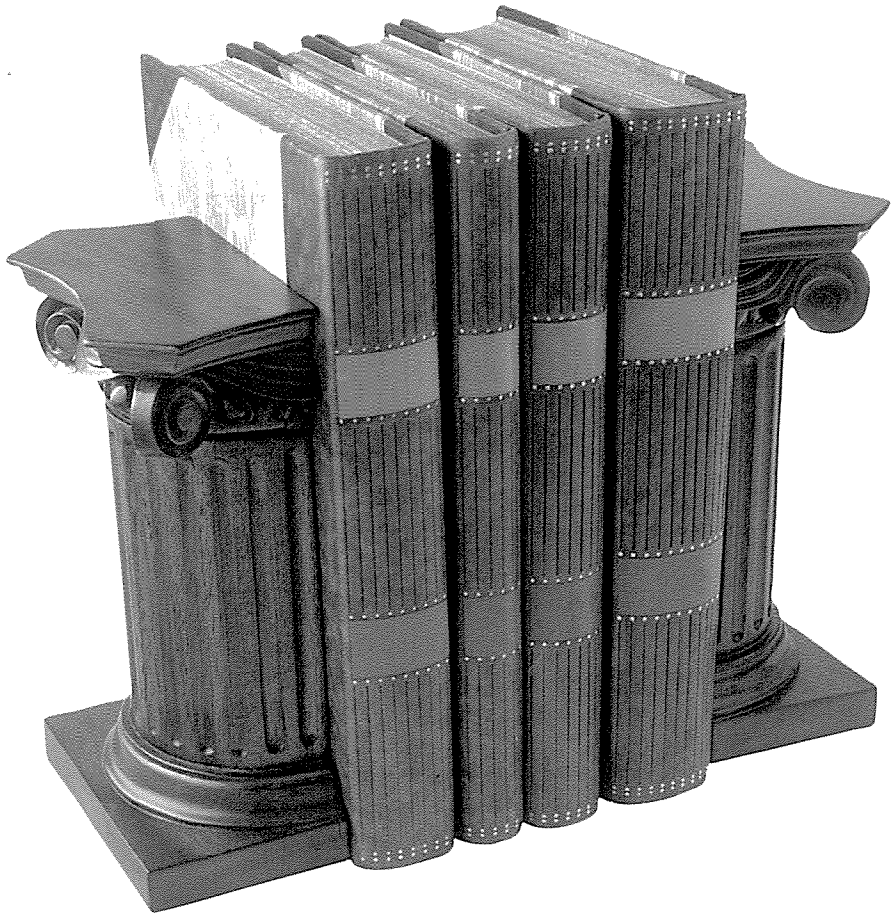
FREEDOM OF EXPRESSION
in the Charter Age

BY Julius Grey



IT IS NOT POSSIBLE TO DOUBT THE IMPORTANCE OF FREEDOM OF EXPRESSION IN THE PANTHEON OF FUNDAMENTAL RIGHTS.

The Supreme Court in Committee for Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139 approved the following passage of Cory J.A.'s judgment in R. v. Kopyto, [1987] 47 D.L.R. 4th 213:

> *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.*

In virtually every other case, the Court has reiterated these principles and stressed the need for a liberal interpretation of freedom of expression. In its most recent case, *R. v. Guignard,* [2002] S.C.C. 14, LeBel J.A. put this as follows at p. 15:

> *This Court attaches great weight to freedom of expression. Since the Charter came into force, it has on many occasions stressed the societal importance of freedom of expression and the special place it occupies in Canadian constitutional law. Very recently, in the highly sensitive context of an examination of the provisions of the Criminal Code relating to child pornography, McLachlin C.J. recalled the fundamental importance of freedom of expression to the life of every individual as well as to Canadian democracy. It protects not only accepted opinions but also those that are challenging and sometimes disturbing (R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2, para. 21).*

However, the fragility of freedom of expression has remained a constant. If, at the time of adoption of the *Charter*, freedom of expression appeared a particularly important freedom to enshrine because the Supreme Court had, in *A.G. Canada & Dupond v. Montreal* [1978] 2 S.C.R. 770, seemingly repudiated the "implied bill of rights" which had been the basis on which free expression was protected before, it is nevertheless quite apparent that expression is not easier today than in 1982, and that this is so despite years of very liberal jurisprudence.

