FREEDOM OF EXPRESSION IN A CANADIAN UNIVERSITY CONTEXT

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I. THE LAW OF FREE EXPRESSION

Freedom of expression is of fundamental importance in a democracy. This truism commands almost universal assent in the abstract, and was confirmed by the Supreme Court in *Committee For Commonwealth of Canada* v. *Canada*[1] when L'Heureux-Dubé J. approved the following passage of Cory J.A. in *R.* v. *Kopyto*:

> It is difficult to imagine a more important guarantee of freedom to a democratic society than that of freedom of expression. A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. These opinions may be critical of existing practices in public institutions and of the institutions themselves. However, change for the better is dependent upon constructive criticism. Nor can it be expected that criticism will always be muted by restraint. Frustration with outmoded practices will often lead to vigorous and unpropitious complaints. Hyperbole and colourful, perhaps even disrespectful language, may be the necessary touchstone to fire the interest and imagination of the public, to the need for reform, and to suggest the manner in which that reform may be achieved.[2]

L'Heureux-Dubé J. went on to say:

> While I may not go as far as MacGuigan J. at the Court of Appeal, who found that the lack of internal modifiers renders the s. 2(b) guarantee "absolute", I do believe that it should be given a large and liberal application. This appears to be consistent with the approach embraced by this court in its prior interpretations of the provision.[3]

Given this theoretical position, it may seem surprising that so much of our daily political debate and passion is spent on both condemning what someone has said and attempting to punish or discipline someone for mere words.[4] Yet in a period of history in which powerful lobbies compete for more power, influence and prestige, it is not surprising that they seize upon expression offensive to their members, both as a way of showing their strength and as a device for maintaining

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[1](1991) 120 N.R. 241 at 286 [hereinafter *Committee*].

[2](1987), 47 D.L.R. (4th 213), 24 O.A.C. 81 at 90-91.

[3]*Committee*, *supra* note 1 at 287-88. See also C. Beckton "La Liberté d'Expression" in Beaudoin and Tornopolsky *Charte Canadienne des Droits et Libertes* (Montreal: Wilson & Lafleur, 1989). See also *Corporation of the City of Peterborough* v. *Ramsden*, [1993] 2 S.C.R. 1084 [hereinafter *Peterborough (City)*] for another case in which freedom of expression prevailed over the public authority's property rights.

[4]This author has pointed this out in "Turning Mean" *Montreal Gazette* (26 August 1993).

the interest and cohesiveness of their membership. Everyone, it seems, believes in the freedom of expression except with respect to their own fundamental beliefs or feelings.

Of course, it is clear that freedom of expression is not absolute. There are situations in which the evils of the expression will outweigh the principle of freedom. There are also other situations in which two different *Charter*[5] rights may conflict.[6]

With respect to such conflicts, the Supreme Court has recently refused to rank the rights in any hierarchic manner.[7] The Court reaffirmed the importance of free expression without turning it into a "trump" card prevailing over all other rights. It is a difficult freedom to set aside, but not a different category of freedom.

The difficulty of justifying s. 1 limitations with respect to freedom of expression has been made clear in a number of judgments, although this has hardly dampened the enthusiasm of would-be limitators who attempt to rationalize them.

In *R.* v. *Zundel (No. 2)*, McLachlin J. said :

> This Court has repeatedly affirmed that all communications which convey or attempt to convey meaning are protected by s. 2(b), unless the physical form by which the communication is made (for example, by a violent act) excludes protection: *Irwin Toy, supra*, at p. 970, per Dickson, C.J., and Lamer and Wilson, JJ. In determining whether a communication falls under s. 2(b), this court has consistently refused to take into account the content of the communication, adhering to the precept that it is often the unpopular statement which is most in need of protection under the guarantee of free speech: see, e.g., *Keegstra, supra*, at p. 828, per McLachlin, J.; *R.* v. *Butler and McCord*, [1992] 1 S.C.R. 452; 134 N.R. 81; 778 Man. R. (2d) 1; 16 W.A.C. 1, at p. 488, per Sopinka, J.[8]

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[5]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

[6]See A.A. Borovoy, *When Freedoms Collide* (Toronto: Lester & Orpen Dennys, 1990).

