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Reforming the Amending Formula
THE CASE FOR A CONSTITUTIONAL CONVENTION

Clyde K. Wells

The failure to achieve implementation of the constitutional proposals contained in the Meech Lake Accord has thrown the country into a state of constitutional turmoil. It has created great apprehension about the constitutional future of Canada and even greater confusion about the manner in which the problem can best be resolved.

After the emotional trauma of the Meech Lake debates, most Canadians were hoping for a year or two of dealing with economic and social problems. Circumstances, however, would permit no such rest. The failure of the Meech Lake Accord not only left Québec in a situation where its legitimate concerns were not addressed, but the manner in which acceptance of the Meech Lake Accord was pressured on the rest of Canada and ultimately refused, inevitably led to a great sense of rejection in Québec. Thus, Québec reacted immediately and created the Belanger-Campeau Commission to consider Québec's constitutional future, amidst increasing expression of support for some form of sovereignty ranging from total sovereignty to a variety of sovereignty-association proposals.

The federal government appointed the Spicer Commission with a mandate to listen to Canadians from coast to coast and try and come to a conclusion as to the kind of nation and the kind of constitutional structure Canadians wanted. Some of the provinces, New Brunswick, Ontario, Manitoba Alberta, and British Columbia, established some form of commission task force or committee to deal with the constitutional desires of their respective provinces.

I cannot speak for the other provinces that did not appoint such commissions, but I can explain why Newfoundland has not. While it is entirely appropriate, and in some cases essential, to refer proposals for constitutional change to separate provincial commissions for public evaluation and approval, it is almost impossible to develop constitutional proposals or alternatives through eleven separate commissions. Each of the individual provincial commissions will tend to focus on the prime concerns of that province and the national issue is not likely to be discussed, at least not in a national context. Thus, instead of narrowing the differences between the different parts of the country, individual commissions are likely to widen them. Such processes will tend to produce even firmer provincial positions and make the achievement of the essential compromise even more difficult.

Quite apart from the understandable narrowness of the focus of each provincial commission, even the federal Spicer Commission is not structured to enable the give and take of dialogue amongst the provinces that is absolutely essential if a compromise is to be achieved. While it may not be the only forum suitable, I believe the forum most suited to dealing with the constitutional dilemma in which Canada now finds itself, is a constitutional convention.

The use of a constitutional convention has been suggested by others and by myself in the past. It has most recently been mentioned in the discussion paper on *Amending the Constitution of Canada* issued by the federal government at the time that the Prime Minister announced the appointment of a

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Special Joint Committee of the Senate and House of Commons on Amending the Constitution, co-chaired by Québec Senator Gérald Beaudoin and Alberta Member of Parliament, Jim Edwards. It is the amending formula and the contents of that discussion paper that I want to specifically address today.

Some have dismissed the discussion paper as an apology for the failure of the Meech Lake Accord. No doubt the paper contains a clear implication that the Meech Lake Accord failed partly at least because of the three year time period allowed for approvals by provincial legislatures and suggests that the private First Ministers process used in the case of the Meech Lake Accord is implicitly approved in the 1982 amending formula. These items, however, are only a small part of the discussion paper. Read as whole, the discussion paper reasonably fairly sets out the background and origins of the current amending procedure, the results of its attempted usage, and suggestions for alternative approaches to constitutional amendment. It deserves the full and fair consideration of Canadians.

Yet, in one particular area, I think the paper is deficient. While there is extensive discussion about the difficulties experienced by including amendments that would require unanimity in the same resolution as amendments requiring the approval of only seven out of the ten provinces having fifty percent of the population, there is no discussion about the necessity or desirability of requiring unanimity for any amendment.

My personal view is that the requirement for unanimity should be eliminated entirely. Our amending formula is absurd insofar as it allows a single province to hold up important reforms. That absurdity would have been exacerbated under the Meech Lake Accord which would have extended the unanimity requirement to even more areas. No one province should be in a position, ever, to hold up the constitutional development of the nation. The general amending formula should be used for all amendments.

Just how ludicrous the requirement for unanimity is was obvious in the case of the Meech Lake Accord. The citizens and governments of Newfoundland and Manitoba were castigated by some as nation-wreckers, when acting in accord with the sincere conviction of the overwhelming majority of their people, they did not approve of the constitutional changes proposed in the Meech Lake Accord thereby denying the unanimity required. Yet, if the amendments in the Meech Lake Accord had required only the general amending formula, the actions of Manitoba and Newfoundland in refusing to approve would have been entirely acceptable. It is an absurdity to suggest that all provinces have a right to approve or refuse approval, as they in conscience see fit, but small provinces dare not withhold approval in cases where unanimity is required and the larger provinces have approved. I cannot think of a view more offensive to the democratic process than that.

While there is no justification for unanimity, I believe there is justification for a limited constitutional veto for Québec. Even while recognizing that our aboriginal people were the first citizens of this land, and that Canada is today, as it will be in the future, the beneficiary of contributions of people from a variety of cultural and ethnic backgrounds, we cannot ignore the historical fact that the Canadian nation was founded on the basis of an understanding between the French- and English-speaking peoples of the colonies in North America then administered by Britain, to build a nation encompassing their two cultures and using their two languages and two legal systems. If that understanding is to be honoured today, I believe that it can only be so honoured by a commitment to promote those two cultures, accommodate the two legal systems and build, in the decades ahead, a bilingual nation from coast to coast. If this is accepted as the constitutional precept I believe it to be, then it must also

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be appropriately reflected in Parliament and the functioning of our national institutions, and appropriately accommodated in our constitutional amending formula.

That accommodation can be achieved through the implementation, in a reformed Senate, of a mechanism of separate linguistic voting on constitutional changes affecting language, culture, and the civil law system. Such changes would require the approval of the majority of senators from Québec separately from, and in addition to, the approval of the majority of the senators from the other provinces collectively. This double majority principle could also be extended in appropriate cases to certain types of federal legislation specifically altering language or cultural matters. A reformed Senate and the linguistic voting divisions could be used as well to approve appointments to the Supreme Court of Canada with an effective veto over appointment of civil law judges given to Québec senators and over appointment of common law judges given collectively to the senators from the other provinces.

Other than amendments affecting culture, language, and the civil law system, I believe every amendment to the Constitution should become effective upon receiving the approval of the Senate, the House of Commons, and the legislatures of seven of the ten provinces having fifty percent of the population. Our constitutional development should never be held captive by the straightjacket of unanimity.

A matter that did receive a great deal of attention in the discussion paper was the question of the three-year time limit. It has been suggested that if there had been a one-year time limit the Meech Lake constitutional changes would have been approved. Many others would say that that is in itself the soundest possible argument against a shorter time limit. Those who blame the changes in provincial governments within the three-year period for the failure of the Meech Lake Accord avoid facing the real reason. The truth is that the impact and nature of the constitutional changes proposed in the Meech Lake Accord became known to, and sufficiently if not perfectly understood by, the Canadian people during those three years and that by the end of the period the proposed changes were totally unacceptable to an overwhelming majority of Canadians. One can only marvel at the insensitivity to democratic rights displayed by those who would suggest the time limit should be shortened in order to avoid a similar opportunity to assess and understand amendments in the future.

Whether we have unanimity for some amendments and the general amending formula for others or the general amending formula for all, proposed changes should be implemented if, as and when the appropriate level of approval is achieved. If any legislature thinks the proposal is outstanding for an undue length of time, it can take action to rescind its resolution of approval. Either the House of Commons or Senate could do likewise. The United States, the original federal state, has never had any difficulty with an amending formula without such a time limit. Thus, instead of being shortened, I would suggest the time limit should be eliminated. It serves no purpose.

The discussion paper invites consideration of replacing or supplementing what it describes as our existing "legislative model" with a "referendum model" or a "constituent assembly model", what I would call a "constitutional convention". I don't think there is any merit whatsoever in suggesting that our existing legislative procedure could be replaced with either a constitutional convention or a referendum procedure or even with both. The three methods have different functions. The legislative procedure provides a means of approving or rejecting a proposal: to issue a proclamation to amend the constitution. A referendum is a means of ascertaining the wishes of the people but it can also be used as a means of directly approving or rejecting approval for the issue of the proclamation. A constitutional convention is a gathering of representatives of the people, either appointed or elected, or a combination of both, whose mandate it is to consider all of the alternatives and put forward a specific proposal or alternative proposals for approval or rejection by either the legislatures or the people directly in a referendum.

A constitutional convention cannot be used for an approval process. Its function is to develop proposals or achieve a compromise that can subsequently be submitted either to the legislatures or a referendum for approval. While a referendum can be used to directly approve or reject a proposal, in my view it is unwise to eliminate the existing legislative process and replace it with a referendum process because a referendum is inappropriate to deal with routine or ordinary amendments where there is no real doubt or strong opposition. Instead, the legislative model should remain the basic constitutional amending process with a referendum or constitutional convention being used to supplement the normal legislative process where circumstances prevent that process from working properly.

A referendum might be called where there is great controversy as to whether or not a particular proposal should be accepted. A constitutional convention might be used where major issues might be involved and there is great divergence of opinion as to what proposal should be put to the legislatures or the people for approval.

To summarize, I suggest we should have an amending formula that would provide as follows:

1. A legislative procedure based on our present general amending formula which allows the Governor General to issue a proclamation implementing the proposed constitutional amendment upon the approval of the Senate and House of Commons and the legislatures of seven of the ten provinces having fifty percent of the population.

   No amendment should require unanimity and the three-year time limit should be removed.

   Amendments affecting culture, language, and the civil law

system, should be subject to a double majority in the Senate. Such amendments would require the approval of the majority of senators from Québec separately from and in addition to the approval of the majority of senators from the other provinces collectively. This would, of course, necessitate the elimination of the override of the Senate by the House of Commons provided for in section 47 or an exception to that override in the case of amendments requiring a double majority in Senate.

2. A referendum could be resorted to where substantial amendment was involved and there was great doubt or uncertainty as to the level of approval in the country. It could also be used where the necessary legislative approval had not been received after the passage of a substantial period of time or when any political, economic or social circumstance warranted. Depending on the circumstances a referendum could be called upon a resolution approved:

   (a) by the Senate and House of Commons plus any five legislatures, or

   (b) by the Senate and House of Commons plus the legislatures in provinces having in total fifty percent of the population, or

   (c) by seven of the ten legislatures having fifty percent of the population.

   In the case of a referendum, no matter how called, the Governor General should be required to issue the proclamation upon receiving the approval by referendum that would otherwise have been required by legislative action, namely, an overall majority plus a majority in each of seven of the ten provinces having fifty percent of the population.

3. A constitutional convention, or constituent assembly as the discussion paper calls it, should be convened when there are major colutitutional issues outstanding and there is no clear consensus as to how these issues should be addressed so as to attract the support of the majority of the people reasonably representative of the various parts of the country. In such circumstances it would be impossible to get legislative approval because there would be no agreement as to how the proposal or alterative proposals could be structured. It would be equally impossible to seek approval through a referendum for the same reason. In that kind of dilemma a constitutional convention should be able to be convened in the same manner as a referendum could be called.

A constitutional convention would provide the two things essential to achieve a legitimate and enduring compromise that could then be presented to Parliament and the Legislatures for entrenchment. Those two things are: first, a means of exchange and development of compromise between Québec and the other provinces of Canada and amongst Canadians generally and, second, the legitimacy that can only come from a compromise accepted after open public debate of issues, positions and proposals where the debaters will be aware of and feel the pressures of public opinion.

Neither the Spicer Commission nor the provincial commissions can provide those two essential elements. In fact, the provincial commissions not only will not provide an opportunity for such dialogue, their focus will tend to be on matters that are exclusively or predominantly of concern to the particular province.

Clearly the outstanding constitutional issues in Canada today are of such a magnitude that they cannot be dealt with on a simple amendment basis. As well as all of the major issues involved in responding to Québec's five proposals to address its legitimate concerns and the amending formula issues set out in the discussion paper, there is also the major question of Senate reform. When you add to this the fact that there are strong differences as to the basic concept of the nation as a federal state, and recognize that a level of acrimony does exist, it is difficult to imagine any other process that could be used to resolve such problems and achieve an acceptable compromise.