The very frequency with which cases are brought before the courts is proof that freedom of expression is often honoured "more in the breach than in the observance". Both the state, at all levels, and the powerful lobbies which play such a major role in public life in Canada have shown a marked impatience with free expression and a great desire to limit it in their own areas of endeavour while paying lip service to it everywhere else.

On the one hand, freedom of expression is so accepted as a principle that it has no declared opponents of any importance. On the other hand, it is constantly under fire.

For instance, the business lobby perceives no contradiction in opposing secondary picketing on the one hand and trying to strike down restrictions on campaign spending on the other. A similar contradiction can be found in the position of virtually every powerful lobby. It is always "different" in the case where one is passionately committed.

It must be remembered, too, that although the protection of expression was essential in 1982 and no respectable *Charter* could have omitted it, the political impulse which led to the adoption of the *Charter* was not fuelled principally by concern for expression, but rather by demands for equality on the part of various groups and lobbies, by concerns about abuses in criminal law and, in large part, by a desire to correct some of the excesses of Quebec's language legislation without impairing the policy of promoting and protecting French throughout the country. Yet an unexpectedly significant number of cases proved necessary in order to avoid a diminution in the level of freedom of expression.

There thus exists a surprising paradox. On the one hand, freedom of expression is so accepted as a principle that it has no declared opponents of any importance. On the other hand, it is constantly under fire. Even some activist human rights advocates have a tendency to turn against freedom of expression by enshrining the prohibition of hate speech or pornography as human rights issues. Further, the almost universal acceptance of liberal democracy as our ideology after the fall of communism has not strengthened free expression; in the 1970s when some people continued to dream of a different and more controlled system, speech was at least as easy as it is today.

The protection of free expression can be thus seen as a task of Sisyphus. No sooner do we defeat an attempt to restrict it in the name of some worthy cause, than another attempt comes from a very different and often unexpected quarter.

Since the need for protection is usually associated with unpopular expression, one cannot often count on public opinion as an ally. Views that are generally popular are rarely challenged in the first place and few people display the objectivity of Voltaire who wanted to protect the rights of others to say things which he abhorred.

It is therefore particularly important not to yield to the temptations of self-satisfaction and self-congratulation that the presence of a liberal *Charter* has inspired in many Canadians. Freedom of expression is relatively weak, and despite the Courts' vigorous defence of it, will continue to be weak in an epoch of increasing conformism and concern with security and discipline.

THE NON-LEGAL RESTRICTION OF FREEDOM OF EXPRESSION

What is often forgotten is that the legal restrictions of freedom of expression, those most easily corrected by the courts, are often the tip of the iceberg insofar as limits to free speech are concerned. There are numerous social restrictions, often known under the name "political correctness". There has never been a society without political correctness, nor perhaps can there be. Often, political correctness is a concensus about the very glue that holds a society or class together. In many cases, political correctness and legal restrictions go together. For instance, non-conforming religious attitudes were initially simply politically incorrect in 16th or 17th century Europe; at a certain point they became "heretical" and thus punished by law. Further, political correctness permeates even the writing of the proponents of freedom. Milton, in his defence of freedom to publish, cannot bring himself to extend his reasoning to Roman Catholics, much like many of today's *Charter* activists cannot accept the right to sexist or racist expression, or to fantasies about use of violence.

There is, of course, no charter or code of political correctness in any society. Often one milieu within a society has dif-

ferent rules from another. Political correctness for those who write in the financial pages of our newspapers is neo-liberalism and it is a rare occurrence for a left-wing view to appear there. In the universities, on the other hand, political correctness means rather 'gender-equality' and 'multicultural' views usually associated with the Canadians left. Both constitute a threat against those who do not conform, not



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in the physical sense, of course, but with respect to their careers and social status. Moreover, views inconsistent with ones we are expected to express are often viewed as ridiculous or idiotic and people fear ridicule more than physical or legal repression, which leaves an aura of heroism around the victim.

