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Case Comment

GAY ALLIANCE TOWARD EQUALITY v. *VANCOUVER SUN*

By W. W. Black*

I. INTRODUCTION

In the autumn of 1974, a new and more comprehensive *Human Rights Code* was proclaimed in British Columbia.[1] A short time later, the Gay Alliance Toward Equality (GATE) submitted a classified advertisement to the *Vancouver Sun* which read: "Subs to GAY TIDE, gay lib paper $1.00 for 6 issues. 2146 Yew Street, Vancouver." The newspaper refused to publish the advertisement, and a complaint was filed which, after investigation, was referred to a Board of Inquiry. The Board found that the Code had been violated,[2] and the British Columbia Supreme Court upheld the decision on the ground that it was based on findings of fact outside the scope of appeal.[3] The British Columbia Court of Appeal overturned the Board's decision by a two to one majority.[4] In May, 1979, the Supreme Court of Canada held by a six to three majority that there had been no violation of the Code, but it did so on grounds that were different from those of the Court of Appeal.[5]

An advertising firm would be pleased by the results. As the case proceeded, it was extensively reported in the press and it has now been included in several law reports. Seldom has an advertisement that was refused publication achieved wider exposure. The result has been less successful from the point of view of human rights advocates. The fact that the Code was restricted should not be a major disappointment, for the decision was on a narrow ground that should have little effect on future cases. More significantly, however, the case leaves unanswered many important questions concerning the *Human Rights Code.*

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1 *Human Rights Code of British Columbia*, S.B.C. 1973 (2d sess.), c. 119.

2 *Gay Alliance Toward Equality* v. *Vancouver Sun*, unreported, 1975 (B.C. Bd. of Inquiry), [hereinafter *GATE*].

3 *Vancouver Sun* v. *Gay Alliance Toward Equality*, unreported, Aug. 16, 1976 (B.C.S.C.), digested [1976] W.W.D. 160.

4 *Re Vancouver Sun and Gay Alliance Toward Equality* (1977), 77 D.L.R. (3d) 487, [1977] 5 W.W.R. 198 (B.C.C.A.).

5 *Gay Alliance Toward Equality* v. *Vancouver Sun* (1979), 27 N.R. 117, [1979] 4 W.W.R. 118 (S.C.C.).

In a sense, there are two *GATE* cases. The first formed the basis of the complaint and concerns the question of whether the *Human Rights Code* covers the refusal of a service to a gay rights organization. The Supreme Court majority judgment touches only briefly on this question, but it was the central issue before the Board of Inquiry and the lower courts and was discussed extensively in the dissenting Supreme Court judgments. The second is a case about freedom of the press that provides incidental clues as to the importance that the Supreme Court attaches to egalitarian rights and the protection of minorities. That is the case as it appears in the majority judgment of the Court and in portions of Dickson J.'s dissenting judgment.

These two cases have little to do with one another, and I have found it necessary to discuss them in separate sections. The section that follows discusses the scope of the *Human Rights Code* and its application to homosexuals. The third section deals with the Court's approach to freedom of speech, and the final section discusses the way in which the Court balanced the competing rights.

II. DISCRIMINATION

Section 3 of the *Human Rights Code* provides,[6]

> (1) No person shall
> (a) deny to any person or class of persons any accommodation, service, or facility customarily available to the public; ...
> unless reasonable cause exists for such denial or discrimination.
> (2) For the purposes of subsection (1),
> (a) the race, religion, colour, ancestry or place of origin of any person or class of persons shall not constitute reasonable cause; and
> (b) the sex of any person shall not constitute reasonable cause [with certain qualifications].

Canadian human rights statutes typically apply to public accommodations, services and facilities, but only the British Columbia and Manitoba Acts use the term "reasonable cause." The first issue in the case was whether a public service had been denied. If so, it was necessary to interpret the words "reasonable cause" and decide whether they applied to discrimination against homosexuals.[7] Appellate courts were forced to consider the proper scope of appeal.

A. *Public Services*

The *ratio decidendi* of the case is that the newspaper did not deny a service that it customarily offered the public when it refused to publish the

[6] *Human Rights Code of British Columbia*, S.B.C. 1973 (2d sess.), c. 119, s. 3.

[7] Neither the Gay Alliance nor the Human Rights Commission raised the argument that the word "sex" comprehended discrimination on the basis of sexual orientation. That contention had been rejected in a Saskatchewan case (*Re Bd. of Gov. of the Univ. of Sask. and Sask. Human Rights Comm'n* (1976), 66 D.L.R. (3d) 561, [1976] 3 W.W.R. 385 (Sask. Q.B.)), but a later Court of Appeal judgment criticized the case on the ground that a writ of prohibition was inappropriate and the Human Rights Commission should have been permitted to consider the issue (*Re CIP Paper Products Ltd. and Sask. Human Rights Comm'n* (1978), 87 D.L.R. (3d) 609 (Sask. C.A.)).

advertisement. The Supreme Court started from the proposition that freedom of the press is an important right in Canada and stated that the language of the Code must be limited so as not to infringe upon that right. The newspaper seemed to have conceded that newspaper advertising was a public service,[8] but the Court adopted a different approach. It did not consider whether "advertising" or even "classified advertising" was a public service. Instead, it said that the service offered was advertising space for such subject matter as the newspaper might from time to time determine. It concluded that the content of this particular advertisement was not within the service that the newspaper offered.[9] This reasoning would apply as well to other Canadian statutes that use similar language.[10]

I believe that this reasoning creates a narrow exception that applies specifically to publishers. Portions of the judgment at first seem to restrict the application of section 3 with respect to other types of business as well, but they lose significance when read in context. For example, at one point Martland J. gave a short list of businesses covered by section 3, but he later said that newspaper advertising, which is not on his list, is a public service, albeit one that can be limited in terms of content.[11] Therefore, it seems clear that he did not intend his list to be comprehensive. In another passage, he noted that the newspaper published daily a notice reserving the right to reject any advertisement submitted for publication.[12] Obviously, human rights statutes would be useless if businesses could exempt themselves simply by posting a notice saying, "We do not serve women or Indians." The majority judgment creates no such loophole, for Martland J. went on to find that the refusal "was not based upon any *personal characteristic* of the person seeking that advertisement, but upon the *content of the advertisement itself*."[13] The published reservation was relevant to the scope of the service, but it was not found to permit discrimination with regard to whatever service was offered.

It is possible to think of examples in which businesses other than publishers might arguably justify refusal of a service in terms of the "content" of the service offered, but I do not believe the reasoning of the Court in *GATE* would apply. The Court expressly said that it interpreted the Code

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[8] *GATE, supra* note 5, at 129-30 (N.R.), 128 (W.W.R.).

[9] *Id.* at 126-27 (N.R.), 125-26 (W.W.R.).

[10] It is unclear whether the wording of the Ontario Code, which refers to a service "in a place to which the public is customarily admitted," would apply to newspaper advertising or whether a distinction would be drawn between the submission of an advertisement in person at an office open to the public and a submission by telephone or mail. See *The Ontario Human Rights Code*, R.S.O. 1970, c. 318, s. 2.

[11] *GATE, supra* note 5, at 126-27 (N.R.), 125-26 (W.W.R.). Cases have interpreted the term "service" broadly outside of the publishing field. See, e.g., *Re Ins. Corp. of B.C. and Heerspink* (1978), 91 D.L.R. (3d) 520, [1978] 6 W.W.R. 702 (B.C.C.A.) (policies of insurance); and *Race Rels. Bd.* v. *Applin*, [1975] A.C. 259, [1974] 2 W.L.R. 541, [1974] 2 All E.R. 73 (H.L.) (fostering of children); *cf. A.G. Can.* v. *Cumming*, not yet reported, July 31, 1979 (F.C.T.D.) (assessment of taxation by Department of National Revenue).

[12] *GATE, supra* note 5, at 127 (N.R.), 125 (W.W.R.).

[13] *Id.* at 127 (N.R.), 126 (W.W.R.). [Emphasis added.]

as it did for the purpose of protecting freedom of the press, and it seems clear that the word "content" was used to refer only to forms of communication.

B. *Reasonable Cause*

Only in British Columbia have boards of inquiry had to consider the meaning of the term "reasonable cause," but its interpretation raises policy issues of more general relevance. At common law, innkeepers and common carriers were prohibited from denying their accommodation or services without reasonable cause,[14] and the purpose of section 3 was to extend a similar obligation to other businesses.[15] Though the majority decision of the Supreme Court of Canada decides the case on another ground, the words "reasonable cause" were the focus of discussion before the Board and the lower courts, and in the dissenting Supreme Court judgments.

Though Martland J. does not expressly discuss the words "reasonable cause," he does rely on the fact that the refusal was based on the content of the advertisement rather than a personal characteristic of the individual who submitted it. However, that passage should not be read as implying that the words "reasonable cause" are limited to denials based on a personal characteristic. Such a limitation would make it easy to circumvent the Code and was rightly rejected by the dissenting judges. One could exclude blind people, for example, by forbidding the entry of guide dogs or even the use of white canes, for even the most unreasonable prohibition would fall outside the Code if it were not in terms of a personal characteristic. Women and religious minorities could often be excluded by means of dress requirements. Indeed, with a little ingenuity, almost any group could be excluded on some basis other than a personal characteristic.[16] Martland J.'s point was that the content of the advertisement placed it outside the scope of the service that the newspaper offered the public. He clearly had not addressed himself to the issue of reasonable cause, and his judgment should not be interpreted as inadvertently placing an unjustifiable limitation on those words.[17]

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[14] See Molot, *The Duty of Business to Serve the Public: Analogy to the Innkeeper's Obligation* (1968), 46 Can. B. Rev. 612.