Our Constitution, at the moment, makes no provision for a constitutional convention but that should not be an impediment. The current amending procedures do not specify what process is to be pursued in arriving at the wording of constitutional amendments to be submitted to the legislatures and Parliament. It could just as well come from a constitutional convention as from a first ministers' conference. Any proposal coming out of the convention would still require the approval of Parliament and either seven or all ten legislatures to be effective. Even if a compromise were achieved, feelings are running so high and opinion so divided, a referendum may still be necessary in order to determine if the proposal would meet with an acceptable level of approval across the country.

One difficulty that might arise is in achieving agreement on the manner in which the convention should be constituted. Because it would have no jurisdiction to enact or implement a recommendation or decision, the voting of its members would only be a factor in determining the final recommendations it would put forward. An argument could be made for having equal representation for each province but, then again, an argument could clearly be made for having representation weighted to take into account population. Perhaps a fair solution might be to have one half of the membership divided equally amongst the provinces and the other half based on population. There would remain the question of whether they should be elected or appointed by the provincial governments. Perhaps they should be partly appointed and partly elected.

These issues should be able to be resolved. In the event that agreement could not be reached, the matter could be resolved by Parliament. Clearly, as matters now stand, Parliament would have jurisdiction to establish such a convention in any event.

Unless somebody has a better idea for a means to resolve our constitutional dilemma, the provincial and federal governments and Canadians generally had better start thinking fairly soon about a constitutional convention. Not only does it make sense in these difficult circumstances, I believe it may offer the only realistic way out of our present constitutional dilemma.

In our present political and constitutional disorder we are unable to give proper attention to, or provide appropriate remedies for, the many important economic and social problems facing the country. These problems will not stand idly by while we fiddle over constitutional issues. They will grow and continue to damage our economy and society until they are properly addressed.

Political leaders, federal and provincial, have a responsibility to find and use a forum to deal effectively with our constitutional problems. The country needs it and the people of Canada have a right to expect it.

The Honourable **Clyde K. Wells**, Premier of Newfoundland and Labrador. This is the text of a speech delivered to the Constitutional and International Law Section of the Northern Alberta Branch of the Canadian Bar Association and the Centre for Constitutional Studies, University of Alberta at the Law Centre on January 24, 1991.

S.C.C. APPOINTMENTS

The two most recent appointments to the Supreme Court of Canada were Justice William A. Stevenson and Justice Frank Iacobucci. Their appointments sparked considerable public interest in their personal histories as well as their judicial views on individual rights and liberties.

Justice Stevenson was appointed to the Court in October of 1990 to fill the seat left vacant by the retirement of Chief Justice Brian Dickson. Prior to his appointment to the Supreme Court, Justice Stevenson was a member of the Alberta Court of Appeal. Justice Stevenson has a long record of judicial service having also served on the District Court of Alberta and the Alberta Court of Queen's Bench. He was also a professor of law at the University of Alberta and one of the driving forces behind the Canadian Judicial College. Justice Stevenson is fifty-six years of age, is married with four children.

Justice Iacobucci was Chief Justice of the Federal Court of Appeal at the time of his appointment to the Supreme Court. He occupies the position on the Court previously filled by Justice Bertha Wilson. Prior to his appointment to the Federal Court Justice Iacobucci served as the Deputy Minister of Justice for Canada. Prior to entering Government service, he was Dean of Law at the University of Toronto.

The following lists of *Charter* cases decided by Justices Stevenson and Iacobucci were compiled by Mr. Brett Nash of the Charter of Rights Data Base at the University of Alberta. The Charter of Rights Data Base has been in operation since 1983 and is one of the principle research resources of the Centre for Constitutional Studies. It contains abstracts of over 3,000 reported and unreported cases involving the *Charter of Rights and Freedoms*. In addition to cases, the data base contains abstracts of selected periodicals and books dealing with the *Charter* and other rights documents. The Charter of Rights Data Base is available on QuickLaw.

(Charter cases follow on pages 74 & 75)

CHARTER CASES IN WHICH JUSTICE STEVENSON TOOK PART:

R. v. D.L.F. (1990), 71 Alta. L.R. 241

This case dealt with a s. 7 challenge of the "de minimis" test, used with respect to causation in criminal matters. Justice Stevenson concurred in the decision that there was no violation with respect to its use.

R. v. Babcock, [1990] 3 W.W.R. 48, 71 Alta. L.R. (2d) 351

This claim under s. 8 of the *Charter*, that obtaining a hair sample was unreasonable, was found by the Court, with Justice Stevenson concurring, not to be a violation.

R. v. Galbraith (1989), 49 C.C.C. (3d) 179, 66 Alta. L.R. (2d) 388

This s. 8 challenge of a search warrant authorized under an emergency authorization was found by Justice Stevenson, writing for the Court, not to be a violation of the right.

Hutfield v. College of Physicians and Surgeons (1989), 93 A.R. 159

In this case, the court was asked to reconsider a case dealing with s. 8 of the *Charter*. Justice Stevenson concurred in the judgement that there was no need to reconsider the *Blue Cross* decision if the intervenor wished to challenge the forced production of documents.

R. v. Martineau, [1988] 6 W.W.R. 385, 61 Alta. L.R. (2d) 264

The court was asked to rule on whether ss. 7 and 11(d) of the *Charter* were violated by a charge under s. 212(a), combined with s. 21(2) dealing with parties to a crime, of the *Criminal Code*. Justice Stevenson concurred in the judgement that the *Charter* was violated and the section could not be justified under s. 1.

R. v. Camire (1989), 66 Alta. L.R. (2d) 200

This case dealt with a delay in trying the accused, violating s. 11(b) of the *Charter*. Justice Stevenson concurred in the decision of the Court that there was no violation.

R. v. Nichol (1987), 53 Alta. L.R. (2d) 188

Justice Stevenson concurred in this judgement concerning the applicant's s.10(b) rights. It was found that no violation occurred.

R. v. Rasmussen (1988), 59 Alta. L.R. (2d) 402

This was an appeal from conviction based on a breach of the applicant's s. 8 rights. Justice Stevenson concurred with the court that there was no violation of the applicant's rights with respect to the gaining of the evidence.

R. v. Cole (1988), 61 Alta. L.R. (2d) 412

This was an appeal from conviction in which the applicant wanted evidence to be excluded pursuant to s. 24(2) of the Charter. Justice Stevenson concurred in the judgement refusing the request.

R. v. Paquette (No. 1), [1988] 1 W.W.R. 98, 55 Alta. L.R. (2d) 1

This matter dealt with the right of an accused to invoke the French language provisions in the *Criminal Code*, and ss.15 and 24(1) of the *Charter*. At the time, the Code provisions were not proclaimed in Alberta. Justice Stevenson, who wrote the majority decision, held that there was no *Charter* violation.

R. v. Farrell (1986), 74 A.R.. 239

The applicant in this case was claiming a violation of his s. 11(b) right to be tried in a reasonable time. Justice Stevenson concurred in the judgement which found that there was no violation of s. 11(b) as there were extradition matters which delayed the trial in Canada.

R. v. Keegstra, [1988] 5 W.W.R. 211, 60 Alta. L.R. (2d) 1, 43 C.C.C. (3d) 150, rev'd. [1991] W.W.R. 1 (S.C.C.)

This case dealt with a challenge of the hate propaganda provisions in the *Criminal Code* and a claim that they violated ss. 11(d) and 2(b) of the *Charter*. Justice Stevenson concurred in the judgement finding that both the sections of the *Charter* were violated and could not be saved by s. 1.

Cabre Exploration Ltd. v. Arndt (1988), 87 A.R. 149

This action was a challenge of s.26(9) of the *Surface Rights Act* under s.15 of the *Charter*. The Court found, Justice Stevenson concurring, that s.15 was not violated by the provision.

Yes Holdings Ltd. et al v. The Queen (1988), 57 Alta. L.R. 227

This case dealt with a claim that the *Income Tax Act* violated s. 11(h) of the *Charter* in that it put the applicants in a position of potentially being penalized twice. Justice Stevenson wrote the majority decision that the *Income Tax Act* provisions do not violate s.11(h) of the *Charter*.

Paquette v. The Queen (No. 2) (1987), 81 A.R. 12, aff'd. October 2, 1990 (S.C.C.)

This case addressed the issue of whether the fact that the French language provisions in the *Criminal Code* were not proclaimed in Alberta violated the applicant's s. 15 rights. Justice Stevenson wrote the majority decision which found that there was no breach of the applicant's s. 15 rights.

R. v. Broyles (1987), 82 A.R. 238

This case dealt with an alleged violation of ss. 7 and 10(b) of the *Charter*. Justice Stevenson concurred in the judgement that there was no such violation.

R. v. Rackow, [1987] 1 W.W.R. 184, 47 Alta. L.R. (2d) 319

The applicant in this case challenged the "stop-check" programme in Alberta on the basis that it violated ss.8, 9 and 10(b) of the *Charter*. The Court decided, and Justice Stevenson concurred, that the provisions violated ss.8 and 9 of the *Charter*, but were saved by s.1. The Court did find, however, that there was a violation of the applicant's rights under s.10(b).

R. v. Hunter (1986), 45 Alta. L.R. (2d) 405

This appeal from conviction was based on the argument that the applicant was denied the right to a fair trial under s.11(d) of the *Charter* because his counsel could not interview the Crown's witnesses and police officers before the trial. The Court, with Justice Stevenson concurring, found that there was no evidence to suggest that the applicant was denied his right to a fair trial.

Barry et al v. Alberta Securities Commission (1986), 25 D.L.R. (4th) 730, 67 A.R. 222

The applicants claimed that their s. 11(h) right was violated as they were acquitted at trial for securities offences, yet the Commission made a further ruling on the matter. Also the applicants alleged that the Commission was not an impartial tribunal, thus violating their s.11(d)

rights. The Court decided that s. 11 had no application, with which Justice Stevenson concurred.

R. v. Roach (1986), 19 C.R.R. 23, 42 Alta. L.R. (2d) 21
This appeal was based on an alleged violation of the applicant's s. 10(b) rights. Justice Stevenson concurred in the decision that there was no such violation.

R. v. Wowk (1986), 68 A.R. 78
The accused in this action was acquitted at trial based on the violation of his s. 15 rights. However, s. 15 was not in force when the acts occurred and the charges were laid. Justice Stevenson, concurring with the rest of the Court, found that the *Charter* should not be given retroactive operation.

R. v. P.J.T.; R. v. A.A.H.; R. v. P.L.N. and T.J.R. (1985), 41 Alta. L.R. (2d) 163
This was a challenge of the *Young Offenders Act* based on s.15 of the *Charter*. The Court found that there was no violation of the applicant's rights, a decision with which Justice Stevenson concurred.

Reference Re Public Service Employee Act (1984), 35 Alta. L.R. (2d) 124, 57 A.R. 268
The argument in this case was whether certain provisions concerning collective bargaining violated ss.2(d) and 15 of the *Charter*. Justice Stevenson concurred with the majority decision that the *Charter* was not violated by the provisions.

Black and Co. v. The Law Society of Alberta, [1986] 3 W.W.R. 590, aff'd. [1989] 4 W.W.R. 1 (S.C.C.)
The applicant alleged a violation of ss. 6 and 2(d) of the *Charter* were violated by Law Society rules which prohibited inter-provincial law firms. Justice Stevenson wrote a concurring judgement which held that the rules violated the *Charter*.

R. v. McEachern (1984), 57 A.R. 217
This case dealt an acquittal on appeal to the Queen's Bench, questioning whether the accused's s.10(b) rights were violated. Justice Stevenson concurred with the Court in holding that there was no violation of the accused's s.10(b) rights and reinstated the conviction.

R. v. Neale (1986), 46 Alta L.R. (2d) 225, 28 C.C.C. (3d) 345
The question presented in this case was whether s. 7 was violated by 24 hr. suspensions of drivers' licenses under the *Motor Vehicle Administration Act*. The Court held that the provision did not violate s. 7, a decision with which Justice Stevenson concurred.

