1 A.C. 588.

10. *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 at 49-50.

11. This occurred despite the fact that the 'trade and commerce' power had been revived partially by the Supreme Court of Canada in *GMC Ltd.* v. *City National Leasing*, [1989] 1 S.C.R. 641.

12. Para. 30.

13. Quoting Rand J. at para. 32. This jurisdiction had been confirmed by the Supreme Court in *Schneider* v. *The Queen*, [1982] 2 S.C.R. 112 (regarding compulsory treatment for heroin addiction) and *R.* v. *Wetmore*, [1983] 2 S.C.R. 284 (regarding Food and Drugs Act).

14. Para. 32.

15. Para. 33.

16. Para. 33.

17. Para. 34.

18. Para. 34.

19. Para. 36.

20. Para. 44.

21. Quoting Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough: Carswell, 1992) at para. 198.

22. Para. 200.

23. Para. 212.

24. Para. 215.

25. In *Morgentaler* v. *The Queen*, [1976] 1 S.C.R. 616 at 627.

26. Para. 217.

27. For more on this, see Richard Moon, *"RJR-MacDonald* v. *Canada* on the Freedom to Advertise" (1995) 7 Constitutional Forum 1.

28. Bill C-68, *An Act respecting firearms and other weapons*, 1st Sess., 35th Parl., 1994-95.

29. Coalition for Gun Control, "Bill C-68: A Brief to the Senate Committee on Legal and Constitutional Affairs" (1995)

30. Matters seem to have changed since Lord Watson described an Act "restricting the right to carry weapons of offence, or their sale to young persons" as being solely within the authority of the provincial legislature. See *A.-G. Ont.* v. *A.-G. Can.*, *supra* note 4 at 362.

31. *A.-G. of Canada* v. *Pattison* (1981), 59 C.C.C. (2d) 138 at 142 per McGillivray CJA.

32. The courts have begun to distinguish again between 'true' and 'regulatory' crimes for Charter purposes. See *Thomson Newspapers*, [1990] 1 S.C.R. 425 and *R.* v. *Wholesale Travel Group*, [1991] 3 S.C.R. 154.

33. Para. 48.

34. Para. 201.

35. Para. 210.

36. It might be that the regulation of shooting clubs and ranges (s.29) is beyond federal competence. To the extent that this regulation is incidental to the government's larger objective, it would pass constitutional muster. See the discussion of the test of "fit" in *GMC*, *supra* note 11.

37. *Labatt*, [1980] 1 S.C.R. 914 courtesy of Estey J. is one of the few cases in which the S.C.C. held that prohibition + penalty = criminal purpose; this involved advertising. See also *Boggs* v. *The Queen*, [1981] S.C.R. 49 per Estey J. (driving while provincial licence suspended).

38. Hogg, *supra* note 21 at 492-95.

39. *R.* v. *Morgentaler*, [1993] 3 S.C.R. 463 at 512 per Sopinka J.

40. *Ibid.* at 496.

41. See *R.* v. *McKinley Transport*, [1990] 1 S.C.R. 627 and Hogg, *supra* note 21 at 1065-66.

42. See *R.* v. *Smith*, [1987] 1 S.C.R. 1045 and *R.* v. *Goltz*, [1991] 3 S.C.R. 485.

43. *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075.

THE CHARTER AND PUBLICATION BANS: A COMMENT ON *DAGENAIS* V. *C.B.C.*

Patrick Nugent

In late 1992 Lucien Dagenais and three other Christian Brothers were on trial, or about to go on trial, in Ontario for the physical and sexual abuse of young boys who had been in their care at Catholic boarding schools. *Dagenais* v. *C.B.C.*[1] concerned a publication ban issued in the course of Dagenais' trial which prevented the C.B.C. from broadcasting the docudrama, *The Boys of St. Vincent*, until the completion of all four trials.[2] The case received considerable attention from the popular media which is seldom as indignant as when its own interests are threatened. In its decision, the majority of the Supreme Court agreed with the Ontario Court of Appeal and found the publication ban in the case to be overly broad and unwarranted in light of available alternative measures. The analysis the Court adopted to reach its conclusions raises several important issues. The Court determined that the *Charter* did indeed apply to the common law rule concerning publication bans. The Court also outlined the proper procedure to be followed by third parties appealing interlocutory orders, such as publication bans, in criminal matters. In addition, the common law rule regarding publication bans was refashioned in a *Charter*-friendly form and, in the course of its analysis, the Court reformulated the "deleterious effects" branch of the *Oakes* test.