[15] *B.C. Leg. Assembly Deb.* Nov. 6, 1973, at 1353.

[16] Also, it is far from clear what constitutes a "personal characteristic." The term would seem clearly to exclude such matters as manner of dress and to include matters such as race and sex, but the status of other factors is less clear. The phrase could be interpreted as applying only to unalterable physical characteristics. But it might also be applied to temporary physical conditions such as pregnancy. Factors not related to physical condition such as religion or marital status (both of which are explicitly included in the *Human Rights Code*) might or might not be considered personal characteristics. Martland J.'s failure to define the term is further evidence that his point was that a newspaper could determine its content and his reference to personal characteristics was merely by way of contrast.

[17] It would be even less justifiable to limit the words "reasonable cause" to the grounds of discrimination set out in subsection (2) of section 3. That interpretation ignores the difference between the wording of section 3 and that of sections 4 and 5, both of which omit any reference to reasonable cause and do contain a comprehensive list of prohibited grounds. The interpretation would also render subsection (1) of no effect. It is not surprising, then, that it has been rejected in other cases and was not even argued in the *GATE* case. See *dictum* in *Re Burns and UPPT Local 170* (1978), 82 D.L.R. (3d) 488, [1978] 2 W.W.R. 22 (B.C.S.C.); *cf. Heerspink, supra* note 11.

Laskin C.J.C. may have adopted a definition of reasonable cause that goes too far in the other direction. Portions of his judgment could be construed as suggesting that these words prohibit any form of unreasonable conduct, whether or not it relates to discrimination.[18] As so interpreted, section 3 would be violated if a bartender concluded hastily and unreasonably, but without any bias, that a customer was drunk, and an employer would violate section 8 by failing to hire an applicant because the application had negligently been misplaced. These examples illustrate that, as so interpreted, the *Human Rights Code* would usurp many areas of law including much of the field of labour relations. It seems clear that the legislature did not intend such a result and that, in the context of a human rights statute, the words "reasonable cause" should be limited to conduct in some way related to unequal treatment of an identifiable group.[19] Chief Justice Laskin's statements should be read together with the facts of the case which showed a clear refusal to such a group.

It is possible to define the phrase "reasonable cause" in a way that avoids the problems arising from both judgments. The solution is to interpret the prohibition as applying to conduct that has a discriminatory *effect* upon an identifiable group. By making the effect of the conduct the operative factor, the Code is broad enough to prohibit practices not framed in terms of a personal characteristic and neutral on their face if they operate to exclude a group. On the other hand, since an effect on a group must be proved, the prohibition is not extended to every type of unreasonable conduct. Thus, an employer who unreasonably required applicants for a manual labour position to have completed twelfth grade would violate the Code if it could be shown that the requirement had the effect of excluding a disproportionate number of native people. But an employer who required all of his or her employees to work in unreasonably dangerous conditions would not be subject to the Code.[20]

Limiting the application of the Code to conduct that has a discriminatory effect is consistent with the purposes of human rights legislation. It is also consistent with other decided cases. *The Ontario Human Rights Code,* which prohibits only specified forms of discrimination, has been interpreted

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[18] *GATE, supra* note 5, at 135-36 (N.R.), 133 (W.W.R.).

[19] An early Board of Inquiry decision supported the broader interpretation but was subsequently rejected by other Boards and by the courts. See *Heerspink, supra* note 11, at 525 (D.L.R.), 707-08 (W.W.R.).

[20] The primary disadvantage of this interpretation is the necessity of defining what constitutes a group. In this context, it makes no sense to apply the word to every collection of people who happen for the moment to share a common characteristic. People who own blue coats or whose beds face north would not commonly be called a group. At the other extreme, I believe, it would be contrary to common usage to limit the word to persons who share characteristics about which they have no choice. Such a definition would exclude collections of people who share a common religion, citizenship or political belief, categories expressly recognized in human rights statutes. Perhaps we can do no more than ask whether the average person would commonly think of a particular collection of individuals as a group. That approach is less exact than would be ideal, but it at least places some limitation on the words "reasonable cause" and at the same time covers all of the grounds of discrimination set out in subsection (2) of section 3.

as prohibiting an employer from requiring a uniform that violates the religious beliefs of a potential employee, even though that requirement does not relate to a personal characteristic and the effect on the group was unintended.[21] It would be strange if the more general phrase "reasonable cause" did not cover such facts.

The first step in my proposed approach is to find a discriminatory effect, but there is also a second step. It must be determined whether, despite the discriminatory effect, the conduct is nevertheless reasonable. For example, an employer can demand qualifications that are clearly necessary for the performance of the work whether or not they have the effect of excluding certain groups.[22] Unfortunately, not all cases are that obvious, and the decisions handed down in the *GATE* case reveal important disagreements about the factors that are relevant in deciding the reasonableness of the conduct.

The Board of Inquiry found that the denial was due to a bias against homosexuals rather than a desire to protect standards of decency and good taste, as had been contended. It went on, however, to consider the issue of public decency. It found that neither the advertisement nor the publication *Gay Tide* was in any way indecent, lascivious or improper, nor did the publication recruit heterosexuals to a homosexual lifestyle or advocate illegal conduct. It found that the subject of homosexuality did not, of itself, justify the refusal. The Board did not decide whether loss of business would constitute reasonable cause, because it found no evidence that the advertisement would cause such a loss. The Board concluded that the denial had been unreasonable.[23]

In the Court of Appeal, Branca J.A. stated that the Board had erred in failing to apply an objective test, citing its finding of personal bias. However, he added:

> The Board did not find that the various individuals within the management of the appellant newspaper were impelled towards their bias because of base views or by spite, malice or in bad faith or indeed, in circumstances other than good faith. In the absence of a finding of a bias based on bad faith, how can it be justly said that the bias held by such individuals is one that might not have been reasonable and honestly entertained by them? This was never determined by the Board. If the bias was honestly entertained, then there was not an unreasonable bias.
>
> To go one step further, if the policy was motivated by an honest bias, why then is the policy unreasonable?[24]

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[21] *Singh* v. *Security and Investigation Services*, unreported, 1977 (Ont. Bd. of Inquiry). See also, *Colfer* v. *Ottawa Bd. of Comm'rs of Police*, unreported, 1979 (Ont. Bd. of Inquiry); *Foster* v. *B.C. Forest Products Ltd.*, unreported, 1979, (B.C. Bd. of Inquiry), *aff'd.* B.C.S.C., unreported, October 9, 1979; and *Robertson* v. *Metropolitan Investigation Security (Canada) Ltd.*, unreported, 1979, (Ont. Bd. of Inquiry).

[22] This discussion concerns the determination of reasonable cause when the alleged ground of discrimination is not one of the grounds explicitly named in the Code. A somewhat different approach would apply if one of the named grounds of discrimination were alleged.

[23] *GATE, supra* note 2.

[24] *GATE, supra* note 4, at 495 (D.L.R.), 209 (W.W.R.).

Mr. Justice Robertson of the Court of Appeal agreed that the Board had erred in failing to apply an objective test. Outlining his view of the correct approach, he said:

> It is in my view that the words in s. 3(1) of the Code, "unless reasonable cause exists" require the application of an objective test: Does such a cause exist? It is wrong in law to substitute for this the subjective test that the Board applied: What motivated the person who denied or discriminated and was this motivation reasonable cause for the denial or discrimination? To put it another way: If reasonable cause does in fact exist, the person discriminated against cannot claim the benefit of s. 3, even though the other person did not know of the existence of the cause; conversely, if reasonable cause does not in fact exist, the other person cannot justify his act of discrimination by a genuine belief that a reasonable cause did exist.[25]

He then found that the Board had erred not only in looking at the motivation of officers of the newspaper, but also in failing to consider the possibility that the newspaper would lose business by publishing an advertisement that offended some of its subscribers.[26]

The majority judgment of the Supreme Court of Canada does not discuss these points. The dissenting judges conclude that the issue is a question of fact and outside the scope of appeal; thus, they do not discuss in any detail the standards to be applied. They do, however, reject the defence of "honest bias."[27]

The judgments of Branca J.A. and Robertson J.A. contain a number of errors that would seriously undermine the *Human Rights Code*. Their use of the subjective/objective dichotomy compounds the problem as those words have several meanings and could be applied in various senses to different aspects of the case. Though Robertson J.A. expressed "substantial agreement" with the quoted portion of Branca J.A.'s judgment, the tests formulated by the two judges seem mutually inconsistent, and the test of Branca J.A. was expressly rejected by the three Supreme Court judges who considered it.[28] Therefore, neither Court of Appeal judgment is binding. Nevertheless, the absence of any clear definition of "reasonable cause" by the Supreme Court makes it necessary to examine those judgments.