[7]*Dagenais et al.* v. *CBC et al.* (8 December 1994), No. 23403 (S.C.C.) [hereinafter *Dagenais*].

[8](1992), 140 N.R. 1 at 18-19 (S.C.C.) [hereinafter *Zundel (No. 2)*]. See also *Osborne* v. *The Queen* (1991), 82 D.L.R. (4th) 321 (S.C.C.) [hereinafter *Osborne*]; *Libman* v. *A.G. Que.*, [1992] R.J.Q. 2141 (Que. S.C.).

This refusal to exclude any form of non-violent expression from protection has made it substantially harder to justify any form of repression, if only because the burden is automatically placed on those seeking to restrict.[9]

In a series of judgments it was made clear that all expressions were not equally protected and, in particular, commercial expression was somewhat less so.[10] Yet in many of the "commercial" cases, freedom prevailed over well-intentioned but excessive attempts at control.[11]

A case of particular interest for university freedom of expression, although not a university case, is *Cabaret Sex Appeal* v. *City of Montreal*.[12] Owners of nude dancing cabarets succeeded in setting aside a Montreal by-law which prohibited any use of the human body in outside billboards and advertisements.[13] Baudouin J.A. took dead aim at "political correctness" and pointed out, as had McLachlin J.,[14] that it is precisely the unpopular, controversial and even hurtful expression that needs protection, not the safe and bland kind:

> Une société libre et démocratique comme la nôtre doit nécessairement faire preuve d'un haut degré de tolérance pour l'expression de pensées, d'opinions, d'attitudes ou d'actions qui non seulement ne font pas l'unanimité ou ne rallient pas les vues de la majorité des citoyens, mais encore peuvent être dérangeantes, choquantes ou même blessantes pour certaines personnes ou pour certains groupes. La liberté d'expression ne doit pas être couchée dans le lit de Procuste du political correctness. Ce n'est que dans l'hypothèse d'abus clairs, et donc de danger pour le caractère libre et démocratique de la société, qu'au nom de la protection de certaines valeurs fondamentales, alors non négociables, on peut imposer l'intervention légitime de la loi.[15]

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[9]The test of *R.* v. *Oakes*, [1986] 1 S.C.R. 103 applies, tempered by the rule of generous and purposive *Charter* interpretation spelled out in *Gamble* v. *The Queen*, [1988] 2 S.C.R. 595. See also *Edwards Books* v. *The Queen*, [1986] 2 S.C.R. 713 and *Quebec Association of Protestant School Board et al* v. *A.G. Que*, [1984] 2 S.C.R. 66.

[10]*Ford* v. *A.G. Que*, [1988] 2 S.C.R. 712 [hereinafter *Ford*]; *Rocket* v. *Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 [hereinafter *Rocket*]; *Irwin Toy Ltd.* v. *A.G. Que*, [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*]; *Maroist* v. *Barreau du Québec* [1987] R.J.Q. 2322 (Que. C.A.) [hereinafter *Maroist*]; *Prostitution Reference*, [1990] 1 S.C.R. 1123.

[11]*Ford, ibid.*; *Rocket, ibid.*; *Maroist, ibid.*; *Bernstein* c. *Tribunal des Professions* [1993] R.J.Q. 1487.

[12][1992] R.J.Q. 2189 (Que. S.C.), Piché J., aff'd [1994] R.J.Q. 2133 (Que. C.A.) [hereinafter *Cabaret Sex Appeal*].

[13]The motivation was the theory that such advertising demeaned women in society and the expertise filed by the City had a "feminist" ring reminiscent of many university debates.

[14]See *Zundel (No. 2)*, *supra* note 8 at 17.

[15]See *Cabaret Sex Appeal*, *supra* note 12 at 2142-43.

He continued on the same page:

> La loi ne doit pas, au nom du simple droit de n'être pas dérangé, choqué, voire même insulté dans ses opinions, censurer une conduite simplement parce qu'elle ne rencontre pas l'approbation ou les vues de certaines personnes ou de certains groupes.