The question of exactly who and what is bound by the provisions of the *Canadian Charter of Rights and Freedoms* has occupied legal scholars since the document's proclamation. Not until 1986, however, did the Supreme Court of Canada have an opportunity to pronounce on the question. The case of *R.W.D.S.U.* v. *Dolphin Delivery* [3] provided the backdrop for the Court's attempt to define the scope of *Charter* application. However, since the Court rendered its decision in 1986, Canadian jurists and legal academics alike have been struggling to make sense of it.

Most puzzling among the various holdings found in McIntyre J.'s decision for the Court were the assertions: 1) that courts were not "government" for the purposes of section 32(1) of the *Charter* and, thus, were not subject to the application of the *Charter*;[4] and 2) that the *Charter* applied to the common law only "insofar as the common law is the basis of some governmental action."[5] The combined effect of these two holdings is that court orders issued pursuant to the common law are not subject to *Charter* application if the parties to the litigation are non-governmental. In the course of private litigation, then, court orders issued pursuant to the common law could infringe any of the rights and freedoms contained in the *Charter*. Seemingly attempting to soften the implications of this holding, McIntyre J. suggested that the "judiciary *ought* to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the constitution."[6] As Peter Hogg has pointed out, this is what McIntyre J. seemed to do when he went on in the decision to measure the common law rule concerning secondary picketing against sections 2(b) and 1 of the *Charter*.[7] It is instructive that McIntyre J. undertook such an evaluation despite the fact that the case involved two private litigants and a common law rule. The weight to be accorded McIntyre's *ought* (in "ought to apply and develop the principles of the common law ..."), however, was not clear from his judgment and remains unclear after the *Dagenais* decision.

The majority decision in *Dagenais* was delivered by Lamer C.J.[8] McLachlin J. delivered a separate concurring opinion while LaForest, L'Heureux-Dubé and Gonthier JJ. each wrote separate dissents. The

Court divided on the issues of application of the *Charter*, the common law test for publication bans, and the procedure to be followed for appealing a publication ban.

Lamer C.J.'s majority judgment seems to tip-toe around the issue of *Charter* application. At one point he adopts McIntyre J.'s position from *Dolphin Delivery* when he quotes Iacobucci J. approvingly from *R.* v. *Salituro*:[9]

> When the principles underlying a common law rule are out of step with the values enshrined in the *Charter* , the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with *Charter* values ... then the rule ought to be changed.

This is clearly not a strict test: "*values,*" "*if possible,*" "*ought to be changed.*" According to this conception the common law is obviously not to be subjected to the full rigours of *Charter* scrutiny. Elsewhere, however, Lamer C.J. states that "the common law rule governing the issuance of orders banning publication *must* be consistent with the *principles* of the *Charter.*"[10] How these two statements are to be squared is not made clear.

Nowhere in the *Dagenais* decision does Lamer C.J. mention *Dolphin Delivery* or the possible implications of its holdings for the case at hand. Instead, extending the Court's reasoning in *Slaight Communications Inc.* v. *Davidson*,[11] Lamer C.J. holds that in *Dagenais* and in other cases involving common law rules conferring discretion, the rules cannot confer the power to infringe the *Charter* without meeting the section 1 justification test.[12] Lamer C.J. makes no distinction between common law rules in the criminal context and those in strictly private litigation, leaving one to believe that no such distinction is required. If carried to its logical conclusion, the Chief Justice's reasoning seems to turn *Dolphin Delivery* on its head since it at least implies, and may even be construed as explicitly stating, that the *Charter* applies to the common law in *all* contexts.

