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THE CHANGING FACE OF HUMAN RIGHTS IN CANADA

Michelle Falardeau-Ramsay

INTRODUCTION

This is a fascinating time for those interested in human rights, a time of rising hopes and great change. It is also a time of disappointment and frustration for some individuals and groups, who see the grand promise of equality etched out in the *Charter of Rights and Freedoms* and human rights laws, but who have not yet experienced it in their daily lives.

I would like to share some thoughts with you about the human rights situation in Canada. The subject I will address is: "the changing face of human rights." In particular I will focus upon changes in relation to ethnic diversity and sexual orientation.

As you know, many areas of the law tend to reflect the accepted views of the majority at any given point in time. These areas of the law are operating just as they should when they give effect to the beliefs or values of society. These are expressed through the judge's opinion of what the "reasonable person" would think, or what the contemporary "community standards" would be. The law in these areas is a follower most of the time, not a leader.

In human rights law, as we all know, the law is expressly meant to lead on many issues. The idea of human rights is not always to protect the rights of the majority because, by and large, the majority can look after itself through the sheer weight of numbers. Human rights laws are enacted to protect those who are least able to look after themselves. These laws are meant to express some of the deepest and most cherished values of our community. That is why the *Charter* marked such a watershed in Canadian law, because it articulated these rights and freedoms in a fundamental constitutional document.

The *Charter* also gave the courts the power to enforce these values in a more direct way than ever before. And you all know what has happened since: courts have struggled with new and difficult questions touching on the most controversial issues of public life. The courts have sought to balance rights with responsibilities, and in doing so they have struggled to balance the twin demands that lie at the heart of human rights today. On the one hand, there are the demands for change, real change, and soon; but these must be balanced against the equally fervent demand for careful and rational thought before taking a new course, particularly anything that might cost money or disrupt our habits.

In a way, the Canadian Human Rights Commission, and its counterparts throughout the country, have been involved in this perilous balancing act for many years. In my opinion, in recent years the issues have become tougher and more complex as the boundaries of human rights expand and we develop a deeper understanding of their methods. At the same time the competing demands of more groups for shrinking resources increase, and the rapid pace of change naturally causes some people to long for the "good old days."

Human rights laws are meant to lead rather than to follow; they are about change. In what follows, I would like to explore some of the dimensions of this change, and to reflect upon the lessons we have learned, by examining the challenge of ethnic and racial diversity, and the emergence of sexual orientation as a human rights issue.

ETHNIC AND RACIAL DIVERSITY

In speaking to an audience that is familiar with the law, one is always comforted to find "the case" to rely on. If this were an American audience, I would point to *Brown v. the Board of Education*,[1] in which the U.S. Supreme Court gave meaning to the constitutional guarantee of racial equality, and set in motion a chain of events that has not ceased to this day. The thing I notice about this case is that it seems all so very tidy, in theory at least if not in practice as the school desegregation history shows. The case involved a clear choice between two visions of equality, and it offered the Court an opportunity to strike at a clearly defined evil: racial segregation in public institutions. Once the evil was labelled, the remedy for it was clear: desegregation "with all deliberate speed," and by mandatory court order if necessary.

When I look for the Canadian equivalent, I am struck by the untidiness of our situation. We do not yet have our bright and glorious precedent, our *Brown v. the Board of Education*. There are several reasons for this. Other than toward Aboriginal peoples, there is no system which so clearly sets out to subject a racial group in our society to different treatment. And as Canadians have learned in recent years, the situation of Aboriginal peoples is complex, and no one solution is readily apparent because the problems are different for groups across the country.

I do not mean to suggest that our legal, social and political systems treat all persons with equal concern and

respect, or that the claims of discrimination in the justice system are not well-founded. What is clear, I think, is that the discrimination which is experienced in the justice system, in employment and elsewhere, is both complex and subtle. Overt acts of racial hatred do occur in Canada — as cross-burnings, synagogue desecrations and racially-motivated assaults show. But these are not widespread occurrences.

The fact that Canada has become racially and ethnically more diverse in recent years is obvious. The fact that this will continue for the foreseeable future is also obvious. What is less clear is whether the social, political and legal structures in Canada are now capable of adapting to the challenges which have accompanied this change. I would like to outline some of these changes, and some of these challenges, with reference to a few cases.

One of the most significant changes in recent years is the increasing racial and religious diversity of our immigrant population. We all know that Canada is a nation of immigrants, and this is particularly true of Western Canada. These immigrants came with a variety of languages and religions, and they were expected to adapt to the prevailing Canadian norms and standards: to "fit in." More recent immigrants have also brought a host of languages and religions to Canada, but some of these are less easily absorbed into the mainstream of Canadian culture and social practice.

Sikhs, who are obliged by their religion to wear a turban, are one example of a group that has sought to "fit in" to the extent they can within Canadian society, without giving up their religion. And as you well know, this has made some people very uncomfortable.

To follow this example a bit further, many Canadians have questioned why a Sikh ought to be exempted from the Royal Canadian Mounted Police uniform requirement about hats. The furore was intense for a period of time. Yet the dictates of the *Charter* and human rights laws are clear: no one should be forced to choose between compliance with an employment rule and following one's religious beliefs, unless the conflict cannot be avoided by a measure of reasonable accommodation. In the R.C.M.P. example, the question was whether or not a Sikh officer could perform the duties of the job while wearing a turban, and the answer of the senior officers was that the head-gear would not interfere with police duties. From a human rights perspective, this settled the issue.

Yet many people genuinely felt that this was wrong: that "they" were forcing "us" to accept "their beliefs." Underlying much of the debate on this issue was a feeling that the newcomers had simply gone too far in pushing for respect for their different beliefs. While these feelings are understandable, they also pose a challenge to the human rights system. In this case, the lesson was clear: if human rights law is seeking to lead rather than to follow, this will call for a better effort to try to explain why certain changes are being implemented. I have found, for example, that many people did not know that the wearing of a turban is a mandatory requirement for some members of the Sikh faith. Once the case was explained as a matter of religious obligation rather than choice, then the only question often was: well, why should he be able to serve in the R.C.M.P.? And in a free society, and with a police force that realizes that it needs to be more representative in order to be more effective, the answer to that question is easy.

The other example that I would use to illustrate the challenges posed to human rights law by the growing ethnic and racial diversity of Canadian society is drawn from a case taken to a Human Rights Tribunal by the Canadian Human Rights Commission. The complaint involved an allegation of racial discrimination in employment: *Grover v. National Research Council.*[2] According to the evidence gathered by the Commission in its investigation, Dr. Grover was an acclaimed scientist in the field of optics. He worked with one supervisor for several years, and he appeared to be on the way up as a valued contributor. When a new boss arrived, however, Dr. Grover's career took a turn for the worse. He was isolated from many important projects in his field, treated differently than many co-workers, and ultimately denied a promotion it appeared he ought to have obtained. Now the problem here is that there was no explicit racial discrimination: no name-calling, no racially tainted jokes, no blatant racism. Yet something did not seem right about the sudden change in his situation.

A Human Rights Tribunal was appointed to inquire into the case, and after reviewing all of the evidence it concluded that Dr. Grover had been subjected to covert racial discrimination. The Tribunal accepted that racial discrimination "is not a practice which one would expect to see displayed overtly," and it found that its task was to examine the evidence to determine whether the explanations offered by the employer for its treatment of the complainant were genuine or merely pretextual. In the words of the Tribunal: "In weighing the evidence, one often has to assess circumstantial evidence in order to identify... `the subtle scent of discrimination.'" And in this case, the Tribunal found that there was no valid reason for the differential treatment of Dr. Grover; it rejected the budgetary and other explanations offered by the respondent as mere pretext.

The Tribunal ordered that Dr. Grover be promoted to the position he should have held, and that he receive backpay and legal costs. As well, in recognition of the fact that a remedy for the individual would not address the full scope of the problem it had identified, the Tribunal ordered the employer

to review its policies and programs in consultation with the Commission. This review is now underway.

This is a very significant case, and it illustrates both the advantages and the problems of the current human rights system. On the one hand, the alleged victim of discrimination had his hearing, his day in court, before a Tribunal with procedural flexibility and sensitivity to the problems of discrimination and the lack of overt proof. The remedy ordered by the Tribunal deals with both the individual harm and the systemic problems revealed by the evidence. On the other hand, however, the hearings in this case lasted over 30 days, spread out over an 18-month period. Also, the Commission's investigation and conciliation process was not successful in resolving the situation between 1987 and 1990. That, in itself, should cause one to ponder whether the administrative structures now in place are adequate to the task.

What this case reveals is that in facing the challenges posed by an increasingly diverse community, human rights enforcement structures are drawn into a situation much more complex and difficult to resolve than the one faced by Americans in 1954 when the *Brown* case was decided. The groups and the demands are more diverse, the discrimination is often more subtle and covert. As well, the systems are generally less able to deal quickly and decisively with the problems that arise. And the remedies that are available often focus upon the individual rather than the underlying problem.

In my opinion, human rights laws are one small part of the larger mix of laws, policies, education and promotion efforts which are necessary in order to meet the challenges posed by ethnic and racial diversity in a multicultural society. Effective employment equity laws, at a national and provincial level, are another vital plank in this structure. Education that is ongoing and honest is another. As well, governments must have the courage to speak out when public manifestations of racial intolerance emerge. We need only look to the recent events in Germany to see that this type of behaviour must be quelled quickly and forcefully in order to prevent its spread.

I would like to turn now to my second topic, where human rights laws appear to be leading the way without the many supporting structures that exist in other areas of human rights.

SEXUAL ORIENTATION

You may have heard that the Supreme Court of Canada recently decided, by a four to three majority, that a gay man could not claim discrimination on the basis of family status when he was denied a family benefit in employment. This case is one of several in which the assumptions and myths surrounding the situation of gay and lesbian persons, and their place in this society, have been re-examined. I believe that the changes which are occurring on this front are long overdue, but I am equally aware that these are matters of intense controversy in some quarters. I would like to outline some of the legal developments, and to explain the point of view of the Canadian Human Rights Commission on these matters.

Sexual orientation was not included among the list of prohibited grounds of discrimination when the *Canadian Human Rights Act* was enacted. Virtually from its inception, the Commission has called upon the government to amend the law to add sexual orientation. The basis for this recommendation is simple: it is founded on the belief that one's sexual orientation is and ought to be irrelevant to one's capacity to hold a job, obtain a bank account or get a seat on an airline. In this respect it is similar to the other grounds of discrimination listed in this Act, and as well, it is clear that widespread discrimination on the basis of sexual orientation has occurred in Canada. All of this led the Commission to support the inclusion of sexual orientation as a prohibited ground of discrimination.

This gained public support in 1985, with the Report of the Parliamentary Committee appointed to review the impact of the equality guarantee in the *Charter* on federal laws. The Committee recommended that sexual orientation be added to the law, and in its reply in 1986, the government gave the following specific pledge:

> The government will take whatever measures are necessary to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction.

At that time, a comprehensive review of the Act was underway, and a full package of amendments was expected soon.

Since then the government has not introduced the promised changes to the law, and the courts have been invited to fill the gap. The first case along these lines was the decision of the Ontario Court of Appeal in *Haig and Birch v. Canada*.[3] This case involved a challenge to the constitutionality of the *Canadian Human Rights Act*, due to its failure to include sexual orientation in the law. The challenge was launched by two men who had suffered discrimination, but had been denied access to the complaint procedures under the law due to this shortcoming in the law. The Commission intervened in the case, to support the constitutional argument that the failure to include sexual orientation in the statute amounted to a denial of the "equal

protection and equal benefit of the law without discrimination."[4] However, the Commission argued that the ground should be "read into" the law for a temporary period, during which Parliament could amend the law in order to bring it into conformity with the *Charter*.

This case was argued before the decision of the Supreme Court of Canada in *Schachter v. Canada*,[5] but when that decision was released the Court of Appeal applied it to the facts of this case. Mr. Justice Krever found that the appropriate remedy in this particular case was to "read in" sexual orientation as a prohibited ground. Mr. Justice Krever rested his analysis on the following assumptions which, in my opinion, are unchallengeable:[6]

> The social context which must be considered includes the pain and humiliation undergone by homosexuals by reason of prejudice toward them. It also includes the enlightened evolution of human rights social and legislative policy in Canada, since the end of the Second World War, both provincially and federally.

Mr. Justice Krever concluded that in the face of this constitutional challenge, the only real remedies available were to strike down the law, but suspend the operation of that order, or to read the missing words into the statute. Krever J.A. decided that, applying the guidelines established by the Supreme Court in *Schachter*, the proper remedy was to read the words into the statute.

He found that this remedy was appropriate because the words to be added were defined with sufficient precision, and the budgetary and operational impact of this addition would not be significant. Finally, Mr. Justice Krever said this about the presumed intention of Parliament:[7]

> In this case the group to be added is significantly smaller than the group now benefitting. Given the evidence in the material before the court on this application of the commitment of successive Ministers of Justice on behalf of their governments to amend the legislation to add sexual orientation to the list of prohibited grounds of discrimination, it is surely safe to assume that Parliament would favour extending the benefit... of the Act to homosexual persons over nullifying the entire legislative scheme... It is inconceivable to me that Parliament would have preferred no Human Rights Act over one that included sexual orientation as a prohibited ground of discrimination. To believe otherwise would be a gratuitous insult to Parliament.

Mr. Justice Krever ordered that the Act "be interpreted, applied and administered as though it contained `sexual orientation' as a prohibited ground of discrimination in s. 3 of that Act."[8]

Since this decision, the Commission has been accepting and investigating complaints of discrimination on the basis of sexual orientation. We have received about 30 such complaints since August 6th, 1992. And the views of Mr. Justice Krever as to the intent of the government were vindicated when, on December 10th, the Minister of Justice introduced a Bill into the House of Commons to amend the *Human Rights Act*, and included in this Bill was a provision which would add sexual orientation to the list of prohibited grounds. Also included in the Bill is a definition of "marital status" which would restrict its scope to "cohabiting with an individual of the opposite sex in a conjugal relationship for at least one year."