It follows that only in exceptional cases will courts permit the restriction of freedom of expression. Either the limitation must be relatively minor or marginal[16] or the harm from the expression must be of a particularly weighty nature. A consideration of the leading cases where restrictions were upheld illustrates this. In *Irwin Toy* the Supreme Court noted:

> But having identified advertising aimed at persons under 13 as *per se* manipulative, the legislature of Quebec could conclude just as reasonably that the only effective statutory response was to ban such advertising.[17]

In other words, advertising aimed at children was banned because of its *inherently* undesirable nature.[18]

In *R.* v. *Keegstra*,[19] the Supreme Court upheld Canada's legislation outlawing hate propaganda.[20] However, Dickson C.J.C. went on to show just how little restriction the law would tolerate:

> The meaning of "hatred" remains to be elucidated. Just as "wilfully" must be interpreted in the setting of s. 319(2), so must the word "hatred" be defined according to the context in which it is found. A dictionary definition may be of limited aid to such an exercise, for by its nature a dictionary seeks to offer a panoply of a possible usages, rather than the correct meaning of a word as contemplated by Parliament. Noting the purpose of s. 319(2), in my opinion the term "hatred" connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. As Cory J.A. stated in *R.* v. *Andrews*, *supra*, at p. 179:
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> > Hatred is not a word of casual connotation. To promote hatred is to instil detestation, enmity, ill-will [*sic*] and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition in [s. 319(2)].

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[16]See *Prostitution Reference*, *supra* note 10; *R.* v. *Canadian Newspapers Ltd.* (1988), 65 C.R. (3d) 50 (S.C.C.) [hereinafter *Canadian Newspapers*].

[17]*Supra* note 10 at 999.

[18]The decision was backed up by an overwhelming statistical and sociological case showing the defencelessness of children.

[19][1990] 3 S.C.R. 697 [hereinafter *Keegstra*].

[20]This writer must say at once that, despite narrowness of the majority ruling, he prefers McLachlin J.'s dissent.

> Hatred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction on both the target group and of the values of our society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.
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> Those who argue that s. 319(2) should be struck down submit that it is impossible to define with care and precision a term like "hatred". Yet, as I have stated, the sense in which "hatred" is used in s. 319(2) does not denote a wide range of diverse emotions, but is circumscribed so as to cover only the most intense form of dislike.[21]

He continued:

> Recognizing the need of circumscribing the definition of "hatred" in the manner referred to above, a judge should direct the jury (or him or herself) regarding the nature of the term as it exists in s. 319(2).[22]

It is evident that even the majority in *Keegstra* would not have saved the provisions against hate propaganda were it not for this very narrow scope. This is confirmed by the opposite result in *Zundel (No 2)*,[23] where the scope of the prohibition was a little broader.

Another case which makes this point is *Butler* v. *The Queen*,[24] which declared the criminalization of pornography to be valid. Sopinka J. said:

> In making this determination with respect to the three categories of pornography referred to above, the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk or harm is substantial. Finally, explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production.[25]

If this were not sufficient to make the point, Sopinka J concluded:

> On the other hand, the civil liberties groups argue that pornography forces us to question conventional notions of sexuality and thereby launches us into an inherently political discourse. In their factum, the British Columbia Civil Liberties Association adopts a passage from R. West, "The Feminist-Conservative Anti-

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[21] See *Keegstra, supra* note 19 at 771-778.

[22] *Ibid.* at 778.

[23] *Supra*, note 8.

[24] [1992] 1 S.C.R. 452.

[25] *Ibid.* at 485. Gonthier J. was much more restrictive, but he spoke for only two of seven Judges.

Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report" (1987), 4 Am. Bar Found. Res. J. 681, at p. 696:

> Good pornography has value because it validates women's will to pleasure. It celebrates female nature. It validates a range of female sexuality that is wider and truer than that legitimated by the non-pornographic culture. Pornography (when it is good) celebrates both female pleasure and male rationality.

