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Aboriginal and Treaty Rights

RECONCILING POWERS AND DUTIES: A Comment on *HORSEMAN*, *SIOUI* and *SPARROW*

Catherine Bell

The 1984 ruling of the Supreme Court of Canada in *Guerin* v. *R.* signalled a new era of judicial opinion on the question of aboriginal and treaty rights.[1] Traditionally, Canadian courts have upheld the ability of the Crown to exercise its jurisdiction over native people to their detriment.[2] *Guerin* began the movement away from this tradition by creating a new dichotomy in judicial premises: the absolute power of the federal government to unilaterally extinguish aboriginal and treaty rights and the duty of the Crown to act as a fiduciary in its dealings with Canada's first peoples. The tension in judicial reasoning created by this dichotomy and its impact on the legal rights of aboriginal peoples is illustrated by a comparison of the majority and dissenting opinions in *R.* v. *Horseman*.[3] However, decisions rendered within one month of *Horseman* suggest that the direction of the Supreme Court is to resolve the tension by stressing concepts of duty and honour and that the emphasis on federal power in *Horseman* is an anomaly.[4]

The appellant in *Horseman* was a Treaty 8 Indian who killed a grizzly bear in self-defense. A year later, in need of money, he obtained a grizzly bear hunting license and sold the hide. He was subsequently charged with trafficking in wildlife without a license contrary to section 42 of the Alberta *Wildlife Act*.[5] Two broad issues were before the Supreme Court. Was the *Wildlife Act* constitutionally applicable to Treaty 8 Indians? Were hunting rights granted by Treaty 8 extinguished, reduced or modified by paragraph 12 of the Alberta Natural Resources Transfer Agreement (N.R.T.A.)?[6] In a four to three split, the Supreme Court answered both questions in the affirmative.

Central to the resolution of these issues was the principle that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."[7] In applying this principle, Mr. Justice Cory accepted the legal power of the Crown to breach its treaty obligations and read a clear intent to limit Indian rights into paragraph 12.[8] Speaking for the majority, he held that provincial laws of general application are applicable to Indians pursuant to section 88 of the *Indian Act* so long as they do not conflict with treaty rights.[9] Treaty 8 includes the right to hunt for commercial purposes, but this right was abrogated by paragraph 12 of the N.R.T.A.. The Agreement had the effect

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of merging and consolidating treaty rights of Indians in the province and restricting the province's power to regulate the Indians' right to hunt "for food only"; that is, for sustenance of the Indian hunter or his family. Sustenance is not defined by Cory J., but his reasoning limits its scope to consumption of the product of the hunt. The isolated act of the appellant was characterized as an act of commerce despite the fact that the purpose of the sale was to obtain food for nourishment. As the right to hunt commercially was no longer protected by Treaty 8, the appellant could not raise Treaty 8 as a defence to the charge.

Cory J. rejected arguments that (a) the N.R.T.A. was intended to protect Indian rights; (b) the treaty could not be altered without consent and compensation; (c) endorsing unilateral abrogation brings dishonour to the Crown; and (d) the Crown is the trustee of native hunting rights. Recognizing that it might be "politically and morally unacceptable in today's climate to take such a step...without consultation with and concurrence of the Native peoples affected", he distinguished moral from legal obligations.[10]

Alternatively, he argued that the treaty contemplated the power of the Crown to alter hunting rights by providing that they were subject to regulations necessary to protect fish and fur bearing animals. Further, there was a "quid pro quo": in exchange for the reduction of rights in paragraph 12, the Crown expanded hunting territories and allowed the adoption of non-traditional hunting methods.

The dissenting opinion of Madame Justice Wilson (Dickson C.J. and L'Heureux-Dubé J. concurring) illustrates the dramatic change which occurs in the legal position of native peoples when the Court operates on the premise of honour and duty in applying interpretive principles. The effect is to make the Crown's onus of proving intent to extinguish a true onus by refusing to operate on the presumption that the Crown intends to dishonour its commitments. Describing Treaty 8 as a "solemn engagement," she stated that it should be given an interpretation, if possible given the language, which implements, and is consistent with, the promise of the Crown that the Indians could continue a way of life that centred around unlimited access to wildlife resources. Regulatory powers must also be interpreted in the context of this commitment. Canada committed itself to regulating hunting in a manner that would respect the lifestyle of the Indians and the way in which they traditionally pursued their livelihood.

Wilson J. agreed that the Crown can unilaterally abrogate treaty rights, but she emphasized that the intent to alter Treaty 8 obligations by paragraph 12 of the N.R.T.A. must be unambiguous. In her view, paragraph 12 was intended to protect Treaty 8 rights.[11] Not satisfied that the government made an "unambiguous decision" to renege on its Treaty 8 obligations (and in view of the implications of bad faith) she concluded that the phrase "for food" is designed to draw a distinction between traditional practises protected by treaty (which may include a right of exchange) from sport hunting or hunting for purely commercial purposes. The sale of the hide was for food and fell outside the range of activities that the province could regulate by means of the *Wildlife Act*.[12]

Sioui and *Sparrow* suggest that the Supreme Court is following Justice Wilson's lead by tempering power with notions of duty and honour. In *Sioui*, the accused family was charged with a violation of the *Quebec Parks Act*[13] after they entered a provincial park, cut branches, lit campfires, and built a shelter, contrary to the park regulations. They alleged that they were practising certain ancestral customs and religious rites protected by a treaty between the Huron and the British. Three issues were raised before the Supreme Court:

(1) Was an informal document signed by General Murray of the British Army in 1760 a treaty?
(2) If so, was the treaty still in effect?
(3) Did the treaty make certain provisions of the *Parks Act* unenforceable against the respondents?

The Court held that the respondents were exercising existing treaty rights and that provisions of the *Parks Act* inconsistent with these rights were unenforceable against the respondents.

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The alleged treaty guaranteed protection, free exercise of religion and customs, and trade with the English in exchange for peace but it did not specify the territory over which these rights could be exercised. Speaking for the majority, Mr. Justice Lamer (as he then was) stated that formalities are of secondary importance in the creation of a treaty. The essential criteria are the intention to create legal obligations, the presence of mutually binding obligations, and a certain measure of solemnity. In his analysis of these elements, he emphasized the understanding of the Huron signatories to the document and the British practise of entering treaties.

Most interesting is Justice Lamer's description of the historical relations between Great Britain and Canada's first peoples as "nation-to-nation" relations. Referring to Canada's first peoples as independent nations, and affording them sufficient autonomy to enter into solemn agreements with the Crown, he characterized the Indian-Crown relationship as falling somewhere between "the kind of relations conducted with sovereign states and relations such states had with their own citizens."[14] These notions of indigenous nationhood and solemnity affected Lamer's interpretation of the Crown's power of extinguishment and his willingness to find intentional breach. For example, he held that the English could not extinguish the Huron treaty by entering an agreement with the French. Emphasizing the sacred nature of treaties, he stated consent of the Huron was required. Other examples are the limitations placed on the theory of extinguishment by occupancy. In his view occupation must be totally inconsistent with treaty rights. The treaty right must not only be contrary to the purpose underlying the occupancy, but must also prevent the realization of the purpose.

The shift in premise from power to duty and honour is also evident in the *Sparrow* decision. *Sparrow* is the first decision of the Supreme Court of Canada to interpret section 35(1) of the *Constitution Act, 1982*.[15] Arguably it can be distinguished from previous cases on the basis that it concerned the power of the federal government to regulate aboriginal rights after their entrenchment in the Constitution. However, statements made about the historical powers of the Crown, the Crown's fiduciary obligations, and principles of interpretation suggest that the future trend may be to hold the Crown to a "high standard of honourable dealing."[16]

Mr. Sparrow was charged in 1984 under the *Fisheries Act* for fishing with a drift net longer than that permitted by his band's fishing license.[17] The issue before the Supreme Court was whether Parliament's power to regulate fishing is limited by section 35(1) and more specifically, whether the net length restriction was inconsistent with that provision. The Court prescribed the analytical process required to resolve the issue and then sent the matter back to the trial court.

The Supreme Court confirmed that section 35(1) only applies to rights in existence when the *Constitution Act, 1982* came into effect. Rights are affirmed thereby in their historic, unregulated form, subject only to prior extinguishment. The regulation of a right does not necessarily have the effect of extinguishing it.

In drawing distinctions between regulation and extinguishment, the Court placed limits on pre-1982 federal powers of extinguishment. The Court unequivocally stated that the test for extinguishment to be adopted is the "clear and plain" test enunciated by Mr. Justice Hall in the *Calder* case.[18] The Court concluded that there is nothing in the *Fisheries Act* or its regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. Permits issued under the Act were simply a matter of controlling the fisheries and not a method of defining the underlying rights of Indian peoples.

In contrast, the Court failed to set limits on the type of rights that can be categorized as aboriginal rights. Further, it emphasized aboriginal rights must be interpreted flexibly so as to allow their exercise in a contemporary manner. Speaking generally on the nature of fishing rights, the Court stated that interpretation of this right must be "sensitive to the aboriginal perspective itself on the meaning of the rights at stake."[19] Adopting this perspective, it is artificial to distinguish between the right to fish and the particular manner in which that right is exercised.

The interpretive framework for section 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. When the purpose of the affirmation of aboriginal rights was considered, the Court concluded that a generous, liberal interpretation of the words was demanded. It is within this framework that the Court determined the effect of section 35(1). First, the section provides a constitutional basis upon which negotiations can take place. Second, it affords aboriginal peoples constitutional protection against provincial legislative power. Third, federal legislation affecting the exercise of aboriginal rights enacted under a federal head of power after 1982 will not automatically invoke section 52 and be rendered of no force or effect. Rather, the validity of the legislation is to be determined by a two part procedure.