This leads me to the second important decision in this area: *Attorney General of Canada v. Mossop*.[9] This case concerned a claim for bereavement leave by a federal employee, Brian Mossop. He claimed this leave when the father of his partner died, and under the collective agreement such leave was available upon the death of an "immediate family member." Mossop and his partner had lived together for over ten years. They had joint ownership of a house and joint bank accounts; they were beneficiaries of each other's wills, and they shared the daily responsibilities of running a home and maintaining a relationship. They had a sexual relationship. Their families and friends knew them as a couple.

For the Commission, they were members of a family, although perhaps not the "traditional family." As we all know, the traditional family does not exist for many Canadians today, and our view of the definition of family status is that it is broad enough to accommodate all sorts of long-lasting intimate personal relationships of mutual sharing and support. It is the view of the Commission that if an employer makes family benefits available to an employee, these benefits must be distributed in a non-discriminatory way.

A Human Rights Tribunal agreed with the Commission's approach to this complaint, which was filed on the basis of "family status," since at that time sexual orientation was not a prohibited ground of discrimination. This was overturned by the Federal Court of Appeal.

The Supreme Court of Canada rejected the Commission's appeal, by a four to three majority. The majority of the Court found that the claim of Mossop was so closely connected with his sexual orientation that it could not stand on family status. And since sexual orientation was not a prohibited ground of

discrimination when the case arose, the approach of the Commission and the Human Rights Tribunal could not be accepted.

Chief Justice Lamer traced the history of this case, and noted that after the *Mossop* case was argued before the Court, the *Haig* decision which added sexual orientation as a prohibited ground was released. The Court asked the parties whether they wished to make submissions on the relevance of *Haig* to the *Mossop* case, and the Commission and the other parties did so in November 1992. The Commission argued that the *Mossop* case could still stand as a family status case, since the major rationale for a narrower interpretation of the term "family status" was the absence of sexual orientation from the Act. With the *Haig* case, it was argued, this rationale was gone, and thus the Court should adopt a broad interpretation.

Chief Justice Lamer, however, appears to have thought that the Commission should raise a constitutional issue for the first time before the Court, in order to re-litigate the *Haig* case. We saw several problems with such an approach; first, the Court has traditionally been reluctant to accept constitutional arguments which were not raised below. Second, in order to raise such an issue, it would have been necessary to amend the complaint upon which the entire case was based, seven years after the complaint was first filed and after the case had been argued before the Tribunal and the Court of Appeal on another basis. The absence of an adequate record on the matter was also a concern. In the end, the Commission decided to pursue the matter on its merits, but a majority of the Court would not accept our arguments.

In her dissenting opinion, Madame Justice L'Heureux-Dubé states that Courts should defer to the decisions of expert bodies such as the Human Rights Commission or the Tribunal, on matters of law as well as of fact. As an aside, I would commend this opinion to any of you who are interested in the issue of judicial review of administrative agencies; in my opinion it is a masterful analysis of the competing policy and practical considerations which are at play in this area of the law.

Madame Justice L'Heureux-Dubé examined a great deal of research and social science evidence on the modern family, and she concluded that the traditional family unit no longer had a monopoly on the term in Canada. Therefore, she was prepared to defer to the Tribunal's decision on this matter, since it had adopted an interpretation of the term which it could reasonably bear. She ruled that the Commission's approach to this issue, by which a certain number of criteria could be examined in order to determine whether a family relationship existed, was an appropriate way of resolving the issue.

In the end, the *Mossop* decision did not finally resolve any major issues, since the majority of the Court went out of their way to emphasize that their decision did not address discrimination on the basis of sexual orientation. The Commission will review its current cases, and on the basis of the *Haig* decision it will continue to deal with cases based on sexual orientation.

All of this shows that the change in this area of the law has largely been driven by the courts rather than the legislatures, at least in the federal sphere. Sexual orientation is now listed as a prohibited ground of discrimination in seven jurisdictions: Quebec, Ontario, Manitoba, Nova Scotia, New Brunswick, British Columbia and the Yukon. The challenges which have come to the forefront recently have not been about the basic right to equal treatment in terms of getting or keeping a job. Instead, issues of equal entitlement to employment and other benefits has been the main point of debate.

The Canadian Human Rights Commission has adopted the view that if employee benefits are made available to persons in long-term, stable and interdependent relationships, these benefits ought to be made available regardless of the sexual orientation of the recipient. This is, in our view, simply a matter of fairness. And to those who argue that this will impose a crushing cost on employers or society at large, our response is that the facts simply do not bear this out. A recent study by a major benefits consulting group estimated the total costs associated with such a system to be approximately 1% of pension or benefits costs. Remember, too, that employees who claim family benefits generally are required to contribute more. Finally, it is important to realize that not all gay and lesbian individuals live in such relationships, and many of those who do will not choose to claim employment benefits either due to a fear of discovery or because it would not be economically advantageous to do so.

The interesting thing about these changes is that they are coming rapidly, but they are mainly being imposed from outside rather than adopted on a voluntary basis. This may contribute to some of the controversy which has accompanied these changes, but it also points to a failure to adapt to the changes which have been coming since 1985, with the coming into force of the equality guarantees. Many legal and benefits systems have not been generating these changes from within, and now they are being imposed from outside. In my opinion, though this was probably inevitable, it does create a certain amount of hostility and controversy that does not always contribute to a rational resolution of the challenges we face.

CONCLUSION

This brief discussion of two areas of rapid and profound change in the human rights field is only an introduction. There are many other areas to explore, and no doubt new challenges will emerge as soon as we have sorted out the current ones. I would like to close with some reflections about the changes I have discussed.

In my view, these very different areas share several things in common: the changes have occurred due, in large part, to the levers for change which the legal system now makes available to disadvantaged groups. And in today's world, we should all remind ourselves of the glory and the beauty of a system which can accomplish such changes without bloodshed and in accordance with the rule of law.

These changes point out that the legal system is but one part of a broader legal, social and political structure, and they also illustrate the need for all parts of the system to play a role in accomplishing lasting and meaningful social change. While the law may recognize and guarantee formal equality, equality in fact — equality which can be lived and felt by real people in their everyday lives — requires much more than mere legal pronouncements. It requires sustained and rational accommodation on the part of many interlocking systems in our society.

I believe that more than ever before, these systems recognize equality as an urgent imperative in this society, even if sometimes the struggle is long and hard, and the progress is uneven. I remain convinced that the face of human rights in Canada has changed for the better in recent years, and I believe that this will continue. There is no better time to re-dedicate ourselves and our society to the great hope of a world in which all are treated with concern and respect, free and equal in dignity and rights.

Michelle Falardeau-Ramsay, Q.C., Deputy Chief Commissioner, Canadian Human Rights Commission.

1. (1954), 347 U.S. 483.
2. [1992] C.H.R.D. No. 12.
3. (1992), 9 O.R. (3d) 495 (Ont. C.A.).
4. *Canadian Charter of Rights and Freedoms*, s. 15, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.
5. [1992] 2 S.C.R. 679.
6. *Haig and Birch, supra*, note 3 at 503.
7. *Ibid.* at 507.
8. *Ibid.* at 508.
9. (25 February 1993) (S.C.C.) [unreported].

THE SUPREME COURT AND MANDATORY RETIREMENT: SANCTIONING THE STATUS QUO

Shirish P. Chotalia

The recent decision of *Dickason* v. *The Governors of the University of Alberta*[2] casts a long shadow over these words of Justice McIntyre. In *Dickason*, a majority composed of four justices of the Supreme Court upheld mandatory retirement at the age of 65 years as "reasonable and justifiable" discrimination within the meaning of s. 11.1 of Alberta's *Individual Rights' Protection Act*.[3] In taking this position, the Court retracts from the broad and liberal interpretation given to human rights legislation in a Charter conscious era.

> We all age chronologically at the same rate, but aging in what has been termed the functional sense proceeds at widely varying rates and is largely unpredictable. In cases where concern for the employee's capacity is largely economic, that is where the employer's concern is one of productivity, and the circumstances of employment require no special skills that may diminish significantly with aging, or involve any unusual dangers to employees or the public that may be compounded by aging, it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the [Human Rights] Code. In such employment, as capacity fails, and as such failure becomes evident, individuals may be discharged or retired without cause.[1]

Olive Dickason, the Appellant in this case, a tenured professor at the University of Alberta, was forced to retire at the age of 65 years pursuant to the terms of the collective agreement between the University and its academic staff. She filed a complaint with the Alberta Human Rights Commission alleging that the mandatory retirement policy discriminated against her on the basis of age, and thereby contravened s. 7 of the *Individual Rights' Protection Act* of Alberta. Section 11.1 of that statute provides that a contravention of the Act shall be deemed not to have occurred if the respondent shows that the alleged contravention was reasonable and justifiable in the circumstances. The initial Board of Inquiry found in Professor Dickason's favour, as did the Court of Queen's Bench. However, the Court of Appeal overturned the lower Court decision. The Supreme Court then upheld the Court of Appeal decision.

In the majority judgment, Justice Cory addressed the relationship between the *Oakes*[4] test as it applies in assessing Charter violations and "reasonable and justifiable" discrimination as referred to in the Alberta human rights statute. He affirmed that the *Oakes* test applies to private defendants provided that "it is applied without any trace of deference to a private defendant such as an employer or landlord."[5]

Since the advent of the *Charter of Rights and Freedoms*, the Supreme Court has repeatedly confirmed the "near constitutional" nature of human rights legislation, meaning that it incorporates certain basic goals of our society.[6] The majority here did not depart from voicing repeated warnings that "*no* deference should be given to the policy choice of the defendant as would be the case in the s. 1 analysis of a social policy."[7] In other words, the Court acknowledged in principle that while legislatures and Parliament are to be given due deference and latitude when legislating between competing societal groups,[8] a private actor engaged in discriminatory practices is not to be given the same latitude.

This is a rational position, given that through our democratic institutions legislators are legitimately placed to create social policy, while rights offenders have no such mandate to justify discriminatory practices. Deference to legislatures has been upheld in *Irwin Toy*[9] and *McKinney* v. *University of Guelph*,[10] given their mandate to legislate between competing interest groups within society with respect to policy issues, but this reasoning cannot be transposed to the private defendant:[11]

> With very few exceptions, employers are not representative of the general public. They are not subject to democratic checks and balances. They are not in the business of making difficult decisions of social policy and mediating between competing claims. They cannot be expected to be free from private interest in deciding whether to adopt a policy that infringes upon protected rights.

Further, as Professor Hogg points out in his constitutional law text:[12]

> The real threat to egalitarian civil liberties in Canada comes not from legislative and official action, but

> from discrimination by private persons — employers, trade unions, landlords, realtors, restaurateurs and other suppliers of goods or services. The economic liberties of freedom of property and contract, which imply a power to deal with whomever one pleases, come into direct conflict with egalitarian values...

However, after taking this laudable position, the Court went on to hold that the *Oakes* test is appropriate only to the extent that it is applied with "a large measure of flexibility" and with "due regard to the context ... the regulation of private relationships."[13] This position emasculates the *Oakes* test which requires that there be a pressing and substantial governmental objective, that the legislative means are rationally connected to those objectives, and that the means constitute a minimum impairment of the *Charter* rights abridged. In stating that "section 11.1 should not be rigidly constrained by the formal categories" of the *Oakes* test, the Court diminishes the quasi-constitutional nature of human rights legislation, demoting private discrimination to a lower standard of justification than state discrimination.

The *Oakes* test has not been applied in a vacuum, but through a careful contextual analysis of the rights and liberties at stake.[14] Further, on many occasions the Court has indicated that the *Oakes* test is not to be applied in a rigid and mechanistic fashion:[15]

> The analytical framework of *Oakes* has been continually reaffirmed by this Court, yet it is dangerously misleading to conceive of s. 1 as a rigid and technical provision, offering nothing more than a last chance for the state to justify incursions into the realm of fundamental rights. From a crudely practical standpoint, Charter litigants sometimes may perceive s. 1 in this manner, but in the body of our nation's constitutional law it plays an immeasurably richer role, one of great magnitude and sophistication.

Antithetically, the Court's application of the flexible, contextual *Oakes* test here fails to exemplify their stated position that "no deference is to be accorded to private discriminators." The majority found that the mandatory retirement policy of the University is rationally connected to the objectives of renewing faculty by introducing younger members "who may bring new perspectives to their disciplines,"[16] by preserving the tenure system, by facilitating planning and management and by protecting "retirement with dignity" for faculty members.[17] Finally, it made the cursory finding that in the "University setting, the policy of mandatory retirement withstands the minimal impairment test."[18]

In upholding the status quo, Justice Cory appeared to draw a distinction between the various grounds of discrimination: ".:. age differs from other grounds of discrimination since everyone of no matter what religion, colour, social origin, nationality or gender becomes older with the passage of time."[19] I would suggest that the analogous grounds approach as set out in *Andrews* v. *Law Society of B.C.*[20] not only confirms that discrimination based on other non-legislated grounds is prohibited by the *Charter*, but also that no one ground warrants greater or lesser constitutional protection than another.[21] Section 1 may safeguard "reasonable exercises in line-drawing"[22] but it does not diminish either the validity of the ground itself, or the careful analysis required to justify discrimination as in the case with any other violated *Charter* right.

