veto. This remains highly questionable. What about the idea of a statutory veto?

Sam LaSelva, a political theorist from the University of British Columbia, argues convincingly that the logic of s. 94 of the *Constitution Act, 1867* gives a clear right of veto to Quebec. Section 94 deals with the standardization of legislation pertaining to property and civil rights in all the common law provinces that existed at the time—Ontario, Nova Scotia, and New Brunswick. Section 94 rules that such standardization cannot occur unless it has been expressly and legally approved by the relevant provincial legislatures.

There is no mention of the province of Quebec in s. 94. However, we all know that Quebec is the only civil law province, and that the jurisdiction over property and civil rights was one of the most important jurisdictions explicitly attributed to the provinces in 1867. The reform of 1982, through the enshrinement of a charter of rights and freedoms, included an important dimension of standardization in the domain of "property and civil rights." All common law provinces ultimately consented to such standardization, thus respecting s. 94 of the 1867 constitution.

However, the legislature of the province of Quebec, to this day, has not given its assent. How can it be possible that in the domain of "property and civil rights," a field that has always been considered fundamental to the nature of Quebec as a distinct society in the Americas, the province of Quebec would be ultimately less autonomous than any of the common law provinces? The economy of s. 94 allows the common law provinces, if they so desire, to standardize their traditions and practices, without being impeded by Quebec for the sake of its self-protection. Interpreted this way, it reflects the federal wisdom of the founders. Interpreted as it was by the courts in 1981–1982, it gives a very strong argument for the current generation of Quebec secessionists.

MORAL BASIS OF CONSTITUTIONAL REFORM

Charles Taylor has argued that the current Canadian constitution is morally dead in Quebec. Donald Smiley believed that, insofar as it applied the principle of symmetry to language rights, the content of the Charter was profoundly absurd. James Tully affirms that s. 1 of the Charter, the overall interpretative clause on reasonable limits to rights in a free and democratic society, changes the nature of Canada from a federation of peoples to an undifferentiated juridical society.

The idea behind the 1982 reform is a defederalizing project of nation building. Its spirit, and its letter, take no account of Quebec's unique circumstances as the only majority French-speaking society in the Americas. Justice, for Aristotle, meant treating equals equally and unequals, unequally. The Canadian Charter treats unequals in a uniform, symmetrical fashion. It treats unequals equally. It has fostered a political culture that reinforces the idea that Canada is a nation of 10 equal provinces.

Considering the nature of our legal traditions in the early '80s, the patriation exercise was accomplished in a shameful manner. The current Canadian constitutional order treats Quebec, and Quebeckers, unjustly. All in all, there is a strong moral basis for the secession of Quebec from Canada.

Guy Laforest is professor of political science in the Département de science politique at Université Laval.

THE DEFENCE OF PAUL BERNARDO: PARADIGM OR PARADOX?

BY DIANNE L. MARTIN

> "The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law."
>
> *Rule 10, Commentary 2, Canadian Bar Association, Code of Professional Conduct*

Recently, the bitter spectacle of the trial of Paul Bernardo for the abduction, rape, and murder of teenagers Kristen French and Leslie Mahaffy has focused sharp attention on lawyers, particularly defence lawyers. Even in that context, the Bernardo lawyers—past and current—have engendered more than usual controversy.

The team members who actually conducted the trial, John Rosen and Tony Bryant, attracted substantial attention for their effective defence of the seemingly indefensible Paul Bernardo—even earning praise in some quarters beyond the criminal bar itself. At the same time, that defence made us all uncomfortable by intensifying the existing doubts about the deal that the prosecution struck with Bernardo's ex-wife Karla Homolka (12 years for manslaughter in exchange for testimony against Bernardo). John Rosen's cross-examination of Homolka cast real doubt on her claim to being a battered woman and, thus, the first of Bernardo's victims. It revealed her, rather, as his willing partner and accomplice. That same cross-examination raised the possibility that Bernardo might in law be entitled to a verdict of something less than first degree murder (which was its purpose), a possibility that provoked the usual response to the bearer of bad tidings.

However, the very conflict that the cross examination exposed was one that may well have been brought about by the actions of another of Bernardo's lawyers, the original trial counsel Ken Murray. On Bernardo's instructions, Murray retrieved videotapes that recorded the rapes and assaults of both victims by both Bernardo and Homolka from their hiding place at the murder scene and retained them in confidence for some 15 months. If Homolka was granted leniency because the prosecution didn't have the tapes (the police failed to find them, although they looked) and Murray should have disclosed them, then Rosen's skillful reliance on what the tapes revealed about Homolka's actual role in the murders is a tainted triumph, savoured only by Bernardo himself.