First, the aboriginal claimant must prove the existence of an aboriginal right and that the legislation in question has the effect of interfering with that right. If it does have such an effect, it represents a *prima facie* infringement of section 35(1). The onus then shifts to the Crown to justify the interference. The test of justification involves two steps. First, the Crown must establish a valid legislative objective such as conservation

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and management of resources. Second, it must show the objective is attained in such a way as to uphold the honour of the Crown. The Court held that the responsibility of the government to act in a fiduciary capacity must be the first consideration in determining whether the legislation or action in question can be justified.

It is by the second limb of the test, and the interpretation of the words "recognized and affirmed" in section 35(1), that the switch in premises from power to duty is most apparent. The Supreme Court directed that the federal power over Indians under section 91(24) of the *Constitution Act, 1867*[20] must be reconciled with the Crown's fiduciary duty which is incorporated in the words "recognition and affirmation." Recognition is achieved through the justification test. Support for this approach is drawn from liberal interpretive principles enunciated in *Nowegijick*[21] and the "high standard of honourable dealing" suggested by *Guerin*.[22] Further, in developing the justification test, the Court emphasized that over the years the rights of Indians have often been "honoured in the breach."[23] It stated that Canada cannot recount with much pride the treatment it has accorded to native peoples by ignoring their legal rights. This approach is to be reassessed in light of contemporary developments in law and the "trust-like" relationship between the Government and aboriginals.[24]

Despite the evolution in Canadian law from power to duty, the same conceptual shift is not evident in the political arena. Native peoples continue to be subjected to protracted negotiations or expensive and lengthy litigation. Some provincial governments continue to deny aboriginal rights. The result is a general feeling of frustration and desperation. Empowered by the movement in the Supreme Court, it is not surprising that native peoples are demanding recognition of their rights. Oka is particularly revealing, for despite protracted negotiations it was apparent that a golf course was to have more priority than native claims. The Federal Government abdicated its fiduciary responsibility towards natives and classified the conflict as a provincial police matter. The tragedy of Oka will hopefully awaken the Canadian government to its duties and the need to find a peaceful and effective mechanism for resolving aboriginal claims. Until then, one is left asking whether the Supreme Court's new directions will have the practical effect of ending the era of honour in the breach.

Catherine Bell, Assistant Professor of Law, Faculty of Law, University of Alberta.

1. (1984) 2 S.C.R. 335.
2. In the area of treaty rights, this power had been tempered on occasion with notions of upholding the honour of the Crown. See, for example, *R.* v. *Taylor and Williams* (1981), 34 D.R. (2d) 360.
3. [1990] 1 S.C.R. 901.
4. *A.G. Quebec v. Sioui*, [1990] 1 S.C.R. 1025 (S.C.C.); *Sparrow v. R.* (1990), 70 D.L.R. 385 (S.C.C.).
5. R.S.A. 1980, c.W-9
6. Treaty 8 states that "Indians shall have the right to pursue their usual vocations of hunting, trapping and fishing" over surrendered lands subject to "such regulations as may from time to time be made by the Government of the country." Paragraph 12 of the Natural Resources Transfer Agreement provides that provincial laws respecting game are to apply to Indians of the province provided that Indians shall have the right "of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and other lands" to which they may have a right of access.
7. *Nowegijick* v. *R.*, [1983] 1 S.C.R. 29 at 36. See also, *Simon* v. *R.*, [1985] 2 S.C.R. 387
8. The emphasis on power may arise from the majority's concern to protect endangered species. Of particular note is the suggestion by Mr. Justice Cory that "the number of bears slain in self-defence could be expected to increase dramatically" if this was a defence to a charge under section 42. Further, it is the author's understanding that the approach of tempering power with notions of duty emphasized in the dissent was not emphasized by the appellant's counsel in oral argument.
9. *Indian Act*, R.S.C. 1985, c. I-6.
10. *Supra*, note 4 at 934.
11. Ironically, the three decisions cited by the majority to support the view that paragraph 12 derogates from treaty rights were decided by Dickson C.J.C. who concurred in Wilson J.'s dissent. They are *Frank* v. *R.*, [1978] 1 S.C.R. 95; *R.* v. *Sutherland*, [1980] 2 S.C.R. 45; and *Moosehunter* v. *R.*, [1981] 1 S.C.R. 282.
12. *Supra*, note 6.
13. R.S.Q., c. P-9.
14. *Sioui, supra*, note 4 at 1038.
15. Being Schedule B of the *Constitution Act, 1982* (U.K.), 1982, c.11.
16. *Sparrow, supra*, note 4 at 409.
17. R.S.C. 1985, c. F-14.
18. Prior to this decision, two theories of extinguishment by legislation could be applied. The first was that statutes which do not specifically refer to extinguishment of aboriginal rights, but which evidence intention to exercise sovereignty inconsistent with aboriginal rights, have the effect of extinguishing those rights. The other view, stated by Hall J. in the *Calder* case, was that the onus of proving extinguishment was on the Crown and that the intention to extinguish must be "clear and plain." See *Calder* v. *A.G. of B.C.* (1973), 34 D.L.R. (3d) 145 (S.C.C.).
19. *Supra*, note 4 at 411.
20. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3.
21. *Supra*, note 8.
22. *Supra*, note 4 at 409.
23. *Ibid.* at 404.
24. *Ibid.* at 408.

THE POST-CRITICAL FUTURE OF LEGAL THEORY

Mark V. Tushnet

In March 1990, the Faculty of Law, University of Alberta and the Centre for Constitutional Studies hosted the Western Canadian Legal Theory Symposium, held in conjunction with the Centre's second annual McDonald Constitutional Lecture. The symposium attracted scholars from law schools throughout Western Canada. Professor Mark Tushnet of Georgetown University Law Centre delivered this year's McDonald lecture and opened the Symposium with the following comments, which appear here in edited form. [ed.]

I take the title of Post-Critical Legal Theory to mean Post-Critical Legal Studies. There are two things that I want to say about what the critical legal studies idea does to problems of jurisprudence. The first is that it is not clear to me that critical legal studies want to be characterized primarily as a form of jurisprudence. My own inclination is to stress the political orientation of post-critical legal studies and to say that things that are called critical legal studies are unified primarily by a certain kind of political project rather than by any unifying concept about the nature of law. Having said that, though, Critical Legal Studies is a more complicated phenomenon, which leads to my second point. It is a phenomenon that locates itself in law schools and for the political project to work in law schools, it is psychologically and, probably, institutionally necessary that there be not just a unifying political project but a sense that there is some common ground other than politics. It is a movement of legal thinkers about law and, therefore, they have to think about something rather than vote for the same people.

With that psychological background, it does seem to me that there are two points about critical legal studies that are widely shared. The first is the notion of indeterminacy. You can have a range of views on the degree of indeterminacy out there. What characterizes critical studies people is that we tend to think that there is a lot more indeterminacy than other people seem to think. I've invented a measure called the "determinile" that goes from zero to one hundred. We think that the legal system is located at five to fifteen, while more centrist scholars locate it at forty to sixty, so there is a large gap. Nobody in critical studies thinks it is zero and nobody in centrist jurisprudence thinks that it is one hundred. The second shared notion is a response to post-legal realist scholarship in the United States, which turned towards policy sciences or policy orientation to resolve whatever degree of indeterminacy people believe that there is. This second shared notion is that the recourse to policy orientation ultimately failed for a variety of reasons. One was the intractability of the social world, such that the policy could not really tell you anything interesting about it. Another was the proliferation, particularly in the United States around the period of the 1960s and 1970s, of views that were serious alternatives substantially different from the earlier range of policies, so that the utility of policy orientation in solving those problems was less apparent.

What sorts of things might happen next? The events in Eastern Europe suggest one short term, but substantial, item. It is reasonably clear to me that the events in Eastern Europe have revitalized the spirit of mainstream liberalism. My sense has been that there was a fair amount of wheel-spinning among liberal jurisprudence. They had a system and they were working it out. If you were inside the system the problems were sort of interesting, but it was not terribly engaging, because it did not have a political push behind it. The events in Europe, I think, have given mainstream liberalism the kind of energy that it lacked in the past five or ten years. I suspect that that will be, in the sweep of things, a relatively short-term phenomenon, but it will be a substantial part of jurisprudence over the next decade. I am not entirely clear what can be made of that — that is, what mainstream liberals will be able to do with the events in Eastern Europe except to give them self-confidence about their enterprise.

I want to identify two other areas of post-critical jurisprudence that seem to me more interesting; feminist and post-modern jurisprudence. Feminist jurisprudence takes a variety of forms. For example, the first form of feminist jurisprudence was to use the existing forms of legal thought to address problems that were seen by theorists to be distinctively women's problems. In the course of that, there developed a women's perspective or women's form of legal thinking, supported by the work of Carol Gilligan and others. For our purposes here, I want to characterize that as a challenge to the objectivism

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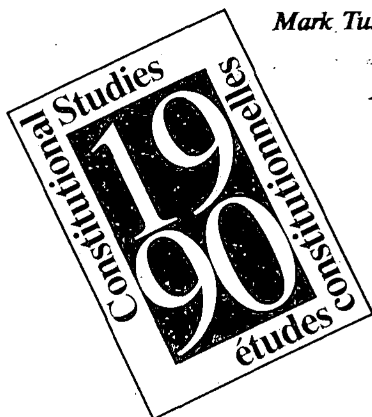
that pervaded mainstream jurisprudence: a challenge that occurred both in style — the legacy of conscious raising discussions, a personalization of the discourse of jurisprudence — and in substance, in its challenge to objectivism. The difficulty with the challenge to objectivism is that there is a tension, not to my mind yet resolved, in the literature of feminist jurisprudence between a non-objectivist's view of law and the inherited notion of the rule of law that is our (male, according to feminist jurisprudence) cultural legacy. In that sense too, there is a confrontation between the feminist jurisprudence and the reconstruction of liberalism which is committed to some form of the rule of law idea.