In contrast, the reasoning in the minority judgment written by Justice L'Heureux-Dubé is fully in keeping with human rights and *Charter* interpretation precedents. First, Justice L'Heureux-Dubé confirmed the role of appellate courts in such cases: "... curial deference to the findings of the Board of Inquiry is consistent both with principle and precedent."[23] In this case the Board of Inquiry had heard *viva voce* testimony from twenty witnesses before concluding that although there was some rational connection between the policy and the University's goals, mandatory retirement was not vital to achieving the stated objectives. The effect of the policy was disproportionate to its objectives. Justice L'Heureux-Dubé then agreed with the majority in distinguishing *McKinney*[24] from the within case on the grounds that no legislative deference is to be accorded to a private offender. This position is consistent with the corollary minority position that the *Oakes* test is to be stringently applied. Given the similarity between the intent, wording and historical context of s. 1 of the *Charter* and s. 11.1 of the *IRPA*, the strict standard of proof articulated in *Oakes* is the appropriate test. "Simply put, this Court owes no deference to the policy decisions of a private employer, and the use of the flexible standard in these circumstances is completely unjustified."[25]

Justice L'Heureux-Dubé paraphrased Wilson J. in *Andrews* v. *Law Society of British Columbia*[26] in stating that as s. 7 of the *IRPA* "is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government [or in this case, the respondent University] to justify the type of discrimination against such groups is appropriately an onerous one."[27] Justice L'Heureux-Dubé thus applied the *Oakes* test to the University's mandatory retirement policy. She squarely confronted Justice Cory's conclusion that "a collective agreement cannot be readily dismissed from consideration" characterizing it as a "substantial departure from this Court's previous statements on the legality of contracting out of

human rights legislation." She is correct.[28] The majority decision views the collective agreement as a factor contributing towards the reasonableness of the discriminatory practice in issue, provided that it was freely negotiated and does not discriminate "unfairly" against minorities. With due respect, this position is absolutely contradictory to the fundamental principles of human rights laws and the *Charter*, and is a dangerous precedent to embrace.[29] Public policy requires that human rights which respect the inherent dignity of the individual cannot be the "common currency of contracts, but values which, by their very nature, cannot be bartered."[30]

As in *McKinney* the University's stated objectives are here taken to be "pressing and substantial," but according to Justice L'Heureux-Dubé they are not rationally connected to a policy of mandatory retirement. She did not accept the University's argument that the elimination of mandatory retirement will threaten the tenure system. The function of tenure is to protect professors from dismissal based upon unpopular academic views, not to shield them from individual assessment for incompetence. Indeed, alternative mechanisms for assessing competence exist and are in force, including peer evaluation. The evidence before the Board of Inquiry indicated that other universities who had abolished mandatory retirement had not abolished tenure. Accordingly there is no established link between the objectives and the means. Nor does the opening of positions to younger academics guarantee the infusion of fresh ideas. This claim is based upon stereotypical notions of older persons. Nor is the abolishment of mandatory retirement necessarily related to underfunding problems as very few persons choose to continue working after the age of 65 years: one fifth of one percent.[31] Finally, pursuant to the *Oakes* test, the means do not constitute a minimal impairment of individual rights because individual assessments of competence are appropriate and existent.

In dealing with the proportionality argument, Justice L'Heureux-Dubé rejected the majority position that mandatory retirement results in the benefits of financial compensation through secure and reasonable pension provisions, given that the University failed to adduce evidence regarding the economic consequences of the elimination of the policy. "The devastating effects that forced retirement has on a worker's finances, and self-esteem are grossly disproportionate to any advantages accrued to the University by its discriminatory practice...."[32] Further, Justice L'Heureux-Dubé made a salient point when she noted briefly that "women are penalized, in particular, because they tend to have lower paying jobs which are less likely to offer pension coverage, and they often interrupt their careers to raise families."[33]

The careful and perspicacious *Oakes* analysis of Justice L'Heureux-Dubé for the minority authenticates the expressed view of all the Justices that a private discriminator is not to be given the deference normally accorded to a legislature. Unfortunately, it is only the minority of the Court that is not afraid to challenge the status quo when the protection of civil liberties so dictates. Lord Denning once said: "You need have no fear. The Judges ... have always in the past — and always will — be vigilant in guarding our freedoms. Someone must be trusted. Let it be the judges."[34] The majority decision in *Dickason* leaves us pondering the optimism of Lord Denning's statement.[35]

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1. *Ontario Human Rights Commission* v. *Borough of Etobicoke*, [1982]1 S.C.R. 202.

2. (24 September 1992) (S.C.C.) [unreported].

3. S.A. 1972, c. 2. The section states: "A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances." This particular section came into force in 1985 after amendments to the Act removing the provision that prevented the application of the Act to those over age 65 years. I would suggest that this history reflects a legislative intent to abolish mandatory retirement at 65 years of age.

4. *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

5. *Dickason, supra*, note 2.

6. *Robichaud* v. *Canada (Treasury Board)*, [1987] 2 S.C.R. 84. See also *Ontario Human Rights Commission and O'Malley* v. *Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536.

7. *Dickason, supra*, note 2.

8. See *Irwin Toy Ltd.* v. *Quebec A.G.*, [1989] 1 S.C.R. 927 and *R.* v. *Edward Books and Art Ltd.*, [1986] 2 S.C.R. 713.

9. *Ibid.*

10. [1990] 3 S.C.R. 229.

11. *Alberta Human Rights Commission Factum* at 32.

12. P. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 786.

13. *Dickason, supra*, note 2.

14. See the early case of *R* v. *Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295. Subsequent decisions have confirmed this principle of Charter application.

15. *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.

16. *Dickason, supra*, note 2.

17. *Ibid.*

18. *Ibid.*

19. *Ibid.* Interestingly the Canadian *Bill of Rights* did not contain protection for discrimination on the grounds of age; only in subsequent anti-discrimination legislation leading up to the *Charter* was "age" included as a protected ground.

20. [1989] 1 S.C.R. 143.

21. See *Re Shewchuk and Ricard* (1986), 28 D.L.R. (4th) 429 (B.C.C.A.) as a further example.

22. See *R.* v. *Brooks* (1989), 93 A.R. 1 (Alta. C.A.).

23. *Dickason, supra*, note 2.

24. *Supra*, note 10. In *McKinney* the Court decided that mandatory retirement at a specified age was not constitutionally impermissible if legislated by Parliament or a legislature. This is in contrast to the within case where the Alberta legislature has not simply legislated to prohibit mandatory retirement. In *McKinney*, Justices L'Heureux Dubé and Wilson dissented from the majority decision stating that, on the assumption that University policies are law, they are discriminatory within the meaning of s. 15(1) of the *Charter*, but constitute reasonable limits under s. 1.

25. *Dickason, supra*, note 2.

26. *Supra*, note 20.

27. *Dickason, supra*, note 2.

28. See *supra*, note 1 at 213-14: "It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy... The Ontario Human Rights Code has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract."

29. *Ibid.* Unfortunately an erosion of this principle has been occurring. See *McKinney, supra*, note 10 wherein the majority held that the acceptance of a contractual obligation might well, in some circumstances, constitute a waiver of a Charter right, especially in a case like mandatory retirement.

30. *Dickason, supra*, note 2. Justice L'Heureux-Dubé then accepted that it may be a factor in the exceptional case although it is not a factor in the within case.

31. Canada Labour Board, as quoted in *supra*, note 2. Indeed Justice Murray of the Court of Queen's Bench noted that the "real villain" in this situation is the demographic bulge of academics currently in their forties, rather than those who are over the age of sixty-five.

32. *Dickason, supra*, note 2.

33. *Dickason, supra*, note 2.

34. "Misuse of Power" (1981) 55 Australian L.J. 720 at 726.

35. In this case Olive Dickason had begun her academic career at the age of 55, had earned the title of "Professor Emeritus," and had just recently written a nationally acclaimed book. Her qualifications were never in issue.

DISTINGUISHING *ZUNDEL* AND *KEEGSTRA*

Bruce P. Elman and Erin Nelson

INTRODUCTION

In 1984, Ernst Zundel, a commercial artist living in Toronto, was charged with two counts of spreading false news contrary to s. 181 (formerly s. 177) of the *Criminal Code*. Section 181 of the *Criminal Code* provides:

> Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

The charges arose from the publication of two articles: *The West, War and Islam!* and *Did Six Million Really Die? The West, War and Islam!* was not distributed in Canada and Zundel was, consequently, acquitted of the charge pertaining to it.

Did Six Million Really Die? was a 32 page pamphlet which was ostensibly written by Richard Harwood of the University of London, although the actual author of the piece was Richard Verral, then editor of a British neo-Nazi newspaper. Zundel had added a foreword and an afterword to the document. This pamphlet asserted that the Holocaust did not occur, that there was never an official Nazi policy of extermination of the Jews and other non-aryan peoples, and that allegations regarding the Holocaust are not "merely ... exaggeration, but an invention of post-war propaganda."[1] The pamphlet goes on to characterize the Holocaust as "the most colossal piece of fiction and the most successful of deceptions...."[2]

Further, the pamphlet alleges that Nazi concentration camps were only work camps and that the Russians built the gas chambers following the end of the Second World War. Several other false allegations were made in the document, including the assertion that *The Diary of Anne Frank*[3] was a work of fiction. Zundel's defence at trial was that he had an honest belief in the truth of the work. This defence was not accepted by the jury and he was convicted and sentenced to 15 months imprisonment and three years probation. During the probation period, he was not to publish anything on the subject of the Holocaust.

The First Appeal:

The trial judgment was appealed, on numerous grounds, to the Ontario Court of Appeal. In the decision, released on January 23, 1987, the Court of Appeal overturned the verdict and ordered a new trial because of errors that had been made in the conduct of the trial. Only the Court's discussion of the constitutional issue has relevance here.

The constitutional issue considered by the Court was whether s. 181 violated s. 2(b) of the *Canadian Charter of Rights and Freedoms*: the guarantee of freedom of expression. The Court first examined the origin and history of the *Code* provision, dating back to *De Scandalis Magnatum* in 1275. This offence was primarily aimed at protecting "the peers and other great men against slanderous lies which might cause mischief to the public if the perpetrator were not punished."[4] These statutes were repealed in England in 1888, but, nonetheless, the offence found its way into the draft *Criminal Code* of 1892. Until the 1955 amendments of the *Code*, the offence was listed under "Part VII: Seditious Offences, Title II: Offences Against Public Order, Internal and External." In 1955, the section (then s. 166) was moved into "Part IV: Sexual Offences, Public Morals and Disorderly Conduct", under the sub-heading of "Nuisances."

The Ontario Court of Appeal held that the expression prohibited by s. 181 (wilful assertions of fact(s) which are false to the knowledge of the person who publishes them, and which cause or are likely to cause injury or mischief to the public interest) did not fall within the protected sphere of freedom of expression (s. 2(b)). The Court further held that even if their decision with regard to s. 2(b) was erroneous and s. 181 did violate the guarantee of freedom of expression, the section would still be valid as a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society" (s. 1 of the *Charter*).

This ground of appeal thus failed and the section was held to be constitutionally valid. Nonetheless, because of the errors made by the trial judge, particularly with respect to jury selection and misdirection on elements of the offence, the conviction was quashed and a new trial ordered. The Supreme Court of Canada dismissed an application for leave to appeal from the Ontario Court of Appeal judgment.[5]

The Second Trial:

A new trial was held, and on May 13, 1988, a second jury delivered a guilty verdict. Ontario District Court Judge Thomas sentenced Zundel to 9 months imprisonment. Zundel did not give evidence at this trial, as he had in the first trial. Judge Thomas stated that the sentence was less severe than that given at the first trial because there was "no evidence that

the accused had actually been able to have any significant part of the community react to his beliefs."[6]

The Second Appeal:

Zundel also appealed the second trial verdict, both in regard to his conviction and his sentence. The appeal judgment was released on February 5, 1990 but no discussion of the constitutionality of s. 181 was included.

THE DECISION OF THE SUPREME COURT OF CANADA

On the 15th of November, 1990, the Supreme Court of Canada granted leave to appeal only with respect to the Charter issue: whether s. 181 of the *Criminal Code* was constitutionally valid. Although the constitutional questions involved challenges based upon both ss. 2(b) (freedom of expression) and 7 (fundamental justice) of the *Charter*, only the s. 2(b) issue was discussed in the majority opinion. Section 2(b) of the *Charter* states:

> Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Charter litigation, usually, involves a two-step process: (i) Does the statutory provision violate a *Charter* right? and (ii) Is it a justifiable limitation under s. 1 of the *Charter*?

Violation of the Right:

Is s. 181 of the *Criminal Code* a violation of s. 2(b) of the *Charter*? This involves two inquiries as posed in *Irwin Toy*:[7]

> (i) Is the prohibited expression protected by s. 2(b)? Does it attempt to convey meaning? Is it violent in form?
> (ii) Is the purpose or effect of the government action in question (in this case s. 181) to restrict such expression?

In resolving this issue, Justice McLachlin reviewed the prior jurisprudence on freedom of expression. She noted that, in *Irwin Toy*, the Court held that s. 2(b) protected "minority beliefs which the majority regard as wrong or false," and that the *Keegstra*[8] case stood for the proposition that content is irrelevant in determining whether or not the expression is protected. All expressive activity is protected by s. 2(b) unless it is "violent in form." The Court refused to concede the Crown's argument that lies or false statements can never have any value and therefore should not be protected by s. 2(b). Justice McLachlin stated that what is "false" cannot be defined with enough precision "to make falsity a fair criterion for denial of constitutional protection."[9]

The Court held that the type of speech prohibited by s. 181 fell within the protected sphere of s. 2(b) and that the purpose and effect of s. 181 was to suppress such speech. Thus, the Court held that s. 181 was a violation of the constitutional guarantee of freedom of expression.

Section 1 Analysis:

Section 1 of the *Charter* provides:

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

In dealing with the s. 1 inquiry, the Court followed the now familiar test as set out in *R.* v. *Oakes*:[10]

1. The provision must address a legislative objective which is sufficiently important to warrant overriding a constitutional right. The objective of the legislation must be pressing and substantial.
2. The means used to achieve the objective must be proportional:
   (i) the means must be rationally connected to the objective;
   (ii) the means must impair the *Charter* right or freedom as little as possible;
   (iii) the effect of the means must be proportional to the legislative objective.

Objective:

Justice McLachlin found that there was no real evidence available as to the purpose or objective underlying s. 181. The original purpose of the false news provision was the preservation of "political harmony." However, in removing the section from that part of the *Code* entitled "Sedition" and placing it in the part entitled "Nuisance," Parliament seemed to have departed from s. 181's original political purpose. Justice McLachlin rejected the suggestion that the purpose of s. 181 had become the preservation of "social harmony," as this was a "shifting purpose" which, in her opinion, was not permissible.

