Rocket v. *Royal College of Dental Surgeons of Ontario*

PROFESSIONAL ADVERTISING AND THE LIMITS OF REGULATION

June Ross

In *Rocket* v. *Royal College of Dental Surgeons of Ontario*[1] the Supreme Court of Canada has again applied section 2(b) of the *Charter* in the context of the regulation of advertising. Following its earlier decisions, the Supreme Court held that commercial expression is protected by the *Charter*[2] and that restrictions on the content of advertisements violate section 2(b).[3] This decision, however, goes beyond the earlier jurisprudence in a number of ways: (1) it provides an example of a restriction on advertising that is not justifiable under section 1; (2) most importantly, it explicitly recognizes that the commercial nature of expression has constitutional significance in the context of section 1; (3) with significance to the area of professional advertising, it considers the nature of the legislative objectives that may be pursued by restrictions on such advertising; (4) in the remedies area, some further guidance is provided relating to the use of a "striking out" remedy rather than other more selective remedial alternatives.

The case concerned an advertisement that appeared in a number of magazines and newspapers. It contained photographs of the respondents Howard Rocket and Brian Price, the heading "New Faces of the Canadian Establishment", and the following text:

> Drs. Howard Rocket and Brian Price, founders, Tridont Dental Centres, at the Holiday Inn, Toronto downtown.
>
> They work twelve hours a day, including weekends and together log some 300,000 kilometres in business travel a year. In 1979, Dr. Rocket and Dr. Price foresaw the future of dentistry in the concept of delivering dental services from shopping malls, to make it more convenient and accessible for the public. They formed Tridont Dental Centres and in 1980 opened their first outlet in a Toronto suburb. The response from the public was overwhelming. By 1985 Tridont had grown from a staff of three to a staff of fifteen hundred, becoming North America's largest storefront dentistry group. Today they have over 70 outlets in Canada and the United States, a figure expected to increase by more than 20 each year.
>
> Success like this occurs when business people recognize a need for change and respond to it. Holiday Inn is recognizing and responding to their changing needs. That is why when Drs. Howard Rocket and Brian Price travel on business they stay at a Holiday Inn Hotel — Holiday Inn — a better place to be.

Drs. Rocket and Price were charged with professional misconduct as defined in sections 37(39) and (40) of Regulation 447[4] filed under the Ontario Health Disciplines Act[5] and were scheduled to appear before the Discipline Committee of the Royal College of Dental Surgeons of Ontario. Subsection (40) is a general professional misconduct provision. Subsection (39) classified as professional misconduct any advertising not expressly permitted. Prior to the hearing before the Discipline Committee, Drs. Rocket and Price applied to the Ontario Divisional Court for a declaration that subsection (39) was of no force and effect and that subsection (40) could not be applied to them. They were unsuccessful at the Divisional Court level, the Court following its decision in *Re Klein and Law Society of Upper Canada*[6] which held that commercial speech was not within the purview of the *Charter* section 2(b).

The Ontario Court of Appeal reversed with respect to subsection (39) in a majority judgment written by Cory J.A. (as he then was), with Dubin A.C.J.O. dissenting.[7] The Court unanimously refused to grant a declaration as to the inapplicability of subsection (40).[8] The Court's finding with respect to subsection (39) was appealed to the Supreme Court of Canada, but the refusal of the declaration with respect to subsection (40) was not cross-appealed, so that the only question before the Supreme Court was the constitutionality of the advertising regulation.

In a unanimous judgment delivered by McLachlin J. the Supreme Court first reaffirmed its position in the *Ford* and *Irwin Toy* decisions that commercial expression is protected under the *Charter* because it has "intrinsic value as expression" and because of "the importance of fostering informed economic choices to individual fulfilment and autonomy".[9] The definition of expression adopted by the Court in the previous cases and applied in *Rocket* is both very broad and very simple: activity is expressive if it aims to convey a meaning and if it does not take a prohibited form (the only examples of which thus far have been provided are acts or threats of violence). Professional advertising obviously meets this test. In determining whether the regulation in question infringed free expression the Court followed the analysis in *Irwin Toy* and considered whether its purpose infringed the guarantee. The regulation in this case, as in *Irwin Toy*, did prohibit the expression of certain content and its purpose thus violated

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section 2(b). In addition, it also banned the "perfectly usual and acceptable forms" of expression via radio and television, and severely limited the use of newspapers.[10] This, too, contravened section 2(b).