When Murray acted on Bernardo's instructions to obtain the videotapes and retain them, his conduct seemed to many to be inexplicable negligence at best and criminal obstruction at worst. That it might also have been a legitimate choice by an ethical defence lawyer is a pos-

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presented as fact. An unattributed statement such as "smoking causes cancer" is powerful precisely because it is not being presented as an opinion—whether of the government, the tobacco companies, or anyone else—but as an objective fact, akin to the statement "the earth is round."

THE AFTERMATH

What will be the fallout of the judgment? The anti-smoking lobby immediately called for the government to declare tobacco a hazardous product and impose direct controls on its sale and use. There is no chance of that happening. The enforcement problems associated with those kinds of restrictions would be hugely expensive and probably futile, fueling an underground economy in cigarettes much larger than that observed in earlier 1994, prior to the cut in cigarette taxes.

The Supreme Court went out of its way to indicate that it would have upheld a somewhat less restrictive ban on advertising. Look for Justice Minister Rock to introduce new legislation imposing tough controls on advertising, while allowing for "purely informational" ads from the tobacco companies, sometime early in 1996.

Patrick J. Monahan is associate professor at Osgoode Hall Law School, York University and co-editor of Canada Watch.

THE DEFENCE OF PAUL BERNARDO: PARADIGM OR PARADOX? *from page 13*

sibility that garners little support at the moment. However, if Murray was right to act on the instructions, just how obvious is it that he was obliged to hand them over to the prosecution? What ethical or professional duty compelled that course of action as opposed to holding them confidential?

A DUTY TO HAND OVER THE TAPES?

> The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted or required by this code.
>
> *Rule 4, Canadian Bar Association, Code of Professional Conduct*

The Code of Professional Conduct requires that a lawyer protect the confidentiality of "everything" except "what ought to be disclosed"—an unhelpful command if ever there was one. Guidance as to what to do with material such as the Bernardo-Homolka videotapes must, therefore, come from another source: the "common law" of the Code of Professional Conduct, in the form of the opinions and practices of senior members of the bar.

Much of that analysis has centred on categorizing the tapes—to determine just what sort of legal animal they are. The majority view seems to be that the tapes are physical evidence of the commission of crimes and, as such, constitute evidence that must be turned over to the prosecution (in a manner that harms the client's position as little as possible). A minority view casts them as a communication (or admission) of the client, a high-tech diary, as it were, and therefore subject to the rules of confidentiality: once confidential, always confidential, unless express instructions are given by the client to release them.

Not all client instructions can or should be accepted, however. For example, had Murray declined to retrieve the tapes on the ground that it would not be in Bernardo's best interest for his lawyer to be in possession of evidence that might have to be disclosed, they may well have been demolished along with the house. Such a decision would also have raised controversy if it had become known, of course, particularly among those who conceive of the defence lawyer's role as a mere adjunct to the conviction process. On the other hand, the tapes might have been held confidential forever—a personally horrible burden, but one that also could be justified, however unpopular it, too, would have been if known. There are other possibilities, including the route that was actually taken.

FOLLOWING INSTRUCTIONS?

The issue and its importance is not to second-guess what counsel did in a particular case, but to ponder the paradox. Until a trial is completed, and a verdict is rendered, the accused is innocent and entitled to (and needful of) a resolute and fearless advocate to preserve that status. He or she is entitled to "instruct" counsel and to expect that their instructions will be respected, and to expect skill and wisdom in the advice that is provided.

And therein lies the true paradox. This position assumes that, on the one hand, a lawyer's actions on behalf of a client can be morally neutral and completely shielded from scrutiny behind the mask of "instructions" and, on the other hand, presumes that a lawyer always knows just what a client's interests might (or should) be and essentially accepts no "instructions" except to provide the best possible defence. The first position is morally vacant, the second highly presumptuous.

> *In the final analysis, the only position that is consistent with the exceptional power and privilege accorded to advocates for criminal defendants is that it is a lonely and difficult task, rarely simple or popular, and that each decision must be judged on its own terms.*

In the final analysis, the only position that is consistent with the exceptional power and privilege accorded to advocates for criminal defendants is that it is a lonely and difficult task, rarely simple or popular, and that each decision must be judged on its own terms. Although popular opinion must not determine the decisions that a lawyer makes for an individual client, ethical decisions cannot be divorced from their social contexts.

Ultimately, all that is truly clear is that the questions posed by the defence of Paul Bernardo have not yet been answered and may not be answered for a long time to come.

Dianne L. Martin is an associate professor of law in the Faculty of Law, Osgoode Hall Law School, York University.