According to Justice McLachlin, the Court must look to the intent of the legislature at the time of enactment or amendment of the relevant section. She noted that the Court "cannot assign objectives, nor invent new ones according to the perceived current utility of the impugned provision...."[11]

Thus, she concluded that "Parliament (had) identified no social problem, much less one of pressing concern, justifying s. 181 of the Criminal Code."[12]

To bolster her argument that no pressing and substantial objective could be ascribed to s. 181, Justice McLachlin noted that, in 1986, the Law Reform Commission of Canada had recommended the repeal of s. 181, as it was "anachronistic." Furthermore, no other "free and democratic" countries had provisions similar to s. 181. As to some provisions alluded to by the dissent, the majority noted that these sections were all far more specific than s. 181 and, in fact, appeared to be more comparable to s. 319(2) of the *Code* (wilful promotion of hatred) than to s. 181.

Finally, the section has been used infrequently since 1955. This lent further support to the argument that no legislative objective important enough to warrant overriding a *Charter* right could be attributed to s. 181. Justice McLachlin stated that the "purpose" branch of the *Oakes* test had not been met by s. 181. She further stated that even if s. 181 did have a valid and important legislative objective (as had been argued by the dissent), it would still fail under s. 1 because it could not meet the proportionality test.

Rational Connection:

Although the majority found no articulated objective underlying s. 181, let alone one that was pressing and substantial, for the sake of the analysis, they assumed that the section was rationally connected to the objective of "promoting social harmony." The majority proceeded to undertake the rest of the proportionality test.

Minimal Impairment:

Justice McLachlin held that the section was not a minimal impairment of the guarantee of freedom of expression. According to Justice McLachlin, the "fatal flaw" of s. 181 was its overbreadth, particularly in relation to the "undefined and virtually unlimited reach of the phrase `injury or mischief to a public interest'."[13]

Justice McLachlin distinguished s. 181 from s. 319(2) by contrasting the term "hatred against any identifiable group" with "mischief to a public interest," which she asserted was "capable of almost infinite extension."[14] The two sections were further distinguished in that s. 319(2) was restricted to the prohibition of hate propaganda, while s. 181 was not limited in this manner and could, therefore, affect a "broad spectrum of speech, much of which may be argued to have value."[15] Justice McLachlin also mentioned that while the expression at issue in the case at bar was arguably of little or negative value, the issue before the court was the value of all expression which could potentially come within the reach of s. 181.

Although there was agreement among all members of the Court as to the potential harm which could result from the appellant's publications, in the result, the Supreme Court of Canada struck down s. 181 of the *Criminal Code* as a violation of s. 2(b) of the *Charter* which could not be upheld as a reasonable limit under s. 1, and entered an acquittal for Zundel.

DISSENTING JUDGMENT: *R.* v. *ZUNDEL*

Justices Cory and Iaccobucci delivered dissenting reasons with Justice Gonthier concurring. In the dissent's view, s. 181 of the *Criminal Code*, although a violation of the freedom of expression guarantee in s. 2(b) of the *Charter*, was justified as a reasonable limit under s. 1. The divergence between the majority and dissenting views turns, as it so often does, on the s. 1 analysis.

Section 1 Analysis:

Objective:

The dissent concluded that the aim of s. 181 was "to prevent the harm caused by the wilful publication of injurious lies" which "in turn promotes the public interest in furthering racial, religious and social tolerance."[16] To support the importance of this objective, other *Charter* provisions were used, as were international instruments and "legislative responses in other jurisdictions."

The *International Convention on the Elimination of All Forms of Racial Discrimination*,[17] the *International Covenant on Civil and Political Rights*,[18] and similar instruments were cited by the dissent "to emphasize the important objective of s. 181 in preventing the harm caused by calculated falsehoods which are likely to injure the public interest in racial and social tolerance."[19]

Sections 15 (equal protection) and 27 (enhancement of multicultural heritage) of the *Charter* were also employed by the dissent in attempting to support the importance of s. 181's objective.

Proportionality:

The dissent concluded that s. 181 limited "only that expression which is peripheral to the core rights protected by s. 2(b)."[20] According to the dissent:[21]

> [A] careful examination of the philosophical underpinnings of our commitment to free speech reveals that prohibiting deliberate lies which foment

> racism is mandated by a principled commitment to fostering free speech values.

The dissent further held that they were bound to follow the *Keegstra* decision and, thus, it was "appropriate to limit expression protected by s. 2(b) under s. 1 where such expression threatens the dignity of members of the target group and promotes discrimination ...."[22]

Rational Connection:

Once the dissent had identified the objective of s. 181 as the promotion of "social harmony," they had little difficulty in finding that s. 181 met the "rational connection" branch of the proportionality test.

Minimal Impairment:

In this component of the s. 1 analysis, the dissent began with an examination of the text of s. 181. The dissent argued that s. 181 was a "minimal intrusion" on freedom of expression because of the very heavy onus placed on the Crown in order to obtain a conviction. The Crown was required to prove: (i) the wilful publication of false factual statement(s) that the publisher knew were false and (ii) that the statement caused or was likely to cause injury to a public interest. All of these requirements were in an accused's favor, resulting in only a trivial encroachment on the s. 2(b) guarantee of freedom of expression.

In the majority decision, Justice McLachlin identified the main defect in s. 181 as being overbreadth. The dissent argued that s. 181 was not overly broad. In making this argument, the dissent must overcome the difficulty presented by the text and, in particular, by the phrase "cause or are likely to cause injury to a public interest." No restriction on the meaning of the phrase "injury or mischief to a public interest" is found in the section. Numerous interpretations of that phrase are available to a trier of fact and, thus, there is potential for abuse.

Finally, in spite of the existence of hate propaganda legislation (*Criminal Code* s. 319(2)) the dissent held that s. 181 "still fulfils an important role in a multicultural and democratic society ... (in emphasizing) the repugnance of Canadian society for the wilful publication of known falsehoods that cause injury to the public interest through their attacks upon groups identifiable under s. 15 of the *Charter* ...."[23]

Proportionality Between Effects and Objective:

The dissent held that, given the minimal worth of the expression caught by s. 181, and the narrow definition of the section, the effects of the section did not outweigh Parliament's objective. Once again, this analysis turns on the validity of the dissent's earlier decision that the promotion of "racial harmony" is a pressing and substantial objective underlying s. 181.

Although the reasons of the dissent are compelling, they are based on errors. The dissenting justices appear to have been motivated by grave concern with regard to the type of expression at issue in this particular case: Holocaust denial literature "disguised as authentic research."[24]

ZUNDEL AND *KEEGSTRA*: A COMPARISON

Zundel and the earlier case of *R.* v. *Keegstra*[25] both involved the dissemination of anti-semitic propaganda. As noted earlier, Ernst Zundel was originally convicted under s. 181 of the *Code* for publishing and distributing Holocaust denial literature. James Keegstra was an Alberta school teacher who was convicted of wilfully promoting hatred contrary to s. 319(2) of the *Criminal Code* for "systematically denigrating Jews and Judaism" in his classes. While s. 181 was struck down as an infringement of s. 2(b) of the *Charter* that could not be saved by s. 1, the Supreme Court of Canada upheld s. 319(2) as constitutionally valid. Both provisions were found to infringe freedom of expression; the difference in the results arises from the s. 1 analyses. Section 319(2) provides:

> Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
> (b) an offence punishable by summary conviction

Specific statutory defences are provided in s. 319(3):

> No person shall be convicted of an offence under subsection (2)
>
> (a) if he establishes that the statements communicated were true;
> (b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;
> (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
> (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

The two provisions are located in different parts of the Code; s. 181 is found under the heading of "Nuisance," while s. 319(2) is found in the "Hate Propaganda" section. Other differences include:

i) Section 181 prohibits *wilfully publishing a false statement tale or news*; the content of a statement which may be prohibited is not specifically discussed in the provision. There is no indication as to whether Parliament's intention was to prohibit any particular type of statement, tale or news (for example, racist speech), but rather the section appears to have been designed to catch every false statement uttered.

ii) Further, the section speaks of *mischief or injury to the public interest*, but nowhere in the provision is this ambiguous phrase defined. The section is not clear on exactly what type of injury or mischief it seeks to prohibit or prevent; the public interest could be defined in innumerable ways.

iii) Section 319(2), on the other hand, explicitly deals with the *wilful promotion of hate against identifiable groups*. "Identifiable group" is defined as "any section of the public distinguished by colour, race, religion, or ethnic origin."[26] Thus, the section is directed at preventing the growth of hate against vulnerable minorities.

iv) Arguably, s. 181 can apply to the publication of a false statement to only one other person. The definition of "publish" used in defamation law is that a statement has been published if it has been communicated to one person other than the one to whom the statement refers. Section 319(2), on the other hand, specifically exempts *private conversation* from its scope.

v) Section 319(3) provides for *statutory defences*, further clarifying the narrow reach of the provision. Specific statutory defences are not found in s. 181.

vi) No prosecution under s. 319(2) can be commenced without consent of the attorney-general.[27] Under s. 181, anyone may commence a prosecution.

As noted earlier, the difference lay in the outcome of the s. 1 analysis. The textual differences of the provisions appears to have been a major factor in the contrasting determinations of their constitutional validity.

Section 1 Analysis:

Objective:

The first step in the s. 1 inquiry is a determination of whether the provision is based upon a legislative objective which is sufficiently important to override a *Charter* right. In the *Zundel* case, as noted earlier, the majority of the Court (*per* Justice McLachlin) had considerable difficulty in attributing any purpose to s. 181, let alone a "pressing and substantial" one.

In *Keegstra*, on the other hand, Chief Justice Dickson was able to define the objective of s. 319(2) as the prevention of harm caused by expression which promotes hatred of identifiable groups. The finding that this was, in fact, the objective of the section was supported by the "close connection between the recommendations of the Cohen Report (Report of the Special Committee on Hate Propaganda in Canada) and the hate propaganda amendments to the Criminal Code."[28] Justice Dickson identified the two principal harmful effects of hate propaganda as (i) the response of humiliation and degradation engendered in members of the target group; and (ii) the influence such material has on the society as a whole by indirectly causing attitudinal changes.

The objective attributed to s. 319(2) was further supported by our obligations under international human rights instruments such as the *International Convention on the Elimination of All Forms of Racial Discrimination*[29] and the *International Covenant on Civil and Political Rights*,[30] as well as by other sections of the *Charter*.

In reviewing other *Charter* provisions, Justice Dickson focused on ss. 15 and 27, stating that these sections "represent a strong commitment to the values of equality and multiculturalism, and hence underline the great importance of Parliament's objective in prohibiting hate propaganda."[31] The conclusion reached by the Chief Justice with respect to the objective of s. 319(2) of the *Criminal Code* was that,[32]

> it would be impossible to deny that Parliament's objective in enacting s. 319(2) is of the utmost importance ... Parliament has recognized the substantial harm that can flow from hate propaganda, and in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension in Canada, has decided to suppress the wilful promotion of hatred against identifiable groups.

Proportionality:

Rational Connection:

In *Zundel*, there is little reference to the "rational connection" branch of the s. 1 justification test. In the *Keegstra* decision, Justice Dickson first discussed the "relation of the expression at stake to free expression values." The free expression values alluded to by the Chief Justice were: (i) the search for truth; (ii) the attainment of self-fulfilment by expressing oneself freely; and (iii) freedom of expression and the ability to participate in the political process. He concluded that "expression intended to promote the hatred of identifiable groups is of limited importance when measured against free

expression values."[33] This finding allowed the Court to more easily justify s. 319(2) as a reasonable limit on freedom of expression.

In terms of whether s. 319(2) was rationally connected to Parliament's objective, the Chief Justice stated:[34]

> [I]t would be difficult to deny that the suppression of hate propaganda reduces the harm such expression does to individuals who belong to identifiable groups and to relations between various cultural and religious groups in Canadian society.

The Court did not accept the contention that the media coverage of a trial was likely to lead to an increased following for the hate-monger. Although media attention is often focused on the proceedings pursuant to charges under s. 319(2), the message sent by the publicity, as well as by the trial process, is "the severe public reprobation with which society holds messages of hate directed towards racial and religious groups."[35]

As to the contention that government suppression of expression would serve only to make that expression more attractive, Justice Dickson argued:[36]

> Government disapproval of hate propaganda does not invariably result in dignifying the suppressed ideology. Pornography is not dignified by its suppression, nor are defamatory statements against individuals seen as meritorious because the common law lends its support to their prohibition ... [i]n this context, no dignity will unwittingly be foisted upon the convicted hate-monger or his or her philosophy ...

Finally, as to the argument that the Weimar Republic[37] had laws similar to s. 319(2) "and yet these laws did nothing to stop the triumph of a racist philosophy under the Nazis,"[38] Justice Dickson responded that no claim had been made that s. 319(2) could by itself prevent a tragedy like the Holocaust. That is not, however, a compelling reason for the repeal or removal of such laws from the Canadian *Criminal Code*.

Minimal Impairment

In the *Zundel* case, the Court concluded that s. 181 of the *Code* did not constitute a minimal impairment of freedom of expression. In particular, the phrase "public interest" caused a serious problem of "overbreadth."

With respect to this branch of the *Oakes* test, s. 319(2) was also challenged as being overbroad and unjustifiably vague, thus creating "a real possibility of punishing expression that is not hate propaganda."[39] In order to dispose of this contention, Justice Dickson focused on the terms of s. 319(2), the defences to the charge (in s. 319(3)), and the alternative modes available to fulfil Parliament's objective.

a. Terms of section 319(2):

Justice Dickson first noted that s. 319(2) specifically exempts private conversation from its scope. He stated that this was an indication that Parliament was not encroaching on the privacy of individuals through the use of the section.

