THE SILENT MAJORITY SPEAKS: *RJR-MACDONALD Inc.* V. *CANADA*

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After the Supreme Court announced its decision in *RJR-MacDonald*,[1] striking down certain provisions of the *Tobacco Products Control Act*,[2] the more sensationalist media implied that the Court had encouraged us all to go out and smoke ourselves and others to death. More thoughtful media reports predicted no sudden inundation of the airwaves and the newsprint with exultation in the delights of filling one's lungs with nicotine, and they were correct. Only a micrometer or two below the level of the actual holding itself is a mass of reasoning which brings little joy to the successful appellant tobacco manufacturers.

The holding is complex. Seven of the nine judges wrote opinions. Only L'Heureux-Dubé J. and Gonthier J. were silent, and in dissent. Seven members of the Court affirmed the valid enactment of the legislation under Parliament's criminal law power, though McLachlin J. restricted her opinion to advertising bans and mandatory health warnings, rather than support the broader interpretation of the power favoured by the other six. Only Sopinka and Major JJ. disagreed. All nine judges agreed that the legislation constituted an infringement of freedom of expression as guaranteed by section 2(b) of the Charter, as indeed the Court's current capacious approach to the interpretation of that sub-section makes inevitable.[3] They did not, however, do so in complete harmony. Three different aspects of the Act were at issue: the imposition of an advertising ban, the prohibition of trademark usage beyond tobacco products, and the mandatory health warnings. The dissenting four (La Forest, L'Heureux-Dubé, Gonthier and Cory JJ.) found that only the first two aspects constituted an infringement of freedom of expression. The majority found that the mandatory health warnings also constituted an infringement.

When it came to section 1 analysis under the *Oakes* test,[4] all nine judges agreed as a minimum that the objective of reducing tobacco-associated health risks by reducing advertising-related consumption and providing warnings of dangers is an important government objective. Several judges accepted different broader phrasings of the objective. With one exception, all nine judges agreed that there was a rational connection between the objective and the consequences of the impugned sections of the Act. The exception concerned section 8, limiting the use of tobacco trademarks on anything other than tobacco products. McLachlin J. and her two associates denied a rational connection in the case of that section. With regard to the criterion of minimal impairment, wider divisions appear. The four dissenters accepted that the infringement of freedom of expression constituted by the Act was indeed minimal. A majority of five judges did not. This difference of opinion turned out to be the decisive disagreement for the purposes of the final decision to strike down the impugned sections of the Act.

It is therefore clear that the decision is far from a ringing endorsement of the constitutional right of tobacco producers to purvey manipulatively to the young and vulnerable instruments of self-destruction. A clear majority of the Court are prepared to criminalize tobacco advertising. All of the Court back as a valid governmental objective the control of tobacco advertising. All of the Court accept that the kind of regulation the Act contains is rationally connected to that objective. Though the issue was not much discussed directly, there is plenty of indication that the deleterious effects of the Act on the tobacco manufacturers' freedom of expression is unlikely to be held to outweigh the effects of not having the legislation. All that remains is for new legislation to be introduced which will satisfy the majority that the impairment is minimal, and the Court should be

satisfied. There are plenty of hints as to how such acceptable legislation might read. If the government cannot devise legislation appropriate for reintroduction, that can hardly be blamed on the Court.

So much for the raw data on the decision. The reasoning employed is of some interest, and I will spend the rest of this Note discussing that. First, let me distinguish two perspectives from which one might assess the Court's opinions. The first is an 'internal' perspective — one which examines a new piece of institutional history in relation to past institutional history, and looks for changes and movements in the historical patterns of thought. The second is an 'external' perspective — to examine and assess the Court's reasoning from an independent jurisprudential point of view. The second perspective considers the coherence of the reasoning, its success, according to McLachlin J., as an 'application of the processes of reason'.[5] The first might be called the lawyer's perspective, and the second the philosopher's. Since I am by trade a philosopher, no prizes for guessing the perspective I shall pick. After all, the Court itself aspires to be judged by such standards.