A proper application of the test should not suppress what West refers to as "good pornography". The objective of the impugned provision is not to inhibit the celebration of human sexuality.[26]

Once again, the law can prohibit only extreme abuse or, as Baudouin J.A. said, "ce n'est que dans l'hypothèse d'abus clair et donc de danger pour le caractère libre et démocratique de la société ...".[27]

The third major case which has brought out this point is *A.G. Canada* v. *R.J.R. MacDonald Inc.*[28] While some *dicta* in this case, especially with respect to *Irwin Toy*,[29] might make it seem that there has been an evolution favourable to governments, the very high onus on any restrictive legislation is shown by the following passages from the pen of Justice LeBel:

> 1. La Loi comme telle vise un problème de santé publique. *Ce n'est pas une simple loi de réglementation d'un aspect de la publicité.*
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> 2. Dans la société moderne, le tabagisme constitue en effet un problème de santé majeur. Suivant l'ensemble d'une preuve médicale, que l'on n'a pas contredite, et dont des extraits abondants sont cités au mémoire de l'appelant, la consommation du tabac crée un environnement qui paraît favoriser l'éclosion d'un certain nombre de maladies. Le mémoire de l'appelant cite plusieurs extraits de témoignages ou de rapports d'expertises pertinents, à ce sujet. Ainsi, le docteur Beauchamp témoignait que la seule façon de prévenir le cancer du poumon est l'arrêt de la consommation de cigarettes (m.a., p. 34; au même sens, voir docteur Lefco, cité p. 37). On peut aussi se reporter au long témoignage et aux expertises d'un médecin et spécialiste anglais, fort connu dans le domaine, le docteur Richard Doll. Le rapport et le témoignage du docteur Doll concluent à une interaction entre la santé et la consommation du tabac et à la nécessité de restreindre celle-ci, pour préserver celle-là autant que possible.

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[26] *Ibid.* at 500.

[27] See *Cabernet Sex Appeal, supra* note 12.

[28] [1993] R.J.R. 375 (Que. C.A.). This case is under reserve having been heard by the Supreme Court of Canada.

[29] *Supra* note 10.

> 3. La consommation du tabac présenterait un caractère graduellement addictif, qui rendrait la cessation de l'habitude difficile, selon plusieurs témoins.[30] [emphasis added]

The inescapable conclusion is that freedom of expression is seen as a particularly significant guarantee of freedom and democracy in Canada and it will not easily be restrained for some perceived public good.[31] Moreover, the mere fact that an unquestionably lofty ideal inspired the legislator will not be sufficient. If it were, the *Osborne* case could not have been decided as it was.

In the latest Supreme Court case, *Dagenais*,[32] the court refused to rank the various *Charter* guarantees in order of importance.[33] However, the majority judgment by Lamer C.J.C. reiterated the past *dicta* about freedom of expression and its crucial importance. Further, Lamer C.J.C. dealt another blow to those who wanted to see in *Irwin Toy*[34] an indication that any *reasonable* impairment would pass the s.1 test, rather than *as minor an impairment as reasonably possible*:

> A party who uses the power of the state against others must bear the burden of proving that the use of state power is justified in a free and democratic society. Therefore, the party seeking the ban bears the burden of proving that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure, that the proposed ban is as limited (in scope, time, content, etc.) as possible, and there is a proportionality between the salutary and deleterious effects of the ban.[35]

He added:

> d) The judge must consider all other options besides the ban and must find that there is no reasonable and effective alternative available.
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> e) The judge must consider all possible ways to limit the ban and must limit the ban as much as possible.[36]

Except in the most unusual cases, freedom of expression must take precedence over such factors as personal taste, claims that individuals or groups may be offended, and any notions of truth or orthodoxy.

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[30] *Ibid.* at 397-398.

[31] *Osborne, supra* note 8. No one can doubt that the independence of the public service is both a proper and significant goal.

[32] *Supra* note 7.

[33] In this, the Court was almost certainly very wise.

[34] *Supra* note 10.

[35] See *Dagenais, supra* note 7 at 49. See also *Peterborough (City), supra* note 3.

[36] *Dagenais, ibid.* at 50.

II THE APPLICATION OF THESE PRINCIPLES TO THE UNIVERSITY

The university is an institution which by the nature of its endeavour should be both particularly sensitive to freedom of expression and vigilant in its defence. Dedicated to inquiry and research and devoid of physical or financial means of defence against the powerful and the wealthy, the university is constantly vulnerable to those who would limit its freedom or hijack its capacities for their own purposes. The force of Cory J.'s words in *Edmonton Journal* v. *A.G. Alberta*[37] is much augmented when applied to a university context.