The Chief Justice then examined the word "wilful." The presence of this word had previously been held to indicate that the *mens rea* requirement of s. 319(2) is that of *intention* to promote hatred, or the *knowledge* that promotion of hatred is foreseeable or substantially certain to result from an act done in pursuit of another purpose.[40] This demanding mental element requirement was held by Justice Dickson to severely limit the reach of s. 319(2):[41]

> [T]his stringent standard of *mens rea* is an invaluable means of limiting the incursion of s. 319(2) into the realm of acceptable (though perhaps offensive and controversial) expression. It is clear that the word "wilfully" imports a difficult burden for the Crown to meet, and in so doing, serves to minimize the impairment of freedom of expression.

The Alberta Court of Appeal (in the decision that formed the subject of the appeal to the Supreme Court) had held that "even a demanding *mens rea* component fails to give s. 319(2) a constitutionally acceptable breadth,"[42] largely because of the fact that the section does not require proof of actual hatred resulting from a communication. Justice Dickson held that to require proof of actual hatred "gives insufficient attention to the severe psychological trauma suffered by members of those identifiable groups targeted by hate propaganda."[43] He further stated that such a requirement would seriously weaken the section's effectiveness because a causative link between a statement and resulting hatred would be extremely difficult to prove.

The third aspect of s. 319(2) dealt with by Justice Dickson was the phrase "promotes hatred against any identifiable group;" in particular, the words "promotes" and "hatred" were examined. The Chief Justice found "promotes" to mean "active support or instigation,"[44] or "more than simple encouragement or advancement."[45] With respect to the word "hatred," Justice Dickson stated that it must be interpreted "according to the context in which it is found;" and that in the context of s. 319(2), the term "connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation."[46] In this sense, "hatred" is restricted to cover only the most "intense form of dislike."[47]

b. Defences to section 319(2):

The specific statutory defences provided in s. 319(3) were held to further limit the scope of the provision in that they are,[48]

> intended to aid in making the scope of the wilful promotion of hatred more explicit ... [t]o the extent that s. 319(3) provides justification for the accused who would otherwise fall within the parameters of the offence of wilfully promoting hatred, it reflects a commitment to the idea that an individual's freedom of expression will not be curtailed in borderline cases.

It was argued that the defence of truth (s. 319(3)(a)) was inadequate protection against an overly broad hate propaganda law. It would often be difficult to classify statements as being "true" or "false." This would result in a "chilling effect" on speech as persons who feared prosecution would exercise self-censorship. Justice Dickson, however, rejected this argument.

c. Alternative Modes of Furthering Parliament's Objective:

It was argued before the Court that criminal sanction was not necessary to meet the legislative objective in enacting s. 319(2); that in fact other methods would be more effective in combatting the harm resulting from hate propaganda. Among suggested alternatives were information, education and human rights legislation. The Court held that it is open to the government to employ several measures in order to fulfil its objective, and that "section 1 should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a *Charter* right ...."[49]

Section 319(2) was held by the court not to "unduly impair the freedom of expression."[50]

Effects of the Limitation

Justice McLachlin, in the *Zundel* decision, held that weighing the effects of the legislation against its objective led to the finding that the effects of s. 181 were not proportional to its objective. She stated:[51]

> Any purpose which can validly be attached to s. 181 falls far short of the documented and important objective of s. 319(2). On the other side of the scale, the range of expression caught by s. 181 is much broader than the more specific proscription of s.319(2).

In summarizing the s. 1 analysis, Justice McLachlin stated that "at virtually every step of the *Oakes* test, one is struck with the substantial differences between s. 181 and the provision at issue in *Keegstra*."[52] She held that s. 181 could not be related to any "existing social problem or legislative objective," and that the provision was, as concluded by the Law Reform Commission, "anachronistic."

In the *Keegstra* decision, Justice Dickson held that because of the limited value of the expression prohibited by s. 319(2), and because of the great importance of the legislative objective underlying the section, the effects of the provision on freedom of expression did not outweigh Parliament's objective.

CONCLUDING COMMENTS

1. The majority decision in the *Keegstra* case was written by Chief Justice Dickson, with Justices Wilson, L'Heureux-Dubé, and Gonthier concurring. The dissent, led by Justice McLachlin, included Justices Sopinka and LaForest. In the interval between the *Keegstra* and *Zundel* decisions, both the Chief Justice and Justice Wilson retired. Justice Wilson was succeeded by Justice Iaccobucci and the Chief Justice was replaced by Justice Stevenson, who has since also retired. The majority in the *Zundel* case was composed of Justices McLachlin, Sopinka, LaForest and L'Heureux-Dubé, with Justices Cory, Iaccobucci and Gonthier dissenting. It may be argued that the *Zundel* decision was the product of a changed composition of the Court since the judgment in *Keegstra*.[53] Nonetheless, Justice McLachlin's use of the *Keegstra* decision (a decision in which she dissented) as a benchmark for evaluation of the false news provision, confirms the constitutionality of the hate propaganda provision and the validity of the analysis employed in *Keegstra* itself.

2. It is clear that the different results in these two cases turned, in large measure, on the originally articulated objective underlying each provision. In *Zundel* the original objective behind s. 181 — to ensure political harmony in the realm — had no currency and, thus, was not pressing and substantial. The concept of "shifting purpose" was rejected by the majority. The original purpose behind the hate propaganda provisions still has relevance today (perhaps even more so than when it was legislatively adopted). Consequently, the purpose was seen as pressing and substantial. Thus, recent legislation has a better chance of passing muster than does older legislation (recall that s. 181 was described as "anachronistic"). This will remain so as long as the concept of "shifting purpose" is rejected by the courts. Undoubtedly, this issue will be revisited in future cases.

3. The other salient observation arising from a comparison of the judgments is that s. 319(2) was upheld because of the narrow drafting of the section and the creation of special statutory defences in s. 319(3). Thus the text of s. 319(2), itself, is its most valuable feature from a constitutional perspective, but makes it quite difficult to employ from the

perspective of the criminal law. Maybe this is the answer; it is difficult to secure a conviction on s. 319(2) and so it should be.

4. Finally, the question remains: can s. 319(2) be used to successfully prosecute Holocaust deniers like Zundel? The issue of Holocaust denial did not play a major role in the *Keegstra* case, even though it was present. Although there is a strong argument to be made that those who deny the Holocaust (and publish pamphlets to that end) are wilfully promoting hatred against Jews, no precedents exist on whether the courts will accept Holocaust denial propaganda as statements promoting hatred. Nonetheless, it is sobering to recall that the *Zundel* prosecution was initially commenced under s. 181 by the Holocaust Remembrance Association because the Attorney General of Ontario refused to undertake to prosecute him under s. 319(2), fearing that a conviction could not be secured.

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1. *Did Six Million Really Die?* at 4.
2. *Ibid.*
3. Anne Frank (1929-1945) was the teenage author of a diary composed while hiding from Nazis in Amsterdam. She died in Bergen Belsen concentration camp in 1945. The diary, discovered by non-Jewish friends after the family's arrest, was first published in 1947. (*Encyclopedia Judaica*)
4. *R.* v. *Zundel* (1987), 58 O.R. (2d) 129 (Ont. C.A.) at 144.
5. See 61 O.R. (2d) 588.
6. *R.* v. *Zundel (No.2)* (1988), 7 W.C.B. (2d) 26.
7. *Irwin Toy Ltd.* v. *Quebec (Attorney-General)*, [1989] 1 S.C.R. 927.
8. *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.
9. *R.* v. *Zundel*, [1992] 2 S.C.R. 731.
10. *R.* v. *Oakes*, [1986] 1 S.C.R. 103.
11. *Supra*, note 9 at 764.
12. *Supra*, note 9 at 769.
13. *Supra*, note 9 at 774.
14. *Supra*, note 9 at 775.
15. *Ibid.*
16. *Ibid.*
17. As cited in *Zundel*, *supra*, note 9 at 811.
18. *Ibid.*
19. *Supra*, note 9 at 811.
20. *Supra*, note 9 at 828.
21. *Supra*, note 9 at 824.
22. *Supra*, note 9 at 826.
23. *Supra*, note 9 at 841.
24. *Supra*, note 9 at 808.
25. *Supra*, note 8.
26. Section 318(4) of the *Criminal Code*, R.S.C. 1985, c. C-46.
27. See s. 319(6) of the *Criminal Code*, R.S.C. 1985, c. C-46.
28. *Supra*, note 8, at 748-749.
29. As cited in *Keegstra, supra*, note 8 at 751.
30. *Ibid.*
31. *Supra*, note 8 at 756.
32. *Supra*, note 8 at 758.
33. *Supra*, note 8 at 762.
34. *Supra*, note 8 at 767.
35. *Supra*, note 8 at 769.
36. *Ibid.*
37. For a discussion of the laws of the Weimar Republic, see C. Levitt, "Racist Incitement and The Law: The Case of the Weimar Republic" in D. Schneiderman, *Freedom of Expression and the Charter* (Toronto: Carswell, 1991), and C. Levitt "Under the Shadow of Weimar: What are the Lessons for the Modern Democracies?" in L. Greenspan and C. Levitt, eds, *Under the Shadow of Weimar: Democracy, Law and Racial Incitement in Six Countries* (Westport, CT: Praeger, 1993).
38. *Supra*, note 8 at 768.
39. *Supra*, note 8 at 771.
40. *R.* v. *Buzzanga* (1979), 25 O.R. (2d) 705 (Ont. C.A.).
41. *Supra*, note 8 775.
42. *Supra*, note 8 at 776.
43. *Ibid.*
44. *Ibid.*
45. *Supra*, note 8 at 777.
46. *Supra*, note 8 at 777.
47. *Supra*, note 8 at 778.
48. *Supra*, note 8 at 779.
49. *Supra*, note 8 at 784.
50. *Supra*, note 8 at 786.
51. *Supra*, note 9 at 775-776.
52. *Supra*, note 9 at 776.
53. The issue of the changed composition of the Court and its potential effect on the *Zundel* decision was discussed in B. Elman, "Supreme Court Upholds Hate Propaganda Law" (1991) 2 *Constitutional Forum* 86-89. See also B. Elman, "*Her Majesty the Queen* v. *James Keegstra*: The Control of Racism in Canada" in L. Greenspan and C. Levitt, eds, *Under the Shadow of Weimar: Democracy, Law and Racial Incitement in Six Countries* (Westport, CT: Praeger, 1993).

UPDATE
CONSTITUTIONAL DEVELOPMENTS IN ISRAEL

INTRODUCTION

The State of Israel was born on the 14th of May 1948 (corresponding in the Jewish calendar to the 5th day of the month of Iyar 5708). From the earliest days of the new state's existence, attempts have been made to write a constitution. First a constituent assembly was elected to write a constitution. They met in February of 1949 but the task of drafting a constitution proved too daunting and they abandoned the idea. Instead, the assembly transformed itself into the first Knesset (Parliament) with full legislative authority in spite of the fact that no constitutional framework existed for the Knesset's actions.[1]

In 1951, the Harari Resolution solved this dilemma. Pursuant to this resolution, the constitution would be attacked in a "piecemeal fashion."[2] A series of "Basic Laws" have, since 1951, been enacted to cover all aspects of Israeli governmental institutions and functions — the Government, the Knesset, the Army, the Office of President, the Supreme Court, the State Comptroller, and so forth.

All that appeared to be missing was a Basic Law providing constitutional protection for individual rights and freedoms.

Two Basic Law dealing with human rights — *Basic Law: Freedom of Occupation* and *Basic Law: Human Dignity and Freedom* — were enacted in the last Knesset. A translation of these laws follows. A third Basic Law — *Basic Law: Fundamental Rights of the Person* — provides a more general law protecting individual human rights and is presently before the Knesset for consideration. An unofficial translation of this proposed Basic Law follows as well.

In the Spring of 1990, *Constitutional Forum constitutionnel* published an article by David Kretzmer on constitutional change in Israel.[3] The articles that follow by Justice Aharon Barak and Professor Lorraine Weinrib provide an update on the situation and some thoughts on the effect that the *Canadian Charter of Rights and Freedoms* has had as a model for the new Israeli Basic Laws. — ***B.P.E.***

1. L. Susser, "We the People" *Jerusalem Report* (5 November 1992).
2. D. Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?" (1992) 26 *Israel Law Review* 238-249.
3. D. Kretzmer, "The Constitutional Debate in Israel" (1990) 1:3 *Constitutional Forum constitutionnel* 13-14.

BASIC LAW: FREEDOM OF OCCUPATION[1]

Freedom of Occupation	1. Every citizen or resident of the State may engage in any occupation, profession or business; this right shall not be restricted except by statute, for a worthy purpose and for reasons of the public good.
Grounds for Licensing	2. If the engagement in an occupation is conditional upon receiving a license, the right to a license shall not be denied except according to statute and for reasons of state security, public policy, public order and health, safety, the environment, or safeguarding of public morals.
Application	3. All governmental authorities are obligated to respect the freedom of occupation of every citizen or resident.
Stability of the Law	4. Emergency regulations shall not have the power to change, temporarily suspend or place conditions on this Basic Law.
Entrenchment of the Law	5. This Basic Law shall not be changed except by a Basic Law enacted by a majority of Knesset members.
Temporary Provision	6. Legislative provisions that were in force prior to the coming into force of this Basic Law, and which contradict its provisions, shall remain in force for two years from the date on which this Basic Law comes into force; however, the aforesaid provisions shall be interpreted in the spirit of this Basic Law.

[1] Enacted by the Knesset on 28th Adar A, 5752 (3 March 1992); the Bill and explanatory comments were published in *Hatza'ot Hok* 2096, 17th Tevet 5752 (24 December 1991), 102.

BASIC LAW: HUMAN DIGNITY AND FREEDOM[2]

Purpose

1. The purpose of this Basic Law is to safeguard human dignity and freedom, in order to entrench in a Basic Law the values of the State of Israel as a Jewish and democratic state.