If I am right that the words "reasonable cause" apply only to conduct with a discriminatory effect, some account must be taken of the reasons motivating the person who denied the service. Discrimination can result from a conscious desire to exclude a group or from the application of a policy that unintentionally affects a group adversely. In the former case, it is obvious that the thought processes of the alleged discriminator are relevant to the

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[25] *GATE*, *id.* at 496 (D.L.R.), 209-10 (W.W.R.).

[26] *Id.* at 496 (D.L.R.), 210 (W.W.R.). Robertson J.A.'s statement that the Board had not considered the issue resulted from his determination that the Court could examine only the stated case and could not refer to the decision of the Board. (*Op. cit.* at 497 (D.L.R.), 211 (W.W.R.)). That point is not discussed in the Supreme Court of Canada judgments.

[27] *GATE*, *supra* note 5, at 133, 152 (N.R.), 130-31, 149 (W.W.R.).

[28] *Id.*

issue. But they are also relevant in the latter instance, for we can only decide whether other members of the group would have been similarly affected if we know the reason for the exclusion. It is not enough merely to determine that there was no good reason for an exclusion of an individual, for that finding does not reveal whether or not the exclusion related to group membership.[29] By forbidding consideration of the reason for the refusal of the service, Robertson J.A., like Laskin C.J.C. if broadly interpreted, would seem to extend the *Human Rights Code* to prohibit all unreasonable conduct, whether or not it has a discriminatory effect.

Mr. Justice Robertson's test would in another respect unduly narrow the Code. Apparently, he would find that a denial of a public service (or employment) explicitly based on a person's race would not violate the Code if, unbeknownst to the discriminator, some other reason were later shown to have existed that would have justified the refusal. That result is untenable. The existence of an alternative ground might be relevant to the issue of damages, but it should not provide a defence, as human rights statutes are designed to prevent future discrimination against other individuals as well as to provide a private remedy to the complainant.[30] Moreover, human rights inquiries could become inquisitions into the entire life of a complainant if factors unknown to the alleged violator at the time of the incident were a defence.

If, then, it is proper to examine the reasons motivating the denial of a service, is Branca J.A. correct in saying that there is no violation if a person honestly believes that a denial is justified? In his words, should an "honest bias" provide a defence? If so, the test of reasonable cause would be subjective in the sense that the standard by which the conduct was to be judged would be set in each case by reference to the personal beliefs of the individual who had denied the service.

Chief Justice Laskin's somewhat sarcastic tone in rejecting this interpretation was appropriate. The law almost never allows a person to determine the standards by which he or she is to be judged. In addition, human rights legislation would be rendered largely ineffective by the recognition of a defence of "honest bias." Discrimination is seldom motivated simply by spite. More often people feel that their antipathy to a group is justified either by the

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[29] It would be possible to define discrimination purely in terms of statistical proof that a disproportionate number of members of the group had, over a period of time, been excluded. However, that definition is inconsistent with the scheme of Canadian human rights legislation with its emphasis on individual complaints requiring a determination as to whether discrimination took place on a particular occasion. Moreover, even equal employment opportunity programmes, which are not based on individual complaints, do not penalize the disproportionate exclusion of a group if it is unrelated to any practice or policy of the business to which the programme applies. See U.S. Equal Employment Opportunity Comm'n, 1 *Affirmative Action and Equal Employment* (Washington: n. pub., 1974) at 4-7.

[30] *Human Rights Code of British Columbia*, S.B.C. 1973 (2d sess.), c. 119, s. 17 requires a board to order that the contravention cease and the offender refrain from committing the same or a similar contravention. An award for special or aggravated damages is optional.

fact that the group is unworthy in some way—that it is "lazy" or "dishonest," for example—or by reference to some principle such as national identity or the need to avoid social unrest by maintaining a homogeneous society. The invalidity of these views should not blind us to the fact that bigots almost always honestly, often passionately, believe in their own rationalizations. But human rights legislation is not enacted simply to ensure that people live up to their personal convictions. Its purpose is to compensate the victims of discrimination and, more idealistically, to change the attitudes that cause the harm. Obviously, neither of these aims can be achieved if the very existence of a deeply felt prejudice provides a defence.

For similar reasons, Robertson J.A. is wrong in suggesting that the fear that a business would lose other customers by serving a minority group should constitute reasonable cause. That defence would in effect determine reasonable cause on the basis of the prevailing attitudes of prejudiced people in the immediate vicinity. The strength of the defence would be proportional to the prevalence of the bias, and human rights legislation would be ineffective in precisely those communities in which it was most needed. Moreover, the claim that business will be lost by serving a minority is almost always made without supporting evidence.[31]

Finally, the question is not whether we approve of a group, but whether we think that its members have a right to equal treatment. It seems trite to point out the distinction between support of a particular political party, for example, and a belief that it should be allowed to participate in elections. Mr. Justice Branca seems to miss that distinction in stating that the fact that many people object to homosexuality on moral or religious grounds shows that discrimination against homosexuals is reasonable.[32] The same is true of communism, divorce or abortion, but few would argue that communists, divorcees, and supporters of abortion should be denied ordinary public services. Our test of reasonable cause should be "objective" in the sense that we rise above our emotional sympathy or animosity toward a particular group and try to decide the issue on the basis of more generalized criteria.

C. *Sexual Orientation*

Since the majority of the Supreme Court decided the case on the ground that no public service had been denied, it did not consider the applicability of the Code to discrimination against homosexuals. The dissenting judges concluded that the Board of Inquiry had acted properly in finding that the Code had been violated. That conclusion is supported by the legislative history of the Code,[33] and is consistent with the approach that I have suggested in interpreting section 3.

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[31] *Cf. GATE, supra* note 5, at 134(N.R.), 131-32 (W.W.R.). Human Rights tribunals have consistently rejected this "discrimination by proxy" defence. See, e.g., *Hayes* v. *Central Hydraulic Mfg. Co.*, unreported, 1973 (Alta. Bd. of Inquiry); and *Singh, supra* note 21.

[32] *GATE, supra* note 4, at 494 (D.L.R.), 208 (W.W.R.).

[33] *B.C. Leg. Assembly Deb.* Nov. 5, 1973, at 1260, 1265; Nov. 6, 1973, at 1355.

A broader question is whether it is wise to include sexual orientation within the grounds of discrimination prohibited by human rights legislation. That question is of some importance outside British Columbia. The Quebec statute now prohibits discrimination on that ground,[34] and the Ontario Human Rights Commission has recommended that it be included in the Ontario Code.[35] The Board of Inquiry in *GATE* faced that question in interpreting the words "reasonable cause" and said:

> On one side of the dilemma is the argument that society must strive to define and protect a strong acceptable standard of public decency. Such a standard, while flexible enough to enable it to respond to the ever changing attitudes displayed by the constituent elements of our community, must, at the same time, have sufficient rigidity and strength to ensure the protection of those basic concepts of decency and propriety that are fundamental to a civilized way of life.
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> On the other side of the dilemma is the assertion, exemplified by the Code, that society must actively seek to protect those portions of its citizenry, who are different in some way and who thus attract to themselves acts of discrimination that are fostered by pre-conceived and unreasonable judgments or opinions marked by suspicion, fear, intolerance or hatred.
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> The answer to the dilemma lies in the willingness of a mature society to recognize and to accept that people are different and to tolerate those differences. By recognizing that homosexuals exist, society is simply acknowledging that there are, in fact, people who do have, what is for them at least, a quite natural ability to relate sexually and emotionally to others of the same sex. By accepting this fact society is having regard to the preponderance of evidence and professional opinion that exists to the effect that homosexuality is not an illness or a mental disorder and that it is a predominant and permanent characteristic of a significant portion of our population—perhaps as much as 10% thereof.
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> . . . .
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> Surely now in the 1970's our fear of the different or the unusual must be overcome by our confidence in the strength of our social fabric taken as a whole. Acceptance of people for what they are does not require that society at the same time encourage or promote homosexuality or convert those who are not naturally so inclined. To recognize and respect the beliefs or practices of others without necessarily agreeing or sympathizing with them is to show the sort of tolerance that is the mark of a truly civilized and mature society.[36]

The protection of homosexuals is consistent with the primary aim of human rights legislation which is to require that people be judged on the basis of individual merit rather than a stereotype assumed to be characteristic of all members of a group to which they belong. Certainly, such a stereotype exists concerning homosexual men and women. It seems, then, that homosexuals are subject to the kind of discrimination that human rights statutes are designed to prevent. Also, there seems to be no evidence that businesses are harmed by serving homosexuals.[37] However, many claims have been made about this controversial subject, and they cannot all be canvassed in this comment.

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[34] *Charter of Human Rights and Freedoms*, S.Q. 1975, c. 6, s. 10, as am. by S.Q. 1977, c. 6, s. 1.

[35] Ont. Human Rights Comm'n, *Life Together: A Report on Human Rights in Ontario* (Toronto: Queen's Printer, 1977) at 81-82.

[36] *GATE, supra* note 2, at 26-28.

[37] It may be of some interest that the Vancouver Sun has reversed its policy and now accepts such advertisements, apparently without adverse effect.