R. v. Crate (1983), 7 C.C.C. (3d) 127
This action concerned the right to a trial by jury in s. 11(f) of the *Charter*. Justice Stevenson concurred that there was no violation of the accused's *Charter* rights.

Becker v. Alberta (1983), 45 A.R. 36
This case dealt with an expropriation of land and the claim that it violated s. 8 of the *Charter*, and a request for an order under s. 24(2). Justice Stevenson agreed with the Court's decision that s.8 does not apply to seizure of real property by expropriation.

R. v. Stanger (1983), 2 D.L.R. (4th) 121, 26 Alta L.R. (2d) 193
Section 8 of the *Narcotic Control Act* was challenged as violating s.11(c) of the *Charter* and the reverse onus in the section violated s.11(d). Justice Stevenson agreed with the Court in finding that s.11(d) was violated but s.11(c) was not.

R. v. Big M Drug Mart Ltd. (1983), 5 D.L.R. (4th) 121, aff'd (1985), 18 D.L.R. (4th) 321 (S.C.C.)
The *Lord's Day Act* was alleged to violate s.2(a) of the *Charter*. Justice Stevenson concurred with the majority judgement which held that the Act violates s.2(a) and could not be saved by s.1.

CHARTER CASES IN WHICH JUSTICE IACOBUCCI TOOK PART:

A.G.(Can.) v. Southam Inc., [1990] 3 F.C. 465
This case dealt with Rule 73 of the Senate and the refusal to grant the Respondent access to Senate committee hearings, which the Respondent claimed violated its rights under s.2(b) of the *Charter*. Justice Iacobucci wrote the judgement which allowed the appeal, and overturned the trial decision which held that Southam's rights were violated.

A.G.(Can.) v. Central Cartage, [1990] 2 F.C. 641
This was an appeal from trial with respect to an order, under s.36.3 of the *Canada Evidence Act*, to produce allegedly privileged documents. The Government of Canada was claiming privilege with respect to certain Privy Council documents. The Respondents claimed s.36.3 violate ss.7 and 15 of the *Charter*. Justice Iacobucci wrote the judgement which allowed the appeal holding that there was no *Charter* violation.

Ingebrigtson v. Canada (F.C.A. Nov. 1, 1990)
Justice Iacobucci wrote the judgement of the court holding that Standing Courts Martial are not independent tribunals within the contemplation of s.11(d) of the *Charter*, and not saved by s.1.

Veysey v. Canada, [1990] 1 F.C. 321
Justice Iacobucci wrote the judgement concerning prisoners homosexual conjugal visits and s.15 of the *Charter*. The case was decided on grounds other than the s.15 argument.

Clarke v. Canada (M.E.I.) (F.C.A. May 9, 1990)
This case dealt with self-employed persons' lack of benefits under *Unemployment Insurance* legislation and s.15 of the *Charter*. Justice Iacobucci concurred in the judgement which found no violation.

Sullivan v. The Queen (F.C.A. Dec. 14, 1989)
Justice Iacobucci concurred in the judgement concerning the violation of the applicant's s.10(b) rights. The violation was justified under s.1 of the *Charter*.

A.G.(Canada) v. Young et al (F.C.A. July 31, 1989)
This case dealt with s.15 of the *Charter* and an amendment to the Unemployment Insurance Act. Justice Iacobucci concurred in the judgement which found no violation.

Mandatory Retirement Cases: Part I

APPLYING THE *CHARTER*: WHAT IS GOVERNMENT?

Katherine Swinton

The mandatory retirement cases delivered by the Supreme Court of Canada in December, 1990 were awaited anxiously by those concerned about the impact on employment opportunities and policies for both younger and older workers.[1] What many may not have known was that there was another important issue in these cases — the scope of the *Charter*'s application, its reach beyond the actions of the legislature and the public service.

There has been much debate since the entrenchment of the *Canadian Charter of Rights and Freedoms* about the scope of its application, particularly whether it applies to private action. Section 32(1) provides that the *Charter* applies to Parliament, the legislatures of the provinces, and the "government" of Canada and each province. Many academics have argued that the purpose of this section is to sweep government action under the *Charter*, but they contend that private action is caught, as well, because s. 52(1) of the *Constitution Act, 1982* provides that the constitution is the supreme law, and any law inconsistent with it is of no force and effect.

The Supreme Court rejected the argument that the *Charter* applies to private action in *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, a case in which a union argued unsuccessfully that an injunction restraining secondary picketing violated the *Charter*'s guarantee to freedom of expression.[2] McIntyre J., writing for the majority, held that s.32 of the *Charter* specified the actors to which it would apply — the "legislative, executive and administrative branches of government".[3] Excluded from its scrutiny would be private action, and it would apply to the common law only if that type of law was the basis for some government action.

While the Court in *Dolphin* gave some definitive answers about the scope of *Charter* application, it necessarily left open many questions. In particular, it left future cases to determine what is governmental action. There are a myriad of institutions constituted by Canadian governments, ranging from independent administrative tribunals (such as labour relations boards), to Crown corporations (such as the CBC), to business corporations. Government is also closely involved in many activities through funding, as in education or assistance to industrial enterprises, and through extensive regulation of behaviour (for example, in the financial instruments area). While it enacts laws in the legislatures and issues regulations through Cabinet, it also delegates powers of regulation and policy-making to various entities, such as school boards. Even if *Dolphin* resolved that the *Charter* does not apply to the private sector, it left open the issue of which of these many entities are so intertwined with government that they come under *Charter* scrutiny. And are all actions of government caught, even contracts?

All that McIntyre J. told us in *Dolphin* was that the *Charter* would apply to "many forms of delegated legislation, regulations, Orders in Council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the legislatures."[4] It was not until the four mandatory retirement cases that the Court had an opportunity to revisit the application issue in detail, and to explain and extrapolate from McIntyre J.'s statement.[5] While the Court determined that the *Charter* applies to a college in British Columbia *(Douglas)*, it does not apply to universities in Ontario and British Columbia *(McKinney, Harrison)* nor to the Vancouver General Hospital *(Stoffman)*. In the course of those decisions, the Court both reaffirmed its decision in *Dolphin* and gave further guidance as to what is government action.

LaForest J., writing for the majority in each case, was clearly well aware of the criticisms of *Dolphin's* public/private distinction for, in *McKinney*, he explained the rationale for restricting the *Charter*'s application to government. Historically, bills of rights have been directed at governments, because these institutions can enact rules that bind the individual. "Only government requires to be constitutionally shackled to preserve the rights of the individual", he wrote, for private institutions can be regulated by government. He also suggested that the application of the *Charter* to all private action would diminish individual freedom, since large areas of settled law and individual choices made through contract would be subject to judicial oversight. He also expressed concern that the Courts would be given an impossible burden if they must scrutinize all private action, as well as government action. Finally, he argued that there are more flexible means available to government, such as human rights legislation and tribunals, to deal with private action that infringes others' rights.

He then turned to the question whether universities were a part of government. His reasons do not give a precise set of criteria that will lead to easy determination whether an entity is part of government. Indeed, it would be impossible to do so, for these determinations rest on context and require a close examination of the statutory infrastructure and method of operation of each institution. LaForest J. did, however, give some indication of the factors that are *not* determinative. For example, the mere fact of incorporation or creation by statute does not make the entity "government", a conclusion that was important in order to protect private corporations from the *Charter*'s reach through an indirect route. Secondly, he held that the fact that an entity is subject to judicial review of some of its decisions is not conclusive, nor is the fact that it performs an important public service, that it is subject to extensive government regulation, or that it receives extensive financial assistance from the public purse. At the same time, he stated that

the *Charter* is not limited to entities which discharge functions that are "inherently governmental in nature".

If these had been the indicia adopted — regulation, public service, government funding, statutory creation — the universities and the hospital in *Stoffman* would have been subject to the *Charter*. All are created by government, funded heavily by it, perform important public functions in the areas of education and health care, and are subject to a degree of government oversight. However, for LaForest J., what separated these institutions from government was their independent decision-making authority. In the case of the universities, although there was extensive government funding, the Lieutenant-Governor in Council had a role in structuring the governing body, and there was a degree of government oversight in the implementation of new programmes, the universities remained self-governing institutions, left to manage their own affairs and to allocate the funds received from government and other bodies. In the words of Beetz J. from an earlier case, which LaForest J. adopted, "statutes incorporating universities do not alter the traditional nature of the institution as a community of scholars and students enjoying substantial internal autonomy". Under the present structure, the government has no power of legal control over university operations, especially in regulating the terms of employment of academic staff.

Similarly, the Vancouver General Hospital, despite extensive government funding and supervision, including ministerial approval of the by-laws of the hospital's board, was a self-governing institution because the routine, day-to-day control was left to the board of the institution.

In contrast, *Douglas/Kwantlen* resulted in a finding that a British Columbia college was part of government. A key difference between this and the other cases is the fact that the college was, by statute, an agent of the Crown, which indicates a close degree of control by the government. Moreover, LaForest J. found a much greater degree of government control of the governing structure and programme here, including a board constituted entirely of government appointees holding their seats at pleasure. Like the other institutions, it was also extensively funded by government.

Wilson J. took a contrasting approach to LaForest J. in all of these cases, and she was joined by Cory J. in all and L'Heureux-Dube J. in *Stoffman*. She was critical of what she described as LaForest J.'s "narrow" approach to the issue, arguing that it rested on an American doctrine of constitutionalism which sees government as a necessary evil and "the minimal state as an unqualified good". This is not fair to LaForest J., as he points out, for his reasons in this and other cases on the merits of constitutional challenges indicate a large measure of deference to the legislative will — hardly an indication of hostility to state action.

In *McKinney*, Wilson J. not only embarked on a lengthy consideration and defence of *Dolphin*; more importantly for future cases, she adopted a framework of three tests (which Cory J. endorsed in each case) to apply when an entity is not self-evidently part of the legislative, executive or administrative branches of government: the control test (whether one of these branches exercises general control over the entity), the government function test (whether the entity performs a traditional function of government or a function which, in more modern times, is recognized as a responsibility of government), and a government entity test (whether the entity acts pursuant to statutory authority specifically granted to it to further an objective that government seeks to promote in the broader public interest). The tests are not cumulative — that is, an affirmative answer to one is a strong, but not conclusive, indicator that the entity is part of government, while a negative answer to all is not determinative that the *Charter* is inapplicable.

Applying these tests to each of the fact situations, she decided that each entity was part of government. She gave much greater significance to the degree of government control and funding than LaForest J. As well, she was influenced by the fact that the institutions perform an important public service, while LaForest J. rejected a "public purpose" test for the application of the *Charter* as "fraught with difficulty and uncertainty".

Some will criticize the Court for the uncertainty continuing to surround the application issue following these cases. Yet this criticism is unfair and asks for an impossible degree of precision in a grey area of *Charter* application. The Court has given us some important guidance, not only with the regard to the institutions in these cases, but others as well. It has also indicated that certain activities will come within *Charter* scrutiny, for both LaForest and Wilson JJ. stated that restrictions on rights do not escape *Charter* scrutiny just because they are included in a contract or collective agreement. Government can restrict rights not only by legislation, but by administrative action or contract as well.

The Supreme Court has affirmed that the *Charter* is a document which speaks to government. Defining what is "government" is not an easy task, as many political scientists and policy analysts will attest. We can only proceed on a case by case basis, using the framework that the Court has begun to set out.

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1. *McKinney* v. *University of Guelph*; *Harrison (Connell)* v. *University of British Columbia; Stoffman v. Vancouver General Hospital* and; *Douglas/Kwantlen College Faculty Association v. Douglas College* (all decided December 6, 1990).
2. (1986), 33 D.L.R.(4th) 174 (S.C.C.).
3. *Ibid.* at 195.
4. *Ibid.* at 198.
5. The Court also discussed application issues, in much less detail, in *Slaight Communications Inc. v. Davidson* (1989), 59 D.L.R.(4th) 416 (application to the order of an adjudicator determining a complaint of wrongful dismissal under the *Canada Labour Code*), *British Columbia Government Employees' Union v. A.G. B.C* (1988), 53 D.L.R.(4th) 1 (application to contempt order) and *Black v. Law Society of Alberta* (1989), 58 D.L.R. (4th) 317 (application to regulations of law society).