Apparently cognizant of the broad implications of the Chief Justice's decision, McLachlin and La Forest JJ. attempt to refine the majority's holding in the area of *Charter* application. La Forest J. distinguishes *Dagenais* from *Dolphin Delivery* on the grounds that the court order in *Dagenais* "is one exercised pursuant to a discretionary power directed at a governmental purpose, i.e., ensuring a fair trial" and "not the invocation of the law by a private individual."[13] The fact that the infringement was a by-product of criminal proceedings, which themselves arose at the behest of the Crown, provides for La Forest J. a sufficient governmental nexus to warrant the application of the *Charter* to the publication ban. La Forest J. also states that he agrees with the comments of McLachlin J. on the point of *Charter* application.

McLachlin J. explicitly recognizes the implications of the majority judgment, stating that "the practical effect of the Chief Justice's approach ... may mean that all court orders would be subject to *Charter* scrutiny."[14] The result in *Dolphin Delivery* would have been completely different, states McLachlin J., if the Chief Justice's reasoning in *Dagenais* had been applied, since the ban on secondary picketing at issue in that case was exercised pursuant to a common law rule which conferred discretion to infringe the *Charter*.[15] A more tenable approach, McLachlin J. claims, would be a narrower one which would begin with the proposition that "court orders in the criminal sphere which affect the accused's *Charter* rights or procedures by which those rights may be vindicated must themselves conform to the *Charter*."[16] McLachlin J. also leaves open the possibility of *Charter* application beyond the criminal sphere, suggesting, however, that the determination of the limits of *Charter* application in such contexts be made on a case-by-case basis.[17]

In support of her position, McLachlin J. draws upon the Court's previous decisions in *R.* v. *Rahey* [18] and *B.C.G.E.U.* v. *British Columbia (Attorney General)*.[19] *Rahey* involved an appeal based on the accused's section 11(b) right to be tried within a reasonable time and the assertion that the trial judge in the case, by ordering 19 adjournments, had violated this right. In *Rahey*, La Forest J., without addressing the implications of *Dolphin Delivery*, found that "the courts, as custodians of the principles enshrined in the *Charter*, must themselves be subject to *Charter* scrutiny in the administration of their duties."[20] Also called upon to support McLachlin J.'s position, but adding to the confusing jurisprudence in the area, was the *B.C.G.E.U.* case. At issue was an injunction prohibiting picketing outside the British Columbia court house. Dickson C.J.'s majority decision distinguished *Dolphin Delivery* on the ground that the motivation for the court's action in *B.C.G.E.U.* was "entirely public in nature," namely the protection of access to the courts by the public, and held that, as such, the *Charter* should apply to

the court's action. The public nature of the action in *Dagenais* then (criminal proceedings), would also seem to attract *Charter* application.

Although not mentioned by McLachlin J., in the period between *Dolphin Delivery* and *Dagenais* the Supreme Court has several times applied the *Charter* to the common law in the criminal context. In *R.* v. *Bernard*[21] the Court evaluated the common law rule which held that intoxication provided no defence to general intent offences with reference to sections 7 and 11(d) of the *Charter*. At issue in *R.* v. *Swain*[22] was the common law rule permitting the Crown to adduce evidence of the accused's insanity, irrespective of the wishes of the accused. This rule was found to infringe section 7 of the *Charter*. In neither of these cases did the Court address the holdings in *Dolphin Delivery*. One is left to presume that since criminal proceedings by definition involve the state, common law rules in such a context must comply with the *Charter*, further supporting La Forest and McLachlin JJ.'s positions.

Justice L'Heureux-Dubé, however, rejects the majority holding that the publication ban under consideration should be subjected to *Charter* scrutiny.[23] L'Heureux-Dubé J. takes a strict approach to McIntyre J.'s assertion in *Dolphin Delivery* that the *Charter* does not apply to court orders *per se*, since the courts do not constitute government under section 32(1). Referring to her own approach in *Young* v. *Young*,[24] where even a court order made pursuant to *statutory* authority was held to be immune from *Charter* scrutiny, it is not surprising that L'Heureux-Dubé J. reached the conclusion she did. It is troublesome, however, that L'Heureux-Dubé J. approvingly identifies exceptions to the rule about *Charter* application to judicial activity (*Rahey* and *B.C.G.E.U.*) without articulating why, courts not being "government," the *Charter* would apply to their activity.[25] Also, drawing on the token remarks about the *Charter's* application to the common law in *Dolphin Delivery* and *Salituro*, L'Heureux-Dubé J. repeats the Court's vague assertion that the common law must be developed in a manner consistent with the *Charter*.[26] If the common law is to be developed consistent with the *Charter* and, of course, statutes must be consistent with the *Charter*, and court orders are only made under the authority of one of these sources, unless a judge oversteps the authority conferred by the law it is difficult to imagine how a court order could legitimately result in a *Charter* infringement.