D. *Scope of Appeal*

The *Human Rights Code* provides for an appeal on questions of law or questions of fact going to jurisdiction.[38] It seems clear that a Board of Inquiry's jurisdiction does not depend upon whether reasonable cause did or did not exist. Therefore, the scope of appeal is affected greatly by whether a Board's determinations about reasonable cause are characterized as questions of law or fact. That characterization involves a policy determination as to who should decide the issue. Even if characterized as a finding of fact, however, the tribunal is not given sole responsibility for the issue. The finding must be made using proper criteria, and a tribunal can be assigned a greater or lesser degree of responsibility for an issue by making those criteria general or detailed.[39]

I believe that Boards of Inquiry should be assigned primary responsibility for the issue of reasonable cause and that the legal standards imposed on them should be kept fairly general. The record of the courts in enforcing anti-discrimination provisions is discouraging. Common law provisions have been interpreted in an extremely restrictive fashion.[40] The statutes that were enacted during and after World War II relied on judicial enforcement and proved to be almost completely ineffective.[41] They were replaced by new legislation, a primary purpose of which was to transfer responsibility for enforcement from the courts to administrative tribunals.[42] It would be unfortunate if this legislative objective were thwarted by the overzealous use of appellate powers.

The administrative approach reflected in human rights legislation makes good sense. Anti-discrimination law is a developing field that raises questions of policy with which the courts have little experience. Specialized administrative tribunals can develop expertise in the area. In addition, women and racial minorities are woefully under-represented in the judiciary, and the use of administrative tribunals makes possible a more equitable representation of these groups.

III. FREEDOM OF SPEECH

The majority judgment of the Supreme Court of Canada treats the case as primarily concerning freedom of the press. Martland J. starts from the proposition that this freedom is an important right in Canada, citing the

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[38] *Human Rights Code of British Columbia*, S.B.C. 1973 (2d sess.), c. 119, s. 18.

[39] Davis, *Administrative Law Text* (3d ed. St. Paul: West, 1972) at 545-47; *cf.* Fleming, *The Law of Torts* (5th ed. Sydney: Law Book Co., 1977) at 134-35.

[40] See Hunter, *Human Rights Legislation in Canada: Its Origin, Development and Interpretation* (1976), 15 W. Ont. L. Rev. 21 at 23-24.

[41] See, e.g., *R.* v. *McKay* (1955), 113 C.C.C. 56 (Ont. Cty. Ct.); and *R.* v. *Emerson* (1955), 113 C.C.C. 69 (Ont. Cty. Ct.); *cf.* Tarnopolsky, *The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada* (1968), 46 Can. B. Rev. 565 at 568-69.

[42] Tarnopolsky, *id.* at 569-71.

Alberta Press case[43] and a judgment of the United States Supreme Court.[44] In characterizing the nature of the dispute, he says, "The issue which arises in this appeal is as to whether s. 3 of the Act is to be construed as purporting to limit that freedom."[45] He concludes that a newspaper can determine the scope of the advertising service that it offers and that section 3 of the *Human Rights Code* does not apply to a refusal based on the content of an advertisement. That limitation is not apparent from any literal reading of the section. The majority seems to have invoked the rule of construction that legislation should be construed narrowly if a broader construction would infringe upon a fundamental right. That principle has been long established, if intermittently applied. For example, in *Brownridge* v. *The Queen*[46] the Supreme Court of Canada held that the breathalyzer provisions of the *Criminal Code* should be construed to permit a person to consult counsel before being required to take the test. *McKay* v. *The Queen*[47] concerned the right of a property owner to display a candidate's sign during a federal election. The Supreme Court created an exception allowing such signs though none was apparent in the wording of the by-law. These cases, particularly the *McKay* case, suggest that strained interpretations of a statute are permissible to preserve a fundamental right.

In his dissenting judgment, Chief Justice Laskin criticized the distinction made between the content of an advertisement and the personal characteristic of a customer. He said:

> Counsel for the Vancouver Sun would have it that although it could not discriminate against a person on the ground that he had only one eye—that would be discrimination related to an attribute of the person—it could refuse an advertisement soliciting subscriptions to a periodical for the blind because of newspaper policy against accepting such an advertisement.

He called this argument "a desperate one."[48] Mr. Justice Dickson also rejected this argument. He accepted the premise that freedom of the press is an important right and that newspapers have a unique and important place in western society. However, he found that the proper distinction was between the editorial and news content of a paper and advertising space. He found that the *Human Rights Code* gave members of the public a right of access to publish their views in paid advertisements unless there were reasonable grounds to deny that right, but that newspapers had full control over other portions of the paper.[49]

The importance that the majority places on freedom of expression is in sharp contrast to other recent decisions of the Supreme Court. In *Nova Scotia*

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[43] *Reference Re Alberta Statutes*, [1938] S.C.R. 100, [1938] 2 D.L.R. 81, [hereinafter *Alberta Press*].

[44] *Miami Herald Publishing Company* v. *Tornillo*, 418 U.S. 241, 94 S. Ct. 2831 (1974).

[45] *GATE*, *supra* note 5, at 126 (N.R.), 124 (W.W.R.).

[46] [1972] S.C.R. 926, 28 D.L.R. (3d) 1, 7 C.C.C. (2d) 417.

[47] [1965] S.C.R. 798, 53 D.L.R. (2d) 532.

[48] *GATE*, *supra* note 5, at 135-36 (N.R.), 133 (W.W.R.).

[49] *Id.* at 148-49 (N.R.), 145-46 (W.W.R.).

Board of Censors v. *McNeil*,[50] the Court upheld the constitutional power of the Province to censor films. The Court cited the general power of the provinces to regulate intra-provincial business and held that movie censorship came within these powers. The Court has also upheld the power of the provinces to regulate the content of advertising. In *A.G. Quebec* v. *Kellogg's Co. of Canada*,[51] the Court upheld a Québec regulation prohibiting the publication of cartoon advertising intended for children. The specific issue before the Court was whether this provision applied to television advertising. However, the Court referred to provincial regulation of other advertising and said, "[t]he Provincial power to enact such legislation under s. 92(13) and (16), if not under s. 93, of *The British North America Act, 1867*, would appear to be clear."[52] The Court then distinguished cases holding that the power to regulate television transmission was *ultra vires* the provinces and added, "That power is not in issue in the present case. What is in issue here is the power of a provincial legislature to regulate and control the conduct of a commercial enterprise [Kellogg's] in respect of its business activities within the province."[53]

Of course, both the *McNeil* and *Kellogg's* cases concerned constitutional challenges to a statute rather than a question of statutory construction, as in *GATE*. However, the reasoning of those cases, which relied upon the general power of the provinces to regulate business enterprises, seemed to suggest that communications media enjoyed no special status with regard to provincial regulation. In constitutional terms, at least, freedom of expression seemed to count for little; the province could regulate the content of a company's advertisements just as it could regulate the quality of its cereal. These cases seemed to have narrowly confined the scope of earlier cases, such as *Saumur* v. *City of Quebec*[54] and *Switzman* v. *Elbling*,[55] which had held that freedom of expression was a matter of constitutional significance.

Even more striking is the contrast between the Court's approach to freedom of expression in the *GATE* case and the *Dupond* case.[56] In *Dupond*, the Court upheld the constitutionality of a Montreal by-law that banned all parades and demonstrations within the city for a period of 30 days. It held that this by-law came within provincial powers over matters of a local nature and the prevention of crime. The Court did not seem to have assigned any special significance to the fact that these powers had been exercised so as to limit freedom of expression. The judgment stated that English law does not recognize a right to use the public streets for an assembly to express one's views, and the right seemed to have played no part in the Court's consideration of the division of powers between the federal and provincial governments. The Court's approach might be explained on the basis of Beetz J.'s

[50] [1978] 2 S.C.R. 662, 84 D.L.R. (3d) 1.
[51] [1978] 2 S.C.R. 211, 83 D.L.R. (3d) 314.
[52] *Id.* at 220 (S.C.R.), 319 (D.L.R.).
[53] *Id.* at 222 (S.C.R.), 320 (D.L.R.).
[54] [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641.
[55] [1957] S.C.R. 285, 7 D.L.R. (2d) 337.
[56] *A.G. Can.* v. *Montreal*, [1978] 2 S.C.R. 770, 84 D.L.R. (3d) 420, [hereinafter *Dupond*].

statement that parades and demonstrations are not speech at all,[57] but that conclusion itself illustrates the Court's unwillingness in *Dupond* to give broad ambit to freedom of expression.