The Mandatory Retirement Cases: Part II

THE SEARCH FOR REASONABLE LIMITS: IS *OAKES* RETIRED?

William Black

Mandatory retirement is a conundrum from the point of view of both equality rights and social policy. Therefore, it is not surprising that the Supreme Court of Canada was split in three recent decisions about the issue.

The three companion cases concerned the mandatory retirement of university professor and administrative staff[1] and the denial of hospital admitting privileges to doctors who have reached the age of 65.[2] *McKinney* contains the most detailed examination of the issues. One ground of challenge in all three cases was that the policies of these institutions themselves violated section 15 of the *Charter*. A second ground in the university cases was that exemptions in the Ontario and B.C. human rights statutes allowing for mandatory retirement should be struck down.[3] Though the Court held that the *Charter* does not apply to universities or hospitals, it went on to find that the policies would violate section 15 but would be saved by section 1, if the *Charter* were applicable. The Court upheld the statutory exemptions using similar reasoning.

SECTION 15 ANALYSIS

Speaking for the majority in each of the cases, LaForest J. had little difficulty in determining that the policies and statutory exemptions were discriminatory for the purposes of section 15. Clearly, the policies of the institutions caused disadvantage based on age, a ground enumerated in section 15. Similarly, the statutory exemptions allowing mandatory retirement constituted differential treatment based on an enumerated ground and denied those over 65 the equal protection and benefit of the human rights legislation.

The Court had rejected the "similarly situated test" in *Andrews*,[4] and it is not surprising that it adhered to this position in *McKinney*. Somewhat more surprising was LaForest J.'s characterization of the case as one of adverse impact discrimination rather than intentional discrimination. The age distinction was made consciously and reflected an adverse judgment or stereotype about persons over 65 as a group. It would seem clearly to constitute intentional discrimination. Arguably, the intent issue is not important to section 15 analysis, since the section covers both intentional discrimination and unintended adverse effects. But the characterization was cited later by LaForest J. in his section 1 analysis as helping to justify a limit on the rights.

In addition to a finding of discrimination, earlier cases had held that section 15 applies only to the application of "law",[5] and this issue caused the Court some difficulty in the mandatory retirement cases. There was no problem with respect to the statutory exemptions, which clearly are law. But it was less clear that the mandatory retirement policies of the institutions, some of which were incorporated in collective agreements, constitute law.

The Court adopted a very broad definition of "law" for the purposes of section 15. LaForest J. said that a university policy adopted in the exercise of a statutory power or discretion would be covered. A term of a contract with a government entity, whether or not it amounted to "policy", would also be covered. LaForest J. added that all acts taken pursuant to powers granted by law would constitute "law" for the purposes of section 15.[6] Wilson J. was even more emphatic in stating that "discrimination engaged in by anyone to whom the *Charter* applies is redressed whether it takes the form of legislative activity, common law principles or simply conduct."[7] Thus, it seems very unlikely that the word "law" in section 15 will play any limiting role once one has found that the requirements of section 32, discussed by Katherine Swinton, have been met.[8]

SECTION 1

The Supreme Court of Canada has been divided for some time about the manner in which section 1 should be applied, and this division is reflected in the mandatory retirement cases. In *R. v. Oakes*, the court established a fairly strict test for determining whether a *Charter* right could be limited.[9] But later cases have raised doubts about the Court's continued adherence to this test.[10]

The mandatory retirement cases reflect a further erosion of the strict *Oakes* standards. Since the Court took a fairly similar approach in considering both the institutional policies and the statutory exemptions, I will focus on the latter here in the interest of brevity.

LaForest J. said that the balancing should not be "mechanistic" and that the competing values should be "sensitively weighed."[11] He found that the statutory objectives (preserving the integrity of pension plans and of allowing free bargaining in the workplace about all terms of employment, including seniority and tenure) to be pressing and substantial.[12] He also cited the fact that mandatory retirement schemes have created settled expectations.

In considering whether the means to achieve these objectives met the proportionality test, LaForest J. found that the exemptions were rationally related to these objectives and met the "minimal impairment" test. He said that in the circumstances of these cases, the question is whether the government has a reasonable basis for concluding that the legislation interferes as little as possible with the guaranteed right. Citing the need for

deference to the legislative and political judgment in light of the complexity of the issue and the fragmentary, conjectural nature of the available information, he found that this standard had been met.

LaForest J. also found that the effects of the limit were proportional to the objectives. He noted that the inequality did not arise from legislation about mandatory retirement but from a statute that afforded protection to those within a particular age. This legislation was intended, in his view, to protect those most in need, taking account of the other social programs available to those over the age of 65. He emphasized the right of the legislature to take incremental measures to deal with a social problem.

Wilson J. and L'Heureux-Dubé dissented, finding that the legislation was not saved by section 1.[13] Wilson J. conceded that the strict *Oakes* test is not always applicable, but she said that departures should only be made in exceptional circumstances, in particular, where the legislature must strike a balance between claims of competing groups and has chosen to promote or protect the interests of the less advantaged. She concluded that these cases did not present such circumstances, noting that a lower standard of scrutiny was not justified by the fact that the legislative purpose was to extend non-discrimination rights to at least some groups. She also noted that the statutory exemption excluded all complaints of age discrimination by workers over 65, including complaints about discriminatory terms and conditions of employment. The fact that the exemption was not limited to mandatory retirement policies supported her conclusion that it did not meet the rational connection branch of the *Oakes* test.

L'Heureux-Dubé J. also found that the exemption was too broad. In addition, she concluded that the purpose did not meet the *Oakes* test because it was based on false generalizations about the effects of aging. As well, she found that the effects of the exemption were disproportionate.

A key question is exactly why the majority departed from the *Oakes* standard in applying section 1. There are a number of possible explanations, which have quite different implications for the application of section 15 in the future.

LaForest J., quoting the *Irwin Toy* case, suggests that a lower standard is appropriate where the state interest involves the reconciliation of claims of competing individuals or groups or the distribution of scarce resources.[14] Where two individuals or groups can each assert a competing equality claim, it does seem sensible that one should not be given priority over the other just because it was the first to some before the court and the other is considered only at the section 1 stage.[15] However, the second justification — the allocation of scarce resources — is harder to defend. Since almost all government social programs allocate limited resources, and since such programs are often of greatest importance to disadvantaged individuals and groups, the result would be to afford the least protection to those groups that section 15 was designed to protect.[16]

A second explanation is that mandatory retirement results in a complex web of offsetting social and economic benefits and detriments that justifies a lower level of scrutiny. The situation is somewhat unique, it is true, in that a substantial proportion of those affected support mandatory retirement as a net benefit. Also, arguably the claimants were trying to have it both ways in challenging age discrimination while assuming that they would retain the benefits of seniority. In my opinion, however, it would be a dangerous trend for the Court more generally to attempt to assess all of the collateral effects of abolishing a discriminatory policy or to justify exclusion from one form of assistance (such as human rights legislation) on the ground it is offset by some other government benefit (such as income support for seniors). A serious attempt to do so involves exactly the type of complex social and economic analysis LaForest J. was trying to avoid. As the dissenters note, it also ignores the rights of groups who are not eligible for the offsetting benefits, such as women and members of minorities who do not have their share of the kinds of jobs that provide pension plans and lifetime tenure.

A third (and related) possibility is that a lower standard of scrutiny will apply to legislation such as human rights statutes that afford benefits rather than imposing prohibitions. That reasoning is also problematic since such laws are often designed to deal with disadvantage. As LaForest J. notes, governments must be given some leeway to deal with problems incrementally. But where the limitation on the benefit is explicitly on the basis of an enumerated or analogous ground and the excluded group is the one more at risk, it is not readily apparent why a lower level of scrutiny is appropriate, as the dissenters point out. Surely, no one would argue that the exclusion of members of certain races from human rights protection would be justifiable on the ground that governments must deal with discrimination one step at a time.

That example suggests a fourth explanation — that a lower standard of scrutiny will apply to age discrimination than to other grounds under section 1. LaForest J. cites the fact that, unlike grounds such as race and sex, there is a correlation between age and ability, at least at the extremes. He also notes that most of us pass through ages and thus are less likely to form settled prejudices. If this is the explanation, we may be moving toward something like the U.S. levels of scrutiny approach, through the mechanism of section 1.[17]

I have not exhausted the possible explanations, but this list demonstrates the variety of possibilities. Because we have so few Supreme Court of Canada equality decisions, it is tempting to treat each one as an important guide. However, generalizations based on the mandatory retirement cases may be suspect in light of the rather unique nature of the issue.

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(Notes continued on page 85)

Expression, Racism and The Charter

FREE SPEECH AND ITS HARMS

Frederick Schauer

In traditional American academic discourse, there is only one position about free speech: the more free speech the better. Commonly the asking of sceptical questions about free speech has been at best a marginal activity. Part of what I want to do is ask the questions about free speech that the principle of free speech encourages us to ask about everything else.

To start with, speech is an other-regarding act. As a seven year old, like most others similarly situated, I would run home crying because I had been called a name, whereupon my mother advised me: "sticks and stones may break your bones but names will never hurt you." I soon realized that this was a crock. My mother was wrong. To think of speech as incapable of causing harm, to think of speech as a self-regarding act, in the context of the distinction in classical political theory between self-regarding and other-regarding acts, gets us off on the wrong foot right at the beginning. Some of us speak just to hear the sound of our own voices but, more commonly, we speak in order to have an effect on others. And some of these effects can cause harm, as in the more common examples of defamation of character, invasion of privacy, or interference with contractual relationships. Indeed, with enormous frequency, the kinds of things that people say to others about others cause the types of harms we would normally consider sufficient to justify government regulation.

In addition, speech can be other-regarding by inducing people to do things that they would otherwise not have been inclined to do. Advertising, for example, is premised on the view that speech can cause people to change their behaviour. And if we suspect that the images we find all around us, of people having a grand old time driving their Fords, drinking their Molsons, and smoking their Marlboros, will increase the incidence of those behaviours, then the images all around us favourably portraying sexual violence against women are likely to increase the incidence of that behaviour too.

Finally, speech might also cause harm in a face-to-face epithetical form. A bit of water falling on you from the window washers above is not the same as being intentionally spit upon. Although physically identical, the latter is dehumanizing and insulting. And when somebody comes up to us and addresses us with a derogatory racial or religious epithet, we feel harmed in almost the same way.

Because speech can harm in a number of different ways, a legal regime of free speech does not immunize speech from regulation because it is harmless, but rather immunizes speech despite the harm it may cause. The real culprit here is John Stuart Mill. Virtually all of his book *On Liberty*, except Chapter 2, is about why it is politically and morally impermissible for the state to regulate self-regarding conduct — acts that affect no one other than the actor. Chapter 2 is about freedom of speech. Because Chapter 2 is placed in the context of his larger discussion, Mill is commonly taken to have made the argument that self-regarding activities such as speech ought not to be regulated. I don't think Mill says this, but even if he does he is wrong. The principles that we discuss when we talk about regulating or not regulating self-regarding conduct have very little to do with the question of regulating speech, once we recognize that speech is other-regarding and potentially harm-producing.

Why should society tolerate potentially harm-producing speech? One possible answer is that toleration is quite simply a good thing and that we should not condemn or restrict that which just happens to be different. But we do not normally tolerate burglars, murderers, or rapists, although many societies have decided to tolerate a wide-range of other-regarding and harm-producing conduct when it takes place in the context of words or pictures. More commonly, therefore, people say that however bad it may be to tolerate harmful speech, it is even worse to tolerate government regulation of speech. This is because, it is said, the government regulation of speech is likely to be even more harmful than the speech it regulates. On this view, the state as regulator of speech is an evil greater than any other possible evil left unregulated. The operating assumption here is that when government is removed as regulator of speech, what remains is a domain in which ideas succeed or fail based on their truth or falsity.