Safeguarding of Life, Body and Dignity

2. The life, body or dignity of any person shall not be violated.

Protection of Property

3. A person's property shall not be infringed.

Protection of Life, Body and Dignity

4. Every person is entitled to protection of his life, body and dignity.

Personal Liberty

5. The liberty of a person shall not be deprived or restricted through imprisonment, detention, extradition, or in any other manner.

Exit from and Entry into Israel

6. (A) Every person is free to leave Israel.
(B) Every Israeli citizen outside Israel is entitled to enter Israel.

Privacy and Personal Confidentiality

7. (A) Every person is entitled to privacy and to the confidentiality of his life.
(B) A person's private domain shall not be entered without his consent.
(C) No search shall be carried out of a person's private domain, on his body, of his body, or of his personal effects.
(D) The confidentiality of a person's conversations, writings and records shall not be infringed.

Infringement of Rights

8. The rights according to this Basic Law shall not be infringed except by a statute that befits the values of the State of Israel and is directed towards a worthy purpose, and then only to an extent that does not exceed what is necessary.

Exception for Security Forces

9. The rights according to this Basic Law may not be restricted, qualified or waived for those serving in the Israel Defense Forces, the Israel Police, the Prison Service or in other security organizations of the State, except according to law and to an extent that does not exceed what is required by the nature and character of the service.

Conservation of Laws

10. Nothing in this Basic Law affects the validity of law that existed prior to the coming into force of this Basic Law.

Application

11. All governmental authorities are obligated to respect the rights under this Basic Law.

Stability of the Law

12. Emergency regulations shall not have the power to change this Basic Law, to suspend its force temporarily, or to set conditions upon it; however, when there exists a state of emergency in the State by virtue of a proclamation under s. 9 of the Law and Administration Ordinance, 5708-1948,[3] emergency regulations may be promulgated under the aforesaid section which deny or restrict rights according to this Basic Law, provided that the denial or the restriction are for a worthy purpose, and for a period and to an extent that shall not exceed what is necessary.

[2] Enacted by the Knesset on 12th Adar B, 5752 (17 March 1992); the Bill and explanatory comments were published in *Hatza'ot Hok* 2086, of 6th Kislev 5752 (13 November 1991), 60.

[3] *Official Gazette*, no. 2 5708, 1; *Sefer Ha-Chukkim* 5741, 306.

BASIC LAW: FUNDAMENTAL RIGHTS OF THE PERSON

Chapter 1: Fundamental Principles

Fundamental Principles

1. Fundamental human rights in Israel are founded on the recognition of the value of the human being, the sanctity of his or her life and being free; and these rights will be honoured in the spirit of the principles that are in the Declaration of the Establishment of the State of Israel

Derogation or Limitation of the Fundamental Rights - How

2. Fundamental human rights may be derogated from or limited only by means of a statute or explicit agreement in a statute which are consistent with a democratic state, which have a proper purpose and do not go beyond what is required.

Chapter 2: Fundamental Rights

Equality Before the Law and Prohibition of Discrimination

3. Everyone is equal before the law: There shall be no discrimination between persons for reasons of sex, religion, nationality, race, community, country of origin or any other reason. This holds only when the reason is not relevant to the matter.

Physical Integrity and Human Dignity

4. (A person's life, body, and human dignity may not be violated.)
Every person has the right to life, physical integrity, and human dignity. [handwritten]

Personal Liberty

5. A person's liberty may not be taken away or violated by imprisonment, detention, extradition, or in any other way.

Freedom of Movement

6. a. Every person lawfully present in Israel is free to move throughout the country as he wishes.
b. Every citizen or resident of the State has the freedom to chose his or her place of residence in Israel.
c. Every person is free to leave Israel.
d. Every Israeli citizen who is outside of Israel has the right to enter Israel.

Freedom of Religious Belief

7. Every person has freedom of religious belief and also the freedom to fulfil the ([principles of] his or her belief and) the commandments of his or her religion.

Freedom of Opinion and Expression

8. Every person has freedom of opinion and expression and also the freedom to publicly express opinions and information in any manner.

Artistic Freedom and Freedom of Scientific Research

9. Every person has artistic freedom and freedom of scientific research.

Personal Privacy and Privacy of One's Life

10. a. Every person has the right to privacy and to the privacy of his or her life.
b. The entry onto private property without permission is prohibited, as is the carrying out of a search on a person's private property, on a person's body, inside a person's body or clothing.
c. The privacy of a person's conversations, writings and records shall not be violated.

Legal Personality

11. Every person has the capacity for obligations, rights, and undertaking legal actions.

Right to Property

12. A person's property may not be interfered with.

Freedom of Occupation

13. Every citizen or resident of the State has the freedom to engage in any occupation, trade or business.

Freedom of Assembly

14. Every citizen or resident of the State has the right to have assemblies, marches and demonstrations.

Freedom to Unionize

15. Every citizen or resident of the State has the freedom to join a union.

Right to Apply to Judicial Authorities

16. Every person has the right to apply to the judicial authorities.

Presumption of Innocence

17. Every person is presumed innocent until found guilty in a judicial proceeding.

Not to Punish without a Caution

18. A person is not criminally guilty for an act or omission that was not a crime according to a statute at the time of action or omission, and a person may not receive a more severe punishment that was applicable by law at the time of the commission of the crime; but the fixing of the amounts of fines is not to be considered an increase in severity of punishment.

Fair Judicial Proceeding

18a. Every person accused of a criminal offence has the right to a fair trial.

Chapter 3: Miscellaneous

Application

19. Every governmental organ or person acting on its behalf is obligated to honour fundamental human rights.

Obligation of Governmental Bodies

Possibility 1

19a. Every governmental body or person acting on its behalf is obligated to act fairly and justly.

Possibility 2

19a. Legal authorities affecting human rights may operate only in a fair proceeding, without bias or irrelevant considerations.

Possibility 3

Add to the end of section 19: ... to act fairly and to come to a just verdict.

Restriction relating to the Defence Forces

[-]

Non-application to Marriage and Divorce Laws

21. The Basic Law does not apply to laws prohibiting and permitting marriages and divorces.

Exercise of Fundamental Rights for a Bad Purpose

22. No fundamental human right may be exercised in a way that will damage the existence of the State or its democratic government or in order to suppress the human rights.

Stability of the Law

23. Emergency decrees do not have the force to alter this Basic Law, to suspend it temporarily or to add conditions to it. Nevertheless, when there exists in the State a state of emergency by force of a declaration pursuant to section 9 of the Proclamation of the Governmental and Judicial Authorities, 1948, it is permissible to make emergency decrees pursuant to the above cited section which have the power to derogate from or to limit the fundamental rights according to sections 5, 6(a)-(c), 8, 10, and 12-15, as long as the derogations or limitations do not exceed the time or extent required.

Force of Law

24. There is nothing in this Basic Law that affects the force of a law that existed prior to the adoption of the Basic Law; however, the law shall be interpreted in the spirit of this Basic Law.

Inflexibility of the [Basic] Law

25. This Basic Law may only be altered explicitly, directed or by a Basic Law which states that it has force despite what is stated in this Basic Law, and that is approved in a plenary sitting of the Knesset by a two thirds majority of the Members on first, second, and third readings.

There are proposed amendments concerning the rights of soldiers, police, prisoners and public servants. Each states that their fundamental rights may be denied or limited to the extent necessitated by the nature and character of their service.

Ministry of the Attorney General
Proposed Basic Law: Fundamental Human Rights / Proposal on Social Rights (6.12.92)

Social Rights

18b. Every resident has the right to live in human dignity, and included in this is the right to work and to fair working conditions and salary, the right to elementary education and the right to enjoy an appropriate level of health and material well-being. The rights in this section will be realized according to law and subject to reasonable limitations determined by the financial capacity of the State.

Right of Workers to Unionize

15a. Workers have the right to join unions for the purpose of defending their rights and for the purpose of adhering to collective agreements.

Right to Strike

15b. Workers have the right to strike.

A CONSTITUTIONAL REVOLUTION: ISRAEL'S BASIC LAWS

Justice Aharon Barak

The following is the text of a speech delivered by the Honourable Justice Aharon Barak of Israel's Supreme Court on May 18, 1992 upon receiving the degree of Doctor of Philosophy, Honoris Causa, from the University of Haifa.

Not everyone knows this, but recently a revolution has occurred in Israel. I am speaking of a constitutional revolution, in which the Knesset, as the constitutive branch, enacted *Basic Law: Human Dignity and Freedom*, and *Basic Law: Freedom of Occupation*. The first law provides that no person's life, body or dignity shall be violated, by virtue of being human. A person's property shall not be violated. Every person is entitled to protect his or her life, body and dignity. Every person has freedom from imprisonment, detention or extradition. Every person has the right to leave Israel, and every Israeli citizen has the right to enter Israel. Everyone has the right to privacy and confidentiality. A person's private domain may not be entered without his or her consent. No search may be made of a person's private domain, on his body, of his body, or his personal effects. The confidentiality of a person's conversations, writings and records may not be violated.

Basic Law: Freedom of Occupation stipulates that an "ordinary" law can restrict the freedom to engage in an occupation only if it is enacted "for a worthy purpose and for reasons of the public good." *Basic Law: Human Dignity and Freedom* provides that human dignity and freedom may be infringed only "by a statute that befits the values of the state of Israel, which is directed towards a worthy purpose and only to the extent necessary."

By virtue of this basic legislation, human rights in Israel have become legal norms of preferred constitutional status — much like the situation in the United States, Canada and many other countries. This is clear with regard to *Basic Law: Freedom of Occupation*, which the Knesset itself entrenched by stipulating that it may not be changed except by a Basic Law passed by an absolute majority of Knesset members. It is less clear in the case of *Basic Law: Human Dignity and Freedom*, which was not so entrenched; but the minimalist interpretation of that Basic Law requires, in my opinion, that any ordinary legislation which contradicts the provisions of the Basic Law without stating explicitly that it is doing so will not be valid. To be sure, in the past the courts in Israel, the Supreme Court foremost, also recognized basic human and civil rights. In terms of content, the new basic rights do not effect a real revolution. In a long line of judgments, the Courts have recognized, in the words of Justice Landau, those "fundamental rights that are not written in any book, but which emanate directly from the character of our state as a democratic, freedom-loving state."

Through these judicial decisions, most of the basic rights set out in the new legislation have already been recognized. Indeed, the revolution is not one of content so much as of force. With the enactment of the Basic Laws, these fundamental rights have become "inscribed in the book." From now on, they bind not only the citizens and residents, and not only the administrative authorities, such as the government and local authorities. From now on, they bind the Knesset itself. Above the Knesset as the legislative branch stands the Knesset as constitutive branch, and above the ordinary law of the Knesset stand the two Basic Laws. The people are sovereign, and the Basic Laws are supreme. A Knesset law may no longer infringe the basic rights mentioned, unless it is enacted for a worthy purpose, even then only to the extent necessary, and it fits the values of the state of Israel as a Jewish, democratic state.

As with all constitutional legislation, the two Basic Laws are sometimes phrased in generalities. They employ "majestic generalities." They contain inherent conflicts between individual rights and public needs, such as the freedom from detention on one hand, and the legislation regarding administrative detention on the other; or freedom of property versus expropriation for public needs; or freedom of movement as against preventing exit from Israel for security reasons. The principal organ of state that must pour content into the majestic generalities, and must resolve the inherent conflicts, is the judiciary — primarily the Supreme Court.

The Israeli society has imposed upon us, the Justices of the Supreme Court, the task of giving content to the molds for human rights that will befit our values as a Jewish democratic state. We must do so in complete subservience to the words of the Basic Laws. We must do so by taking a broad view of Israeli society, against the background of its whole national experience. We must mirror the *Ani Ma'amin* of our sovereign

life, for in Justice Agranat's words, "it is a well-known axiom that the law of a nation should be studied through the looking-glass of its national life." We must set our eyes to the past, to the roots of our culture, tradition and religion. We must go back to our history, as the basic laws are the outcome of the history of a people and a society. We must intertwine our efforts with the judicial approaches to human rights that we have recognized thus far. We must draw inspiration from the universal human rights accepted by modern democracies. We must give expression to the social and ethical developments of Israeli society. We must crystallize the modern self-understanding of Israeli society; in other words, its very identity. There is no single philosophical and economic social conception underlying this society. We are a pluralistic society. Naturally, our identity will be complex and many-faceted.

As Justices of the Supreme Court, we will have to give content to the Basic Law's avowed purpose of "entrenching in a Basic Law the values of the state of Israel as a Jewish democratic state." What is a Jewish state, and what is a democratic state? We dealt with this in the past when we interpreted Knesset laws. Now we will have to deal with it not only to interpret the existing law, but also in the framework of determining the validity or invalidity of Knesset laws. It may already be said that the term "Jewish and democratic" does not contain a contradiction, but rather a completion, a complementing. As President Shamgar remarked in another context: "The existence of the State of Israel as the state of the Jewish people does not negate its democratic character, just as the Frenchness of France does not negate its democratic character." The State is Jewish, not in the religious sense, but in the sense that Jews have the right to immigrate here, and that their national experience is that of the State. (This manifests itself, *inter alia*, in the language and the state holidays.)

The fundamental values of Judaism — which we bequeathed to the whole world — are our basic values. I am referring to the values of love of humanity, sanctity of life, social justice, doing what is good and just, protecting human dignity, the rule of the law-maker, and other such eternal values. The reference to these values is on a universal level of abstraction. The state is democratic, by recognizing institutions and organs built upon majority rule, by providing full equality among all its citizens and by its recognition of basic human and civil rights.

The task that the new legislation has placed upon us is weighty. It requires sensitivity, wisdom and responsibility. It demands not only legal erudition, but an understanding of life. It is based on an awareness of the legal historical and social developments that we have witnessed and those yet to emerge. It is founded on enlightened analysis of Israeli law, and on reference to the law of enlightened nations from which we may draw inspiration. It requires patience and tolerance. It needs public trust and understanding. It presumes a strength of spirit to withstand the passing winds of the hour, whether of the leaders or the masses. It is based on the understanding that without a society and security, individuals have no existence; and without individuals and their natural rights, the society has no reason to exist. The judge cannot be naive and see a security problem in everything. The rule of law, equality and human rights *are* the security of the state. Nor can a judge be innocent and place individual rights as the supreme, exclusive value. A constitution is not a blueprint for national suicide, nor are Basic Laws a platform for social annihilation. The task is weighty. I am convinced that we will discharge it. Israel has the best of judges, at all levels. Now that we have been given the tools we will do the work.