It is especially difficult to reconcile the Court's approach to the "implied bill of rights" in the two cases. That theory declares that the democratic system that we inherited necessarily implies a freedom of expression on the part of all subjects that cannot be suppressed by provincial legislatures or perhaps even by Parliament. The theory was first developed in *obiter* by Duff C.J.C. and Cannon J. in the *Alberta Press* case.[58] It was further developed in minority judgments in the *Saumur* and *Switzman* cases,[59] but it has never been adopted by a majority of the Court and seemed to owe its survival to the careful attention of constitutional law teachers. It appeared that the majority judgment in *Dupond* had effected a decisive end to this theory. In outline form, Mr. Justice Beetz said:

> 1. None of the freedoms referred to is so enshrined in the Constitution as to be above the reach of competent legislation.
> 2. None of those freedoms is a single matter coming within exclusive federal or provincial competence. Each of them is an aggregate of several matters which, depending on the aspect, come within federal or provincial competence.[60]

In the *GATE* case, Mr. Justice Martland cited the *Alberta Press* case as demonstrating the importance Canadian law accords to freedom of speech.[61] That view can be reconciled with *Dupond* on the basis that freedom of speech might be of significance in interpreting statutes even if it were of no consequence to constitutional issues. But Martland J. went on to hint that *Alberta Press* may still be valid as constitutional law, saying:

> A newspaper supporting certain political views does not have to publish an advertisement advancing contrary views. In fact, the judgments of Duff C.J. and Davis and Cannon JJ. in the *Alberta Press* case, previously mentioned, suggest that provincial legislation to compel such publication may be unconstitutional.[62]

In light of *McNeil*, *Kellogg's* and *Dupond*, none of which were cited, it is hard to accept this *obiter*. Whether valid or not, however, it makes it difficult to distinguish *GATE* from *Dupond* on the ground that one concerned a constitutional challenge and the other did not, for that distinction does not seem to have played an important part in the thinking of the majority in *GATE*.

Cherneskey v. *Armadale Publishers Ltd.*[63] also suggests that the distinction between constitutional and non-constitutional cases does not explain the Court's change of emphasis. In *Cherneskey* a Saskatchewan Alderman sued a newspaper for publishing defamatory statements contained in a letter to the editor. In defence, the newspaper pleaded that the statements were fair com-

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[57] *Id.* at 797 (S.C.R.), 439 (D.L.R.).

[58] *Supra* note 43.

[59] *Supra* notes 54 and 55.

[60] *Supra* note 56, at 796-97 (S.C.R.), 439 (D.L.R.).

[61] *Supra* note 5, at 127 (N.R.), 125 (W.W.R.).

[62] *Id.*

[63] (1978), 90 D.L.R. (3d) 321, [1978] 6 W.W.R. 618 (S.C.C.).

ment on a matter of public interest. The Court had to determine the nature of the subjective mental state that would defeat the defence of fair comment. But at the heart of the dispute was the question as to who had the burden of proof on the issue, since the authors of the letter were unavailable and there was no evidence at all as to their subjective mental state.

In *Cherneskey*, the Court was not dealing with the *B.N.A. Act* or even with the wording of an ordinary statute. Moreover, there was no Canadian authority on point. The English cases contained language that could be used to support either result, but could readily be construed as supporting the position of the newspaper. In short, the Court had a clear opportunity to opt for freedom of expression, unfettered by statute or contrary judicial precedent. The majority chose not to do so. It held that a newspaper has the burden of proving that comment in letters to the editor represents either the honest opinion of the letter writer or of the newspaper. The decision specifically said that newspapers enjoy no special status in the law of defamation.[64] The effect on free speech was not simply overlooked but was consciously subordinated to another interest, for Dickson J., in a strongly worded dissent, argued cogently that the result would discourage the publication of letters expressing opinions contrary to those of the newspaper and would limit free discussion of public issues.[65]

The cases that I have cited deal with a wide variety of facts and legal issues and all can be distinguished from the *GATE* case on one ground or another. Freedom of speech must always be balanced against other social interests, and it is possible that the Court found the competing interests particularly strong in those cases. However, when they are read together, one does not have the feeling that the Court reluctantly subordinated an important right in favour of other interests of paramount importance. Instead, the Court took pains to emphasize that newspapers and movie theatres are ordinary businesses, and marchers are in the same category as pedestrians and motorists. Freedom of speech was subordinated to a variety of interests that have nothing in common, and it seems more likely that the Court assigned a relatively low priority to that freedom than that it treated the other disparate interests as all being particularly grave.

Earlier cases in which the Court had acted to protect freedom of expression generally involved risks to that freedom that were substantially more serious than any risk created by the *Human Rights Code*. Most of them involved a restriction on the power to criticize the government or to present a political view in opposition to the government. For example, the statute considered in *Alberta Press*[66] came into effect upon criticism of the social credit program, *Boucher* v. *The King*[67] considered a pamphlet highly critical of the

[64] *Id.* at 337 (D.L.R.), 632 (W.W.R.).

[65] *Id.* at 343-45 (D.L.R.), 641-43 (W.W.R.).

[66] *Supra* note 43. In addition, the remedy for a violation of the statute included a ban on publication until further order or prohibition of material written by a specified person or emanating from a specified source. These remedies could be imposed by order of the Lieutenant Governor upon recommendation of the Chairman of the Board established by statute. S.A. 1937 (3d sess.) Bill 9, s. 6.

[67] [1951] S.C.R. 265, [1950] 1 D.L.R. 657.

Québec government, and *Switzman*[68] considered a law restricting the distribution of material supporting communism. Limits on political criticism can be misused by a government to perpetuate itself and there is a special danger that such laws will not be enforced impartially. The Alberta statute was particularly severe, for it required that newspapers publish, without compensation, a reply by the government and thus created a financial penalty for publishing such criticism. *Saumur*[69] considered a provision that in effect gave the chief of police unfettered discretion to prohibit the distribution of material on the streets. The material had to be submitted to the police in advance, and the power was one of prior restraint on speech.[70]

The *GATE* case did not involve any of these factors. The *Human Rights Code* does not in any way restrict the power of the newspaper to criticize the government. Indeed, it protects the right of advertisers to publish such criticism. There is no direct or indirect interference with the news columns or editorial views of the newspaper. The obligation to publish an advertisement is determined by the scope of the advertising service that the newspaper offers rather than by the publication of an editorial opinion as in *Alberta Press.* The law specifies only that the advertisement be published at the normal rate set by the newspaper. It creates no financial detriment.

Two factors might be thought to point to a restriction on free speech, but I do not believe that they are comparable to the restrictions considered in earlier cases. First, the *Human Rights Code* imposes an affirmative legal obligation rather than a prohibition. The law has tended to disfavour affirmative obligations, and though that attitude seems to be changing somewhat,[71] it may have influenced the Court. Requiring a person to assist in publishing material that he or she finds offensive can cause emotional distress, even if it is done for pay in the ordinary course of business. That factor alone, however, does not constitute an undue restriction on freedom of speech if applied to publishers. The law often condones similar obligations. Radio and television stations are required to air political advertisements during an election.[72] Newspaper employees, book store clerks and secretaries are often obligated by contract to compose, reproduce or deliver material that they find offensive if they choose to take part in those kinds of business activity. The law would award damages if a printing company that had contracted to publish a periodical refused to reproduce material with which it disagreed. It does not seem to be a great jump to impose a similar obligation on the basis that a

[68] *Supra* note 55.

[69] *Supra* note 54.

[70] The *McKay* case, *supra* note 47, might be viewed as an exception. The prohibition was of lawn signs and concerned the format of the presentation rather than the content of the signs. The rule was prospective, and the government had no stake in the outcome. It seems that the Court was persuaded not by the severity of the restriction but by the importance of the subject matter—federal elections.

[71] See, e.g., *Horsley* v. *MacLaren*, [1972] S.C.R. 441, 22 D.L.R. (3d) 545; and *Rivtow Marine Ltd.* v. *Washington Iron Works*, [1974] S.C.R. 1189, 40 D.L.R. (3d) 530.

[72] *Canada Elections Act*, R.S.C. 1970 (1st supp.), c. 14, s. 99.1, as am. by S.C. 1974, c. 51, s. 14, S.C. 1977, c. 31, s. 58.

mass circulation newspaper has chosen to offer an advertising service to the public.[73]

Any emotional distress caused by requiring that material be published must be discounted by the comparable distress incurred by people who will be unable to publish views that are important to them unless their right to do so is protected by law. We must choose between competing claims to freedom of expression, and in any particular case the emotional distress of either party may be more severe. If, for example, a religious group submitted a paid announcement of services to a publisher of another faith, we cannot presume that the distress caused by requiring publication would outweigh that caused by a refusal to publish. In short, it is not clear whether, on balance, imposing this affirmative obligation restricts or expands freedom of expression.

Though it was not considered by the Supreme Court majority, one other aspect of the *Human Rights Code* might cause concern. In using the words "reasonable cause," the legislature seems to have assigned considerable discretion to human rights tribunals to elaborate gradually upon the exact scope of the statute. Discretion can be abused, and it is worth considering whether there is a risk that the *Human Rights Code* could be misapplied so as to restrict free speech unduly.

It would be a mistake to ignore that risk, but it does not follow that publishers should be immunized from the Code. Instead, the Court could have placed limitations on the words "reasonable cause" that would have minimized the potential conflict with freedom of expression. Dickson J.'s dissenting judgment makes a start in that direction by emphasizing the immunity of news and editorial columns from regulation and by specifying that reasonable cause should be judged by an objective test.[74] The Court could also have imposed other limitations. For example, it might have specified that a newspaper could refuse an advertisement that was so large that it would require news columns to be restricted, or it could have acknowledged the right of the paper to edit offensive language in a non-discriminatory manner. As so limited, the Code would provide a circumscribed right of access to advertising space that would take account of the claims of both the public and the newspaper to freedom of expression.