A common metaphor in much of free speech theory is the "marketplace of ideas". But it is not just a metaphor. The marketplace of ideas is, after all, a market, and markets are regulatory mechanisms that entrench certain forms of power at the expense of others. When we think of traditional markets, we are cognizant of the fact that some people might have greater financial power in those markets. So too with the marketplace of ideas. For example, one of the ads that appears quite frequently on United States television extols the Bill of Rights, extols freedom of speech, and invites viewers to call a toll-free number to receive a beautiful copy of the Bill of Rights. And whom do you call for this Bill of Rights? The cigarette manufacturer, Phillip Morris — a multinational tobacco company! They may be doing this because they are good citizens. But it may be that they are also or mostly concerned with a pending bill that would totally prohibit the advertising of cigarettes. Phillip Morris becomes a free speech claimant in part because it prefers the marketplace of ideas where it can happily fight it out with the American Cancer Society for the hearts and minds of the American people. Consider who between these combatants has the money, the resources, and the expertise in dealing with markets.

Moreover, the marketplace of ideas is also subject to those same influences of authority as are other markets. When Michael Jordan or Wayne Gretzky are paid large amounts of money to tout this product or that, to say that "Wheaties are better than Cheerios," their endorsement does not derive from an enormous amount of time spent studying cereals. People react a certain way to these messages because a Michael Jordan or a Wayne Gretzky utters them. That is one of the factors influencing the way markets work. If we are sceptical about the role of authority with respect to markets, therefore, we might also be sceptical about the same influence in the marketplace of ideas.

Ultimately, I think, there is a close philosophical compatibility between the marketplace of ideas and other market places. Especially in an era of mass electronic media, those with the resources to participate in the market would find the marketplace of ideas an attractive and comfortable concept. Consider a scenario where everybody in this country were given a gun. One of the things that guns do is to empower the disempowered. But if we give everybody a gun, then we are also giving guns to those who are already well-armed. Would such a scheme equalize power or would it make the already powerful even more so? A free speech system empowers everyone in the same way. On occasion it gives more power to those with very little. But it also gives more power to those who already have it.

Indeed, many of the recent free speech claimants are what might be called political conservatives. A list of recent claimants in First Amendment litigation includes Dun and Bradstreet, The Association of Cable Operators, Pacific Gas and Electric, The First National Bank of Boston, The National Conservative Political Action Committee, American Future Systems (Tupperware), The Association of Private Clubs in the City of New York, and Phillip Morris. And whether these litigants are "conservative" or not, they are hardly the marginalized and powerless such as those more traditional free speech litigants — the Jehovah Witnesses, the anarchists of 1919, or the Communists of 1951.

Thus a free speech system can be harmful in two different ways. First, it can be harm-producing by protecting harm-producing acts. Second, it can exacerbate distinctions that are already drawn in society. Speech is an instrument of power, and if we think that certain allocations of power are harmful, then a free speech system that reinforces those allocations might itself be harmful.

I should conclude by noting that I am not really as sceptical about free speech as I might sound. Free speech is a good thing, one is expected to be for it, and I am, in fact, for it. But if free speech is a good thing, then we ought to be willing to apply the lessons of free speech to free speech. And if, as Mill said, we can never be certain of our ideas unless we have subjected them to the most stringent and the most sceptical challenges, then it is ironic that so much of the culture surrounding free speech forgets that message when free speech itself is at issue.

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THE *CHARTER* AND RACISM

David Matas

The *Canadian Charter of Rights and Freedoms* is a passive instrument. It does not require governments or legislatures to do anything. It just prevents governments and legislatures from doing certain things. A government or a legislature that was totally inactive in every respect would be an awful government, a terrible legislature. But it would be a government, a legislature, that complied with the *Charter*.

The *Charter* prohibits racial discrimination in law.[1] But it does not require governments or legislatures to promote racial equality. A government that did absolutely nothing about racial equality would be in full compliance with the *Charter*.

The discrimination that is prohibited by the *Charter* is not just discrimination in the law. It is also discrimination under the law. A discriminatory impact is prohibited as much as a discriminatory intent. Even if a law, on its face, is neutral, it nonetheless may violate the *Charter* where the law, in its operation, has an adverse discriminatory racial effect.[2]

Once a legislature passes a law that is discriminatory in nature, once a government institutes a programme that is discriminatory in impact, the courts have the power to require the offending government to remove the discrimination by giving equal benefits to all, as opposed to no benefits to anyone. The *Charter* allows the courts power to grant such remedy as the courts consider appropriate and just in the circumstances.[3] It may be more appropriate and just to order the extension of a discriminatory government programme to all, rather than to strike it down as invalid, because it is discriminatory, and make it available to none.[4]

When a law, however, does not discriminate, either in intent or impact, then the government or the legislature have done their *Charter* duty. The *Charter* does not reach into the private sector to prevent one group of citizens discriminating against another. As long as governments are not actively promoting inequality, they can, legally, wash their hands of what goes on in society generally.

Human rights fall into two categories. There are political and civil rights. And there are economic, social and cultural rights. Many economic, social and cultural rights, by their very nature, require government activity. For instance, the International Covenant on Economic, Social and Cultural Rights sets out the right to work. The Covenant goes on to state that, to realize this right, there shall be policies and techniques to achieve steady development and full employment.[5] In other words, the Covenant commits governments to full employment policies. A government that has no employment policy at all violates the Covenant. A government that does nothing is in breach of its international obligation in relation to the right to work.

While economic, social and cultural rights tend to require activity on the part of government, and political and civil rights can be more easily realized by government inaction, it is not true to say that all political and civil rights are merely passive rights. The international human rights instruments impose a number of positive obligations on governments to realize political and civil rights. For instance, the International Covenant on Civil and Political Rights, which Canada has signed and ratified, requires Canada to prohibit by law advocacy of national racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[6] The International Convention on the Elimination of all Forms of Racial Discrimination, which Canada has also signed and ratified, commits signatories to declare illegal and prohibit organizations which promote and incite racial discrimination, and to recognize participation in such organizations or activities as an offence punishable by law. The Convention commits Canada to encourage means of eliminating barriers between races.[7]

The Principles on War Crimes and Crimes Against Humanity, a General Assembly resolution which Canada supported, states that war crimes and crimes against humanity, wherever they are committed, shall be subject to investigation.[8] The persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial, and, if found guilty, to punishment. And one could go on.

None of these obligations are in the *Charter*. The *Charter* does not prohibit hate propaganda. It does not prohibit racist organizations. It does not set out the offenses of war crimes and crimes against humanity.

International obligations do not require that these offences be in the *Charter*. It is enough if they are in the law. Hate propaganda has been part of Canada's statute law since 1970, well before Canada ratified the International Covenant on Civil and Political Rights in 1976. War crimes and crimes against humanity are also offenses at Canadian law, but only since 1987, long after the obligation to enact such laws arose. The duty to prosecute has existed, at the very least, since the end of World War II, and arguably even before that. But Canada did not comply with the duty till decades later.

Regarding the duty to prohibit racist organizations, there is still not compliance. Canada has not legislated, nor has the government indicated it would introduce legislation to prohibit racist groups. The obligation exists internationally, but it is nowhere to be found in the Canadian statute books.

The Honourable Jules Deschênes, in the Report of the Commission of Inquiry on War Criminals, has taken a different point of view. The Report argues that international offenses are part of Canadian law by virtue of the *Charter*, whether the Canadian Parliament has legislated the offenses or not.[9]

The *Charter* states[10] that any person charged with an offence has the right not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations. This is what Commissioner Deschênes said of that provision. He wrote "In entrenching that provision in its Constitution, Canada could not have more clearly acknowledged its respect for international law; it could not have bowed more reverently to the universal belief in a basic law common to all mankind; it could not have more eloquently adopted that law into its own legal system."[11] He concluded, "war crimes can now form the basis of criminal prosecution in Canada, notwithstanding the lack of any domestic law, or even any domestic law to the contrary." Though what the learned judge said was restricted to war crimes, his remarks would be equally true of propagating hatred, organizing racist groups or any other international law offences not part of Canadian legislation.

That is the view of the Commission of Inquiry on War Criminals. But it is not the view of the Government of Canada, nor of any of the provincial governments. No prosecutions have ever been launched relying solely on the *Charter* and international law, without reference to Canadian legislation.

Nor is it likely that any Crown prosecutor would ever launch such a prosecution. The legal theory of the Honourable Jules Deschenes could be tested. But it would have to be by way of a private prosecution. The Canadian *Criminal Code* states that anyone who on reasonable and probable grounds believes any offence has been committed may lay an information. The laying of the information does not have to be done by a person in an official capacity. Laying an information is, essentially, charging a person with an offence and starting the proceedings.[12] Once the information is laid, the person who charges can assume conduct of the prosecution. "Prosecutor" is defined in the Criminal Code to include the person who institutes the proceedings and includes his or her counsel.[13]

The Crown can intervene, either to stay the proceedings or to take them over.[14] But if the Crown does nothing, the private prosecutor can carry the case of its conclusion. Should anybody wish to try this avenue of legal recourse, it is open to them. For now, it remains untested. There have been many private prosecutions, historically, in Canada. But there have been none for offenses at international law which are not offenses according to Canadian statute law.

Leaving aside the possibility raised by Deschenes in his Royal Commission report, we are left with the situation where the *Charter* is a brake rather than a spur. It hampers governments in what they can do, but does not push them to do anything. The impediments the *Charter* throw in the way of government are not just impediments to inflicting discrimination. They can be as well impediments to government in combatting discrimination.

Every law a Canadian legislature passes is subject to *Charter* scrutiny, including laws designed to combat racial discrimination. A law is not exempt from *Charter* scrutiny simply because it has as its purpose the combatting of discrimination. So, for instance, in the *Keegstra* case in Alberta, the hate propaganda law in the *Criminal Code*[15] was held to be unconstitutional by the Alberta Court of Appeal. The Court held that the provisions violated the presumption of innocence requirement in the *Charter*.[16] The offence of hate propaganda has, according to the *Code*, four defenses — truth, religious opinion, public interest and removal. The burden of proof for establishing these offences is on the accused. The Court held that imposing the burden of proof on the accused to establish these defenses violates the presumption of innocence. The Court also held that the hate propaganda law violates the freedom of expression guarantee in the *Charter*.[17] Finally, the Court held the law was not a reasonable limit to the rights to freedom of expression and presumption of innocence guaranteed by the *Charter*. So the law failed.[18]

The Ontario Court of Appeal held exactly the opposite, in the case of *Andrews and Smith*.[19] That Court held the Canadian hate propaganda law to be constitutional. The issue came up for decision at the level of the Supreme Court of Canada. The Supreme Court heard the appeals from the *Keegstra* and *Andrews and Smith* cases in December, 1989. The Court came down with a decision, one year later in December, 1990, that the hate propaganda law is constitutional.[20]

From June 6, 1988, when the *Keegstra* decision came down, till December, 1990, when the Supreme Court of Canada decided the hate propaganda law was constitutional in Alberta, hate propaganda circulated in Alberta without hindrance. Throughout the whole of Canada, the *Keegstra* decision had a chilling effect on potential hate propaganda prosecutions. The Canadian ability to combat hate propaganda was temporarily wounded in Alberta and hampered everywhere.

A similar comment can be made about the laws against war crimes and crimes against humanity. While these laws have not been law struck down as unconstitutional by any court, they have suffered one constitutional challenge after another. Before Alberta Helmut Rauca was extradited for prosecution for war crimes in West Germany in 1982, his counsel argued in Court that Rauca should not be extradited because of the statement in the *Charter* that every citizen of Canada has the right to remain in Canada.[21] When Imre Finta was prosecuted for war crimes,

his counsel argued that there was a violation of the guarantee of fundamental justice in the *Charter* on the grounds the war crimes law was retroactive. Counsel for Finta also argued that the equality guarantee of the *Charter* was violated by the war crimes law because the law applies to acts committed outside Canada, but not to acts committed inside Canada.[22] These challenges did not succeed. But they had to be answered.