With regard to the application of section 1, the Court made the important holding that:

> ..the fact that expression is commercial is not necessarily without constitutional significance. Regulation of advertising may offend the guarantee of free expression in section 2(b) of the *Charter*, but this does not end the inquiry. The further question of whether the infringement can be justified under section 1 of the *Charter* must be considered. It is at this stage that the competing values — the value of the limitation and the value of free expression — are weighed in the context of the case. Part of the context, in the case of regulation of advertising, is the fact that the expression at issue is wholly within the commercial sphere.[11]

The Court drew an analogy between its approach and the American approach, which has assigned to commercial speech an expressly lesser degree of protection than is granted political speech. This result is achieved in the American jurisprudence by establishing separate criteria for testing the justifiability of restrictions on political and commercial speech. Laws that restrict commercial speech must serve substantial interests, directly advance these interests, and be no broader than necessary. Laws that restrict political speech face a stricter test: they must serve compelling interests and must be precisely tailored to those interests. There are other differences as well. As noted by the Supreme Court in *Rocket*, the American courts strike down overbroad political speech regulations, but not overbroad commercial speech regulations. The latter are simply not enforced when a specific application would be unconstitutional. Another distinction in the American case law, although not noted by the Supreme Court in *Rocket*, is that parties asserting a deprivation of free commercial speech must prove that their speech was neither misleading nor related to an illegal activity.[12]

The Supreme Court's approach in *Rocket*, while analogous to the American approach, also has differences noted by the Court. The remedial approach is different, and further the Canadian approach "does not apply special tests to restrictions on commercial expression", but "does permit a sensitive, case-oriented approach to the determination of ... constitutionality."[13] This is more similar to a "sliding scale" analysis, proposed in the American jurisprudence but not adopted by a majority in the United States Supreme Court, rather than a distinctive levels or tests analysis.[14] Prior to this case it appeared that commercial expression received less protection than other forms, considering for example the application of section 1 in *Irwin Toy* as compared with *Edmonton Journal* v. *Attorney General of Alberta*.[15] In *Irwin Toy*, the Supreme Court expressed deference to legislative opinion, refusing to "second guess" or to "redraw the line" drawn by the legislature and stating that the government must be "afforded a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence".[16] However, the Court did not relate this deference to the commercial nature of the expression, but to the nature of the legislation, which was characterized as an attempt to protect a vulnerable group. In *Edmonton Journal*, while no such deference to the legislature was apparent, the majority did not relate its stricter application of section 1 to the nature of the speech involved and instead distinguished *Irwin Toy* on the basis of the nature of the legislation involved. Only Wilson J. in her concurring judgment explicitly held that freedom of expression could have different degrees of importance in different contexts. In *Rocket* this view was expressly adopted by the unanimous Court:

> As Wilson J. notes in *Edmonton Journal* v. *Alberta Attorney General* ... not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious.[17]

The acceptance of different degrees of constitutional protection for different types of expression is not only important from the point of view from those who wish to justify restrictions on commercial expression, but also for those who wish to challenge restrictions on political expression. Some laws outside the commerical expression area, such as hate propaganda laws, can certainly be characterized as laws aimed at protecting a vulnerable group. Should the approach to a section 1 analysis of the justifiability of those laws thus be as deferential as the *Irwin Toy* analysis? The author would submit not, because of the different type of expression involved.

How did the fact that commercial speech was involved affect the application of the section 1 test as defined in *Regina* v. *Oakes*?[18] The analysis in *Rocket* included a lengthy assessment of the value of the expression involved. The Court noted that advertising is valuable to dentists only from an economic perspective, and that this minimizes the constitutional value of the expression. On the other hand, reflecting the rationale for inclusion of commercial speech within section 2(b), such advertising serves "an important public interest by enhancing the ability of patients to make informed choices".[19] Further, the choice of a dentist is a relatively important consumer choice. These factors increase the value of the expression. These points are fairly unexceptional, except that one might argue that in the context of ability to practice a profession,

which can only be done if there are paying patients available, some form of self-worth or self-fulfilment is involved in addition to profit and loss.[20]

On the other hand, the Court noted that the advertising regulation aimed to protect consumers of dental services who as non-specialists "lack the ability to evaluate competing claims as to the quality of different dentists."[21] They constitute a vulnerable group, and legislation enacted to protect them is particularly important. It is interesting to note that the Court has thus concluded that the importance of the consumer choice supports free expression, while the difficulty of the consumer choice supports legislative incursions on that free expression. One must wonder how often these two factors will effectively counter-balance each other. It is certainly arguable that virtually all important consumer decisions, not only relating to the choice of professional services but also to the purchase of major consumer items such as homes or even possibly cars, involve difficult evaluations for non-specialists.