It seems, therefore, that the strong emphasis in *GATE* on the importance of freedom of expression is a departure from other recent cases and may even go beyond cases such as *Alberta Press*, *Saumur* and *Switzman*. The change in approach is exemplified by the Court's citation of the federal *Bill of Rights* and its reliance on American authority. The Court has seldom given the *Canadian Bill of Rights* operative effect even as applied to federal legislation;[75] in *GATE* it was cited in interpreting a provincial statute. In addition, the Court had taken pains in several earlier cases to emphasize distinctions between the American and Canadian constitutional systems in

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[73] However, a Board of Inquiry might sensibly take the affirmative nature of the requirement into account in refusing to grant an order of specific performance.

[74] *GATE, supra* note 5, at 141, 148-49 (N.R.), 139, 145-46 (W.W.R.).

[75] S.C. 1960, c. 44. See Tarnopolsky, *The Supreme Court and Civil Liberties* (1976), 14 Alta. L. Rev. 58 at 81-96.

refusing to follow United States decisions concerning fundamental rights.[76] In *GATE*, the Court relied heavily on a decision of the United States Supreme Court discussing freedom of the press.

The American approach to regulation of the media is instructive, but it is more helpful in defining the problem than in providing a solution. In particular, the American cases are helpful in separating out the various claims that are lumped together in the handy phrase "freedom of speech." The cases have distinguished between freedom of speech and freedom of the press, a distinction that has found little favour in Canadian cases.[77] Earlier United States cases also distinguished between ordinary speech and "commercial speech" such as advertising, though this distinction is now becoming less important.[78] But most important in the context of the *GATE* case, the American cases have distinguished between freedom from regulation of speech and a right of access to the media to enable members of the public to disseminate their views.[79] Obviously, the freedom from regulation and the right of access frequently come in conflict. The United States Supreme Court's resolution of this conflict is at best an uneasy compromise and perhaps an indefensible one.

In *GATE* the Supreme Court of Canada relied upon the *Tornillo* case,[80] which considered the constitutionality of a Florida statute providing that if a newspaper published criticism of a political candidate, "such newspaper shall ... publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply. . . ." The United States Supreme Court first discussed in considerable detail the arguments in favour of a right of access. In particular, the Court cited the concentration of ownership of newspapers and noted that "the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible."[81] The Court did not contest the validity of these points, but said that governmental action to provide a mandatory right of access would violate the First Amendment of the United States Constitution. Noting that the reply must be printed free of charge, the challenged statute was said in effect to exact a penalty for criticism of political candidates. The Court continued:

> Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be

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[76] See, e.g., *A.G. Can.* v. *Lavell*, [1974] S.C.R. 1349 at 1365, 38 D.L.R. (3d) 481 at 494; and *Smythe* v. *The Queen*, [1971] S.C.R. 680 at 686, 19 D.L.R. (3d) 480 at 485.

[77] But see *CKOY Ltd.* v. *The Queen*, [1979] 1 S.C.R. 2 at 14-15, 90 D.L.R. (3d) 1 at 11-12. The Court states that the press "has no more freedom of expression than the ordinary citizen." But it goes on to distinguish between freedom of the press and freedom of speech.

[78] *GATE, supra* note 5, at 145-46 (N.R.), 142-43 (W.W.R.) (*dissenting*).

[79] See Schmidt, *Freedom of the Press vs. Public Access* (New York: Praeger, 1976) at 119-218.

[80] *Supra* note 44.

[81] *Id.* at 251 (U.S.), 2836 (S. Ct.).

blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate. . . .[82]

The Court then held that the statute would violate the First Amendment of the United States Constitution even without these penalties. The portion of the judgment quoted by the Supreme Court of Canada said:

A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[83]

Tornillo represents a high point in the United States Supreme Court's recognition of the immunity of the press from regulation. However, the Court recognized even in *Tornillo* that this immunity was not absolute and cited with approval a case upholding a statute prohibiting employment advertisements that express a preference for males or females.[84] Other cases have restricted that immunity so as to give the public a right of access to the media. In *Red Lion Broadcasting Co.* v. *Federal Communications Commission*,[85] the Court upheld the constitutionality of a regulation providing for a right of reply by a person or group criticized in a broadcast on the ground that airwaves are limited and a licence to use this limited resource carries a concomitant obligation to provide access to other points of view. The Court found that such regulations "enhance rather than abridge the freedoms of speech and press protected by the First Amendment . . . ."[86] It has been pointed out that the Court's emphasis on the limited number of broadcast frequencies may be misplaced and that an even stronger argument can be made for a right of access to newspaper space. In fact there are more broadcasting stations than daily newspapers in the United States, just as there are in Canada.[87] The economic constraints seem to be more effective than the technological ones.

The conflict between press immunity and a right of access caused particular difficulty in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*.[88] The Court upheld the right of the broadcaster to refuse an advertisement expressing a group's views on the Viet Nam war. A majority rejected the view of the two dissenting judges that the broadcaster had itself violated the First Amendment in refusing the advertisement. The majority also ruled that the Federal Communications Commission had properly inter-

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[82] *Id.* at 257 (U.S.), 2839 (S. Ct.).

[83] *Id.* at 258 (U.S.), 2840 (S. Ct.).

[84] *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. 376, 93 S. Ct. 2553 (1973).

[85] 395 U.S. 367, 89 S. Ct. 1794 (1969).

[86] *Id.* at 375 (U.S.), 1798-99 (S. Ct.).

[87] Powe, *"Or of the [Broadcast] Press,"* [1976] 55 Tex. L. Rev. 39 at 56-57; Statistics Canada, *Canada Yearbook 1978-79* (Ottawa: n. pub., 1978) at 676-80 (120 daily newspapers versus 614 radio and television stations, 402 of which are private).

[88] 412 U.S. 94, 93 S. Ct. 2080 (1973).

preted its powers in refusing to order that the advertisement be accepted. However, the majority was careful to note that the refusal of the advertisement must be considered in conjunction with the broadcaster's statutory obligation under the "fairness doctrine" to present opposing points of view in its regular programming. Moreover, three of the justices took pains to note that the Commission was examining the possibility of providing some form of right of access, and added:

> [T]he history of the Communications Act and the activities of the Commission over a period of 40 years reflect a continuing search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licencees. The Commission's pending hearings are but one step in this continuing process. At the very least, courts should not freeze this necessarily dynamic process into a constitutional holding.[89]

Thus, two members of the Court found that a right of access could be derived from the Constitution itself even in the absence of any statute. Three other judges rejected this view but took care to avoid any suggestion that a statute providing for such a right would be unconstitutional.[90]

Read in the context of these other cases, *Tornillo* states a principle applicable only within a circumscribed area. The United States Supreme Court has struck a precarious balance between the freedom of the media from governmental intrusion and the right of others to make their views known to the general public. The decisions are fairly narrow legal rulings applied to specific situations. Therefore, American law does not provide any easy answer to the issues raised in the *GATE* case, even ignoring any differences in American and Canadian constitutional language. In particular, *Tornillo* is of little help in considering the importance of the fact that the *Human Rights Code* applies only to advertising and not to news or editorial columns, a distinction stressed by Dickson J. in upholding the Code.[91] Subsequent lower court judgments in the United States have split as to the applicability of *Tornillo* to advertising.[92]

To summarize, neither the Canadian nor the American cases formulate a test by which the *GATE* case can be easily judged. The Court's approach to freedom of speech in *GATE* seems different from that of other recent cases, but the judgment does not identify the reason for that change. The American cases make a useful distinction between freedom from regulation and a right of access, but the boundary between the two is left uncertain and, judged by American law, the facts of *GATE* fall within the area still in dispute.

In *GATE* the Court placed an elaborate gloss on the words "service customarily available to the public" that is inexplicable by any literal reading of the statute. As I have noted, the Court relied on the rule that statutes should be construed restrictively if they infringe upon a fundamental right. If,

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[89] *Id.* at 132 (U.S.), 2101 (S. Ct.).

[90] *Id.* at 170-204 (U.S.), 2120-38 (S. Ct.) (*dissenting*).

[91] *GATE, supra* note 5, at 148-49 (N.R.), 145-46 (W.W.R.).

[92] Compare *Fitzgerald* v. *Nat'l Rifle Ass'n of America*, 383 F. Supp. 162 (D. Ct. D. N.J. 1974) at 166 with *Gore Newspapers Co.* v. *Shevin*, 397 F. Supp. 1253 (D. Ct. S.D. Fla. 1975) at 1257.

as I have suggested, the *GATE* case presented the Court with competing claims to freedom of expression, one of which was enhanced by the Code, that rule of construction does not seem appropriate. The obvious conclusion is that the majority did not see public right of access as a fundamental right comparable to the newspaper's claim to freedom of the press. Their failure to do so was not inadvertent, for Dickson J.'s dissenting judgment discussed that approach.

I wish to outline two alternative justifications for freedom of expression and to examine the hypothesis that the Court's reasoning reveals a shift from the justification previously emphasized in Canadian cases to a different one that is inconsistent with recognition of a right of access.