Normally, the courts do not enforce political correctness, but sometimes they do. Many cases before our courts turn around discretion, and judges, who are part of our society and have been educated and trained in it, will often resolve such questions in accordance with accepted norms. For example, in deciding whether a particular writing is or is not obscene, judges will be influenced by our moral attitudes and by the society's likely reaction. In *R. v. Sharpe,* [2001] 1 S.C.R. 45, the Supreme Court went as far as it could in protecting free expression by limiting somewhat the scope of the child pornography law. We can all imagine the indignant outcry which would have resulted if it had invalidated the law altogether. Indeed, the use of the notwithstanding clause, and not the strengthening of liberty, would have been the likely end result of such a decision.

This illustrates that the Courts and the laws cannot go far beyond what a society will tolerate without risking irrelevance. Judges are not wrong in staying within the bounds of the acceptable. The *Charter* and the constitution are only tools, very useful tools perhaps, but not ultimate guarantees of freedom.

A number of illustrations can demonstrate this proposition. One concerns 19th century Britain as opposed to 19th century France or Russia. There can be no doubt that Britain was altogether more open to free expression than tsarist Russia and more consistently open than politically unstable France. Yet the frank treatment of adultery and sexuality by Tolstoy, Dostoevsky, Stendhal and Flaubert would not have been tolerated in Britain despite all the pious homilies about freedom and the British way of life.

Because of its sensitivity towards the various groups which compose it, modern Canada is particularly susceptible to political correctness and, in recent years, this problem has grown more acute. As a result, Canadians are careful when discussing ethnic groups, religion, language, native affairs and, indeed, any subject where their interlocutors may become offended. As Baudouin J.A. noted in *Ville de Montréal v. Cabaret Sex Appeal,* [1994] R.J.Q. 2133 freedom of expression includes the freedom to wound. But political correctness and its potentially devastating consequences for transgressors, make Canadians cautious. In the absence of direct political control, conformism and excessive sensitivity perform the same function.

A related problem has to do with the establishment of parliamentary democracy as virtually the only permitted ideology after the defeat of communism. While some of the effects of this ideology have proved beneficial, there does exist a negative side. It now appears that any expression of sympathy for revolution or overthrow of governments or for any form of violence is suspect unless it is limited to events very far back in history. If this were 1860, support for Garibaldi or Juarez would be grounds for exclusion from Canada and for dismissal from sensitive jobs. In fact, history is often rewritten in order to comply with current views of right and wrong. Our epoch has a tendency to exalt itself and to see itself as the culmination of human development. Since one of the main purposes of freedom of expression is to promote change, this ideological complacency is not propitious for it.

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Of course the *Charter* can be a useful bulwark against those restrictions. What is important is to determine if we have made good use of it.

THE LIMITS

The essential function of the Courts faced with a broad guarantee like freedom of expression is to set the limits. And limits there must be, for no freedom operates in a vacuum and in absolute terms.

Limits are needed to prevent abusive, immoral and extreme applications of rights. For instance, no one has the right to scream "fire" in a crowded cinema, nor the freedom to print state secrets in the media. As we have seen in discussions, *R. v. Sharpe,* limits are also needed to prevent interpretations, even laudable ones, that the society is simply not ready to accept. When courts part company completely with social reality, they risk becoming irrelevant and discredited. It is unlikely that even the most intellectually powerful court could have imposed gender equality, homosexual rights and the abolition of capital punishment in 1800. Courts can and should be a little ahead of the society, but they cannot set themselves adrift and attempt to impose a visionary utopia.

Finally, limits can be necessary because different fundamental rights can clash. Sometimes, a clash is artificially created to reduce the scope of truly fundamental rights like free expression by granting constitutional status to various doubtful claims – victims' rights, the right not to be the subjected to hate literature, and so on. However, there can arise true conflicts, as illustrated by *Dagenais v. CBC,* [1994] 3 S.C.R. 835 where freedom of expression competed with the right to a fair trial. There is even an example – electoral expense limits – where one kind of freedom of expression competes with another and it is necessary to ration the speech of the wealthy in order to protect the rights of free expression of the less affluent.