One reason why the government has not legislated a prohibition against racist groups, which it has committed itself to do by means of the International Covenant on the Elimination of All Forms of Racial Discrimination, is the *Charter*. The *Charter* guarantees freedom of association.[23] The government is worried that any law prohibiting racist organizations would run afoul of that provision.

If the positive international obligations of Canada about combatting discrimination and racism, as well as the negative ones, were in the *Canadian Charter of Rights and Freedoms*, none of these problems would arise. The hate propaganda law could not have been struck down. The war crimes law could not be challenged. A law against racist groups could be enacted without fear of its being declared invalid.

The Supreme Court of Canada has already held, in a case about Roman Catholic school funding in Ontario, that one part of the constitution cannot be used to invalidate another part of the constitution. Even if the hate propaganda law violated freedom of expression, the courts would have had no power to declare it invalid for that reason once it became part of the constitution.[24]

The international instruments on which the *Charter* draws are unlike the *Charter* in form. In Canadian law we see the negative prohibitions entrenched in the constitution and the positive obligations enacted only in legislation, if at all. The positive obligations must pass the tests of the negative prohibitions. The negative prohibitions sit in judgment on the positive obligations.

In international instruments, on the other hand, negative prohibitions and positive obligations sit side-by-side, equal in stature. The prohibitions do not have a higher legal standing than the positive obligations. The positive obligations and the negative prohibitions must be balanced off against each other, or read together as a whole.

In Canada, the negative prohibitions can defeat and have defeated the positive obligations. The *Charter* does not just do nothing to promote racial equality. It stands in the way of the promotion of racial equality by requiring all such promotion to meet the tests of the negative prohibitions set out in the *Charter*. When an act of a government or legislature to promote racial equality is struck down because of the *Charter*, as the hate propaganda law was for a time in Alberta, the *Charter* becomes an obstacle to racial equality. Hate propaganda was temporarily flourishing unchecked in Alberta because of the *Charter*.

If the *Charter* had positive obligations as the international instruments do, the obligations would be effective. But the positive obligations are not there. The point I would make about the *Charter* and racial discrimination is that the *Charter* as a spur or a prod to combatting racial discrimination is a dead loss, a non-starter. Positive efforts to combat racial discrimination are completely and totally absent from the *Charter*.

The *Charter* is not meant to be a spur. But it is meant to be a brake. And it is as a brake that it can be effective. But even as a brake there are real, acute problems. The *Charter* is not brake enough.

What I have in mind, in particular, is the behaviour of the Government of Canada overseas. In the book *Closing the Doors: The Failure of Refugee Protection* I have co-written with Ilana Simon, I describe in detail the problems of racism in immigration and refugee processing.

Contemporary problems are three fold. There is the points system for independent immigrants and assisted relatives that has a discriminatory racial and national impact, favouring some nationalities over others in fact, if not in law.

There is the maldistribution of visa offices and visa officers abroad. India, for instance, has only one visa office though the distances are huge, and transportation is difficult. The United States, by contrast, from which Canada admits a similar number of immigrants each year, has twelve Canadian visa offices distributed throughout the country. In all of Africa there are only four visa offices each with one or two visa officers. In the United Kingdom, by contrast, there are sixteen visa officers in London alone.

This maldistribution in offices and officers leads to widely differing speeds of processing. In India and Africa, the delays in processing are inordinate. In the United States and Western Europe, applications proceed expeditiously. Canada does not have a quota system by nationality in its law. But the effect of the maldistribution of offices and officers, and the consequent variations in delay is to create, in effect, an informal quota system.

The third problem is visa imposition itself. For some countries, including India, a person who wants to come to Canada as a visitor must obtain a visa. In other countries, such as the United States or most of the countries of Western Europe, no visa is necessary.

The Government of Canada imposes country visa requirements for those countries where there is fear of abuse of the Canadian immigration system from spontaneous arrivals. In

other words, if some nationals are suspected of potential abuse, then all nationals are penalized with a visa requirement. A visa requirement is as blatant a discrimination on the basis of nationality as one can imagine. An innocent visitor is burdened with the requirement of obtaining a visa because the Government of Canada suspects all nationals of the country of the visitor of potentially abusing Canadian immigration law.

The problem with the *Charter* in this context is it provides no grip on the problem. Canadian immigration and visitor processing overseas discriminates. And the *Charter* does not prevent it.

The Federal Court of Canada has held, in a case decided in August of last year by Mr. Justice Muldoon, that in order to invoke the *Charter*, the person who brings the *Charter* case must be physically present in Canada.[25] The case was a case of sex discrimination, not race discrimination, but the principle would remain the same.

I have some difficulty with that decision. The Supreme Court of Canada held in 1985 that refugee claimants in Canada illegally, without status, could invoke the *Charter*.[26] If a person outside Canada cannot rely on the *Charter*, but a person in Canada illegally can invoke the *Charter*, then there is a legal incentive to enter Canada illegally simply in order to get the benefit of the *Charter*.

But if we assume the decision of Mr. Justice Muldoon is a correct statement of the law, then we must admit that the *Charter* fails not only as positive spur, but also as a negative brake. At least overseas, the Government of Canada can discriminate and the *Charter* will have nothing to say.

It may well be that a Canadian sponsor, or a Canadian assisting relative, can launch a *Charter* challenge when the foreign applicant cannot. But if there is no sponsor, or no assisting relative, the foreign applicant for entry to Canada can be a victim of discrimination and yet not have a *Charter* remedy.

The *Charter* has been important as an educational tool. Its value to Canada goes beyond its legal impact. Even if the *Charter* has not been a legal spur to action, it has been a practical spur. The problems I have mentioned are problems of incompleteness rather than a failure in what is already there. But the *Charter* is incomplete as an instrument in the battle against racism. It could be a better instrument than it is.

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1. Section 15(1).
2. *Andrews v. Law Society of B.C.* (1989), 56 D.L.R. (4th) 1 (S.C.C.).
3. Section 24(1).
4. *Schachter v. The Queen* (1990), 66 D.L.R. (4th) 635 (F.C.A.).
5. U.N.G.A. Res. 2200 (XXI) (1967) Art. 6.
6. 999 U.N.T.S. 171 (1966) Art. 20.
7. 660 U.N.T.S. 195 (1969) Art. 4.
8. Resolution 3074 (XXXVIII) 3 Dec. 1973, Article 1.
9. Canada, Commission of Inquiry on War Criminals, *Report*, Pt. 1: Public (Ottaw: Supply and Services, 1986) (Commissioner: Hon. Jules Deschênes) at 131-132.
10. Section 11(g).
11. *Supra*, note 9.
12. *Criminal Code*, R.S., c.C-34, s.504.
13. *Ibid.*, s. 2.
14. Barton and Peel, *Criminal Procedure and Practice*, 2nd ed., P-49.
15. *Supra*, note 12, s. 319.
16. Section 11(d).
17. Section 2(b).
18. (1988), 60 Alta. L.R. 1 (Alta. C.A.).
19. (1988), 28 O.A.C. 161 (Ont. C.A.).
20. *R. v. Keegstra*, [1991] 2 W.W.R. 1 (S.C.C.).
21. *Re F.R.G. and Rauca* (1983), 145 D.L.R. (4th) 638 (Ont. C.A.).
22. *R. v. Finta* (1989), 61 D.L.R. 4th 85 (Ont. H.Ct.).
23. Section 2(d).
24. *Re Education Act* (1987), 40 D.L.R. (4th) 18 (S.C.C.).
25. *Ruparel v. M.E.I.*, T-1322-88, August 8, 1990.
26. *Singh v. M.E.I.* (1985), 17 D.L.R. (4th) 422 (S.C.C.).

The Search for Reasonable Limits (Notes cont'd)

1. *McKinney v. University of Guelph, Harrison (Connell) v. University of British Columbia.* A third case, *Douglas/Kwantlen College Faculty Association v. Douglas College*, raised the issue of mandatory retirement at a community college, but the Supreme Court of Canada decision considers only the issue concerning the application of the *Charter*.
2. *Stoffman v. Vancouver General Hospital Legislature Building.*
3. See *Ontario Human Rights Code*, S.O. 1981, c.53, s. 9(a) and the *British Columbia Human Rights Act*, S.B.C. 1984, c.22, ss.1 & 8. *Stoffman, supra*, note 2, did not consider the human rights legislation since doctors were not employees of the hospital and thus would not come within the prohibition of discrimination by employers in any event.
4. See *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.
5. *Ibid.* at 163-164.
6. *McKinney, supra*, note 1 at 30-32.
7. *McKinney, supra*, note 1 at 79.
8. Only Sopinka J. seemed to have doubts about the matter.
9. *R. v. Oakes*, [1986] 1 S.C.R. 103.
10. See, e.g. *Irwin Toy Ltd. v. Québec (A.G.)*, [1989] 1 S.C.R. 927 at 992ff.
11. *McKinney, supra*, note 1 at 35.
12. He found the objective of providing employment for youth to be less convincing.
13. Cory J. also dissented in the *Stoffman* case, though he agreed with the majority's application of s.1 in the other cases.
14. *McKinney, supra*, note 1 at 37, quoting *Irwin Toy, supra*, note 9 at 994.
15. It is not clear, however, that all claims of competing individuals and groups raise issues of equality coming within section 15 protection.
16. See C.L. Smith, "Dimensions of Equality", paper presented at the Supreme Courts Conference on Constitutional Law, April 5, 1991, Duke University.
17. In this regard, presumptions about a correlation between ability and an enumerated or analogous ground of discrimination are troubling. In particular, it could weaken protection for those with physical and mental disabilities, especially if we did not take account of our historical prejudices and stereotypes with regard to the effects of a disability.

A Review of the *Keegstra* Case

SUPREME COURT UPHOLDS HATE PROPAGANDA LAW

Bruce P. Elman

On the 11th of January, 1984, James Keegstra, a teacher at the Junior and Senior High School in Eckville, Alberta, was charged with wilfully promoting hatred against the Jewish people contrary to, what is now, section 319(2) of the *Criminal Code* of Canada. The charge related to statements made by Keegstra while teaching his Grades 9 and 12 Social Studies classes. The *Keegstra* prosecution heightened an already lively debate on whether the *Criminal Code* prohibition against the dissemination of hate propaganda was constitutionally valid. The debate raged on in the public forum and within our court system for almost seven years. Finally, on the 13th of December, 1990, the Supreme Court of Canada settled the matter, for the time being at least: the Justices, by a 4 to 3 majority, upheld the constitutional validity of section 319(2).[1]

SOME BACKGROUND:

In 1965, the Minister of Justice, the Honourable Guy Favreau, set up a special committee to study the problem of hate propaganda in Canada. The committee, chaired by Dean Maxwell Cohen of McGill Law School, concluded that the provisions of the *Criminal Code* were inadequate to deal with the problems of hate propaganda. Consequently, they recommended amendments to the *Criminal Code* which would put in place provisions to deal with the various aspects of hate propaganda. The Cohen Committee suggested that Parliament enact prohibitions against the "advocating of genocide" (now section 318), the "public incitement of hatred" (now section 319(1)), and the "wilful promotion of hatred" (now section 319(2)). Special search and seizure powers relating to hate propaganda (now section 320) were also recommended. These recommendations were adopted by Parliament and became law in 1970.

From the outset, the most controversial of these provisions was the prohibition against the "wilful incitement of hatred". The text of the provision is as follows:

> Everyone 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 two years; or
>
> (b) an offence punishable on summary conviction.