The first justification starts from the proposition that we have a democratic system of government that gives citizens the right to participate in the governmental process. If this system is to result in sound decisions, it is necessary that all citizens have access to the relevant information, and there must be free discussion of all sides of public issues so that competing views can be tested against one another in the "marketplace of ideas." The reader is undoubtedly familiar with this position, and I will not develop it in detail.

The point I wish to emphasize is that this approach justifies freedom of speech on the basis of the good of society rather than any individual interest. Freedom of speech must be maintained because the system will not work properly without it.

Proponents of strict obscenity laws assert that the material that they want to ban is totally unrelated to any discussion of governmental affairs, and they are usually right. One can imagine the reaction of Queen Victoria and her ministers if they had been told that the *B.N.A. Act* protected a book such as *Lady Chatterley's Lover*,[93] much less magazines composed entirely of nude pictures and lurid sexual fantasy. Civil libertarians often defend the right to publish such material on the ground that any restriction on speech constitutes a precedent that can be gradually extended to suppress political criticism. That argument is sometimes valid, as in the case of Lawrence's social criticism, but it is often strained beyond credibility. Though there is no definitive line between sexual material and the discussion of public affairs, we tolerate much finer distinctions in other areas of the law even when fundamental rights are at stake.[94]

Often, non-political forms of speech can be defended more persuasively in terms of a second justification. This approach is not based upon the good of society but is a claim of individuals and derives from the broader claim that the individual has the right to be free from governmental restriction unless his or her conduct is unduly harmful to other individuals. Historically, this justification is tied to theories of natural law and it postulates that the source of individual rights is outside the political system.[95]

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[93] Lawrence, *Lady Chatterley's Lover* (New York: Grove Press, 1962); see *R.* v. *Brodie*, [1962] S.C.R. 681, 32 D.L.R. (2d) 507, 132 C.C.C. 161.

[94] Our elaborate set of rules concerning the admissibility of statements made to police provides an example.

[95] Lloyd, *The Idea of Law* (London: Penguin, 1972) at 83-85.

Canadian authority has defended freedom of speech almost entirely in terms of the first justification. The approach is most fully developed in the discussions of the implied bill of rights and derives naturally from our constitutional language. The cases have relied primarily on the preamble to the *B.N.A. Act* which provides that Canada shall have a constitution "similar in principle to that of the United Kingdom."[96] The decisions have reasoned that this language refers to the democratic tradition of Great Britain and have asserted that freedom of speech is essential to that system of government. The source of the right is firmly grounded within the governmental system that we inherited.

The second justification is given prominence in American political history. The framers of the United States Constitution were influenced by the theory that the source of governmental power is in the voluntary delegation by the members of society of the pre-existing rights that they naturally possessed as individuals.[97] The United States Declaration of Independence states that all people "are endowed by their Creator with certain inalienable rights .... That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed ...."[98] Roscoe Pound noted that "Jefferson claimed the rights of Americans by the universal title of humanity when the breach with England made it awkward to claim them as Englishmen."[99] This view has been incorporated into American constitutional law.[100]

The two justifications for freedom of speech usually reinforce one another. The discussion of public affairs can be defended either on the basis that it promotes good government or that there is no reason to restrict the individual's right to speak. But the two approaches lead in quite different directions when the "right of access" aspect of freedom of expression is at issue. The inconsistency between them in that context is clearly revealed in the majority judgment in *Tornillo*. The Court seemed to concede that the concentration of power in the publishing industry has imperilled the "marketplace of ideas" and that the purported object of the statute under challenge was to ensure that the public had access to all sides of an issue.[101] The Court continued:

> However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment....[102]

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[96] *Alberta Press*, *supra* note 43, at 132-35, 145-46 (S.C.R.), 107-09, 119-20 (D.L.R.); *Saumur*, *supra* note 54, at 330-31 (S.C.R.), 671-72 (D.L.R.); *Switzman*, *supra* note 55, at 306-07, 326-28 (S.C.R.), 357-59, 369-71 (D.L.R.).

[97] Lloyd, *supra* note 95, at 84.

[98] *The Declaration of Independence—1776*, 1 U.S.C. at xxvii (1964).

[99] Pound, *The Development of Constitutional Guarantees of Liberty* (New Haven: Yale Univ. Press, 1960) at 75.

[100] Sutherland, *Constitutionalism in America* (New York: Blaisdell Pub. Co., 1965) at 2-4; see Dworkin, *Taking Rights Seriously* (Cambridge: Harvard Univ. Press, 1977) at 191-92.

[101] *Supra* note 44, at 248, 251 (U.S.), 2835-36 (S. Ct.).

[102] *Id.* at 254 (U.S.), 2838 (S. Ct.).

This passage, together with that quoted earlier,[103] seems clearly to subordinate the right of access to the right of the individual to be free from governmental intrusion, just as the Court subordinated the latter right to the former in the *Red Lion* case.[104]

In *GATE*, the majority of the Supreme Court cited only two cases, *Tornillo* and *Alberta Press*.[105] In terms of the distinction that I have drawn, these cases reflect quite different values. *Alberta Press* justified freedom of speech in terms of the need for free discussion in a democracy; Duff C.J.C. and Cannon J. found that the statute discouraged such discussion. In *Tornillo*, the United States Supreme Court made a similar finding, but went on to say that the statute would be unconstitutional even if it had the effect of promoting rather than restricting free discussion, and it was this latter line of reasoning upon which the majority in *GATE* relied. Therefore, the Supreme Court of Canada seems, consciously or unconsciously, to have adopted a justification for freedom of speech quite different from that outlined in earlier Canadian cases and in some circumstances inconsistent with the traditional Canadian rationale. The change in approach is most apparent in a passage in which Martland J. states:

> The law has recognized the freedom of the press to propagate its views and ideas on any issue and to select the material which it chooses to publish. As a corollary to that a newspaper also has the right to refuse to publish material which runs contrary to the views which it expresses .... A newspaper supporting certain political views does not have to publish an advertisement advancing contrary views.[106]

The right to suppress political views seems clearly inconsistent with any justification based upon the needs of our democratic system.

The willingness to examine American cases concerning fundamental rights is welcome, not because we should be moving toward an American approach to fundamental rights, but simply because the American jurisprudence is extensive and we should not ignore the lessons, both positive and negative, that it provides. Mr. Justice Dickson's approach in his dissenting judgment is also noteworthy in this regard. He carefully examines the American approach, evaluates its positive and negative features, and considers whether it fits into the Canadian system. Although he ultimately rejects the American approach, his judgment is far more instructive for having gone through this process.

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[103] See text following note 83, *supra*.

[104] *Supra* note 85.

[105] *Supra* notes 44 and 43, respectively.

[106] *GATE*, *supra* note 2, at 127 (N.R.), 125 (W.W.R.). Martland J. also notes that a newspaper published by a religious group would not have to publish an advertisement advocating atheism. Arguments in favour of a right of access stress the concentration of control of the mass media and the barriers to entry into that industry. Those justifications do not apply to small independent publications. Also, if the primary purpose of a publication is dissemination of the views of a religious or political group rather than profit, the claim to immunity seems particularly strong. Canadian human rights statutes provide a limited exemption to such organizations (see *Human Rights Code of British Columbia*, S.B.C. 1973 (2d sess.), c. 119, s. 22), and perhaps such provisions should be clarified. But it is a mistake to equate the claims of such publications with those of mass circulation newspapers.

The Court's reliance on the right of free speech is also a welcome shift from recent cases that seemed to be steadily eroding that right. I have tried to show that the Court actually was faced with two competing claims to freedom of expression and that the opposite result could be defended with equal plausibility in terms of that right. Nevertheless, the Court's willingness to recognize any aspect of the right is a hopeful sign.

IV. BALANCING RIGHTS

The claims of each of the parties were based upon a fundamental right. The position of the Gay Alliance and the B.C. Human Rights Commission reflected the egalitarian rights embodied in the *Human Rights Code*. The *Vancouver Sun*'s argument was founded on freedom of the press.

When, as here, two fundamental rights are in conflict, it is often said that they must be balanced against one another. It makes little sense to try to determine whether the Court assigned the "correct" weight to each of the competing rights, for they cannot be measured by any absolute standard. We can only speculate about the result if one of the rights is pitted against some other interest or if the same rights come into conflict in some other context. But any assessment of the importance that will be accorded the case as precedent requires precisely such speculation.

The result in *GATE* cannot be explained in terms of any binding rule of law. Certainly the Court was bound by no judicial precedent. The majority judgment cited only two cases, one of which was American. The other, *Alberta Press*,[107] was easily distinguishable and had recently been sharply restricted if not overruled. The Court had to read a good deal into the words "service ... customarily available to the public" and was not bound by the statutory wording. It is also hard to believe that the result was influenced by reaction to the innocuous wording of the advertisement or that the Court was concerned about the consequences of including this two-line advertisement in the expansive classified advertising columns of the *Vancouver Sun*, which admitted that it published larger and far more explicit advertisements concerning homosexuality and had also published news stories on this subject.[108] It seems clear, then, that the decision was not based on the particular facts of the case and that the Court was forced to make a fundamental value judgment about the relative importance of the competing rights. The three obvious explanations for its change of direction are: 1) that it now assigns greater importance to freedom of speech than it has in the recent past; 2) that it assigns low importance to egalitarian rights and the protection of minorities; or 3) that there is an unwillingness to extend protection to homosexuals.