Before turning to post-modernism I would like to mention one additional aspect of feminist jurisprudence which recently has attracted a fair amount of attention. This is the claim within some forms of feminist thought that there is a 'women's perspective'. This makes a claim of essentialism about the gender-aspect of viewing the world, and raises a number of problems. For example, it unifies all living in ways that seem accurate, to the extent that it treats these perspectives as essentially grounded in gender. But it is puzzling how there could be discourse across gender lines if there is some essential perspective that arises from gender that women have, and presumably a different one, that men have. It is hard to figure out what the exchange between them could possibly be.

The second post-critical movement, labelled post-modernism, is connected to the prior discussion in that it questions the distinction between objectivism and subjectivism that is implicit in the way I have framed the feminist challenge to the mainstream. At most, for the post-modernist, the distinction between objectivism and subjectivism is culturally constructed. The bite of the claim of the post-modernists is that our contemporary culture cannot support that distinction anymore. To the extent that discussions are cast in terms of objectivity and subjectivity they are trying to live off of a legacy that has essentially been dissipated and so cannot really generate anything anymore. For myself, I find the post-modernist's position extremely interesting but a little puzzling. Puzzling for me because the people who offer it, at least in the United States, seem to be located on the political left and yet they cannot have any reason for being on the left given their challenge to the entire terms of the discussion. At some level, the project for post-modernists is to figure out if there is any connection between these apparent political positions and the jurisprudential position to which they are committed.

Mark V. Tushnet, Professor of Law, Georgetown University Law Centre, Washington, D.C.

Professor Tushnet's McDonald Lecture, "The Possibilities of Interpretive Liberalism" will appear in the Centre's forthcoming annual supplement to the Alberta Law Review, *Constitutional Studies / Études constitutionnelles* [ed.]



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Rocket v. *Royal College of Dental Surgeons of Ontario*

PROFESSIONAL ADVERTISING AND THE LIMITS OF REGULATION

June Ross

In *Rocket* v. *Royal College of Dental Surgeons of Ontario*[1] the Supreme Court of Canada has again applied section 2(b) of the *Charter* in the context of the regulation of advertising. Following its earlier decisions, the Supreme Court held that commercial expression is protected by the *Charter*[2] and that restrictions on the content of advertisements violate section 2(b).[3] This decision, however, goes beyond the earlier jurisprudence in a number of ways: (1) it provides an example of a restriction on advertising that is not justifiable under section 1; (2) most importantly, it explicitly recognizes that the commercial nature of expression has constitutional significance in the context of section 1; (3) with significance to the area of professional advertising, it considers the nature of the legislative objectives that may be pursued by restrictions on such advertising; (4) in the remedies area, some further guidance is provided relating to the use of a "striking out" remedy rather than other more selective remedial alternatives.

The case concerned an advertisement that appeared in a number of magazines and newspapers. It contained photographs of the respondents Howard Rocket and Brian Price, the heading "New Faces of the Canadian Establishment", and the following text:

> Drs. Howard Rocket and Brian Price, founders, Tridont Dental Centres, at the Holiday Inn, Toronto downtown.
>
> They work twelve hours a day, including weekends and together log some 300,000 kilometres in business travel a year. In 1979, Dr. Rocket and Dr. Price foresaw the future of dentistry in the concept of delivering dental services from shopping malls, to make it more convenient and accessible for the public. They formed Tridont Dental Centres and in 1980 opened their first outlet in a Toronto suburb. The response from the public was overwhelming. By 1985 Tridont had grown from a staff of three to a staff of fifteen hundred, becoming North America's largest storefront dentistry group. Today they have over 70 outlets in Canada and the United States, a figure expected to increase by more than 20 each year.
>
> Success like this occurs when business people recognize a need for change and respond to it. Holiday Inn is recognizing and responding to their changing needs. That is why when Drs. Howard Rocket and Brian Price travel on business they stay at a Holiday Inn Hotel — Holiday Inn — a better place to be.

Drs. Rocket and Price were charged with professional misconduct as defined in sections 37(39) and (40) of Regulation 447[4] filed under the Ontario Health Disciplines Act[5] and were scheduled to appear before the Discipline Committee of the Royal College of Dental Surgeons of Ontario. Subsection (40) is a general professional misconduct provision. Subsection (39) classified as professional misconduct any advertising not expressly permitted. Prior to the hearing before the Discipline Committee, Drs. Rocket and Price applied to the Ontario Divisional Court for a declaration that subsection (39) was of no force and effect and that subsection (40) could not be applied to them. They were unsuccessful at the Divisional Court level, the Court following its decision in *Re Klein and Law Society of Upper Canada*[6] which held that commercial speech was not within the purview of the *Charter* section 2(b).

The Ontario Court of Appeal reversed with respect to subsection (39) in a majority judgment written by Cory J.A. (as he then was), with Dubin A.C.J.O. dissenting.[7] The Court unanimously refused to grant a declaration as to the inapplicability of subsection (40).[8] The Court's finding with respect to subsection (39) was appealed to the Supreme Court of Canada, but the refusal of the declaration with respect to subsection (40) was not cross-appealed, so that the only question before the Supreme Court was the constitutionality of the advertising regulation.

In a unanimous judgment delivered by McLachlin J. the Supreme Court first reaffirmed its position in the *Ford* and *Irwin Toy* decisions that commercial expression is protected under the *Charter* because it has "intrinsic value as expression" and because of "the importance of fostering informed economic choices to individual fulfilment and autonomy".[9] The definition of expression adopted by the Court in the previous cases and applied in *Rocket* is both very broad and very simple: activity is expressive if it aims to convey a meaning and if it does not take a prohibited form (the only examples of which thus far have been provided are acts or threats of violence). Professional advertising obviously meets this test. In determining whether the regulation in question infringed free expression the Court followed the analysis in *Irwin Toy* and considered whether its purpose infringed the guarantee. The regulation in this case, as in *Irwin Toy*, did prohibit the expression of certain content and its purpose thus violated

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section 2(b). In addition, it also banned the "perfectly usual and acceptable forms" of expression via radio and television, and severely limited the use of newspapers.[10] This, too, contravened section 2(b).

With regard to the application of section 1, the Court made the important holding that:

> ..the fact that expression is commercial is not necessarily without constitutional significance. Regulation of advertising may offend the guarantee of free expression in section 2(b) of the *Charter*, but this does not end the inquiry. The further question of whether the infringement can be justified under section 1 of the *Charter* must be considered. It is at this stage that the competing values — the value of the limitation and the value of free expression — are weighed in the context of the case. Part of the context, in the case of regulation of advertising, is the fact that the expression at issue is wholly within the commercial sphere.[11]

The Court drew an analogy between its approach and the American approach, which has assigned to commercial speech an expressly lesser degree of protection than is granted political speech. This result is achieved in the American jurisprudence by establishing separate criteria for testing the justifiability of restrictions on political and commercial speech. Laws that restrict commercial speech must serve substantial interests, directly advance these interests, and be no broader than necessary. Laws that restrict political speech face a stricter test: they must serve compelling interests and must be precisely tailored to those interests. There are other differences as well. As noted by the Supreme Court in *Rocket*, the American courts strike down overbroad political speech regulations, but not overbroad commercial speech regulations. The latter are simply not enforced when a specific application would be unconstitutional. Another distinction in the American case law, although not noted by the Supreme Court in *Rocket*, is that parties asserting a deprivation of free commercial speech must prove that their speech was neither misleading nor related to an illegal activity.[12]

The Supreme Court's approach in *Rocket*, while analogous to the American approach, also has differences noted by the Court. The remedial approach is different, and further the Canadian approach "does not apply special tests to restrictions on commercial expression", but "does permit a sensitive, case-oriented approach to the determination of ... constitutionality."[13] This is more similar to a "sliding scale" analysis, proposed in the American jurisprudence but not adopted by a majority in the United States Supreme Court, rather than a distinctive levels or tests analysis.[14] Prior to this case it appeared that commercial expression received less protection than other forms, considering for example the application of section 1 in *Irwin Toy* as compared with *Edmonton Journal* v. *Attorney General of Alberta*.[15] In *Irwin Toy*, the Supreme Court expressed deference to legislative opinion, refusing to "second guess" or to "redraw the line" drawn by the legislature and stating that the government must be "afforded a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence".[16] However, the Court did not relate this deference to the commercial nature of the expression, but to the nature of the legislation, which was characterized as an attempt to protect a vulnerable group. In *Edmonton Journal*, while no such deference to the legislature was apparent, the majority did not relate its stricter application of section 1 to the nature of the speech involved and instead distinguished *Irwin Toy* on the basis of the nature of the legislation involved. Only Wilson J. in her concurring judgment explicitly held that freedom of expression could have different degrees of importance in different contexts. In *Rocket* this view was expressly adopted by the unanimous Court:

> As Wilson J. notes in *Edmonton Journal* v. *Alberta Attorney General* ... not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious.[17]

The acceptance of different degrees of constitutional protection for different types of expression is not only important from the point of view from those who wish to justify restrictions on commercial expression, but also for those who wish to challenge restrictions on political expression. Some laws outside the commerical expression area, such as hate propaganda laws, can certainly be characterized as laws aimed at protecting a vulnerable group. Should the approach to a section 1 analysis of the justifiability of those laws thus be as deferential as the *Irwin Toy* analysis? The author would submit not, because of the different type of expression involved.