Even in the years before *Canadian Charter of Rights and Freedoms* came into effect, critics complained that the provision was an infringement of freedom of expression. This criticism, quite naturally, intensified after the advent of the *Charter*. From the outset, the Cohen Committee had been sensitive to this criticism. In order to allay the fears of civil libertarians, the Committee made two suggestions: (1) that no prosecutions should be undertaken without the consent of the Attorney General, and (2) that a set of defences specifically designed to narrow the scope of the prohibition against the "wilful incitement of hatred" be included in the *Criminal Code*. These defences are found in section 319(3):

> No person shall be convicted of an offence under subsection (2)
>
> (a) if he established 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, discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true;
>
> (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

Not only was this provision unsatisfactory to civil libertarians, it engendered a different type of criticism from those minority ethnic and religious groups who had lobbied so strenuously for the adoption of the Cohen Committee recommendations. Their criticism was straightforward: the provisions were unworkable. The combined effect of sections 319(2) and (3) would make it impossible to convict anyone of this offence. They pointed to the requirements for conviction:

- The Crown must prove that the accused's conscious purpose was to promote hatred. The accused may accidently, negligently, or even recklessly promote hatred. This is not a crime. It is only the wilful or *intentional* promotion of hatred which is prohibited.

- This wilful promotion of hatred must be directed towards an *identifiable group*. An identifiable group is one that is distinguishable by colour, race, religion, or ethnic origin.

- The statements which promote hatred must be *other than in private conversation.*

- The Crown must prove beyond a reasonable doubt that the accused was not making a good faith argument on a religious subject.

- Further, the Crown must disprove, also beyond a reasonable doubt, any reasonable mistaken belief defence.

- Finally, the Crown must prove beyond a reasonable doubt that the accused was not, in good faith, attempting to point out, for the purpose of removal, matters tending to produce feelings of hatred.

- The accused may still escape conviction if he proves that the statements he made were true.

It is little wonder that the leadership of the various ethnic and religious communities in Canada saw the provisions as unworkable. And the Attorneys-General of the province, whose task it was to prosecute under the law, agreed with them.

THE FACTS:

Keegstra had begun his teaching career as an industrial arts teacher. He had shown an "interest" in history and soon found himself teaching Social Studies 9 and 30 (Grades 9 and 12 history, respectively). The curriculum of Social Studies 30 was supposed to be an examination of world history since 1900. Keegstra, however, was not constrained by this "technicality".

He taught that all the major events of history were connected to one central theme: a Jewish conspiracy to take over the world and rule it through the mechanism of one world government. He taught that the Jews were responsible for the First and Second World Wars. He linked the Jewish people to the American, French and Russian Revolutions. He taught that Jews formed secret societies — the Jacobins, the Illuminatti, the Bolsheviks — to pursue their evil plan to rule the world. He taught that Jews controlled the government, the banks, the courts, and the media. And he taught that the Holocaust was a hoax. He taught that the Talmud was the "blueprint" for this one world government. For confirmation of his views, he pointed to the New Testament.

Keegstra taught his students by lecturing. He would speak and they would write down his words. Sometimes he would write a phrase on the blackboard for emphasis and the students knew that this was important (i.e. that it should be used on an exam or in an essay) and they would copy it down in their notebooks. Students were evaluated on essays, tests, and exams. The students were to rely on their notes to complete these assignments. Other, more "mainstream", material was not to be used. History books, encyclopedias, and the like were "censored history" and their use was discouraged.

CASE HISTORY:

Keegstra was charged in January of 1984. The preliminary hearing took place in June of 1984. The accused was bound over for trial. In October of 1984 — prior to the trial — a hearing to examine the constitutionality of the *Criminal Code* provision was held. A decision upholding the validity of the provision was delivered in the next month. The trial began in April of 1985 and lasted three and one-half months. *Keegstra* was on the stand one of those months, during which he quoted extensively from, among other things, biblical scripture. The jury found Keegstra guilty and he was ordered to pay a fine of $5,000.00. Keegstra appealed. On the 6th of June 1988, the Alberta Court of Appeal overturned his conviction on the basis that section 319(2) was unconstitutional. The Crown appealed to the Supreme Court of Canada and the argument was heard in December of 1989. One year later, the Supreme Court of Canada granted the Crown appeal, declaring section 319(2) to be constitutionally valid. For the time being, Keegstra's conviction was reinstated, but the Court returned the matter to the Alberta Court of Appeal for reargument on questions involving the conduct of the trial. On the 15th of March, 1991, the Alberta Court of Appeal ordered a new trial. The Court was of the view that the method of jury selection was defective. The Attorney General of Alberta must now decide whether to pursue a new trial. It has been seven years since the original information was laid and the case is, so to speak, just beginning. More about this aspect of the case later.

THE SUPREME COURT DECISION:

In their analysis, both the majority and the dissent followed the now-standard two-stage approach to *Charter* adjudication. First, each examined whether section 319(2) of the *Criminal Code* violated section 2(b) of the *Charter*. The majority opinion asserted the proposition that expression which "wilfully promotes hatred" does not fall outside the protection of section 2(b) of the *Charter*. Any activity which attempts to convey meaning through a non-violent form of expression has expressive content and falls within the scope of section 2(b).[2] Further, they held that hate propaganda was *not* analagous to violence and, consequently, no exception for hate propaganda could be carved out of the protection afforded by section 2(b) of the *Charter*.

The assertion that section 2(b) had to be interpreted in light of sections 15 (equal protection) and 27 (preservation of multiculturalism) of the *Charter* as well as our International instruments and agreements was rejected. Sections of the *Charter*, other than 2(b), and International instruments and agreements could not be used to attenuate the scope of the protection afforded by freedom of expression under the *Charter*. These contextual values and factors should be used in the second phase of the inquiry.

The dissent was in general agreement with the majority on this stage in the analysis.

In the second phase, the so-called section 1 test, the Court examined whether section 319(2) was a reasonable limit which was demonstrably justified in a free and democratic society. The divergence of views between majority and dissenting factions of the Court rests, as it often does, on the result of the stage two analysis: the majority finds section 319(2) a reasonable and justifiable limitation, the dissent does not.

The majority began by noting that the objective — preventing pain to the target group and reducing racial, ethnic, and religious tension and, perhaps, violence — was of sufficient importance to warrant overriding a guaranteed right. Canada's International obligations and *Charter* sections 15 and 27 emphasize the importance of this objective. Furthermore, in the majority's opinion, section 319(2) is a reasonable and proportional response to secure that objective: the *Code* provision is rationally connected to the objective and does not unduly impair freedom of expression. On this latter point, the majority noted that section 319(2) was not vague nor was it overly broad. Indeed, in the majority's view, the *Code* section was narrowly drawn. They pointed to many of the requirements for a successful prosecution noted above. Other methods, non-criminal in nature, may exist for combatting racist incitement but Parliament is not limited to only one of these methods. Occasionally, the majority noted, condemnation through the force of the criminal law will be necessary.

Finally, the majority held that the advantages of the prohibition against racist incitement outweigh any resulting harmful effects. Once again, the majority referred to the importance of the protection of equality, the preservation and enhancement of multiculturalism, and Canada's International obligations. They contrasted this with the fact that hate propaganda is only tenuously related to the values underlying freedom of expression: the search for truth, individual self-fulfillment, and the maintainence of a vibrant democracy. Thus, the majority upheld the constitutional validity of section 319(2) of the *Criminal Code* and reinstated Keegstra's conviction until the Alberta Court of Appeal could adjudicate on other issues involving the conduct of the trial.

The dissent, while agreeing that the objective was an important one, disagreed on whether section 319(2) was a reasonable and proportional means of securing the objective. They were of the view the *Code* section was not rationally connected to the objective: there was no evidence that criminalizing the dissemination of hate propaganda would, in fact, suppress it. Indeed, the dissent noted that criminalizing racist incitement might have the reverse effect of promoting racism by providing greater publicity and exposure for the racist propaganda. Further, the dissent held that section 319(2) was overly broad in that it could potentially catch more expression than was justifiable. In any event, the provision has a chilling effect on legitimate public discourse. They noted that alternative methods, less intrusive than prohibiting racist incitement, are available to Parliament. Given the serious potential damage to freedom of expression and the dubious benefit to be gained from prohibiting the dissemination of hate propaganda, the dissent held that section 319(2) was not a justifiable limit on freedom of expression and was of no force or effect.

SOME OBSERVATIONS:

1. Majority support for the constitutional validity of section 319(2) may no longer exist.

Two of the four Supreme Court Justices who voted to reinstate Keegstra's conviction have already retired from the Court. One, Chief Justice Dickson, was replaced by Justice Stevenson who, as a member of the Alberta Court of Appeal, voted to strike down the hate propaganda law. A second, Justice Wilson, has been replaced by Justice Iacabucci whose views on this subject are not known. On the other hand, Justice Cory took no part in the decision. While a member of the Ontario Court of Appeal, Justice Cory wrote a stirring judgement in support of the constitutionality of section 319(2) of the *Code*[3] Thus, we can be safe in asserting that he would have sided with the majority. Chief Justice Lamer also took no part in the decision. Although he has often sided with Justices Dickson and Wilson, his precise views on this subject are unknown.

It is unlikely that this change in Court personnel will cause the overturning of the *Keegstra* decision itself. The Supreme Court of Canada rarely changes its mind that quickly. But it may tell us something about the likely result in the *Zundel* appeal which will be heard shortly by the Court. It is very likely that section 193 of the *Code* (publishing false news), which formed the basis of Zundel's conviction, will be declared unconstitutional.

2. In spite of the decision of the Supreme Court, the Keegstra case is not over. It may be with us for some time to come.

Although the Supreme Court reinstated Keegstra's conviction, the Alberta Court of Appeal has overturned the conviction on the method of jury selection. The Attorney General of Alberta must now decide whether to seek leave to appeal to the Supreme Court on this issue, to pursue the re-trial, or to drop the whole matter. It has been seven years since this matter began.

3. Using the criminal process to deter racism is fraught with problems.

There is important symbolic value in having a law prohibiting the dissemination of hate propaganda. Our society must make a clear statement as to the values which we deem of central importance. If we believe that equality, the protection of minorities, and the preservation of multiculturalism are important to Canadian society, we must be prepared to support these values with criminal sanctions if necessary. Indeed, although no causal connection likely exists, there was an alarming increase in overt acts of racism and anti-semitism in Alberta following the Alberta

Court of Appeal's decision to strike down the hate propaganda law in 1988. (Witness the pins protesting the use of turbans by Sikh members of the R.C.M.P., the skinhead attack on former broadcaster Keith Rutherford for having exposed a Nazi war criminal a number of years ago, and the cross-burning at Provost, Alberta accompanied by chants of "Death to the Jews".)

Nonetheless, the criminal process is long, expensive, and, most importantly, unpredictable. It should not be casually invoked. Alternative legal means — perhaps human rights legislation — should be studied to determine if they might be effective in combatting racism. The case of *Malcolm Ross* may point up new ways of deterring racist incitement.[4] It may turn out, however, that minority religious and ethnic groups will be forced to develop extra-judicial strategies to combat racist incitement or remain at the mercy of the hate propagandist.

4. We see an interesting dichotomy of philosophical perspectives disclosed in the Keegstra decision.

We often see *Charter* decisions as being either "conservative" or "liberal". Indeed, a decision to uphold a law which limited freedom of speech would generally be labelled "conservative" while a decision to strike down a government prohibition on speech would be recognized as classically "liberal". The *Keegstra* decision shows us that these labels may no longer be very useful, if they ever were. The dissent's opinion might be classed as more "libertarian" than "liberal". The majority, on the other hand, seems to be concerned with a particular subspecies of "communitarianism" namely "minoritarian" values: the right of the individual to engage in speech which is intended to promote hatred must yield to the greater community interest in the protection of minorities and the ensuring of racial, ethnic, and religious tolerance for all Canadians.

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1. *R. v. Keegstra*, [1991] 2 W.W.R. 1 (S.C.C.).
2. Even threats of violence, according to the majority, would fall within s.2(b). See *ibid.* at 31-32.
3. See *Andrews and Smith* v. *The Queen* (1988), 65 O.R. (2d) 161 (Ont. C.A.).
4. See the N.B.C.A. ruling which restored the human rights commission hearing into Ross in *N.B. Dist. No. 15 v. N.B. Human Rights Board of Inquiry* (1989), 10 C.H.R.R. D/6426.