Judging, however, from the reasoning evinced in the recently released *Hill* v. *Church of Scientology of Toronto*[27] the Court is determined to apply the mushy "consistent with *Charter* values" approach to the common law in cases involving only private litigants. Cory J. for the majority in that case stressed that, when evaluating the common law, "[i]t is important not to import into private litigation the analysis which applies in cases involving government action."[28] The appropriate analysis, however, still remains shrouded in a fog of vague language. Of course this vagueness allows the courts to maintain a great deal of discretion since they are not bound by the relatively strict doctrines of the *Charter* when dealing with the common law.

Dagenais also raises an interesting procedural question about which there is as much divergence on the Court as with the *Charter* application issue. The question concerns the right of appeal of the publication ban (and presumably other interlocutory orders) by third parties, in this case the C.B.C..

Lamer C.J.'s majority judgment is an appropriate starting point for an analysis of the procedural issue in this case. The question which arose concerned the avenues available to the C.B.C., or any other third party to an interlocutory criminal order, after having been denied in their attempt to dissuade the court from issuing a publication ban at the trial level. At its most basic,[29] the judgment of Lamer C.J. on this question may be summarized as follows: If the publication ban is issued by the superior court of a province then the appropriate avenue of appeal is directly to the Supreme Court of Canada by way of section 40 of the *Supreme Court Act*;[30] alternatively, if the order is issued by the provincial court of a province then the appeal should be made to the superior court of the province for a remedy of *certiorari*.[31] Both of these avenues required the majority to proffer more expansive readings of the respective statutory and common law enabling provisions than existed previously. The majority provided these expanded interpretations with the admonition that neither was entirely satisfactory and that legislation was required to deal effectively with the question.[32] Other than an unstated but apparently assumed inherent right of appeal, Lamer C.J. did not offer an explanation of why third parties were entitled to an appeal of the initial publication ban hearing. McLachlin J., in her judgment, suggests that the third party's right of appeal flows from the notion that courts must be able to provide a "full and effective remedy for any *Charter* infringement."[33] Further,

McLachlin J. states that the right of appeal and the procedures for pursuing an appeal outlined by the Chief Justice satisfy the "effective remedy" requirement.[34]

Dissenting on this point were Justices La Forest and L'Heureux-Dubé.[35] Addressing the axiom which seems to inform the judgments of the Chief Justice and McLachlin J. ("where there is a right there is a remedy") L'Heureux-Dubé J. asserts that the only remedy to which the C.B.C. was entitled was being given standing at the trial hearing to decide on the issuance of the publication ban.[36] L'Heureux-Dubé J. was unable to find any grounds in the *Supreme Court Act*, in the *Criminal Code*, or in the common law which would provide an avenue of appeal for a third party from the order of a trial judge in a criminal proceeding. She did state, however, that "[w]ere this a case where the appellants had no access whatsoever to an initial remedy then section 24(1) [of the *Charter*] might confer jurisdiction to provide an initial remedy, such as giving the appellants standing to raise the issue."[37] L'Heureux-Dubé J.'s position on this issue is somewhat problematic since it presumes that a remedy (the publication ban hearing) would *precede* the *Charter* infringement (the actual court order).[38] It would be more reasonable to conclude that the requirement for a remedy would not be fulfilled unless the remedy were available after the *actual* alleged infringement instead of before the *possible* infringement. On the procedural point then, the course described by Lamer C.J. and McLachlin J. would seem more in accordance with the axiom.