How did the fact that commercial speech was involved affect the application of the section 1 test as defined in *Regina* v. *Oakes*?[18] The analysis in *Rocket* included a lengthy assessment of the value of the expression involved. The Court noted that advertising is valuable to dentists only from an economic perspective, and that this minimizes the constitutional value of the expression. On the other hand, reflecting the rationale for inclusion of commercial speech within section 2(b), such advertising serves "an important public interest by enhancing the ability of patients to make informed choices".[19] Further, the choice of a dentist is a relatively important consumer choice. These factors increase the value of the expression. These points are fairly unexceptional, except that one might argue that in the context of ability to practice a profession,

which can only be done if there are paying patients available, some form of self-worth or self-fulfilment is involved in addition to profit and loss.[20]

On the other hand, the Court noted that the advertising regulation aimed to protect consumers of dental services who as non-specialists "lack the ability to evaluate competing claims as to the quality of different dentists."[21] They constitute a vulnerable group, and legislation enacted to protect them is particularly important. It is interesting to note that the Court has thus concluded that the importance of the consumer choice supports free expression, while the difficulty of the consumer choice supports legislative incursions on that free expression. One must wonder how often these two factors will effectively counter-balance each other. It is certainly arguable that virtually all important consumer decisions, not only relating to the choice of professional services but also to the purchase of major consumer items such as homes or even possibly cars, involve difficult evaluations for non-specialists.

This assessment of competing values is most clearly relevant in the context of the third branch of the *Oakes* means test which, as restated in *Rocket*, requires "proportionality between the effect of the measures which are responsible for limiting the *Charter* right and the legislative objective of the limit on those rights. In effect, this involves balancing the invasion of rights guaranteed by the *Charter* against the objective to which the limitation of those rights is directed."[22] However, not only this branch of the means test is affected, but also the more influential second branch, that "the means used should impair as little as possible the right or freedom in question."[23] The judicial deference demonstrated in *Irwin Toy* was referred to with approval in *Rocket*, the Court noting that the "fact that the provincial legislature here acted to protect a vulnerable group argues in favour of viewing its attempted compromise with some deference."[24] This deference is most likely to be apparent in the assessment of the least restrictive means. One author has in fact suggested that deference to the degree shown in *Irwin Toy* changes the test from one of "minimal impairment" to one of no "unreasonable impairment".[25]

Notwithstanding all of the foregoing, which would appear to call for a fair degree of judicial deference, the Court did find that the advertising regulation in question was not justified under section 1. This, however, is not surprising when one considers the breadth of the regulation which prohibited even the advertising of office hours or the languages spoken by a dentist. Overbreadth to this extent can easily be characterized as failing not only a minimal impairment test, but also a no unreasonable impairment test. The Court, at the conclusion of its reasons, anticipated the drafting of further regulations on dentists' advertising. The decision indicates that a fair degree of discretion will be permitted to the professional bodies that do the drafting.

The section 1 discussion also considered the objectives that may be legitimately pursued by restrictions on professional advertising. The Court described two such objectives: the protection of the public from irresponsible and misleading advertising and the maintenance of a high standard of professionalism. These objectives are somewhat interrelated — clearly misleading advertising would be an incident of unprofessional conduct. Further, other forms of irresponsible advertising, such as solicitation in circumstances or by means which unduly pressure or influence potential clients, would also be characterized as unprofessional conduct. However, the separation of the two objectives leads to some concern as to the content of professional standards when these are divorced from issues of protection of the public. Advertising which does not mislead or otherwise harm the public but is nonetheless considered to be unprofessional would seemingly be suspect because it lacks dignity or taste as assessed by the profession or the court. Can the maintenance of dignity be characterized as a pressing and substantial objective? The Supreme Court appears to have considered that this is the case. The Court referred to the dissenting judgment of Dubin A.C.J.O. in the Court of Appeal decision and his reference to the following quote from the 1932 decision of the United States Supreme Court in *Semler* v. *Oregon State Board of Dental Examiners*:

> [T]he community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.[26]

While this excerpt has been cited with approval in more recent American authorities, it is somewhat suspect in view of the subsequent opinion of the Court in *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*.[27] One of the issues raised in the latter case was the use of an illustration in a legal advertisement (a drawing of a Dalkon Shield intrauterine device). This drawing contravened a state regulation prohibiting any illustrations in legal advertisements. It was not argued that the drawing was misleading, and the Court found that the general purpose of the regulation was to ensure that attorneys advertised "in a dignified manner."[28] In overturning the finding of a disciplinary violation, the Supreme Court held that the drawing was not undignified and that:

> More fundamentally, although the state undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are

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> unsure that the state's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgement of their First Amendment rights... The mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.[29]

This issue has practical significance in *Rocket* because, as noted above, the Court did not prohibit the College from proceeding with a disciplinary hearing based on the general unprofessional conduct provision, and because the advertisement featuring Drs. Rocket and Price,while characterized by the Ontario Court of Appeal as "distasteful, pompous and self-aggrandizing", is not clearly misleading.[30] The Supreme Court did not characterize the advertisement in this fashion, but its finding of unconstitutionality was based upon the general overbreadth of the law and not the specific terms of the subject advertisement. Further, the examples of overbreadth employed, such as a prohibition of the advertising of office hours, were far removed from the nature of the subject advertisement. Thus it seems implicit that Rocket and Price, even in the absence of any demonstration of potential public harm, can be subjected to a constitutionally permissible penalty.[31] Hopefully when the issue receives a full consideration a different conclusion will be reached.

Finally, the Supreme Court addressed the appropriate remedy in the case. The question posed was whether the law, overbroad in the manner described above, should be struck out entirely or whether the courts should merely decline to enforce it when a specific application would be unconstitutional because it is within the overbroad portion of the law. This, as noted above, is the American approach in the commercial speech context although not in other First Amendment cases. Alternatively, the Supreme Court considered reading down or selectively striking out overbroad provisions of the regulation. The Court declined to employ either of these alternatives. It refused to read down the law because this would involve supplying additional exceptions to the general prohibition, a task for the legislators. It refused to follow the American "as applied" approach not because this would violate the legislators' authority, even though the result of the remedy would be very similar to reading down, but because of a concern that the invalid law left "on the books" would deter protected expression.[32] This type of deterrence or "chill" is the general rationale for the striking down of overbroad laws in American First Amendment jurisprudence. It is not applied to commercial speech because it is felt that this speech is more vigorous and less likely to be chilled.[33] The Supreme Court found that in the context of professional advertising, because professionals would be unwilling to challenge their governing bodies, a chill would be likely to occur.

In conclusion, the Supreme Court's decision in *Rocket* may be characterized as nicely balanced. In finding that the restriction on advertising is not justified under section 1 it indicates that there is indeed force to the constitutional guarantee of free expression in the commercial context. In striking down the overbroad law rather than adopting a more limited remedy, it reaffirms or enlarges this force. On the other hand, the judgment indicates a disinclination to interfere with more carefully drafted advertising regulations, justifying the Court's assurance that "it will not be impossible to draft regulations which prohibit advertising which is unverifiable and unprofessional while permitting advertising which serves a legitimate purpose in furnishing the public with relevant information".[34]

June Ross, Assistant Professor of Law, University of Alberta.

1. The Supreme Court of Canada, unreported judgment, June 21, 1990.
2. *Ford* v. *Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927.
3. *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, *supra* n.2.
4. R.R.O. 1980.
5. R.S.O. 1980, c. 196.
6. (1985), 16 D.L.R. (4th) 489.
7. (1988), 49 D.L.R. (4th) 641.
8. In a telephone conversation with Martin Teplitsky, Q.C., counsel for Drs. Rocket and Price, the writer was advised that he elected not to pursue the *Charter* challenge to the charge under the general professional misconduct provision. That charge is still outstanding, and no hearing has yet been scheduled. Presumably, should the doctors be disciplined pursuant to that charge, the order itself rather than the provision in the regulation could be challenged under the *Charter*, as was done in *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038 (depending, of course, on the nature of and reason for any discipline order).
9. *Supra*, n. 1, at 9.
10. *Ibid.*, at 13.
11. *Ibid.*, at 9.
12. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557 (1980).
13. *Supra*, n. 1, at 15.
14. The "sliding scale" approach was developed by Marshall J. in the context of equal protection analysis in dissent in *Dandridge* v. *Williams*, 397 U.S. 471 (1970) and in *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973). Stevens J. in a concurring judgment in *Craig* v. *Boren*, 429 U.S. 190 (1976), another equal protection case, also argued that the Court "actually appl[ies] a single standard in a reasonably consistent fashion".
15. [1989] 2 S.C.R. 1326.
16. *Supra*, n. 2, at 990, relating to the assessment of whether a pressing and substantial objective had been shown. The Court also used deferential language when assessing the proportionality of the means, stating for example that it would not, "in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to

(Notes continued on page 20)

Freedom of Association

LABOUR STRIKES OUT AGAIN

Timothy J. Christian

In an important, recent decision[1] the Supreme Court of Canada held there is no constitutional right to engage in collective bargaining. This case confirms that none of the important rights which trade unions have won over the years are included in the *Charter* guarantee of freedom of association. Such rights are based on legislative policy — not fundamental, constitutional freedoms.

THE DECISION:

Thirty-two nurses were employed by the Federal Government in the Baffin Zone of the Northwest Territories. After responsibility for health care in the region was transferred to the Government of the Northwest Territories, the nurses became employees of the Territorial Government. The union certified to bargain for the nurses under federal legislation wished to continue representing them. So, it sought incorporation under section 42(1)(b) of the Public Service Act R.S.N.W.T. 1974, c.P-13. This would have required the Territorial Government to pass a statute incorporating the union as a bargaining agent. This the Government refused to do. The union then sought a declaration that the provisions of the Northwest Territories statute were inconsistent with the *Charter* guarantee of freedom of association.[2]

A narrow majority of the Supreme Court of Canada recently rejected the claim of the union — holding it was bound by the earlier decision of the Court in the *Alberta Reference*[3]. The closeness of the decision shows how sharply the Court is divided on questions of fundamental freedoms and organized labour.