This assessment of competing values is most clearly relevant in the context of the third branch of the *Oakes* means test which, as restated in *Rocket*, requires "proportionality between the effect of the measures which are responsible for limiting the *Charter* right and the legislative objective of the limit on those rights. In effect, this involves balancing the invasion of rights guaranteed by the *Charter* against the objective to which the limitation of those rights is directed."[22] However, not only this branch of the means test is affected, but also the more influential second branch, that "the means used should impair as little as possible the right or freedom in question."[23] The judicial deference demonstrated in *Irwin Toy* was referred to with approval in *Rocket*, the Court noting that the "fact that the provincial legislature here acted to protect a vulnerable group argues in favour of viewing its attempted compromise with some deference."[24] This deference is most likely to be apparent in the assessment of the least restrictive means. One author has in fact suggested that deference to the degree shown in *Irwin Toy* changes the test from one of "minimal impairment" to one of no "unreasonable impairment".[25]

Notwithstanding all of the foregoing, which would appear to call for a fair degree of judicial deference, the Court did find that the advertising regulation in question was not justified under section 1. This, however, is not surprising when one considers the breadth of the regulation which prohibited even the advertising of office hours or the languages spoken by a dentist. Overbreadth to this extent can easily be characterized as failing not only a minimal impairment test, but also a no unreasonable impairment test. The Court, at the conclusion of its reasons, anticipated the drafting of further regulations on dentists' advertising. The decision indicates that a fair degree of discretion will be permitted to the professional bodies that do the drafting.

The section 1 discussion also considered the objectives that may be legitimately pursued by restrictions on professional advertising. The Court described two such objectives: the protection of the public from irresponsible and misleading advertising and the maintenance of a high standard of professionalism. These objectives are somewhat interrelated — clearly misleading advertising would be an incident of unprofessional conduct. Further, other forms of irresponsible advertising, such as solicitation in circumstances or by means which unduly pressure or influence potential clients, would also be characterized as unprofessional conduct. However, the separation of the two objectives leads to some concern as to the content of professional standards when these are divorced from issues of protection of the public. Advertising which does not mislead or otherwise harm the public but is nonetheless considered to be unprofessional would seemingly be suspect because it lacks dignity or taste as assessed by the profession or the court. Can the maintenance of dignity be characterized as a pressing and substantial objective? The Supreme Court appears to have considered that this is the case. The Court referred to the dissenting judgment of Dubin A.C.J.O. in the Court of Appeal decision and his reference to the following quote from the 1932 decision of the United States Supreme Court in *Semler* v. *Oregon State Board of Dental Examiners*:

> [T]he community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.[26]

While this excerpt has been cited with approval in more recent American authorities, it is somewhat suspect in view of the subsequent opinion of the Court in *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*.[27] One of the issues raised in the latter case was the use of an illustration in a legal advertisement (a drawing of a Dalkon Shield intrauterine device). This drawing contravened a state regulation prohibiting any illustrations in legal advertisements. It was not argued that the drawing was misleading, and the Court found that the general purpose of the regulation was to ensure that attorneys advertised "in a dignified manner."[28] In overturning the finding of a disciplinary violation, the Supreme Court held that the drawing was not undignified and that:

> More fundamentally, although the state undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are

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> unsure that the state's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgement of their First Amendment rights... The mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.[29]

This issue has practical significance in *Rocket* because, as noted above, the Court did not prohibit the College from proceeding with a disciplinary hearing based on the general unprofessional conduct provision, and because the advertisement featuring Drs. Rocket and Price,while characterized by the Ontario Court of Appeal as "distasteful, pompous and self-aggrandizing", is not clearly misleading.[30] The Supreme Court did not characterize the advertisement in this fashion, but its finding of unconstitutionality was based upon the general overbreadth of the law and not the specific terms of the subject advertisement. Further, the examples of overbreadth employed, such as a prohibition of the advertising of office hours, were far removed from the nature of the subject advertisement. Thus it seems implicit that Rocket and Price, even in the absence of any demonstration of potential public harm, can be subjected to a constitutionally permissible penalty.[31] Hopefully when the issue receives a full consideration a different conclusion will be reached.