I will not try to assess the likelihood of the third explanation, simply because there is almost nothing upon which to base a judgment about the Court's attitude toward homosexuality. The Court has occasionally considered sex offences involving homosexual activity,[109] but those cases reveal

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[107] *Supra* note 43.

[108] *GATE*, *supra* note 2, at 16-17.

[109] See, e.g., *Guay* v. *The Queen*, [1979] 1 S.C.R. 18, 89 D.L.R. (3d) 532, 42 C.C.C. (2d) 536.

little, if anything, about the Court's attitude toward homosexuality outside of the criminal context.[110] It may be of some significance, however, that the subject of homosexuality has seldom come before the appellate courts except in a criminal context, and that fact may have coloured the attitude of the judiciary.[111]

There is some support in the majority judgment for the first explanation. Martland J. spoke of the importance of freedom of the press, and there is no language critical of the purposes of anti-discrimination statutes or their extension to protect homosexuals. Optimistically, then, the Court adopted a strained and restrictive interpretation of the statute only because of a new commitment to freedom of speech. On the other hand, the majority did not discuss the purposes of the legislation at all; there is nothing in the judgment recognizing that equality of treatment may also be an important interest deserving judicial recognition. Also, the Court did not reinterpret the recent judgments placing limitations on freedom of speech; it simply ignored those cases. For example, the Court cited the judgments in the *Alberta Press*[112] case that gave rise to the implied bill of rights theory, but it did not explain the passages in the *Dupond*[113] case that had seemed to reject that theory. I would be more confident that the majority judgment represented a renewed commitment to freedom of speech if the Court had been more forthright about its change in approach.

That interpretation also does not take account of the way in which the Court divided. The accompanying chart shows the division of the Court in recent freedom of speech cases. Each of the judges is shown as voting for or against the result that protected freedom of speech. With the exception of Spence J., who has consistently favoured freedom of speech (and excluding Pratte and Estey JJ. who each sat on only one other case), it would have been more logical on the basis of the earlier cases to predict just the opposite division. Of course, the chart is oversimplified. Different cases involved different aspects of freedom of speech, and all of the cases raised other issues as well. A judge who assigns great importance to free speech may, in a particular case, have favoured some restriction on that right because he believed that some other interest was of paramount importance. Nevertheless, I believe that a comparison of the cases reveals that four of the six judges in the majority departed significantly from their general approach in earlier cases by stressing the overriding importance of freedom of speech in the *GATE* case. The chart probably overstates the point, but I believe that the conclusion is sound. The optimistic view is that this inconsistency reflects a change of attitude toward freedom of speech, but it could also be taken to suggest that some other value underlies the judgment.

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[110] See Boyle, *Custody, Adoption and the Homosexual Parent* (1976), 23 R.F.L. 129, generally and at 142 for a discussion of homosexuality in the context of family law and a compilation of articles referring to the psychological normality of homosexuals.

[111] The issue of homosexuality would normally arise in civil cases concerning family law. It has only arisen in a handful of reported family law cases in the last decade. *Cf.* Boyle, *id.* at 131; see *Re Bd. of Gov., supra* note 7, for a case not involving family law.

[112] *Supra* note 43.

[113] *Supra* note 56.

FREEDOM OF SPEECH[114]
DIVISION OF COURT

	Kellogg's	McNeil	Dupond	Cherneskey	GATE
Majority					
Martland J.	S	S	S	S	F
Ritchie J.	S	S	S	S	F
Spence J.	F	F	F	F	F
Pigeon J.	S	S	S	S	F
Beetz J.	S	S	S	S	F
Pratte J.	–	–	–	S	F
Dissenting					
Laskin C.J.	F	F	F	S	S
Dickson J.	F	F	S	F	S
Estey J.	–	–	–	F	S

F = Result favouring freedom of speech
S = Result subordinates freedom of speech to another interest

Unfortunately, the theory that the Court assigns relatively low importance to the rights of minorities accords more closely with previous cases. The Supreme Court in *Christie* v. *York Corporation*[115] narrowly construed an anti-discrimination provision in the Québec *Licence Act* so as not to apply to the denial by a tavern owner of service to a "coloured person." The Court found that the refusal was not contrary to good morals or public order and said that consideration must start from the principle of freedom of commerce.

[114] The cases given in the chart are *Dupond, id.*; *Kellogg's, supra* note 51; *McNeil, supra* note 50; and *Cherneskey, supra* note 63. I have omitted one other recent case because it contained conflicting indications of the attitude of the various judges toward freedom of speech. The *CKOY* case, *supra* note 77, concerned the validity of a regulation passed under the *Broadcasting Act* that prohibits the broadcasting of a telephone interview or conversation unless the person consented or telephoned for that purpose. The station alleged, *inter alia*, that the regulation violated s. 2(f) of the *Canadian Bill of Rights* guaranteeing freedom of the press. Spence, Ritchie, Pigeon, Dickson, Beetz and Pratte JJ. held that the regulation was authorized by the statute and did not violate the *Bill of Rights*. Martland J., joined by Laskin C.J.C. and Estey J., dissented on the ground that the regulation was not authorized by the statute and constituted a form of censorship. They did not discuss the *Bill of Rights*. It was the dissenting judges who explicitly relied upon the station's right to free speech. However, the majority found that the challenged regulation protected the freedom of speech of the person telephoning the station. Thus the two judgments seem each to uphold one aspect of freedom of speech and to refuse to recognize a competing aspect of that right. It is noteworthy that the majority judgment in *CKOY* recognized that the case raised competing claims to freedom of expression whereas 5 of the 6 judges who did so failed to make a comparable distinction in the *GATE* case.

The cases that I have cited all were decided within the last two years. If the chart were extended back five years it would also include *Provincial News Co.* v. *The Queen*, [1976] S.C.R. 89, 52 D.L.R. (3d) 222, 20 C.C.C. (2d) 385, in which a majority quashed the appeal of the news company from the order of forfeiture of an allegedly obscene magazine. Martland, Judson and Dickson JJ. were in the majority; Laskin C.J.C. and Spence J. dissented.

[115] [1940] S.C.R. 139, [1940] 1 D.L.R. 81.

The *Christie* case was decided in 1940, but *Bell* v. *Ontario Human Rights Commission*[116] can be read as reflecting a similar approach less baldly stated. *Bell* concerned the denial of housing on the ground of race. At the time, *The Ontario Human Rights Code* prohibited discrimination only with respect to a "self-contained dwelling unit." The Board of Inquiry denied a preliminary motion that the Code was inapplicable because the space was not self-contained, finding that this issue should be determined at the hearing. The Supreme Court of Canada found that the space was not self-contained and granted a writ of prohibition preventing the Board from hearing the complaint. Not only did the Court adopt a narrow construction of the statute, but it denied the Board the opportunity to consider the issue by characterizing it as jurisdictional. The case seems to reflect the attitude that human rights legislation should be strictly construed and human rights tribunals should be strictly supervised. It is possible that both *Bell* and *GATE* are best explained on the basis that the Court continues to assign more importance to the right of freedom of commerce than to egalitarian rights.

The Court has also narrowly interpreted section 1(b) of the *Canadian Bill of Rights,* which guarantees equality before the law.[117] It has held that section 1(b) did not create or expand any right but only confirmed existing rights.[118] Passages from the *Bliss* case[119] come close to suggesting that the right of equality must be subordinated to any other "valid legislative purpose."

The Court has narrowly interpreted other portions of the *Bill of Rights* as well as section 1(b),[120] and it is unclear whether its approach in the equality cases reflects uneasiness with the implications of that particular right or with the concept of a bill of rights. *Bell* is the only other case in which the Court has considered a modern human rights statute, and it may be a mistake to see a pattern on the basis of only two cases. Nevertheless, the Court's record in dealing with minority rights is cause for uneasiness. Human rights statutes were enacted in part in response to the failure of the judiciary to apply common law principles or penal provisions in a way that effectively protected minorities from discrimination.[121] If future cases were to interpret human rights statutes in a very restrictive fashion, minorities would undoubtedly perceive the result as demonstrating the indifference of the judiciary to their rights, and perhaps as reflecting upon the impartiality of the judicial process.

In *GATE,* the Court assigned greater importance to freedom of the press than it has in any case since *Alberta Press.* I hope that it will continue to do so in future cases. Freedom of the press was protected in *GATE* at considerable cost in terms of competing rights, and there should be a suitable return on that jurisprudential investment.

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116 [1971] S.C.R. 756, 18 D.L.R. (3d) 1.

117 See *A.G. Can.* v. *Lavell, supra* note 76; and *Bliss* v. *A.G. Can.*, [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417.

118 *Id.*

119 *Id.* at 193-94 (S.C.R.), 424-25 (D.L.R.).

120 See, e.g., *Hogan* v. *The Queen*, [1975] 2 S.C.R. 574, 48 D.L.R. (3d) 427; and *Mitchell* v. *The Queen*, [1976] 2 S.C.R. 570, 61 D.L.R. (3d) 67.

121 See Tarnopolsky, *supra* note 41, at 569-71.