Preliminary Matters: the Composition of the Supreme Court of Canada

Before looking at the reasons for judgment, a couple of preliminary matters should be considered. One interesting fact is that virtually half of the panel which heard the earlier *Alberta Reference* had left the Court by the time this decision was delivered. Significantly, the writers of the two lead judgements in the *Alberta Reference* (McIntyre and LeDain JJ.) and one of their supporters (Beetz J.) had left the Court. Chouinard J. passed away between the time the arguments were heard and the reasons were issued in that case.

The two dissenters in the *Alberta Reference*, Wilson J. and Dickson C.J.C. remained. The sole survivor of the previous majority was LaForest J. This panel was joined by four new members: Gonthier, L'Heureux Dubé, Sopinka and Cory JJ.. This was as close to a complete change in personnel as labour could have wished.

The structure of the judgement is informative. Sopinka J. wrote the lead judgement for those rejecting the union's argument. Cory J. wrote in dissent and was joined by Wilson and Gonthier JJ.. The reasons of Sopinka J. were supported by LaForest, L'Heureux Dubé JJ. and, most interestingly, by Dickson C.J.C..

The Opinion of Dickson C.J.C.

Here was a case where the role of Dickson C.J.C. was as crucial as it was mysterious. By remaining faithful to the position he had so boldly staked out in the *Alberta Reference*, he could have provided a constitutional foundation for labour law. Instead, holding himself bound by the judgement against which he had powerfully dissented, the former Chief Justice created a new anti-union majority. Thus he leaves a somewhat confusing legacy. In the *Alberta Reference* he wrote a strong opinion in favour of extending constitutional protection to the activities of trade unions — a dissent which could one day have formed the core of a new approach. But in this case he, himself, eliminated this possibility, leaving one with some doubt about where he actually stood on this fundamental issue. Was his preoccupation with precedent not inappropriate in a case raising a fundamental constitutional issue? Surely there was no meaningful way in which he was *bound* by the previous majority. Since the doctrine of *stare decisis* could have no application, did Dickson C.J.C. simply change his mind?

The Majority Opinion of Sopinka J.

In his reasons, Sopinka J. provided a four point summary of the Court's decision in the *Alberta Reference*. His review is a significant sign of the restrictive reading which the Court will give to freedom of association. He started with a small core of meaning and built three concentric definitional circles about it. A review, and commentary upon parts, of his definition is warranted.

(Continued on page 12)

First, beginning with the minimum content of the guarantee, he held "section 2(d) protects the freedom to establish, belong to and maintain an association." The simple act of coming together is thus protected and any state restriction on the formation of, or membership in, associations would violate section 2(d). As Sopinka J. acknowledged, this is the "narrowest conception of the freedom of association."

Second, "section 2(d) does not protect activity solely on the ground that the activity is a foundational or essential purpose of an association." Thus there is a constitutional right to come together but not to do anything.

If taken no further, this conclusion is problematic. An association is defined by what its members do together. A bowling club bowls, a hockey club plays hockey and a union bargains on behalf of its members. Just as a bowling club that could not bowl would not be a bowling club so a union that could not bargain would not be a union. It is simply not meaningful to say there is a freedom to form a union if the union cannot do what union's do. An association is what it does. Sopinka J. would allow us to form associations in name only.

Third, "section 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals." This is the extent of the American conception of freedom of association. It is a right not expressed in the American Bill of Rights but inferred from the inherently collective nature of some rights. In the Canadian context, this interpretation means that section 2(d) is, essentially, a redundant guarantee. It makes express that which could be inferred. For example, freedom of religion must be read as guaranteeing the activity of worshipping in association with others. Obviously, the collective exercise of individuals' constitutional rights is of fundamental importance and it is part of the minimum content of the express guarantee. However, to limit "freedom of association" to protecting something which is necessarily implied even in the absence of the express guarantee is to exhaust prematurely the vitality of the phrase.

Fourth, "section 2(d) protects the exercise in association of the lawful rights of individuals." So, what may be lawfully done by one, may be done in combination with others. Thus, individuals may form and join associations to pursue objects they could lawfully pursue as individuals. This is so because prohibiting individuals from doing together that which they could lawfully do alone would strike at the associational aspect of their collective action.

As Sopinka J. acknowledged, this principle is somewhat "controversial" compared with the first three. In my view, he went further than the majority in the *Alberta Reference* in embracing this principle. Indeed, the proper application of this principle should have led him to the opposite conclusion he reached.

He asserted that "bargaining for working conditions is not, of itself, a constitutional freedom of individuals, it is not an individual legal right in circumstances in which a collective bargaining regime has been implemented." But this merely recites a conclusion — it is not a reasoned position. To state there is no express constitutional freedom for individuals to bargain is to state the obvious. To say there is no individual legal right to bargain in circumstances in which a collective bargaining regime has been implemented is to beg the very question at issue. Had the individuals' legal rights to bargain been extinguished? This question did not receive the attention it deserved.

When the Territorial Government took over responsibility for health care, the thirty-two nurses became "eligible" for membership in the Northwest Territories Public Service Association (NWTPSA). There was a collective agreement between the NWTPSA and the Territorial Government. However, it is unlikely this agreement was binding upon the nurses. The statutory language is very unusual. Section 42(6) provides the collective agreements are binding upon the "members" of an incorporated union.[4] This is a strange provision because in most jurisdictions a collective agreement is binding upon all the employees in a bargaining unit, regardless whether they are members of the union which negotiated the collective agreement. To underscore the point, only those nurses who joined the NWTPSA were bound by a collective agreement. Those nurses who did not join the NWTPSA were not captured by the collective bargaining scheme and were free to engage in lawful individual bargaining with their employer.

Given this fact, the reasoning should have proceeded along the following lines — starting with the proposition that "section 2(d) protects the exercise in association of the lawful rights of an individual":

> What are the lawful rights of an individual?
> - An individual may do that which is not prohibited by law.
>
> Are individuals prohibited from bargaining with their employers about the terms and conditions of their employment?

- No, unless a collective agreement is in existence.

How does a collective agreement come into existence?
- It is formed after collective bargaining between an employer and voluntarily or statutorily recognized bargaining agent. Under the Territorial legislation such a collective agreement is binding only on members of an incorporated employees association.

In the absence of a collective agreement can individuals bargain with their employer?
- Of course.

Were the nurses in this case bound by a collective agreement?
- No. The whole point of the exercise was to get statutory recognition of their bargaining agent so collective bargaining could take place and a collective agreement could be negotiated.

There was nothing in the statutory scheme which expressly prohibited individual nurses from bargaining with their employer. There was no binding collective agreement. So, the nurses had a lawful right as individuals to bargain with their employer. If there is a constitutional right to do together that which it is lawful to do alone, the nurses could form an association to pursue their lawful individual rights. They had a right to engage in collective bargaining with their employer. This is the logical train which follows from the "controversial" proposition adopted by Sopinka J.. It is regrettable he did not follow it.

Instead, proceeding from the finding that collective bargaining could not come within the protection of section 2(d), Sopinka J. went on to examine the restrictive provisions of the Act. He characterized the process of incorporation as a legislated form of voluntary recognition. As nothing in the Act restricted the formation of unions or their ability to apply for incorporation, he concluded there was no restriction of freedom of association. Sopinka J. thus held the legislation passed muster under the narrowest definition of freedom of association. The nurses had the right to form an entity called a trade union.

The Dissenting Opinion of Cory J.

Cory J. began, correctly in my view, by finding he was not bound by the *Alberta Reference*. He carefully sifted through the judgements and concluded that while LeDain J. (on behalf of LaForest and Beetz JJ.) had ruled there was no constitutional protection of collective bargaining, the Chief Justice, Wilson J. and McIntyre J. had left the question open. Therefore, it was for the Court to decide what aspects of collective bargaining were covered by the guarantee of freedom of association.

Cory J. agreed the Northwest Territories Government was not required to implement a scheme for collective bargaining to satisfy the right of the nurses to collective bargaining. However, having introduced a scheme, the Government was obliged to ensure it was constitutional. Here the problem was that the Government retained the unfettered discretion to determine whether and with whom it would bargain. This process of barring employees from bargaining through the agent of their choice struck "at the very heart of the freedom of association."

Cory J. was of the view that the Government could not have absolute discretion to decide with whom it wished to bargain. This position must be right. The power of incorporation enjoyed by the Territorial Government effectively gives the freedom of association to the employer — not the employees. The employer, not the employees, can decide which union will represent employees in collective bargaining. This is the bizarre though inevitable result of the majority decision.

CONCLUSION

This case confirms that the Canadian labour relations system is a product of legislative policy and not based on constitutional guarantees. There seem to be no constitutional values which trade unions may invoke to strike down legislated restrictions on collective bargaining. The reasons of the Court show that organized labour can expect little assistance from the constitution. This decision is the latest and clearest signal that political, not legal solutions, should be sought by labour.

Timothy J. Christian, Dean, Faculty of Law, University of Alberta.

1. *Professional Institute of the Public Service of Canada v. Commissioner of the Northwest Territories et al.* [1990] S.C.J. No. 75.

2. Section 2(d) of the *Charter of Rights and Freedoms* provides:
   2. Everyone has the following fundamental freedoms:
   ...
   (d) freedom of association.

3. The *Alberta Reference* is cited as *Reference Re Public Service Employee Relation Act (Alta.)*, [1987] 1 S.C.R. 313.

4. 42(6) A collective agreement between the Commissioner and an employee's association shall be binding on the Commissioner, the employees' association and the members of such association.

THE PROSTITUTION REFERENCE: SEXUAL COMMUNICATION AND THE STREETS

David Schneiderman

Prostitution continues to be a vexing question for communities across Canada. The solicitation provisions of the Criminal Code proved ineffectual in outlawing or regulating street prostitution. Courts demanded proof that an accused was "pressing and persistent" in soliciting customers in order to convict.[1] Neighbourhood pressure tactics, such as "shame the johns" protests, and civil injunctions were used to inhibit the business of both prostitutes and their clients.[2] In the wake of the limited success of these tactics, and in spite of the recommendations of the Fraser Committee on Prostitution and Pornography that the government partially decriminalize prostitution,[3] the Mulroney Government, in its first term, amended the Criminal Code to restrict street prostitution further. The Code section 195.1(1)(c) prohibits every person "in any public place or in any place open to public view" from stopping persons or traffic, or communicating or attempting to communicate "in any manner", "for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute".