The substantive portion of the *Dagenais* case concerns the common law rule governing the issuance of publication bans. On this issue too, the Court is polarized. Gonthier J. , with whom L'Heureux-Dubé J. is in agreement on this point, asserts that the existing common law rule is consistent with the *Charter* and need not be varied.[39] Gonthier J. argues that the structure of the existing rule need only be modified in accordance with existing *Charter* analysis.[40] Agreeing with the majority that once *prima facie* violations of the competing rights (fair trial and free expression) have been established, Gonthier J. states that the burden of both parties has been discharged and that the ensuing balancing should not privilege or disadvantage either of the rights.[41] Presuming that a publication ban violates freedom of expression, and that the right to a fair trial constitutes a pressing and substantial objective, Gonthier J. focuses his analysis on the last two steps of the *Oakes* test.

Under the minimal impairment branch, possible alternatives to the ban should be considered, but, counsels Gonthier J., "the mere existence of alternatives to publication bans ... does not of itself support the denial of a publication ban."[42] Gonthier J. urges a consideration of the costs and burdens of alternative measures and asserts that alternatives must be considered within the Anglo-Canadian legal tradition.[43] About this tradition, Gonthier J. suggests that it has been to "accept the propriety of bans even though it cannot be said with certainty that the fairness of a trial will be denied."[44] Also part of the Anglo-Canadian tradition, states Gonthier J. approvingly, is a reluctance to engage in the extensive jury challenges, *voire dires* or jury sequestrations which are so prevalent in the American context and which would constitute the bulk of the effective alternatives to publication bans.[45] Further revealing his obvious privileging of the fair trial rights of the accused over the free expression rights of third parties, Gonthier J. cites with approval the Alberta Court of Appeal decision in *R.* v. *Keegstra (No.2)*[46] in which the court banned the showing of a small play about holocaust revisionism. The play was showing in Edmonton, 160 kilometres away from the trial venue. That case was an egregious example of the most remote speculation about risks to trial fairness trumping free expression rights — an outcome that flows naturally from Gonthier J.'s formulation of the publication ban rule.

The majority decision of Lamer C.J. certainly seems to take free expression rights more seriously when considering the publication ban rule. In the view of the Chief Justice, "the pre-*Charter* common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban."[47] As such, the rule must be modified. Lamer C.J. states the test for publication bans as follows:[48]

(a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial because reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

Elaborating on first part of the rule, Lamer C.J. states that while the *Charter* guarantees a fair trial, "it does not require that all conceivable steps be taken to remove even the most speculative risks" and that "publication bans are not available as protection

against remote and speculative dangers."[49] As examples of reasonably available alternatives the Chief Justice includes "changing venues, sequestering jurors, allowing challenges for cause and *voir dires* during jury selection, and providing strong judicial direction to the jury."[50]

The second part of the newly formulated rule requires a consideration of the effects of the publication ban. As such it is analogous to the "deleterious effects" analysis in the *Oakes* test. The Chief Justice, in fact, suggests that this portion of the *Oakes* test be reformulated to conform with the second part of the publication ban rule. Whereas the original "deleterious effects" portion of the *Oakes* test required the consideration of the *objectives* of the impugned measure in light of its deleterious effects, the new test would require that both the objectives and the salutary *effects* of the measure be weighed against its deleterious effects.[51] Under this new formulation, the deleterious effects analysis may yet emerge from its status as a mere vestigial appendix to the functionally important organs of the *Oakes* test.

On the point of the practical implications of the second part of the publication ban rule, Lamer C.J. notes that technological advances in communication (electronic mail and bulletin boards for example) have eroded the actual potential effects of publication bans on jury impartiality and that these advances must be considered when determining the probable efficacy of a ban.[52] Further, the Chief Justice even questions whether future jurors are in fact irremediably adversely affected by the majority of pre-trial publicity, since judicial direction with regard to certain sources of information should enable jurors to focus only on juridically acceptable evidence.[53] Given these observations, and the newly formulated rule, it is likely that free expression will receive more serious consideration from the judiciary when future publication bans are contemplated.