Justice Aharon Barak of the Supreme Court of Israel.

THE CANADIAN *CHARTER* AS A MODEL FOR ISRAEL'S BASIC LAWS

Lorraine Weinrib

On a number of occasions, Justice Barak of the Israeli Supreme Court has remarked that, in the enactment of its new Basic Laws on human rights, Israel walks in the path of the Canadian *Charter of Rights and Freedoms*.[1] And he has encouraged Israel's judiciary to make reference to the Canadian Supreme Court's purposive approach to *Charter* rights and its rights-forwarding orientation to s. 1 limitation in the interpretation of these new laws. Israeli civil servants, such as Deputy Attorney General Shlomo Guberman, made careful study of the *Charter*'s evolution, text and interpretation in the course of formulating and drafting these laws.

How is it that Canada and Israel share a common approach to rights protection? The vast contrasts in constitutional arrangements, history, economic substructure, demographics, security and political culture are obvious — to say nothing of basic divergences on religion-state questions and problems involving race and national ethnic origin. Such matters are the substructure of rights protection. Is there anything left to share?

The fact that Israel has looked to Canada's Charter experience is incontrovertible. To understand this phenomenon one must look beyond the contrasts: the appeal lies at a deeper, more abstract level.

I do not argue that the Israeli Basic Laws are modelled on features unique to the *Charter*. The attraction is the *Charter*'s membership in the post-World War Two family of rights-protecting instruments.[2] By capturing a coherent national statement of constitutional priorities based on these instruments, and in particular a network of institutionally sound roles, the Canadian *Charter* offers a more attractive system of rights protection than, for example, its American counterpart.

What are the distinctive features of this post-1945 rights-protecting system? First, there is the more generous and more up to date array of protected rights and freedoms. Second, there is the provision of express limitation clauses, which forward both the rule of law and a more abstract commitment to the values that inform the specific rights and freedoms guaranteed. Third, there is provision for judicial review. And fourth, the guarantee and the express limitation, both under judicial supervision, are conjoined to a legislative final say in prescribed circumstances.

Turning first to the guarantees themselves, one sees in the *Charter* recognition of rights that pertain primarily to the person, to individual dignity.[3] The individual is not, however, seen as dissociated from the community or general society. On the contrary, the strong equality clause[4] as well as the clause that requires the entire *Charter* to be read in light of the multicultural heritage of Canadians[5] signals the recognition that individuals flourish in communities to which their link is often forged by birth.[6] Similar commitments inform the new Basic Laws.

The *Charter*'s express limitation clauses shift the onus to the state, upon proof of an infringement of a right or freedom. Before shouldering the onus of justifying the incursion on the right in light of the norms set out in the limitation clause, the state must establish that the incursion is "law," that is, that it possesses the formal characteristics informed by the rule of law such as accessibility and intelligibility. Upon satisfaction of this formal precondition, the state may sustain an infringement that has the formal qualities of "law," despite encroachment upon the guaranteed right or freedom, only if it can establish that it is forwarding the substantive norms of limitation. In the international instruments, such as the International Covenant on Civil and Political Rights or the European Conventions, these norms are listed for various types of guarantees; in the Canadian *Charter*, these norms are set out for all the guarantees in one general formulation, the abstract idea of a "free and democratic society."[7] Similarly, as Justice Barak has pointed out, the new Basic Laws provide express formal and substantive bases for limitation.

The legislature enjoys a limited final say under the *Charter*. Whereas under the international instruments the sovereignty of the member states has given birth to temporary, emergency derogation mechanisms, invoked by formal acts of the executive, and subject to review for proportionality,[8] the *Charter* offers a domestic, non-emergency, non-reviewable legislative override clause. When the appropriate legislature has expressly indicated, in

legislation, that it so wills, the override suppresses the guarantee on a temporary basis.[9] This requirement of express and only temporary departure from *Charter* norms works to impose high political cost. (Similarly, the Knesset may alter *Basic Law: Freedom of Occupation* only by an absolute majority vote and may change *Basic Law: Human Dignity and Freedom* only by an enactment that expressly states that it has this effect.)

These four features supersede simpler arrangements for rights protection embodied in the constitutional recognition of freedoms sheltered from state interference. Rights protection, on this view, inhabited the universe of state incapacity — a model now deemed inadequate to the complex interaction between the individual and the state in the modern, liberal, democratic welfare state.

More to the point is the fact that the new structure has emerged since 1945. It reflects the tragic history of this century. Modern constitutions must address the ultimate cost of enmity: war between sovereign states on a world-wide scale; bloody, intractable civil war; and the Holocaust, in which totalitarian power visited systematic denial of civil rights, torture and mass killing against domestic populations on the basis of race, religion, gender, sexual orientation and physical and mental disability. This history has informed modern notions of constitutionalism by demonstrating the intolerable human cost of political ordering unconstrained by the principles that underlie rights protection, namely individual dignity and equality.

The post-war model of rights protection thus rejects the notion that the state best accommodates human flourishing in its inaction and embraces the idea that the state must be disciplined to the values intrinsic to dignified human life in political community.

The American system of rights protection is not inimical to these principles. As an older system, however, its text embraces neither the substantive values nor their institutional protection as clearly as does the Canadian *Charter*. The American Bill of Rights quite appropriately reflected the concerns of the period that gave it birth: democracy in preference to absolute monarchy; separation of powers and minimal government constraining arbitrary power; local government in place of remote power. Even the Civil War Amendments have ultimately failed to dislodge this conceptual foundation. Moreover, much of the elaborate jurisprudence under the United States Bill of Rights is so rooted in features of American federalism and political and social history that one is hard pressed to unravel the distinctively American features from the universal.

It is therefore not difficult to see why our *Charter* has attracted the notice of other countries in the throes of constitutional development, as is Israel. Created by declaration of the United Nations in 1948 as a homeland for the survivors of the Holocaust and beleaguered world Jewry, and immediately, and then intermittently, besieged by totalitarian states rallied by ethnic and religious enmity, Israel faces a day-to-day struggle to build and maintain a vibrant democracy and to realize the universal ideals developed within Jewish civilization, stated so eloquently by Justice Barak as including love of humanity, the sanctity of life, social justice, human dignity, commitment to the rule of law and the role of the law-maker.

The path to a vibrant, resilient system of rights protection will be difficult for Israel. We can see the difficulties in the early but significant steps already taken. The incremental creation of constitutional protection of rights is painstaking, offering no opportunity to see the whole as informing and tempering the parts and presenting only reduced opportunity for principled compromise.

Moreover, Israel's Jewish identity requires thoughtful responses to questions of the relationship between the state and religion. Questions surrounding state use of religious symbols, sabbath observance, public education, public facilities and services, and so on have vexed many countries.[10] But these questions take on unique complexities in the context of the remarkably diverse demographic make-up of Israeli society, especially its multiple fundamentalist manifestations, in the land that is home to so much religious history and so many sites of religious significance.

Religion also arises as a conservative force militating against other norms, such as equality for women generally and the more specific question of marriage and divorce law reform. This tension has undermined support for the passage of the proposed *Basic Law: Fundamental Rights of the Person.* And, pending a comprehensive peace with Israel's neighbours, religious and ethnic political extremism will impose enormous pressure on the judges who delineate the extent to which democracy must be bridled to constitutionalism as well as the permissible exercise of powers to preserve state security. These issues have dimension in Israel that is all but unfathomable to Canadians.

Canadians have, in the past ten years, lived through not

only unprecedented constitutional renewal but also two cathartic failed efforts at further amendment. This experience means that we can empathize with the transformative nature of the current moment of Israel's political development. It also means that Canadians have had little opportunity to reflect on the growing international respect for the *Charter*, so much so that Israel's study of and respect for the *Charter* may come as a surprise. Given the daunting task of constitution-building now underway in Israel and the impressive care taken to ensure meaningful constitutional reform, Canadians can take pride in the fact that it is so often Canada's *Charter* that has provided an important point of reference.

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1. The two enacted laws are: *Basic Law: Human Dignity and Freedom* and *Basic Law: Freedom of Occupation*. A third enactment, *Basic Law: Fundamental Rights of the Person* is under consideration by the Knesset, the Israeli Parliament. For texts and discussion of the first two see D. Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?" (1992) 26 Israel L. Rev. 238. An unofficial translation of the third is available from the author. For background see: A. Rubinstein, "Israel's Piecemeal Constitution" (1966) 16 Scropta Hierosolymitana 202; S. Guberman, "Israel's Supra-Constitution" (1967) 2 Israel L. Rev. 455; A. Shapira & B. Bracha, "The Constitutional Status of Individual Freedoms" (1972) 2 Israel Yearbook on Human Rights 211; B. Bracha, "The Protection of Human Rights in Israel" (1982) 12 Israel Yearbook on Human Rights 110; R. Gavison, "The Controversy over Israel's Bill of Rights" (1985) 15 Israel Yearbook on Human Rights 113; A. Maoz, "Defending Civil Liberties Without a Constitution – The Israeli Experience" (1988) 16 Melbourne Univ. L. Rev. 815.

2. See, W. A. Schabas, *International Human Rights Law and the Canadian Charter: A Manual for the Practitioner* (Toronto: Carswell, 1991); A.F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992). Contrast the comparatively limited American reliance on such international norms: A.F. Bayefsky & J. Fitzpatrick, "International Human Rights Law in United States Courts: A Comparative Perspective" (1992) 14 Michigan J. of Int'l L. 1.

3. For this reason, for example, property interests are not expressly protected. See R.W. Bauman, "Property Rights in the Canadian Constitutional Context" [1992] South African Journal on Human Rights 344.

4. Section 15 (1) and (2) of the *Charter*.

5. Section 27.

6. This view is supported by the language rights provisions, ss. 16 to 23, the reaffirmation of rights to religious public schooling in s. 29, and the provisions that refer to Aboriginal rights, ss. 25 and 35.

7. See s. 1 of the *Charter*. For an account of the transition from individual limitation clauses to one general limitation clause, see L.E. Weinrib, "Constituting Constitutional Change in Canada: Of Diligence and Dice" (1992) 42 U.T.L.J. 207. For an analysis of s. 1 interpretation see "The Supreme Court of Canada and Section 1 of the Charter" (1988) 10 Sup. Ct. L. Rev. 469.

8. A.C. Kiss, "Permissible Limitations on Rights" in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil & Political Rights* (New York: Columbia University Press, 1981); J.M. Ross, "Limitations on Human Rights in International Law and the Canadian Charter" (1984) 6 Human Rts. Q. 180; "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" (1985) 7 Human Rts. Q. 1.

9. Section 33 of the *Charter* is applicable only to those rights that do not engage federalism or democratic participation and may be invoked prospectively only. See L. Weinrib, "Learning to Live With the Override" (1990) 36 McGill L.J. 541.

10. For a comparison between the American and Canadian constitutional approaches, see L. Weinrib, "The Religion Clauses: Reading the Lesson" (1986) 8 Sup. Ct. L. Rev. 508.

THE AUSTRALIAN REPUBLICAN MOVEMENT AND ITS IMPLICATIONS FOR CANADA

John D. Whyte

I

The recent re-election of Paul Keating as Australia's Prime Minister served to energize the movement to abolish the monarchy and to establish a President as head of state. Late last year Prime Minister Keating invited Australians to begin the process of adopting a republican form of government, but his expected defeat in the then up-coming general election no doubt suppressed public enthusiasm for the idea. Since his surprising victory earlier this year, republican sentiment has swept the nation and the republican debate has risen to the top of the political agenda. It is a sign of the vitality of this movement that republicanism is at the fore in broadcasting (including unexpectedly sophisticated discussions about the role of the head of state) and in the press, and is a commonplace topic for discussion in cafes, kitchens and common rooms. In late April the Prime Minister appointed an eminent persons group to advise Australians about the most suitable republican model with instructions to report before the end of this year. Expressions of dissent over the republican proposal have been both weak and resigned — the long-term inevitability of Australia becoming a republic seems to have been universally accepted.

Thomas Keneally, Australia's living literary legend (perhaps as significant to Australia's cultural self-definition as Robertson Davies and Farley Mowat combined are to Canada's) has published a book entitled *My Republic* that has been excerpted everywhere. In it, Irish disdain for the influence of things English is fully explored; it serves as the unanswered (and unanswerable) pamphlet for change.

Australia, like Canada, has had constitutional reform at the top of its political agenda for a long time. There have been commissions, assemblies and referenda but little of this has attracted positive attention. On the other hand, the prospect of ending the monarchy has produced a political energy that has repeatedly caused the agenda for implementing the necessary constitutional change to be moved forward.

Meanwhile, in Canada, there has been no counterpart to this public campaign to adopt a republican form of government and to create a President as head of state. This is remarkable in that both Canada and Australia are monarchies having in common, as regnal head, the person of the monarch of the United Kingdom, the former imperial power over the colonies that became the nations of Canada and Australia. Furthermore, both nations have a long history of striving, first, to have full sovereignty recognized and, second, to put in place all the symbols and practices of national sovereignty. Likewise, constitutional developments in both nations have expressed a strong commitment to democratic values; the adoption of a *Charter of Rights* in Canada and the recent development of an implied bill of rights in Australia have been rooted in democratic theory (not, of course, the same thing as majoritarianism). The use of referenda in Australia since Federation in 1901 and the recent adoption in Canada of a national referendum to obtain approval for the Charlottetown Accord are even clearer examples of a strong democratic commitment.