A Review of the *Taylor* Case

USING HUMAN RIGHTS LEGISLATION TO CURB RACIST SPEECH

David Schneiderman

In a companion case to the decision rendered by the Court in *Keegstra*, the *Canadian Human Rights Act* (CHRA) provisions regarding hate messages were also tested against the *Charter*'s guarantee of freedom of expression. Section 13(1) of the federal statute prohibited communications repeatedly made over the telephone "that is likely to expose a person or persons to *hatred or contempt*" by reason that they belong to certain identifiable groups. At stake in *Taylor and the Western Guard Party v. Canada (Human Rights Commission)* was this provision contained in an otherwise ordinary statutory human rights regime. The impugned provision, however, only vaguely parallelled the racist incitement prohibitions contained in the *Criminal Code* and which were at issue in *Keegstra*.[1]

Taylor had been using the telephone to transmit recorded messages of the most vile nature on behalf of the Western Guard Party, promoting hatred primarily against Jews. Taylor repeatedly ignored a human rights tribunal order that he cease and desist the telephone messages and Federal Court orders citing him for contempt of the tribunal's order. Taylor eventually served a one year prison term for his contempt. In 1983, the Commission moved to cite Taylor and the Western Guard Party for contempt again as they continued to breach the original cease and desist order. In the interim, however, the *Charter* had been proclaimed in force. Taylor and the Western Guard Party challenged the fresh application on the basis that it unreasonably infringed their freedom of expression.

The panel of the Supreme Court agreed, as they did in *Keegstra*, that speech promoting hatred against certain groups fell within the scope of expression protected under section 2(b). The majority of the Court, as they had done in *Keegstra*, upheld the legislation as a reasonable limitation on free expression, particularly given the important objective of promoting equality of groups and dignity of the person. The dissenting minority, as in *Keegstra*, found the prohibitions to be an unreasonable limitation. While the reasons of both the majority and minority closely parallel their decisions in *Keegstra*, there are important differences between the two pieces of legislation in issue. What follows is a summary of those relevant distinctions and the manner in which the Justices handled them.

THE STATUTORY SCHEME

An important component in the reasoning of the Court was the fact that a statutory human rights regime was at issue in *Taylor*. Unlike the *Criminal Code* prohibitions against racist incitement, the CHRA was designed to facilitate the accommodation of minority groups in Canadian society and outlaw certain discriminatory practices. The prohibition against racist speech communicated over the telephone could be seen as an important component of a larger scheme aimed at preventing serious indignities based upon irrelevant characteristics.

Unlike the aim of the criminal process, which is designed to prosecute, convict, and then sentence, the aim of a statutory human rights code is the cessation of the racist activity and conciliation of the final outcome. It is false to equate, therefore, a human rights regime with the more strict procedures associated with the criminal process. This distinction was summarized by Chief Justice Dickson, writing for the majority, as follows:

> The aim of human rights legislation, and of s.13(1), is not to bring the full force of the state's power against a blameworthy individual for the purpose of imposing punishment. Instead, provisions found in human rights statutes generally operate in a less confrontational manner, allowing for conciliatory settlement if possible and, where discrimination exists, gearing remedial responses more towards compensating the victim.

The majority rightly characterized human rights laws in this way but they, too, analogized falsely; they failed to distinguish between the traditional subject of those laws and the particular subject of the law at issue in *Taylor*. Human rights statutes are aimed primarily at prohibiting certain discriminatory *practices* normally associated with conducting business in the public marketplace. Such matters as discriminatory practices in employment, accommodation, or admission to facilities normally open to the public, are some of the activities regulated by human rights codes. Such codes are not ordinarily directed at expression unconnected to an intention to engage in a discriminatory practice under the code.[2] Unlike the usual human rights complainant, who usually has suffered financial loss or suffered the indignity of a discriminatory practice, here there is no "victim" who is seeking a conciliatory solution or compensation. Dickson C.J. was wrong, therefore, to characterize the law as the type of "practice... which is [usually] sought to be precluded" by a human rights code.[3]

THE LACK OF AN INTENT REQUIREMENT

Unlike the *Criminal Code* prohibitions against racist incitement, the CHRA does not require the Commission to prove a discriminatory intent on the part of the respondent. The *Code* provision at issue in *Keegstra* required proof of "wilful" intent, (and even this provision has been the subject of calls for repeal in order to make criminal conviction easier[4]). But human rights codes, as discussed above, are not designed with a view to conviction and, therefore, do not generally require the exacting

standards of the criminal process. More importantly, one of the more pervasive forms of discrimination is systemic in nature; actions which result in unintentional discrimination. For example, height requirements or mandatory uniforms might have the effect generally of excluding particular groups from certain jobs. The result or effect of the impugned act is critical, not the mind of the discriminating actor. To quote Chief Justice Dickson again, "the purpose and impact of human rights codes is to prevent discriminatory effects rather than to stigmatize and punish those who discriminate."

Justice Dickson also refuted the "intent" requirement by noting that a term of imprisonment was not a great possibility in most cases. It would be available, as it was in this case, only if the offender had intentionally breached a tribunal's order. Even in the event of a hearing into a complaint of intentional hatred or contempt, imprisonment could not be the penalty imposed. But, in my view, the fact that imprisonment is an unlikely event, except for the most resistant of respondents such as Taylor, should not be sufficient to mollify concerns about the impact such a provision can have on free expression.

The Canadian Civil Liberties Association (CCLA), an intervenor in all of the hate propaganda cases before the Supreme Court, argued that the provisions were broad enough to catch in their net some of the Association's own activities, such as their successful tactic of posing over the telephone as a prospective employer seeking to hire "whites only" through employment agencies. Making such discriminatory requests over the telephone surely could fall within the scope of the CHRA's prohibitions. Despite the well-intentioned nature of the telephone calls — to expose discriminatory hiring practices — the CCLA and its agents could reasonably be the subject of a human rights complaint. One could imagine a more solicitous civil rights organization not wanting to appear to be running afoul of such a law. The minority of the Court accepted the CCLA's contention that their work could be so caught.

THE LACK OF STATUTORY DEFENCES

Unlike the *Criminal Code* provisions, the CHRA provides no statutory defences. In the *Code*, truthful statements, good faith statements on a religious subject, or good faith statements designed to remove conditions creating racial hatred, are among some of the defences available to an accused. As no such exceptions exist in the CHRA, groups such as the CCLA could be caught by the prohibition. In addition, the CHRA had no free expression exemption, as do most human rights codes which address discriminatory notices, signs or symbols.[5]

A freedom of expression exemption would have, of course, defeated the very purpose of the telephone hate message provision. This bespeaks the extraordinary nature of the human rights law in question. The majority of the Court also found a detailed statutory scheme of defences to be unnecessary. Given the conciliatory objectives of the CHRA, the absence of such defences was more acceptable than would be the case if they were absent from the *Code*. Even then, as Dickson C.J. wrote in *Keegtsra* and reiterated here, the *Charter* does not necessarily mandate that the defence of truth be available to the charge of promoting hatred. He wrote in *Keesgtra* that he found "it difficult to accept that the circumstances exist where factually accurate statements can be used for no other purpose than to stir up hatred against a racial or religious group".[6]

Of the defences available under the *Code*, there has been some dispute over whether communications by an aboriginal chief accusing white Canadians of stealing aboriginal land might be caught by the criminal prohibition against racist incitement.[7] There would be less doubt about the applicability of the CHRA in such circumstances. A telephone campaign by a first nation person or group promoting such ideas (a greater likelihood after the British Columbia Supreme Court decision in the Giktsan-Wet'suwet'en case)[8] might well be caught in the CHRA net. Again, the majority of the Court might have been a little too naive about such prospects.

THE INCLUSION OF PRIVATE COMMUNICATIONS

Unlike the *Code* prohibitions at issue in *Keegstra*, which outlaw the promotion of hatred "otherwise than in private conversation", the provisions in the CHRA concerned wholly private telephone discussions. The problem of inflicting hate speech on unsuspecting and unwilling listeners does not arise, as it does in the case of more public forms of hate mongering. One who chose to call the Western Guard Party line would ordinarily be seen as having assumed the risk of being insulted, degraded, and vilified. One who decided not to hear the message any further, could simply hang up the telephone.

The Human Rights Commission, in argument, and the majority in their reasons, sought to break down this public/private distinction. It was argued that telephone campaigns can take on a very public role. Indeed, as was the case here, telephone messages can be designed to change minds and influence public opinion. Moreover, section 13(1) requires that the respondent have used the telephone "repeatedly" in order to make these communications. The requirement of repetition makes clear the public nature of this otherwise private act.

THE VAGUENESS OF BOTH HATRED AND CONTEMPT

One of the more difficult matters for the Court concerned the definitional scope of the CHRA prohibition. Section 13(1) concerned communications that are likely to expose certain identifiable groups to "hatred or contempt". Compounding the problems of intruding into private communications without any specific defences, are two equally vague concepts: hatred and contempt.

As in *Keegstra*, the majority found the word hatred to be certain enough to meet section 1 scrutiny. The Court adopted

here the definition of section 13(1) described by the human rights tribunal in *Nealy* v. *Johnston*.[9] Under the CHRA scheme, "hatred" refers to "'extreme' ill-will and an emotion which allows for 'no redeeming qualities' in the person at whom it is directed". This was to be contrasted with "contempt", which is "similarly extreme", but describes circumstances "where the object of one's feelings is looked down upon". The section "thus refers to unusually strong and deep-felt emotions of detestation, calumny and vilification". Dickson C.J. did "not find this interpretation to be particularly expansive" for the section "extends only to that expression giving rise to the evil sought to be eradicated and provides a standard of conduct sufficiently precise to prevent the unacceptable chilling of expressive activity."

The CCLA, in their submission, provided examples of the kinds of expression which have been, or could have been, the subject of investigation under Canada's hate laws. Such items that have been held up at the Canadian border,under customs regulations parallelling the *Criminal Code* provisions, included a documentary film regarding Nelson Mandela (which was alleged to have promoted hatred against white South Africans) and Salman Rushdie's *Satanic Verses* (which was alleged to have promoted hatred against Muslims). Add to the formula the notion of "contempt", even in its strongest form, and there is a great danger of overbreadth and chilling effect on free expression, notwithstanding the fact that the provisions are found in a human rights statute. The minority of the Court agreed and found that the section "opens the door to investigations which have more to do with dislike than discrimination." On this basis, the minority found that the section failed the proportionality part of the *Oakes* test; the section was not closely tailored to its objective and unnecessarily infringed freedom of expression.

McLachlin J., however, was encouraging about the prospects of using the process available in human rights instruments to curb hate propaganda. She wrote:

> For establishing the necessary balance between promoting harmony and dignity on the one hand, and safeguarding freedom of expression on the other, the process of this Act is exemplary. It is well designed to minimize many of the undesirable aspects of curbing free expression. This approach to curbing hate propaganda is far more appropriate than the all or nothing approach inherent in the criminalization of such expression. Coupled with a more narrowly-drafted prohibition, it might well withstand constitutional scrutiny.

This important signal to our legislators should not necessarily go unheeded. Legitimate concerns about the section's overbreadth have been raised by the three dissenting Justices. Notwithstanding the government's success in this case, it would be entirely appropriate for it to reconsider the scope of the terms of section 13(1).

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1. *Criminal Code*, R.S., c. C-34, s.319.
2. An exceptions to this, in addition to the CHRA, can be found in the Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, s. 14.
3. From *Canadian National Railway Co* v. *Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1134, quoted approvingly by Dickson C.J..
4. See Canada, House of Commons, *Equality Now* (Ottawa: Queen's Printer, 1984) at 70.
5. See, for example, the Alberta *Individual Rights Protection Act*, R.S.A., c.I-2, s.2(2).
6. *R. v. Keegstra*, [1991] 2 W.W.R. 1 at 68.
7. See Law Reform Commission of Canada, *Hate Propaganda* (Working Paper 50) (Ottawa: Law Reform Commission of Canada, 1986) at 9, fn.31 and A. Alan Borovoy, *When Freedoms Collide: The Case for Our Civil Liberties* (Lester & Orpen Dennys, 1988) at 46 and 325.
8. *Delgamuukw* v. *British Columbia*, [1991] B.C.J. No. 525.
9. (1989), 10 CHRR D/6450 at D/6469.