Finally, the Supreme Court addressed the appropriate remedy in the case. The question posed was whether the law, overbroad in the manner described above, should be struck out entirely or whether the courts should merely decline to enforce it when a specific application would be unconstitutional because it is within the overbroad portion of the law. This, as noted above, is the American approach in the commercial speech context although not in other First Amendment cases. Alternatively, the Supreme Court considered reading down or selectively striking out overbroad provisions of the regulation. The Court declined to employ either of these alternatives. It refused to read down the law because this would involve supplying additional exceptions to the general prohibition, a task for the legislators. It refused to follow the American "as applied" approach not because this would violate the legislators' authority, even though the result of the remedy would be very similar to reading down, but because of a concern that the invalid law left "on the books" would deter protected expression.[32] This type of deterrence or "chill" is the general rationale for the striking down of overbroad laws in American First Amendment jurisprudence. It is not applied to commercial speech because it is felt that this speech is more vigorous and less likely to be chilled.[33] The Supreme Court found that in the context of professional advertising, because professionals would be unwilling to challenge their governing bodies, a chill would be likely to occur.

In conclusion, the Supreme Court's decision in *Rocket* may be characterized as nicely balanced. In finding that the restriction on advertising is not justified under section 1 it indicates that there is indeed force to the constitutional guarantee of free expression in the commercial context. In striking down the overbroad law rather than adopting a more limited remedy, it reaffirms or enlarges this force. On the other hand, the judgment indicates a disinclination to interfere with more carefully drafted advertising regulations, justifying the Court's assurance that "it will not be impossible to draft regulations which prohibit advertising which is unverifiable and unprofessional while permitting advertising which serves a legitimate purpose in furnishing the public with relevant information".[34]

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1. The Supreme Court of Canada, unreported judgment, June 21, 1990.
2. *Ford* v. *Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927.
3. *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, *supra* n.2.
4. R.R.O. 1980.
5. R.S.O. 1980, c. 196.
6. (1985), 16 D.L.R. (4th) 489.
7. (1988), 49 D.L.R. (4th) 641.
8. In a telephone conversation with Martin Teplitsky, Q.C., counsel for Drs. Rocket and Price, the writer was advised that he elected not to pursue the *Charter* challenge to the charge under the general professional misconduct provision. That charge is still outstanding, and no hearing has yet been scheduled. Presumably, should the doctors be disciplined pursuant to that charge, the order itself rather than the provision in the regulation could be challenged under the *Charter*, as was done in *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038 (depending, of course, on the nature of and reason for any discipline order).
9. *Supra*, n. 1, at 9.
10. *Ibid.*, at 13.
11. *Ibid.*, at 9.
12. *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 447 U.S. 557 (1980).
13. *Supra*, n. 1, at 15.
14. The "sliding scale" approach was developed by Marshall J. in the context of equal protection analysis in dissent in *Dandridge* v. *Williams*, 397 U.S. 471 (1970) and in *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973). Stevens J. in a concurring judgment in *Craig* v. *Boren*, 429 U.S. 190 (1976), another equal protection case, also argued that the Court "actually appl[ies] a single standard in a reasonably consistent fashion".
15. [1989] 2 S.C.R. 1326.
16. *Supra*, n. 2, at 990, relating to the assessment of whether a pressing and substantial objective had been shown. The Court also used deferential language when assessing the proportionality of the means, stating for example that it would not, "in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to

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choose the least ambitious means to protect vulnerable groups" (at 999).

17. *Supra*, n. 1, at 15.
18. [1986] 1 S.C.R. 103.
19. *Supra*, n. 1, at 16.
20. The personal self-fulfilment involved in the practice of a profession or other employment has been given constitutional significance in other contexts. See, for example *Slaight Communications Inc.* v. *Davidson*, *supra*, n. 8 (relating to the application of section 1); and *Wilson* v. *Medical Service Commission of B.C.*, [1989] 2 W.W.R. 1 (B.C.C.A.), leave to appeal to S.C.C. denied (relating to the meaning of "liberty" in section 7); but see *contra* Lamer J. (as he then was) concurring in *Reference re section 193 and 195.1(1)(c) of the Criminal Code*, (1990), 77 C.R. (3d) 1 (S.C.C.).
21. *Supra*, n. 1, at 17.
22. *Ibid.*, at 15.
23. *Ibid.*
24. *Ibid.*, at 17-18.
25. D. Gibson, Case Comment on *Attorney General of Quebec* v. *Irwin Toy Limited et al.*, (1990) 69 Can. Bar Rev. 339.
26. 294 U.S. 608 at 612 (1932).
27. 471 U.S. 626 (1985).
28. *Ibid.*, at 647.
29. *Ibid.*, at 647-648.
30. *Supra*, n. 7, at 391 per Cory J.A. Dubin A.C.J.O. suggested there might be a misleading aspect to the advertisement: "Inferentially, the advertisements promote the value of the dental services being performed by the appellants" (at 371).
31. The outstanding professional misconduct charge facing Drs. Rocket and Price does not refer expressly to a lack of taste or dignity, but particularizes the misconduct as follows: "you did lend yourselves and your reputations, for valuable consideration, to the promotion of Holiday Inn" (*supra*, n. 7, at 374 per Cory J.A.). However, the basis for prohibiting endorsements may be simply a perceived lack of dignity in the practice. For example, Ruling 3.7 of the Law Society of Alberta provides "[i]t is undignified and accordingly improper for a member as a lawyer knowingly to endorse a product or service."
32. *Supra*, n. 1, at 21.
33. *Ibid.*, at 10.
34. *Ibid.*, at 23.

