

THE "ABSOLUTE" RELATIVITY OF RIGHTS IN CANADA

by Jamie Cameron

"[T]HERE IS LITTLE ROOM FOR ABSOLUTES"

Judges and academics frequently express pride in Canada's Charter of Rights and Freedoms. That our rights are not absolute is a point of pride that receives frequent mention.

To Canadians, the American jurisprudence appears strange and flawed. There, the fiction of absolute rights has produced bizarre results. The First Amendment, which guarantees "the freedom of speech" in unconditional terms, is a prime example. To avoid the consequences of the text, American courts have held, contrary to all popular understanding, that obscenity (and some other types of expression) is not even speech! But then, in other cases, like those dealing with hate propaganda, the courts revert to the dogma of absolute rights. The puzzle is not easily understood.

In Canada, the Charter establishes a "constitutional equation," which requires the courts to balance the rights and freedoms that it guarantees against the demands of democratic authority. There is no presumption in the text itself that either should win. Through the creation of an equation that balances the interests at stake in particular cases, the Charter invites a nuanced analysis.

Whereas Canada rejects absolutes, the United States remains suspicious of balancing. It has not been forgotten that balancing saved democracy by suppressing the Communist threat during the McCarthy era. Though it of necessity forms a

part of the analysis today, balancing retains a negative connotation in the American jurisprudence.

However, not only is the Charter's equation of rights and limitations realistic, it preserves continuity between a tradition of parliamentary supremacy and a regime of constitutional rights. So it was surely appropriate for Canada to reject the fiction of absolute rights. The question is whether it has. On some issues, a different ethic has emerged.

ZERO TOLERANCE POLICIES

Cases that expose a tension between equality and expressive freedom provide one example. In such instances, courts have generally, but not always, taken the view that offensive ideas that undercut Canada's commitment to equality can be prohibited. According to that analysis, expressive freedom is not an absolute and, when confronted by countervailing values, must yield. At what point, however, does the converse also hold true: when should this vision of equality be tempered by deference to expressive freedom?

Not long ago Ontario's Ministry of Education released a document entitled "Framework Regarding Prevention of Harassment and Discrimination in Ontario Universities." That document demands zero tolerance for a wide range of activities on university campuses that might be considered offensive, and are accordingly characterized as harassment or discrimination. Under the government's policy, there is no room for alternative views about gender, ethnicity, or other characteristics.

Nowhere in the policy statement, which establishes timetables and thresholds for compliance, does the Ministry of Education acknowledge that expressive freedom and the autonomy of academic institutions are important values. And that is because the framework document

seeks to promote a vision of equality absolutely and, to all appearances, at any cost to other values.

Completely lacking in this document is any sense of the balance and nuance the Charter intended.

"... TO BE PARAMOUNT"

Charter values also come into conflict when clashes between freedom of the press and a fair trial arise. Although the Homolka publication ban may be the most notorious and controversial example thus far [see "Justice, Democracy and the Press," *Canada Watch*, March '94], there are others.

In such situations Canadian courts repeatedly invoke the mantra that a fair trial "must have paramountcy" over expressive and press freedom. Once that pronouncement is made, restrictions are easily rationalized. Thus a broadcast of *The Boys of St. Vincent* was banned because charges arising from sexual conduct resembling that in the film were pending in Ontario. And in Homolka's case, Judge Kovacs held that publication of all but a few details of her proceedings should be banned to protect her co-accused's right to a fair trial some 18 months later.

Few would challenge the right to a fair trial. At the same time, it is frequently forgotten that open justice, and public access to information about the justice system, are there, in part, to protect that right. Perhaps that was the gist of the argument that Homolka's co-accused, Paul Teale, made in opposing the publication ban. If I am to be judged, he seemed to be saying, then it is only fair that you also judge her, and her relations with the Crown.

It is questionable, in any case, whether conflict between a fair trial and a free press *can* be eliminated. How, then, should the two be balanced? In addressing that issue, have our courts asked the difficult ques-

tions? What do we mean by a fair trial, and can any trial be made absolutely fair? What are the sources of prejudice to an accused, and how likely is it that they can be eliminated? Does fairness require all information about criminal proceedings to be banned? What, then, would remain of open justice?

In *R. v. Vermette*, the Supreme Court of Canada held that it should not be assumed that publicity in the form of a politician's remarks had compromised the accused's right to a fair trial. To decide that question, the court said, it should not "rely on speculation." There, the suggestion that it would be impossible to select an impartial jury was "a matter of speculation."

In Homolka's case Judge Kovacs spoke of the "exceptional circumstances" that prevailed at the hearing. Even so, he could only speculate that publicity might create a risk of prejudice to Paul Teale's impending trial. And that, in his view, was enough.

Again, the problem is a lack of balance and nuance in resolving the fair trial-free press conflict. We cannot assume that publicity *per se* prejudices a fair trial. Yet it remains unclear what circumstances must be present to displace the presumption in favour of open justice.

CONCLUSION

Like our American friends, we in Canada also have our absolutes. In the instances discussed above, instead of balancing, our courts simply invoke. And once invoked, values like equality and fair trial too often mark the end, rather than the beginning, of the analysis.

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NATIONAL AFFAIRS

WHY PRESTON MANNING SHOULD NOT HAVE TO SUBMIT RECEIPTS

by Patrick J. Monahan

The recent controversy over Preston Manning's \$31,000 expense allowance represented the first major political stumble for the normally sure-footed Reform party leader.

Manning professed to be totally taken aback by the controversy. After all, the practice of major political parties covering the expenses of their leaders is well accepted in Ottawa, and seems perfectly justifiable in principle.

What Mr. Manning seemed to have conveniently forgotten is that he had built his career by exploiting the belief that politicians in Ottawa are fat cats and opportunists. It was Preston Manning who had made such a show of handing back the keys to his government car last fall, apparently signalling that, finally, here was a politician fit for the task of cleaning up the capital.

Too bad that none of the reporters at the "car keys" photo-op thought to inquire as to how Mr. Manning planned to get himself around town. Had Manning been asked this question, reporters would have discovered that, while he had forsaken his government limo, he was prepared to accept a car allowance from the Reform party.

Manning might have attempted to distinguish the party's car allowance from the government-supplied limo on the basis that the allowance

was paid for by party funds, rather than tax dollars. But that argument simply wouldn't wash, since the party moneys were themselves accumulated through tax credits granted to Reform party supporters.

Alternatively, Manning might have pointed out that providing him with a car made sense because it made for a more efficient use of his time. If Manning had to worry about taxis or car pools, he would be diverted from his main task, which is to criticize the government on behalf of his constituents.

A perfectly valid and sensible argument. It is precisely on this basis that the taxpayer provides *all* the party leaders with cars and drivers. Forcing the prime minister to forsake his limo and take the bus might seem to some taxpayers to be a smart money-saving move. But it's actually a false economy, since the cost in terms of lost time far exceeds the tiny savings associated with the sell-off of the government's limo fleet.

The problem for Manning was that he had foreclosed this perfectly sensible argument by his staged stunt with the car keys. The moment he handed back the keys to his government car, he was committed to the view that supplying cars to politicians is a waste of tax dollars.

That's why Manning got caught with his hands in the cookie jar when he turned around and accepted a taxpayer-financed car allowance from the Reform party. Having self-righteously suggested that government-supplied cars are a waste of tax dollars, Manning could not then accept a car that was paid for—even indirectly—by the same taxpayers.

Double standards are deadly. It's these kinds of mistakes that tend never to be forgotten. If Preston Manning ever again tries to criticize

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