Constitutional questions regarding this provision, as well as related Code provisions prohibiting the keeping of a common bawdy house, were referred to the Manitoba Court of Appeal and, ultimately, to the Supreme Court of Canada. The Supreme Court decision on the reference also resolved appeals from the conflicting Court of Appeal decisions in Nova Scotia and Alberta on these issues.[4] In upholding the law as a reasonable limit, the Court clarified the scope of both freedom of expression under section 2(b), and the liberty and security interests protected in section 7, of the *Charter*.

FREEDOM OF EXPRESSION

The Court was unanimous in holding that the provision respecting communications *prima facie* infringed the *Charter*'s guarantee of freedom of expression. Here, the Court reiterated the test it had developed in the *Ford* and *Irwin Toy* cases. The form and content of the expression were distinguished. Section 2(b) of the *Charter*, it was held, protects all content of expression "irrespective of the meaning or message sought to be conveyed".[5] Lamer J., as he then was, alone discussed the forms of expression which could fall outside the scope of the guarantee. Often, form and content are intimately connected, as in art, dance, or language. Threats, or acts, of violence, however, could not be invoked as forms of protected expression. But any law that "makes it an offence to convey a meaning or message, however distasteful or unpopular, through a *traditional* form of expression like the written or spoken word or art must be viewed as a restriction on freedom of expression."[6] Therefore, even though the communication provisions were framed as criminal prohibitions, the Court found that they were aimed at restricting the content of speech, albeit commercial, offending section 2(b) of the *Charter*.

Turning to the section 1 analysis, Justice Lamer characterized the legislative objective as directed at curbing not only the nuisance to residential communities and business neighbourhoods, but also associated criminal activities such as drug use, trafficking, and violence, and the attendant victimization and degredation of the prostitutes themselves. The majority of the Court, Chief Justice Dickson, Justices La Forest and Sopinka concurring, and Justices Wilson and L'Hereux-Dubé in dissent, more narrowly characterized the legislative objective as one directed at addressing solicitation in public places and eradicating the social nuisance accompanying street soliciting.

On the ensuing question of whether the law was a reasonable limit, the division of the Court is unremarkable, unless one examines that division along gender lines.[7] All of the men on the Court agreed that the law was reasonable: that the legislative concern was a pressing one, and that the means chosen were proportionate to the objective. The majority was willing to give Parliament greater "flexibility" in limiting commercial expression where the communication took place in public and, essentially, the prohibited speech was that between only prostitute and customer. The two women, in a dissent, held that while the legislative concern was pressing and substantial, the means employed were not sufficiently tailored to that objective.

The minority found that the prohibition was drafted too broadly as it criminalized any act of communication designed to engage the services of a prostitute, irrespective of whether it contributed to the "social" nuisance. Nor was the prohibition confined to places where people were most likely to be inconvenienced or offended by the expression. The minority would not condone unneccessarily over-broad laws which infringed fundamental freedoms. At the time the amendment was being debated in Parliament, commentators feared that holding hands in the park may be sufficient to trigger the criminal process. Justices Wilson and L'Heureux-Dubé similarily feared that the "proverbial nod or wink may be enough".[8]

Concerns about the law's overbreadth were confirmed within months after the release of the Court's decision. Toronto's alternative weekly newspaper *NOW* was charged with communicating for the purposes of prostitution in relation to the newspaper's business personals section, which was a notorious vehicle for advertising by prostitutes.[9] The virtue in advertising, according to *NOW*, was that women and men did not have to submit themselves to the danger and public degredation of street soliciting, also avoiding the public nuisance which accompanies those activities. The charges were dropped a few weeks later. Based upon the majority's characterization of the legislative objectives, *NOW*'s prosecution would have been beyond the scope of those objectives and unjustifiable.

FUNDAMENTAL JUSTICE

Although all of the justices acknowledged the inherently degrading nature of prostitution, only Lamer J. characterized the objectives of the solicitation provisions as being designed to eradicate the dangerous and dehumanizing act of prostitution.[10] Prostitutes reply, however, that their "trade" is simply another form of wage labour; contracts for sexual services performed by "professionals".[11] As such, they argue, the state has no business putting prostitutes out of business. Section 7 of the *Charter*, they argued in these cases, protected their interest in lawfully pursuing their livelihood.

Economic Liberty

It has long been feared in some quarters that section 7 might be available to unravel a host of social-welfare statutes which affect "liberty" interests; those matters which traditionally have been regarded as in the realm of the "private". These fears were heightened considerably by the earlier judgments of Justices Lamer and Wilson,[12] suggesting that section 7 had not only a procedural, but a substantive, reach. On this cue, the British Columbia Court of Appeal in *Wilson*,[13] held that a medical practitioner's section 7 liberty interest was infringed when the government limited the numbers of doctors that could practice in certain geographic areas. Lamer J. took the opportunity in this case to clarify section 7's reach, condemning the reasoning in *Wilson* in the process.

Characterizing the act of communicating for the purpose of prostitution as a commercial one, Justice Lamer held that the section 7 did not protect economic interests. He reaffirmed that the section set out, in a more general fashion, the kinds of legal rights which are specified in sections 8 to 14. Therefore, "the restrictions on liberty and security that section 7 is concerned with are those that occur as a result of an individual's interaction with the justice system, and its administration".[14] Lamer J. took pains to point out that section 7 was concerned only with state invocation of the judicial system and not general or "pure" public policy. What is at issue in the area of public policy are "political interests, pressures and values that no doubt are of social significance, but which are not "essential elements of a system for the administration of justice"".[15] Lamer J. acknowledged, however, that there are a myriad of regulatory activities engaged in by the state, many entrusted to administrative tribunals, which affect section 7 liberty interests. He thereby left the door to greater substantive review significantly open, despite this more narrow reading of section 7.

Chief Justice Dickson, writing for the majority, held that liberty interests were affected in these cases where the judicial system was being invoked and a person's liberty was threatened by imprisonment. But he found it uneccessary to deal with the broader "economic" arguments which were raised. And, even though the sections were designed to curtail a certain economic activity through very circuitous routes, this alone was insufficient to offend the principles of fundamental justice.

In dissent, Justices Wilson and L'Heureux-Dubé held that liberty was affected — absent fundamental justice — because it was accomplished by infringing another *Charter* right, namely, freedom of expression. Rather than confining the section 7 interests to the types of matters covered in sections 8 to 11, as the majority proposed, the minority extended the principles of fundamental justice to include all *Charter* rights. This was the same argument Wilson J. employed in *Morgentaler*, holding there that the Code provisions in question offended the principles of fundamental justice because they also infringed section 2(a) *Charter* guarantees of "freedom of conscience and religion".[16] The trouble with this argument is that it means section 7 can be successfully invoked whenever the combination of a potential deprivation of liberty or security of the person attaches to the infringment of another *Charter* right. It can conflate many *Charter* infringements into section 7 claims, expanding section 7's substantive range and requiring, arguably, a parallell section 7 jurisprudence. As Justice Wilson herself acknowledged, the nature of the justification required under section 1 may differ depending upon the *Charter* right being infringed. Elsewhere, Wilson J. had written that section 7 infringements must be difficult, if not impossible to justify as a reasonable limit.[17] In this case, Justice Wilson found the section 1 evidence wanting, as imprisoning people for the excercise of their constitutionally-protected freedom of expression was not proportionate to the social nuisance the legislation was designed to curtail.

Void for Vagueness

It was also argued that section 7 was offended if a law prohibiting certain conduct was overly vague. Two rationales

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have been offered for this "void for vagueness" doctrine: (1) to provide fair notice of conduct that is prohibited by law, and (2) to more narrowly confine the discretion of law enforcement officials. The doctrine has achieved constitutional status in the United States but so far it has been questionable whether it applied also in Canada, and to what extent, under either sections 7 or 1. The decision of the Court makes clear that it applies at either stage of the interpretive process. The majority read this requirement of clarity into section 7 but, at the same time, restricted its scope substantially by preserving vague laws which have been clarified by judicial interpretation. Considering that much legal language lacks certainty, the Court was prepared to uphold vague laws if the impugned language had been clarified by courts. Lamer J. went so far as to uphold vague language as long as it "can be or have been given sensible meanings by courts".[18] Therefore, the citizen concerned about running afoul of the law must check not only existing judicial interpretations, the earnest citizen must also determine whether the vague law "can be" given a sensible interpretation by judges.

CONCLUSION

Underlying the judgment is a tension prevalent in the debate over prostitution: decriminalization versus prohibition. For many, prostitutes are seen as victims of a male-dominated consumerism which vulgarizes and exploits female sexuality. Legalizing prostitution reinvigorates the "sexual contract" of female submission,[19] contributing to a general atmosphere which condones sexual violence as does pornography. After all, the word 'pornography', derived from the ancient Greek, simply means "the depiction of whores".[20] For others, prostitutes are also victims, but ones for whom outlawing or criminalizing their behaviour contributes further to their victimization and oppression.[21] The Code provisions, and civil injunctions, have had the effect of driving prostitution to other areas, sometimes abandoned and unlit streets, making women more vulnerable to sexual abuse and violence from johns and pimps.[22] Rather than empowering women, these laws push them further into male submission.

Although not clearly articulated along these lines, the judgments of the majority and minority could be seen as falling within the terms of this larger debate. A debate over which Canadian society remains, as the Court was on the constitutional question, deeply divided.

David Schneiderman, Executive Director, Centre for Constitutional Studies.