While limits are necessary, the broad, liberal interpretation of freedom prescribed by the Supreme Court requires that they be as narrow as possible. There is a myth, entirely untrue, that our courts are less protective of free expression than American ones. In fact, our courts have been just as concerned with free expression, but have chosen somewhat different and more appropriate issues. If pornography has been protected slightly less assiduously than in the U.S., political freedom has counted for more and the type of restriction on communist expression permitted in the U.S. would never pass muster. It is true that in *Libman v. A.G. Quebec,* [1997] 3 S.C.R. 569 the Supreme Court refused to follow the U.S. decision of *Buckley v. Valeo,* [1976] 424 U.S. and protect the right to limitless spending in election campaigns but it is the Canadian decision which ensures greater freedom of expression for most Canadians and which protects more effectively the right to advocate major change without fear.

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A number of liberal principles were established. The most important is that no kind of expressive comment other than violent action is a priori excluded from the protection. Soliciting for the purpose of prostitution (*Reference re Prostitution,* [1990] 1 S.C.R. 1123), gross lies, including holocaust denial (*R. v. Zundel,* [1992] 2 S.C.R. 731) and the right of employees to chat with customers (*R. v. Drapeau,* [1999] R.J.Q. 1635) are all protected and the marginality of the expression is relevant only to justification, not to the initial protection. The Supreme Court put it as follows in *R. v. Zundel:*

> *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, CJ 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.*

Secondly, the form and the context of the expression are clearly relevant, but again, only for justification, not to deny protection. For instance, Quebec's language law did not in any way limit the content of expression, only its language. Nevertheless, it was set aside (*Ford v. A.G. Que.,* [1988] 2 S.C.R. 712). In the field of expression, form can be as important as the message.

Third, only extreme manifestations of expression can be prohibited. In *R. v. Keegstra*, [1990] 3 S.C.R. 691, the Supreme Court upheld Canada's legislation outlawing hate propaganda. However, Dickson C.J.C. went on to show just how little restriction the law would tolerate:

> *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:*
>
> > *Hatred is not a word of casual connotation. To promote hatred is to instil detestation, enmity, ill-will and malevolence in another. Clearly an expression must go a long way before it qualifies within the definition in s. 319(2)...*
>
> *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.*

Although in this writer's opinion, McLachlin J's dissent in *Keegstra* was stronger than the majority view, it is clear that even the majority was only prepared to criminalize truly shocking words and this was later confirmed both by *Zundel* and by *Attis v. Board of Trustees*, [1996] 1 S.C.R. 825 where the Court did protect a very unattractive racist in his employment and was correct in doing so.

The tendency to limit banning to egregious, marginal and harmful expression is confirmed by the nuances of *R. v. Sharpe* and especially by *Butler v. The Queen*, [1992] 1 S.C.R. 452 where Sopinka J.A. said at p. 485:

> *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.*

He concluded at p. 500:

> *A proper application of the test should not suppress what West refers to as "good pornography". The object of the impugned provision is not to inhibit the celebration of human sexuality.*

Other cases which illustrate our courts' reluctance to restrict expression include *R.J.R. MacDonald v. A.G. Canada*, [1995] 3 S.C.R. 1999 where they decided against the government despite its obviously laudable goal of reducing smoking and a relentless campaign in its favour by the powerful anti-smoking lobby, and *Rocket v. College of Dental Surgeons*, [1989] 1 S.C.R. 927 which struck down advertising bans in the professional world, despite a strong tradition of autonomy for professional corporations.

Perhaps the clearest statement was made by Baudouin J.A. in *City of Montreal v. Cabaret Sex Appeal* when he described as follows the situation where restrictions can occur: "ce n'est que dans l'hypothèse d'abus clair et donc de danger pour le caractère libre et démocratique de la société".

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When *Charter* rights clash, the courts will not rank them in order of importance (*Dagenais v. CBC*, [1999] 3 S.C.R. 835). Obviously, the proper equilibrium will depend on the facts of each case. However, even then, the imperative nature of free expression is made clear by Lamer C.J.C. in the following passage:

> *The judge must consider all other options besides the ban and must find that there is no reasonable and effective alternative available.*

Free expression is so vital to our society, that even when it conflicts with other basic rights, there will be considerable judicial reluctance to limit it.