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(b) in absolute terms which distinguishes it, for example, from s.8 of the Charter which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.
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> The vital and fundamental importance of freedom of expression has been recognized in decisions of this Court. In *RWDSU* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, McIntyre J., speaking for the majority, put the position in this way at p. 583:
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> > Freedom of expression is not, however, a creature of the Charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.
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> The importance of freedom of expression has been recognized since early times: see John Milton, *Areopagitica; A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England* (1644), and as well John Stuart Mill, "On Liberty" in *On Liberty and Consideration on Representative Government* (Oxford 1946), at p. 14:
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> > If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

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[37][1989] 2 S.C.R. 1326 at 1336-37 [hereinafter *Edmonton Journal*]. It is to be noted that those words came only a few months after *Irwin Toy, supra*, note 10, which is another indication that *Irwin Toy* did not represent a major change of direction.

And, after stating that "All silencing of discussion is an assumption of infallibility, he said, at p. 16:

> Yet it is evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.

Nothing in the vast literature on this subject reduces the importance of Mill's words. The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy.

Yet the university has not always been immune to repressive forces. Medieval universities enforced religious orthodoxy, as did both Oxford and Cambridge until the 19th century. Not long ago American universities took part in the anti-communist witch-hunt of Senator McCarthy. German universities "purified" themselves of Jews and threw out anti-Nazi scholars and, in the last few years Czech universities applied the "lustration" laws to remove former Communists, with most of the West watching admiringly. In one sense, this is proof only that the university is not sheltered from society. On the other hand, it does serve as a warning that its members, like other citizens, can be easily induced into thinking that freedom of expression applies only to *their* views, when they are not the dominant view.

Today's North American universities have fallen prey to a form of "political correctness" coming often from those who think of themselves as left of centre. This has made the expression of certain views on ethnic, sexual and historical issues dangerous, and has also created a hierarchy of hiring and publication independent of a person's expressed views or merit and based instead on his or her origin or gender.

The problem must be put into its context. The universities operate in a world of few jobs and fierce competition. The left appears to have been largely defeated in its quest for social justice and equality in society and its members have been forced to compete for the remaining limited research funds that the dominant lobbies control. It is not surprising that in such circumstances the atmosphere in the university is less than ideal.

"Political correctness" is something that exists in every sphere of activity at all times. It can best be described as those prescribed opinions with which it is dangerous to differ, not because of physical repression, but because of the effect on one's career.[38] The "political correctness" of university feminists or ethnic

[38]There is usually a hiring and promotion preferential scheme attached to it.

lobbies is more than matched by the "political correctness" of economic liberalism which permeates *The Economist* or the business pages of most Canadian newspapers.[39] This shows that criticism of the university alone is unfair. It nevertheless does not excuse the university's shortcomings.

In a recent book, Professor John Fekete, of Trent University, illustrates and documents the extent of the problem in Canada.[40] He is interested mostly in the feminist side of the problem, but roughly similar difficulties arise from excessive influence of ethnic or native lobbies.

Those who oppose political correctness must realize that freedom of expression can no more be perfect in the university than in society. Legitimate limitations do exist.[41] The university has a commitment to excellence but only limited funds. It must exercise judgment as to the value of various writings and projects. It is impossible to dissociate quality from content and to do so would be to turn moral and academic relativism into the type of established dogma one wants to avoid. A few simple illustrations show how opinions necessarily affect careers.

It would be entirely implausible for a department of geography to grant tenure to a member of the Flat Earth Society. Similarly, it would be difficult to imagine how Lysenko genetics could pass peer review.[42] A history department could turn down a holocaust denier simply because refusing to recognize well-documented facts is not consistent with the methodology of historical research. However that does not justify proceedings of a purely punitive nature, either criminal or disciplinary. Nor does it justify imposing an ideology where the issues are contentious, but not totally clear.[43]

Whereas removing Mr. Keegstra from the class-room was an unimpeachably correct decision, prosecuting him criminally was dangerous, turning him into a potential martyr of the right and giving him importance he would not otherwise

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[39]In *Le Monde Diplomatique* (January 1995), the front-page article of Ignacio Ramonet explores this phenomenon. It is quite clear that a modern economist who takes an interventionist, welfare state position puts himself or herself at risk of unemployment.