1. *Hutt* v. *R.*, [1978] 2 S.C.R. 476.
2. *Attorney-General for British Columbia* v. *Couillard* (1984), 11 D.L.R. (4th) 567 (B.C.S.C.).
3. Canada, *Report of the Special Committee on Pornography and Prostitution, Pornography and Prostitution in Canada*, vol.2 (Ottawa:Supply and Services Canada, 1985) (Chairman: Paul Fraser).
4. *Reference re Criminal Code, ss. 193 & 195.1(1)(c)* (1990), 77 C.R. (3d) 1. The related judgments are *R.* v. *Skinner* (1990), 77 C.R. (3d) 84 from Novas Scotia and *R.* v. *Stagnitta* (1990), 74 Alta.L.R. (2d) 193 from Alberta. The Court in the *Skinner* appeal also dismissed the argument that the *Criminal Code* prohibitions offended the *Charter's* guarantee of freedom of association.
5. Per Lamer J., *supra*, note 4 at 49.
6. *Supra*, note 4 at 52.
7. For a discussion of how gender could be relevant in these circumstances see excerpts from Justice Wilson's Fourth Annual Barbara Betcherman Memorial Lecture in (1989) 6 Cndn. Human Rights Advocate 1 at 3.
8. *Supra*, note 4 at 75.
9. "Sex ads in paper bring charges" *Globe & Mail* (1 September 1990) 1.
10. I am paraphrasing the Fraser Committee at *supra*, note 2 at 378.
11. See *Good Girls/Bad Girls: Sex Trade Workers and Feminists Face to Face* (Toronto: Women's Press, 1987).
12. In *Reference re Section 94(2)*, [1985] 2 S.C.R. 486 and *R.* v. *Morgentaler* (1988), 44 D.L.R. (4th) 385 at 482 ff., respectively.
13. *Wilson* v. *Medical Services Commission*, [1989] 2 W.W.R. 1 (B.C.C.A.).
14. *Supra*, note 4 at 43.
15. *Supra*, note 4 at 45.
16. *Supra*, note 10 at 494.
17. *Supra*, note 4 at 82. Justice Wilson likely was referring to her judgment in *Reference Re Section 94(2)*, *supra*, note 10 at 565.
18. *Supra*, note 4 at 30.
19. Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988) c.7.
20. Andrea Dworkin, *Pornography: Men Possessing Women*. (New York: Perigee Books, 1981) at 200.
21. H. Wade MacLauchlan, "Of Fundamental Justice and Society's Outcasts: A Comment on *R.* v. *Tremayne* and *R.* v. *McLean* (1986) 32 McGill Law J. 213.
22. See Canada, Department of Justice, Research Section, *Street Prostitution: Assessing the Impact of the Law (Synthesis Report)* (Ottawa: Department of Justice, 1989) at 89.

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BURYING *ROTHMAN*: THE SUPREME COURT AND THE RIGHT TO REMAIN SILENT

Bruce P. Elman

When it was decided nine years ago, the case of *Rothman* v. *The Queen* [1981] 2 S.C.R. 64 represented an important statement on the law of confessions in Canada. Principally, the *Rothman* case stood for two propositions:

- Sometimes, in dealing with shrewd and sophisticated criminals, the police, of necessity, must resort to trickery and deceit. The authorities, in their efforts to supress crime, should not be hampered by a rule which excludes evidence obtained by trickery; and, in any event,
- Illegally obtained evidence would be excluded only if the admission of the impugned evidence would **"shock the community"**.

Consequently, prior to the advent of the *Charter*, rarely was evidence excluded because of the methods used by the police in obtaining it. A virtually absolute rule of admission existed: **"Evidence which is relevant is admissible, regardless of the methods by which it has been obtained"**. Confessions would only be excluded if they were involuntary, i.e. obtained by "fear of prejudice or hope of advantage held out or exercised by a person in authority". Of course, if the accused was unaware that the person to whom he was speaking was a police officer (as in the case of a 'jailhouse plant'), it could hardly be said that confession was involuntary.

The *Charter* seems to have changed all of this. In *Collins* v. *The Queen* [1987] 1 S.C.R. 265, the Supreme Court held that the so-called 'shock the community' test was inappropriate for determining whether unconstitutionally obtained evidence would be admissible. But, in spite of the numerous rights granted to arrested, detained, and accused individuals in the *Charter*, the proposition permitting confession by trickery, advanced in *Rothman*, remained uncontroverted until the recent case of *Hebert* v. *The Queen* (S.C.C. judgment delivered June 21, 1990).

THE FACTS:

At 6:00 o'clock on the morning of January 11th, 1987, a male person, wearing a ski mask, approached the front desk clerk at the Klondike Inn and demanded that the clerk hand over the money. When the clerk hesitated, the robber raised a claw hammer in the air and repeated his demand. On this occasion the clerk complied, handing over the contents of the till — $180.00. The perpetrator advised the clerk not to call the police for 10 minutes and then fled. During the next several months, the police received confidential information from three informants that the defendant, Neil Gerald Hebert, was the individual responsible for the robbery.

Acting upon this information, the police, on the evening of April 15th, arrested the defendant in the lounge of the Taku Hotel in Whitehorse. He was advised of his right to retain and instruct counsel and taken to R.C.M.P. headquarters. Once at the detachment, Hebert contacted counsel. He refused to make any statements to the police at that time.

Hebert was placed in a cell with Corporal Daun Miller who was disguised in plainclothes. Miller was pretending to be a suspect under police investigation. While in the cell, the Constable engaged Hebert in conversation, during which Hebert made certain incriminating statements implicating him in the robbery of the Klondike Hotel on the 11th of January.

IN THE LOWER COURTS:

The matter came on for trial before Justice Maddison of Yukon Supreme Court. At the conclusion of a *voir dire* held prior to the trial, Justice Maddison ruled [See: (1987), 3 Y.R. 88.] that the police had violated Hebert's right to counsel and his right to remain silent as guaranteed by sections 10(b) and 7 of the *Charter*, respectively. Furthermore, he held that the 'jailhouse' confessions made to Constable Miller were not admissable at trial. The Crown offered no other evidence and an acquittal followed. The Yukon Court of Appeal reversed Justice Maddison's ruling and ordered a new trial.[See: (1988), 43 C.C.C. (3d) 56.]

IN THE SUPREME COURT OF CANADA:

As in most *Charter* litigation, this case can be broken down into two issues. First, were the accused's rights under the *Charter* infringed? And second, if they were infringed, was the statement made to Constable Miller, nevertheless, admissible under section 24(2) of the *Charter*?

The Majority:

As regards the first issue, the case was argued on two bases: (a) Was the accused's right to silence infringed? and; (b) was the accused's right to counsel infringed? Although these issues

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had been argued separately in the lower Courts, the majority of the Supreme Court saw them as intertwined. Writing for the majority, Justice McLachlin characterized the central issue of the case as follows: "The question...is whether, bearing in mind the *Charter* guarantee of right to counsel and other provisions of the *Charter*, the accused's right to remain silent has been infringed."

Both sides agreed that section 7 of the *Charter* accorded the right to remain silent to a detained person. The real dispute involved the scope of that right. The Crown's contention was that the right to remain silent was defined by the common law rule governing the admissibility of confessions, i.e. only voluntary confessions are admissible. If the Crown's position were adopted, statements obtained by trickery, such as the one here, would generally be admissible. The defence was of the view that the ambit of the right to remain silent protected by section 7 was broader than the common law confessions rule, and that the use of trickery to obtain a confession after the accused had indicated that he did not want to give a statement was a violation of the *Charter*.

Alternatively, we might analyze the issue this way. Section 7 of the *Charter* states that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with **the principles of fundamental justice**." There is no doubt that Hebert's liberty was at stake. The question was whether the police conduct, in obtaining the confession in the manner they did, violated the principles of fundamental justice. Does obtaining confessions by trickery violate the principles of fundamental justice? How does one ascertain this? The Crown's view was that the Court should consult the traditional common law rules for determining the admissibilty of confessions, while in the defence's opinion the principles of fundamental justice had to be given a broader meaning, more in keeping with the constitutionalization of the right to silence in section 7 of the *Charter*.

Initially, Justice McLachlin acknowledged that common law principles regarding confessions, the privilege against self-incrimination, and the right to counsel, might assist the Court in determining the scope of an accused person's right to remain silent. The inquiry, however, should be more far-reaching. In addition to asssesing the appropriate common law rules, the scope of fundamental justice will depend upon "the general philosophy and purpose of the *Charter*, the purpose of the right in question, and the need to reconcile that right with others guaranteed by the *Charter*".

In Justice McLachlin's opinion, the right to remain silent extended beyond the "narrow formulation of the confessions rule". In the pre-trial detention period, the right of a person to remain silent is based on the notion that the suspect has the right to freely choose whether to speak with the authorities or remain silent.

Justice McLachlin, however, went on to note that section 7 of the *Charter* attempts to effect a balance between the rights of the detained person and the interests of the state. Thus the right to remain silent is not an absolute right but rather, is qualified by the interests of the state as well as considerations for the reputation of our judicial system. Consequently the standards set in *Clarkson* v. *Queen* [1986] 1 S.C.R. 383 regarding waiver of a constitutional right have no application to the right to remain silent pursuant to section 7 of the *Charter*. [One should recall that, in *Clarkson*, the Supreme Court would only permit the Crown to claim that an accused had waived the right to counsel if it is "clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights that the procedure was designed to protect and of the effect the waiver will have on those rights in the process". (at 394 - 95)]

Thus, as Justice McLachlin noted: "Our courts must adopt an approach to pre-trial interrogation which emphasizes the right of the detained person to make a meaningful choice and permits the rejection of statements which have been obtained unfairly in circumstances which violate that right of choice". The right to remain silent must extend to a situation where the authorities trick a suspect into making a statement after he or she has conferred with counsel and has declined to make a statement. The trickery employed by the police in such a situation has robbed the accused of the right to choose whether to give a statement or remain silent and, therefore infringed his or her rights.