Notwithstanding the common history and common ideology, Canada seems not to be bent on reform of the head of state. The surprising aspect of this disequilibrium is not that Australia is preoccupied with what, at first glance, may seem to be a matter of minor reform but, rather, Canada's indifference to the continuation of a deeply anomalous constitutional symbol. After all, ending the monarchy would purge vestiges of imperialism as well as end a strong symbol of class ascendancy and privilege. One might reasonably expect Canadians to be every bit as committed to these goals as Australians.

In this essay I shall first address the possible constitutional impact of the adoption of a republican form of government in parliamentary democracies which, like Canada and Australia, have as their head a monarch. I shall then address two further questions. First, what explains Canada's apparent lack of interest in this reform and, second, if Australia were to become a republic would that development produce a mirror campaign in Canada?

II

The current quest in Australia to establish a republican form of government represents a more momentous

constitutional shift than is perhaps being admitted. Republicanism is a rich political tradition, not adequately described as simply the replacement of the monarch with a popularly chosen President. It is a theory of statecraft resting on the idea that the highest collective human endeavour is the joining of citizens (in a condition of approximate equality) in the on-going political project of self-government. At heart, republicanism is about the moral claims on citizens in political communities that aspire to self-determination. It is less about the conditions of individual autonomy than it is about establishing conditions for political autonomy. These conditions include an educated population that is committed to the well-being of the state and a habit of open discourse over real political choices and issues. Republicanism is, of course, profoundly anti-monarch (literally, sole ruler) because it is about the rule of all citizens; it also expresses something about the different role of citizens. The citizen is no longer the subject (or beneficiary) of the King's peace, or army or court, but becomes the joint bearer of responsibility for the safety, sanity and efficiency of state power

Nothing of all this is completely novel in a democratic state like Australia. Yet, it is important to remember that the root ideas of republicanism go beyond democracy and present a morally freighted version of popular government. Office holders who are elected by specifically republican processes can be said to be representatives of the citizenry acting at its most politically focused and self-conscious moments. The platitude about holding a sacred trust from the electorate has its genuine origin in republican theory.

What is at stake in this debate is the foundation of state authority. In a monarchy, the elected governors — the minsters of the Crown — are invited to govern by the regnal head and governing is done in his or her name and with his or her consent. The regnal head has, of course, little choice in the exercise of power: who to invite to govern is mostly determined by the electorate, the advice given to the monarch is usually binding and, in truth, there is no discretion in giving royal assent to bills. From this perspective, having these functions performed by a head of state who is popularly elected would not seem to be a significant change.

On occasion, the head of state is required to make independent judgments: who to invite to form a government in a minority situation; or whether to dissolve parliament and allow an election or, on the other hand, to invite another political leader to attempt to govern. The instances in which these independent judgements will be called for are likely to become more frequent as "interest" based politics grows, as party loyalties weaken, and as multi-party election and Parliaments become more common.

In a democracy, the power over the selection of who should govern or over whether those in power should continue to govern cannot be minimized. In any political system there is a reasonable anxiety that those in power will take as their chief political objective the perpetuation of their own position. Democracies are not immune from this concern because of the ever-present possibility that those who currently control the instruments of government will seize authority either to determine the authentic will of the people, or, worse, to act under an imagined mandate from the people. Hence, the power relationship between the head of state and the state's political leaders is something that requires a clear constitutional basis.

The question is whether adopting a republican form of government will alter the dynamic of this relationship. Under current arrangements, in Australia and Canada, the two players in this relationship enjoy different bases for legitimacy. The political leader has a popular constituency while the head of state carries an ancient and, in a sense, patriarchal responsibility for public peace and orderly public authority. In a democratic monarchy there is a sense of a single person — hopefully a person of wisdom and judgment —carrying residual responsibility for the good government of the people.

When the legitimating basis for the power of the head of state changes so that he or she is the instrument for expressing the people's self-governing duties then the head of state and political leader share a similar claim for authority. In other words, the head of state and political leader are in natural competition to claim to be the superior manifestation of the citizens' will and the superior interpreter of the citizens' wishes.

This could mean that a prime minister, seeking to continue to govern or seeking to prevent any other leader being given a chance to govern, would engage in a campaign of disparagement of the President's legitimacy, or of his or her political evenhandedness, or of his or her right to intrude into the continued working of a `popularly elected' government. The basis of this disparagement would be that the President's election represents a hollow or purely formal mandate. The people's choice to conduct government, it would be said, is the prime minister — the leader of the dominant political party. Furthermore, there would be no other legitimating basis for political action by the head of state — no historically-based responsibility for guaranteeing the propriety of political power. Concerns over such disparagement and over the possibility that the President's orders would be ignored by political leaders are, admittedly, concerns about extreme political situations; they contemplate a prime minister who refuses to submit to the direction of the head of state and this would amount to a revolutionary moment.

A further possible distortion in the relationship between President and prime minister could come from the republican aggrandizement of the head of state. There is the possibility that the President would abandon any form of deference to advice concerning the dissolution of a parliament. Or, perhaps he or she would be tempted to exercise independent judgement in other areas where currently the role is only formal, such as signing executive orders, assenting to new legislation, or making public pronouncements. The President could take seriously his or her role as the current expression of republican virtue — as the embodiment of citizens will to exercise political autonomy. The President could feel bound to preserve the electorate's "true" interests and, to that end, resist the "mistaken" advice of the prime minister or the legislators. In short, the President might be tempted to become the actual governor.

Two strategies have been developed to lessen these concerns over political competition. First, it is suggested that the President not be directly elected by the people but by parliamentarians, perhaps under a system requiring an absolute majority or, even, a two-thirds vote. In this way it is thought that the President will have some degree of political legitimacy and, hence, have the political grounding to intervene when necessary. On the other hand, the President will never be tempted to take over a broader governing function because he or she will be seen as an agent of Parliament and not the direct representative of the people. Although this plan would certainly lessen the risk of a President taking on a political role that would undermine the government, the question remains whether the electorate would view such a President as a mere pawn of Parliament — and the dominant party — and, hence, would be concerned that the fully independent political judgement sometimes required would not be exercised. Perhaps it will simply be impossible to achieve balance between political legitimacy and independence, on the one hand, and a limited legitimacy and appropriate restraint on power, on the other.

The second strategy is to set out in a special constitutional section all the instances in which the President could exercise independent judgement with respect to inviting party leaders to govern or with respect to dissolving Parliament. In this way; there would be no bases on which the President could intervene other than those spelled out in the constitution. In fact, it is highly unlikely that such a code of head of state powers could actually be written. Even if it were written it would of necessity be subject to constant interpretation and contextual amplification, a situation not markedly different than presently exists.

There may, however, be a way around the problem of not being able to articulate a comprehensive set of rules. It should be remembered that in writing and interpreting constitutions what is central is not always the precise constitutional rules but the political ideas and values embedded in the structures and relationships that are created. Interpreting a constitution is often an exercise in inferring from the constitutional recognition of certain offices what are the essential conditions for the office to be performed and what are its necessary constraints. From this conception of constitutionalism it follows that the constitution could express that the exclusive function of the head of state is to ensure the democratic legitimacy of government; it is not to assume responsibility for governance. The President's role is that of guarantor of constitutional government, never that of provider of good government. It would not be difficult to find words to express the limited and residual role of the head of state that would allow superior courts to strike down, or refuse to enforce, executive and legislative orders of a head of state acting alone.

This sort of constitutional check will not, of course, provide standards by which hasty or premature parliamentary dissolutions can be challenged but it would be adequate to forestall the restructuring of the role of President by ambitious incumbents.

In statecraft there is no firm binding of those who are empowered through constitutional recognition or creation. There are, however, ideas of legitimate authority which, when expressed in the constitution text, will control the excesses of office holders. Beyond that, the only thing that can be claimed with great confidence is that constitutional adjustment requires great care; changes in structure in the constitutional order will invariably pave the way for changes in power and behaviour.

III

Why have Canadians not been as interested in republican proposals as Australians currently are? It is not as if abolition of the monarchy has never been broached in Canada. In 1978 the Canadian Bar Association Committee on the Constitution included in its thoughtful and scholarly report a recommendation that the Canadian monarchy be ended. With respect to this recommendation the committee was strangely terse. The recommendation did, however, catch a great deal of media attention — largely disdainful — and this may have led to relatively little attention being paid to the balance of the report. (It was reported in the Canadian press at the time that Prince Philip took exception to the monarchy becoming a political football in Canada — a view that was clearly misguided since Canadians have the right to decide what belongs on their constitutional agenda. Much has happened in the past fifteen years to render obsolete such expressions of umbrage over attacks on royal dignity.)

It is possible that the Canadian Bar Association experience was sufficiently searing to dissuade, at least for a time, talk of republicanism. There are, however, more plausible explanations for the relative degree of Canadian silence on this topic. First, it may be that having a Queen of Canada serves as Canada's strongest reminder that it is not a suburb of the United States. It is reassuringly distinct to have a hereditary monarch as head of state, especially one that seems to surround herself so successfully with royal trappings — bands, uniforms, sesquipedalian titles, protocol and, now, just as in the old days, flashes of domestic irregularity. Although this account of the Canadian constitutional agenda may seem trivializing, one must not underestimate the depth of Canadian anxiety over being non-American.

Second, having a monarch as the head of state may not be a deep concern because, for most Canadians, it is not a fact of tremendous practical or, even, symbolic significance. For some Canadians, however — Canadian francophones and Indians being the two groups that come most readily to mind —the formal fact of the Canadian monarchy is of considerable importance. Nevertheless, the role of the Queen in Canada is seldom spoken of and it is widely realized that the head of state function is performed entirely by the Governor General and by provincial Lieutenant-Governors. Canadians know that the Queen's place in our constitutional arrangements is vestigial — a textual anachronism. They also know what it is to be slow in making formal constitutional changes that codify new realities: until 1982, amendments to the Canadian constitution were effected by enactments of the United Kingdom Parliament.

Third, there is a particular Quebec aspect to abolition of the monarchy that may explain Canadian backwardness. Although Quebec governments have traditionally declined to dedicate any time, effort or political capital to this issue, the rest of Canada, somewhat perversely, is likely to view the adoption of republicanism as severing a tie with England and, therefore, doing something that Quebec will specially value. Until such time as Quebec nationalism again becomes a genuine threat to the integrity of Canada (which may not be in the distant future) the rest of Canada is likely to resist constitutional reforms, a leading aspect of which is doing something which will be seen as paying special regard to Quebec interests.

Finally, abolition of the monarchy would be seen by Canadian Indian communities as an immense threat to their special status within Canada. Indians understand their political commitment and fidelity to the Queen and, conversely, the obligations of protection and support that lie against the Queen. This view is largely a product of the form of the nineteenth century treaties with the Indian nations that were conducted in the Queen's name and that bound the Queen as head of the government. The continuous process of modernizing and Canadianizing the head of state office has been treated as irrelevant by the Indians in face of what they see as the clear textual basis for a direct and personal relationship. This is not an example of primitive literalism on the part of these communities; it is a shrewd tactic to maintain the original purity of the treaties and their implicit acceptance of inherent Aboriginal governmental powers. This latter claim is currently the central tenet of Aboriginal politics and no constitutional change that gives rise to any possibility of undercutting that claim through domestication of the treaties, or reduction of their original status, would be acceptable to them. This is not a trivial political barrier to republican reform.

With respect to the question of whether Australian republicanism will influence Canadian constitutional politics, it is safe to say that the republican movement in Australia in itself will not have a major impact. Canadian consciousness of Australia does not run to political movements. However, if the monarchy were to be abolished in Australia, Canadians would certainly know about it and would understand its direct relevance to Canada. The reason for this is that the Australian reform would be seen as expressing a view about the incompatibility (specifically, the theoretical incompatibility) of a continuing role for the Queen with sovereignty and democracy. Canadians are not so self-confident about their own political maturity that they would dismiss the Australian reform as meaningless. In any event, the republican movement is a one-way street; once it is advanced as serious reform (and an Australian adoption of republicanism would certainly confer seriousness on this idea within Canada) a positive case would have to be made for retaining the british monarch as the Canadian head of state. Quite simply, this would be difficult to do even taking into account the political weight given by Aboriginal communities to maintaining the monarchy.

There are however two further reasons for republicanism to have political momentum in Australia that do not apply in Canada. First, Canadian society is not in the least bit British, and the same cannot be said for Australia. Having the Queen as head of state strikes close to home — it underscores the precise colonial origin of Australia that is widely manifest in the social environment. Canada has no national preoccupation with British influence (it has American influence to fuel its doubts about identity) and, as a result, the continuing role of the Queen has weaker resonances in the national psyche.

Finally, notwithstanding the number of aspects of constitutionalism common to both countries, Australia has a considerably stronger republican sensibility, in the contest of which the monarchy is particularly anomalous. Australians participated in the original adoption of their constitution and

they have participated directly in every reform to it. The Australian constitution reflects the crucial distinction between representative politics for everyday political choice — politics as usual — and direct universal participation in the basic organization of the authority of the state. This latter feature is a pure reflection of republican theory — a theory that rests on the idea of citizen responsibility for and citizen engagement in the project of self-government and in the process of establishing the nation's deepest commitments. Republicanism is about the rule of all citizens and this has been the central idea of the Australian constitution from the beginning. In "republican" Australia, it is the monarchy that represents the radically dislocated idea of authority.

The same cannot so readily be said of Canadian constitutional theory. This is a country which, even in the process of changing the foundations of government, is governed by first ministers, their cabinets and their legislative bodies. From traditional and historical perspectives, the ultimate responsibility of the governors is to the monarch. This view, of course, is utterly misleading as a matter of actual political description but our constitutional arrangement has never been expressed in a way that denies it. Republicanism has not enjoyed clear constitutional expression in Canada.

There is, to my mind, little doubt that Australia will become a republic. The significance of that event will reach beyond Australia and Canada will be required to question the appropriateness of remaining a monarchy under the rule of a "foreign" monarch. When that debate unfolds it seems likely that Canada will also find both the cultural distaste for an anachronistic arrangement and the latent republican sentiment that will propel it towards republicanism.

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