[40]Fekete, *Moral Panic: Biopolitics Rising* (Montreal: Robert Davies Publishing, 1994). This book provides an excellent bibliography. Ironically, Professor Fekete, as a student, was put before a McGill disciplinary tribunal for writing an allegedly indecent, "leftist" article. See *Fekete* v. *Royal Institution for the Advancement of Learning*, [1965] B.R. 1.

[41]For an obvious example, see *Canadian Newspapers, supra* note 16.

[42]There was a case of Lysenko adepts at McGill in the 1970s. Lysenko was a pseudo-scientist whose theory that acquired characteristics could be inherited was imposed as dogma by Joseph Stalin.

[43]Examples abound: Marxists vs. Anti-Marxists in economics and politics; false memory syndrome in psychology; and assimilation vs. multi-culturalism.

have had.[44] The *Ross*[45] case differs from *Keegstra* because Mr. Ross appears to refrain from anti-semitism in the class-room[46] and therefore it appears to be more difficult to justify his dismissal.

Another consideration militates against repression. A study of the various cases shows that it is often the crank, and certainly the weak dissenter, who is subjected to pressure. In the 1950s, there was not a serious lobby supporting communists or Quebec's Jehovah's Witnesses. Today men like Keegstra and Ross are basically lone, verbal snipers against a powerful lobby.[47] When well-placed individuals express views that could be seen as unacceptable, they are rarely caught by repressive laws.[48]

Further, repression is singularly ineffectual.[49] It did not stamp out communism, Jehovah's Witnesses, anti-Semitism or any other temporarily or permanently unpalatable "ism" that was singled out for attention. The country that most assiduously tried to outlaw ethnic hate and its expression was Tito's Yugoslavia. Do its efforts appear successful today?

It follows that those dedicated to freedom of thought should reconcile themselves to the fact that occasional expression of distasteful views – racist, sexist, mendacious, scandalous – must be tolerated. This is particularly wise for those who view themselves as being left of centre because they ultimately do not have the power in our society and so precedents of restrictions will usually be turned against them. There are limits to freedom of expression, but as Cory J.[50] and Baudouin J.A. [51] pointed out, these must be applied only to the extremely narrow category of statements whose harm can be demonstrated. Whenever the use of

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[44]This author says this despite the Supreme Court's decision to uphold the law.

[45]*Ross* v. *N.B. (Human Rights Board of Inquiry)* (1991), 110 N.B.R. (2d) 107 (C.A.).

[46]One may question the reason for letting him work *outside* the class-room only. What is the rationale?

[47]Nothing should be read as approval of them or an attempt to liken them to communists or Jehovah's Witnesses.

[48]Has Jean-Marie Le Pen been prosecuted on any fundamental question? Or Ian Paisley? Or Hitler, once he had sufficient electoral support?

[49]Yet in *Dagenais, supra* note 7, Lamer C.J.C. insisted that effectiveness is also an important issue. If a ban is ineffectual it should not be imposed even if it otherwise met the strict requirements.

[50]See *Edmonton Journal, supra* note 37.

[51]See *Cabaret Sex Appeal, supra* note 12.

restrictive measures seems worthy of debate, one should exercise discretion in favour of freedom.[52]

[52]The calls for freedom, like the calls for restriction have come from both right and left. On the relative right, the late Professor Allan Bloom discussed this issue in several books, including his last one *Love and Friendship* (New York: Simon & Schuster, 1993). In what is clearly a more liberal milieu, we can read Professor Fekete, *supra* note 40; K. Selick "Censorship – More Demeaning than Pornography" *Lawyer Magazine* (May 1993); Dworkin, "Women and Pornography" *New York Review of Books* (21 October 1993). As Michael Coren wrote in "Men" *The [Toronto] Globe and Mail* (14 July 1993), "puritanism is the handmaiden of political extremism both left and right". It follows that tolerance of opposing views is the hallmark of both the democratic left and the democratic right.