PRIVATE INTERESTS AND FREEDOM OF EXPRESSION

Restrictions made by private interests are, in theory, not the province of the *Charter*. In a series of decisions, the Supreme Court has decided that the application of the *Charter* can only be triggered if there is some government involvement, however indirect (*Eldridge v. British Columbia*, [1997] 3 S.C.R. 624). In practice, that distinction is not as significant as we may think. Firstly, interpretation of law and even fact must always favour the fulfilment, not the frustration, of protected rights, even when the *Charter* does not apply directly. Secondly, provincial Charters have had, since Ford, an effect virtually identical to the Canadian *Charter* and they do apply to private matters. For instance, the *Quebec Charter* was applied to restriction of rights by employers without state participation in *Srivastava v. A.G. Que.*, [2001] R.J.Q. 1111.

In *Les Editions Vice-Versa Inc. v. Duclos*, [1998] 1 S.C.R. 591, the Supreme Court decided to protect privacy and the right to publish pictures of individuals by those who take them. Similarly, libel cases have continued unabated, although the link to freedom of expression has been noted.

In *Hill v. Church of Scientology,* [1995] 2 S.C.R. 1130 Cory J. reiterated the importance of a person's reputation.

There is little to dispute about factual falsehoods. A person is clearly entitled not to be falsely calumnied. More delicate is the issue of fair comment and the expression of hurtful or insulting 'opinion' as opposed to 'fact'. There has been no clear Supreme Court balancing of the interests of

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the victim of such opinion and the necessity of maintaining a vigorous climate of debate. There is no law imposing politeness, amiability, restraint or moderation. Yet Quebec courts have awarded damages both to federal MPs who were described as traitors by the Société St. Jean Baptiste because they supported the repatriation of the constitution and to sovereignist leaders who were compared to Nazis (*Hervieux-Paquette v. Société St.-Jean-Baptiste de Montréal,* [1998] R.J.Q. 131 and *Parizeau v. Lafferty, Harwood & Partners Ltd.,* [2000] R.R.A. 417). Both cases are in appeal and both deal with the limits of freedom.

The problem becomes particularly striking when we consider that most federalists consider the "traitor" remark beyond the pale while, in their opinion, the Nazi comparison was a legitimate if excessive political comment. Not surprisingly, most sovereigntists believe the opposite and both groups present subtle, seemingly objective distinctions which justify their views.

This illustrates the principle that few lobbies believe in freedom of expression against their own convictions. But it also shows how the political correctness prevalent in each milieu colours one's analysis of virtually identical situations. The unpopular are more likely to pay damages or to fail to obtain them in a system in which no clear principle governs the limits to freedom of expression by private parties. It is submitted that the notion of libel should be rarely applied to opinion in the absence of bad faith.

However, the issue of private violation of free expression goes much beyond libel. For instance, how far can employers enforce limits to expression? Clearly, they can expect loyalty from employees. However, can they prohibit views which they find totally objectionable? Can a Jewish employer fire an employee who is overly anti-Semitic? Anti-Semitism in such a case may indeed be tantamount to disloyalty. Does this apply to expression of extreme anti-Zionist views, for instance, to a denial of Israel's right to exist? Clearly, such a result would severely restrict political debate. In another context, could a British private rail company dismiss an employee who calls for re-nationalization? Once again, there would be an argument of "disloyalty" on the one hand and freedom on the other.

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The reason for this is the newly acquired strength of private and especially business interests. Since 1980 the state has been weakened by the neo-liberal political wave and the business lobby has been reinforced. We see business partnerships with universities, with the arts and an increasing power of business against labour. In such circumstances, allowing private interests to limit expression could have major academic and cultural effects and could make most employees very cautious in their speech. For instance, there could be virtually no work for left-leaning economists or for radical artists and this could in turn make them into a rare species to the public detriment.

A recent example of this threat has been the attempt by the owners of most Canadian newspapers to impose a certain degree of orthodoxy with respect to their favourite topics – the market economy, Israel, federalism and so on. In the past, faced with state restrictions on expression, the courts have consistently maintained that the right to receive information was as crucial as the one to communicate it. If this line of jurisprudence is not extended to the private sector when it is clearly dominant, it will lose much of its utility.