There are, in addition, some limitations on the rule against eliciting confessions by trickery in the pre-trial detention period. Justice McLachlin pointed out the following:

1. Nothing in the rule prohibits the police from questioning an accused in the absence of counsel after counsel has been retained. Thus, if an accused, in spite of the advice of his counsel, bows to "police persuasion" and volunteers a statement, no *Charter* violation will have occured.

2. The rule applies only after detention. In the pre-detention period, there is, according to Justice McLachlin, no need to protect the suspect from the coercive powers of the state; after detention, however, the state becomes the guarantor of the accused's rights.

3. The rule does not affect voluntary confessions made to cellmates. The real issue is whether the cellmate is a police officer or an agent of the police.

4. The rule applies to the active solicitation of evidence in violation of the accused's right to remain silent. It does not apply to undercover agents whose task is to observe the suspect only. If the accused makes a voluntary statement to the undercover agent in the latter situation, it will be his bad fortune.

Justice Mclachlin found that Hebert's right to remain silent had been violated in the cicumstances of this case and that the statements should be excluded from evidence.

Concurring Judgments:

Although all nine members of the Court agreed to restore the original acquittal, they were not in complete agreement on some important aspects of the right to remain silent. Justices Sopinka and Wilson attacked Justice McLachlin's decision on three counts. First, there is some dispute over the point in time when the right to remain silent will arise. Justice McLachlin's assertion was that the right only arose after detention. Justices Wilson and Sopinka recognized that, in some cases, the damage would have already taken place by the time the suspect was in custody. Rather, Justice Sopinka argued that the right to remain silent arises when the "coercive power of the state is brought to bear on the individual — either formally (by arrest or charge) or informally (by detention or **accusation**)..." (My emphasis). In the words of Justice Wilson, the right to remain silent "... could well predate detention and extend to police interrogation of a suspect".

Justice Wilson also took issue with Justice McLachlin's assertion that the right to remain silent pursuant to section 7 is a qualified right. In Justice Wilson's view, the right, at least within the section 7 context, is absolute. Following this premise, it is inappropriate, when determining if the right has been violated, to inject into the inquiry consideration such as the interests of the state or the integrity of the judicial system. Justice Wilson argued that considerations of the integrity of the judicial system should not arise at this state of the litigation. It should be saved for the section 24(2) inquiry into whether the evidence should be excluded.

Finally, there is disagreement on the issue of "waiver". Once again, in Justice McLachlin's opinion, the doctrine of waiver does not apply to the right to remain silent. Justice Wilson saw "... no reason why the doctrine of waiver should not apply to the right to silence as it does to other rights in the *Charter*". Justice Sopinka concurred, noting that "... any waiver of the right to remain silent must, similar to the right to counsel, pass an 'awareness of consequences' test". As they support an even more expansive definition of the right to remain silent, Justices Sopinka and Wilson, quite naturally, concurred with the majority in restoring the original acquittal.

COMMENT:

Even given the majority judgment's limitations, as exposed in the judgments of Justices Sopinka and Wilson, *Hebert* is a remarkable case. On its most basic level, of course, the constitutionalization of the right to remain silent in section 7 of the *Charter* is affirmed without dissent. Further, the *Hebert* decision will dramatically reduce the ability of the state to obtained confessions by trickery in the pre-trial detention stage. To this extent, the principles articulated in *Rothman* may now be consigned to the footnotes of legal history. *Hebert* has shown, once again, that the Court is not reticent about departing from pre-*Charter* precedent and that common law principles cannot limit the scope of *Charter* rights. What other common law principles may be elevated to constitutional rights and expanded in the process? Finally, it appears that the Court, in spite of personnel changes, remains strongly committed to the fundamental importance of the right to counsel (and other associated rights such as the right to remain silent) in our criminal justice system.

Bruce P. Elman, Professor of Law, University of Alberta and Chair, Centre for Constitutional Studies.

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(Professional Advertising notes from page 10)

choose the least ambitious means to protect vulnerable groups" (at 999).
17. *Supra*, n. 1, at 15.
18. [1986] 1 S.C.R. 103.
19. *Supra*, n. 1, at 16.
20. The personal self-fulfilment involved in the practice of a profession or other employment has been given constitutional significance in other contexts. See, for example *Slaight Communications Inc.* v. *Davidson*, *supra*, n. 8 (relating to the application of section 1); and *Wilson* v. *Medical Service Commission of B.C.*, [1989] 2 W.W.R. 1 (B.C.C.A.), leave to appeal to S.C.C. denied (relating to the meaning of "liberty" in section 7); but see *contra* Lamer J. (as he then was) concurring in *Reference re section 193 and 195.1(1)(c) of the Criminal Code*, (1990), 77 C.R. (3d) 1 (S.C.C.).
21. *Supra*, n. 1, at 17.
22. *Ibid.*, at 15.
23. *Ibid.*
24. *Ibid.*, at 17-18.
25. D. Gibson, Case Comment on *Attorney General of Quebec* v. *Irwin Toy Limited et al.*, (1990) 69 Can. Bar Rev. 339.
26. 294 U.S. 608 at 612 (1932).
27. 471 U.S. 626 (1985).
28. *Ibid.*, at 647.
29. *Ibid.*, at 647-648.
30. *Supra*, n. 7, at 391 per Cory J.A. Dubin A.C.J.O. suggested there might be a misleading aspect to the advertisement: "Inferentially, the advertisements promote the value of the dental services being performed by the appellants" (at 371).
31. The outstanding professional misconduct charge facing Drs. Rocket and Price does not refer expressly to a lack of taste or dignity, but particularizes the misconduct as follows: "you did lend yourselves and your reputations, for valuable consideration, to the promotion of Holiday Inn" (*supra*, n. 7, at 374 per Cory J.A.). However, the basis for prohibiting endorsements may be simply a perceived lack of dignity in the practice. For example, Ruling 3.7 of the Law Society of Alberta provides "[i]t is undignified and accordingly improper for a member as a lawyer knowingly to endorse a product or service."
32. *Supra*, n. 1, at 21.
33. *Ibid.*, at 10.
34. *Ibid.*, at 23.

SUPREME COURT REVERSES SELF ON *BHINDER*

It was only five years ago that the Supreme Court of Canada in *Bhinder* v. *C.N.R.*, [1985] 2 S.C.R. 561 ruled that Canadian National Railway did not offend the Canadian Human Rights Act by requiring employees working in its coach yard to wear hard hats on the job. The complainant, Mr. Bhinder, was of the Sikh faith and was forbidden by his religion from wearing anything but a turban on his head. The Court found the requirement that Mr. Bhinder wear a helmet a *bona fide* occupational requirement (BFOR), even though it had a serious adverse affect on members of the Sikh religion. In *Central Alberta Dairy Pool* v. *Alberta Human Rights Commission* ([1990] S.C.J. No.80), the Court expressly overturned *Bhinder*, acknowledging that a mistake had been made five years earlier.

In the *Dairy Pool* case, Mr. Christie, a member of the World Wide Church of God, requested that he be granted unpaid leave in order to observe two holy days, one of them being Easter Monday. As Mondays are the busiest days in the milk plant, with milk having arrived over the weekend requiring immediate processing, his request for leave on Easter Monday was refused. The Dairy Pool argued that it was a BFOR that employees regularly attend work on Mondays. Justice Wilson, writing for the majority, set out to redefine the tests which must be employed by human rights commissions and boards of inquiry:

1. Where a rule discriminates on its face on a prohibited ground of discrimination, the employer only can justify the rule as a statutory BFOR. In order to qualify as a BFOR a rule must be "imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the adequate performance of the work involved...and not for ulterior or extraneous reasons" (per McIntyre J. in *Ontario Human Rights Commission* v. *Etobicoke*, [1982] 1 S.C.R. 202 at 208). Once a BFOR is established, the employer has no duty to accommodate.

2. Where a rule is neutral on its face but has an adverse effect, or discriminatory impact, on one or more members of the group to whom the rule applies, then the employer only can justify the rule by showing it has taken reasonable steps to accommodate a complainant, short of undue hardship. That is, the employer must have taken such steps "as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer" (per McIntyre J. in *O'Malley* v. *Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 at 555).

Applying these two tests in the context of *Bhinder*, the majority held that the Court in that case had case incorrectly analysed Mr. Bhinder's complaint. The BFOR test should not have been applied to the hard hat rule because the rule did not directly discriminate against Mr. Bhinder on a prohibited ground. The rule, on its face, was not discriminatory but, rather, had a discriminatory effect. The Court in that case should have scrutinized, not the general application of the rule, but the employer's attempt at accomodation. (Wilson J. also thought *Bhinder* may have been wrongly decided even if the BFOR test was applied. — the original decision of the tribunal may have been correct in so far as it found that the rule was not a BFOR.)

Applying these tests to the case at hand, the Court held, as it should have in *Bhinder*, that the rule requiring Mr. Christie to be at work on Easter Monday was not discriminatory on its face but, rather, discriminatory in its effect. The case called for the application of the second test and evidence from the employer that it had taken steps to reasonably accommodate the complainant. The onus of proof not having been discharged, the complaint should have been upheld.

A minority of the Court dissented in approach, but not result. Sopinka J., writing for La Forest and McLachlin J.J., preferred that the Court not deviate as severely from its previous jurisprudence. Therefore, rather than have two seperate and alternative tests, the minority preferred to have the duty to accommodate remain a part of the BFOR test, as Dickson C.J. had argued in his dissenting judgment in *Bhinder*. That is, an employer must establish not only that the rule was reasonable, but that the rule could not be avoided without the individual accommodation of those who may be adversely affected.

[David Schneiderman]