The *Dagenais* decision would appear to be yet another confusing foray by the Supreme Court into the area of *Charter* application. The Court continues to evince contradictory tendencies when discussing the application of the *Charter* to the common law and, as yet, no clear position on the issue has emerged. While it would be more desirable to have the Court confront and deal directly with the incoherence of the *Dolphin Delivery* decision, *Dagenais* may nevertheless represent an incremental step towards a more sustainable and principled approach to determining the *Charter's* application to the common law. Further, a clearly positive aspect of the *Dagenais* decision is the fact that the majority of the Court has given significant weight to the consideration of free expression interests in applying the common law rule governing the issuance of publication bans, an element clearly missing from previous decisions in the area.❑

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Endnotes

1. [1994]1 S.C.R. 835.
2. The trial judge banned the broadcast of the program throughout Canada and banned the publication of details of the ban and the proceedings leading to it until the completion of the trials of the four accused. The Ontario Court of Appeal narrowed the ban to include only a prohibition of the broadcast of the program within the province of Ontario and on one Montreal network.
3. [1986]2 S.C.R. 573.
4. *Ibid.* at 600.
5. *Ibid.* at 599.
6. *Ibid.* at 603, emphasis added.
7. Peter Hogg, "Who is Bound by the Charter?" in Gerald-A. Beaudoin ed. *Your Clients and the Charter - Liberty and Equality* (Cowansville (Que.): Yvon Blais Inc., 1987) at 24-25.
8. With Sopinka, Cory, Iacobucci and Major JJ. concurring.
9. [1991] 3 S.C.R. 654 at 675 in *Dagenais, supra* note 1, at 876.
10. *Ibid.* at 865, emphasis added.
11. [1989] 1 S.C.R. 1038. This case stands for the proposition that *legislation* cannot be interpreted as conferring the discretion to infringe the *Charter* - unless the infringement can be justified under section 1.
12. *Dagenais, supra* note 1 at 875.
13. *Ibid.* at 892-93.
14. *Ibid.* at 941.
15. *Ibid.*
16. *Ibid.* at 944.

17. *Ibid.*

18. [1987] 1 S.C.R. 588.

19. [1988] 2 S.C.R. 214.

20. *Rahey, supra* note 18 at 633 in *Dagenais, supra* note 1 at 943.

21. [1988] 2 S.C.R. 833.

22. [1991] 1 S.C.R. 933.

23. *Dagenais, supra* note 1 at 908-10.

24. [1993] 4 S.C.R. 3.

25. *Dagenais, supra* note 1 at 909-10.

26. *Ibid.* at 911-12.

27. [1995] preliminary version S.C.J. No. 64.

28. *Ibid.* para. 93.

29. And for the purposes of this comment this issue will only receive a relatively superficial analysis.

30. R.S.C., 1985, c. S-26, s.40(1) [rep. & sub. 1990, c.8, s.37].

31. *Dagenais, supra* note 1 at 859-66. *Certiorari* in this case would allow superior court judges to provide a remedy from provincial court judges in cases of excess of jurisdiction or errors in law. (*Ibid.* 864-65)

32. *Ibid.* at 858. The minority judgments also called for legislation to deal adequately with the procedural issue.

33. *Ibid.* at 945.

34. *Ibid.*

35. La Forest J. in his judgment generally affirmed the holdings of L'Heureux-Dubé J. on the procedural question (*Ibid.* at 892).

36. *Ibid.* at 898.

37. *Ibid.* at 907.

38. Although, given that L'Heureux-Dubé J. does not agree that the *Charter* applies to court orders at all, one might argue that if the common law itself, as regards publication bans, may be said to infringe the *Charter* the infringement existed prior to the trial, and the hearing at which the C.B.C. challenged the ban could then be said to follow the existing infringement (thereby providing a remedy after the infringement).

39. McLachlin J. also states that the existing common law rule is satisfactory and that, if properly applied, it meets the standards of justification required by s.1 of the *Charter*. McLachlin J. warns however against "the facile assumption that if there is any risk of prejudice to a fair trial, however speculative, the ban should be ordered." (*Ibid.* at 949-50).

40. *Dagenais, supra* note 1 at 922-23.

41. *Ibid.* at 922.

42. *Ibid.* at 924.

43. *Ibid.*

44. *Ibid.* at 921.

45. *Ibid.* at 927-28.

46. (1992)127 A.R. 232.

47. *Dagenais, supra* note 1 at 877.

48. *Ibid.* at 878.

49. *Ibid.* at 879-90.

50. *Ibid.* at 881.

51. *Ibid.* at 888-89.

52. *Ibid.* at 885-87.

53. *Ibid.* 884-85.