It follows that one of the principal tasks of the courts in the coming years will be to set the limits of private control

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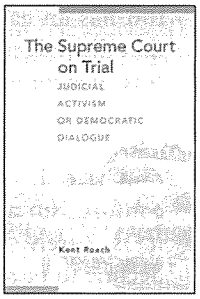

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over expression. The proper solution will surely be to apply such cases as *Butler* and *Keegstra* so as to permit only the most extreme forms of expression to be restrained. It is not possible to permit all expression; as in the public sphere, certain things are simply too unfair and too harmful. But the general principle of freedom prevailing except in extreme cases should be reaffirmed.

Political freedom faces its greatest challenge since McCarthyism from the new concern about security and terrorism. This is not to say that no concern can be justified. It is precisely when there is a considerable body of evidence justifying some concern, as there was with communism, that the danger to liberty is at its greatest.

WHEN THE COURTS HAVE FAILED

Although in general, in those areas where there has been litigation, Canadian courts have done well, there is one very extremely important issue where the results have been disappointing – that of courts and judges.

In the *Kopyto* case, the Ontario Court of Appeal opened an interesting path by acquitting a lawyer convicted of contempt of court for intemperate criticism on the judiciary. However, the courts have not been quick to authorize contestation of other issues associated with courts. For instance, picketing of court houses has been restrained where other picketing would normally be permitted.

Even more significant has been the series of cases which permitted the disciplining of judges (*Moreau-Berubé v. N.B.*, [2002] S.C.C. 11) and which allowed the removal of judges for non-disclosure of a criminal record after a pardon (*Re: Therrien v. Minister of Justice*, [2001] 2 S.C.C. 35). In these cases, the special nature of the judiciary and the need for total absence of suspicion were cited.

These points are not without merit. Judges should avoid controversial and partisan discussions. The issue of general confidence in judges and respect for them is indeed important. However, these cases went altogether too far.

Judges are called upon to make decisions which will be unpopular and seem politically incorrect to many. Yet it is obvious that words which are likely to place a judge in jeopardy are those which displease a large lobby or which are startling and unusual, whether right or wrong. For instance, in the United States where there is often a recall mechanism and where many judges have to stand for re-election, statements on either side of the abortion controversy or against capital punishment could easily prove fatal. If judges are not protected by the *Charter*, some judges will avoid offending established views and persons best placed to mount a campaign against them. This augurs ill for freedom of expression.

Moreover, as with all restrictions on freedom, the curtailing of the expression will not eliminate the offending thought. Indeed, where an impropriety is fully expressed, its victim has an easier time demonstrating that the judgement should be reversed. It is an error to think that a more effective muzzle will make bad judges into good ones. If the price of the restriction is one which reinforces judicial conformism and political correctness, it is surely one which we should decline to pay.

CONCLUSION

Every epoch has its own problems with regard to expression. It is always tempting to boast about previous successes and to ignore present danger.

We have reduced much of the danger of sexual censorship, of linguistic intolerance, of attempts to limit freedom of information or freedom to express unpopular political views. We have also prevented attempts to use fundamental freedom as a way of advancing sectarian views, notably in *Lavigne v. SEFPO*, [1991] 2 S.C.R. 211.

However, many of these dangers will undoubtedly reappear. For instance there is a new spirit of sexual puritanism which will ultimately have an effect on the jurisprudence with respect to censorship. The increasing Americanization of our political process will mean that the limits on election campaigns, however clearly justified, will remain controversial.

Political freedom faces its greatest challenge since McCarthyism from the new concern about security and terrorism. This is not to say that no concern can be justified. It is precisely when there is a considerable body of evidence justifying some concern, as there was with communism, that the danger to liberty is at its greatest. The new emergency legislation on security will undoubtedly be challenged on a number of fronts, including free expression. These challenges must be carefully studied and analyzed because the preservation of full freedom of expression depends largely on their outcome.

The coming years will also force us to come to grips with private limits to expression. Balancing the various interests involved will also have a major effect, especially in an epoch in which the private sector is relatively strong as opposed to the public.

The one quality which can endanger liberty in the future is complacency, the conviction that our *Charter* has made us both virtuous and free. Complacency is never safe, because it necessarily refers to satisfactory results which have already occurred. Yet the nature of freedom of expression is such that, when a battle is won, the battlefield shifts and a new front is created. We can already see that the appearance of new issues and new concerns will force us to fight new judicial battles all the way to the Supreme Court. We cannot afford to rest on the laurels won in the first twenty years of the *Charter*.

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