SUPREME COURT REVERSES SELF ON *BHINDER*

It was only five years ago that the Supreme Court of Canada in *Bhinder* v. *C.N.R.*, [1985] 2 S.C.R. 561 ruled that Canadian National Railway did not offend the Canadian Human Rights Act by requiring employees working in its coach yard to wear hard hats on the job. The complainant, Mr. Bhinder, was of the Sikh faith and was forbidden by his religion from wearing anything but a turban on his head. The Court found the requirement that Mr. Bhinder wear a helmet a *bona fide* occupational requirement (BFOR), even though it had a serious adverse affect on members of the Sikh religion. In *Central Alberta Dairy Pool* v. *Alberta Human Rights Commission* ([1990] S.C.J. No.80), the Court expressly overturned *Bhinder*, acknowledging that a mistake had been made five years earlier.

In the *Dairy Pool* case, Mr. Christie, a member of the World Wide Church of God, requested that he be granted unpaid leave in order to observe two holy days, one of them being Easter Monday. As Mondays are the busiest days in the milk plant, with milk having arrived over the weekend requiring immediate processing, his request for leave on Easter Monday was refused. The Dairy Pool argued that it was a BFOR that employees regularly attend work on Mondays. Justice Wilson, writing for the majority, set out to redefine the tests which must be employed by human rights commissions and boards of inquiry:

1. Where a rule discriminates on its face on a prohibited ground of discrimination, the employer only can justify the rule as a statutory BFOR. In order to qualify as a BFOR a rule must be "imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the adequate performance of the work involved...and not for ulterior or extraneous reasons" (per McIntyre J. in *Ontario Human Rights Commission* v. *Etobicoke*, [1982] 1 S.C.R. 202 at 208). Once a BFOR is established, the employer has no duty to accommodate.

2. Where a rule is neutral on its face but has an adverse effect, or discriminatory impact, on one or more members of the group to whom the rule applies, then the employer only can justify the rule by showing it has taken reasonable steps to accommodate a complainant, short of undue hardship. That is, the employer must have taken such steps "as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer" (per McIntyre J. in *O'Malley* v. *Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 at 555).

Applying these two tests in the context of *Bhinder*, the majority held that the Court in that case had case incorrectly analysed Mr. Bhinder's complaint. The BFOR test should not have been applied to the hard hat rule because the rule did not directly discriminate against Mr. Bhinder on a prohibited ground. The rule, on its face, was not discriminatory but, rather, had a discriminatory effect. The Court in that case should have scrutinized, not the general application of the rule, but the employer's attempt at accomodation. (Wilson J. also thought *Bhinder* may have been wrongly decided even if the BFOR test was applied. — the original decision of the tribunal may have been correct in so far as it found that the rule was not a BFOR.)

Applying these tests to the case at hand, the Court held, as it should have in *Bhinder*, that the rule requiring Mr. Christie to be at work on Easter Monday was not discriminatory on its face but, rather, discriminatory in its effect. The case called for the application of the second test and evidence from the employer that it had taken steps to reasonably accommodate the complainant. The onus of proof not having been discharged, the complaint should have been upheld.

A minority of the Court dissented in approach, but not result. Sopinka J., writing for La Forest and McLachlin J.J., preferred that the Court not deviate as severely from its previous jurisprudence. Therefore, rather than have two seperate and alternative tests, the minority preferred to have the duty to accommodate remain a part of the BFOR test, as Dickson C.J. had argued in his dissenting judgment in *Bhinder*. That is, an employer must establish not only that the rule was reasonable, but that the rule could not be avoided without the individual accommodation of those who may be adversely affected.

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