Freedom of expression is placed where it is in the *Charter*, in part, because of its prominent place in the panoply of liberal democratic values. Most political theorists, however, have not regarded it as a fundamental intrinsic value, but rather as a value with a unique and special contribution to human personal and political flourishing. The Court itself has given its own official version of this contribution. Dickson C.J.C. expressed the values promoted by freedom of expression as 'the quest for truth, the promotion of individual self-development [and] the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged'.[6] The difficulty in subsuming tobacco advertising under section 2(b) of the Charter is that, like other recent hard cases,[7] tobacco advertising *prima facie* has nothing to do with any of those three values.

Faced with such a difficulty, courts may respond one of two ways.[8] Either they may argue that the lack of connection with central freedom of expression values means that the form of expression in question does not come under the relevant constitutional provision. Or they may argue that such forms of expression do come under the provision, but must receive relatively little weight when balanced against other values. Our Supreme Court, taking full advantage of the opportunity offered them by the division of argumentative labour between section 1 and section 2(b) of the Charter, has hitherto opted for the latter alternative. Regulation of commercial expression has been regarded as interference with freedom of expression, but as capable of justification through section 1 analysis because commercial expression is not at the core of free expression. The decision in *RJR-MacDonald* is interesting because there are signs that attention now is being paid to the alternative approach.

As one would expect, the signs are found mostly in the dissenting opinion of La Forest J.; he did, however, have the support of three other members of the Court. The most obvious sign was his willingness to argue that mandatory unattributed health warnings on packs of cigarettes do not constitute a breach of the tobacco manufacturers' section 2(b) right of freedom of expression.[9] La Forest J. accepted the principle, well established in free expression jurisprudence, that to be required to say something one does not wish to say is as much an interference with freedom of expression as to be prevented from saying something one does wish to say. All the same, he did not accept that argument here. His reason is that one cannot reasonably infer merely from the appearance of certain words on a cigarette package that they are an expression of opinion by the manufacturer of the cigarettes. As he went on to argue, government warnings on dangerous products are a fact of contemporary life. No one regards the skull and crossbones on a bottle of poisonous liquid as an expression of opinion by the manufacturer of the liquid. So why is not the same true for warnings on tobacco products?

This looks like a plausible line of argument, and one which the Court might innocently accept. But, in fact, it has enormous ramifications for the coherence of the Court's approach to the interpretation of section 2(b). As noted above, the Court has deemed that anything with meaning is covered[10] by section 2(b). But if that is true, then the unattributed health warnings certainly have a meaning, and under the Court's usual approach there would be no question about their being covered by section 2(b). So the implication of La Forest J.'s argument is that not everything with a meaning is expression within the scope of section 2(b). That thought goes right against the existing drift of the Court's thinking.

Things are not quite that simple. There are indications that La Forest J. may not be thinking

anything so revolutionary. He may be thinking that unattributed health warning are not covered by section 2(b), not because they are not 'expression' within the meaning of section 2(b), but because they are no one's expression. Such thinking needs some care. Consider other cases in which the Court has accepted that required expression is an infringement of freedom of expression. In *Slaight*,[11] a company was required by a labour arbitrator to write a letter of reference a certain way. In *Moore*,[12] a forced retraction after a libel suit was similarly deemed an infringement. In each of these cases, only the guileless suppose that the company or the newspaper are really sincere in such expressions. The requirement to publish is justified for reasons of fairness and justice, and it is not necessary that the expressions are sincere. If the unattributed health warnings are supposedly different, as La Forest J. suggests, why are they different?

Perhaps the thought is that, unlike words in a signed letter or in a newspaper with a masthead, the warnings hang in space as words of a language without a speaker, as the skull and crossbones symbol hangs without a painter. Now, we can in fact think of linguistic expressions which we understand in that way, as having a sense and reference merely in themselves as expressions in a language. Consider the case of the American feminist artist Jenny Holtzer. Her art consists of apt sentiments of one kind or another displayed in different ways in public places. To run across a Holtzer piece without knowing anything about the artist is to run across an expression of opinion which seems indeed to be disembodied. You know (or at least you think you do) that it is someone's opinion; but you don't know whose, and you understand, laugh at or object to the sentiments expressed regardless. In 1982 'FATHERS OFTEN USE TOO MUCH FORCE' appeared on a public billboard in Times Square.[13] It would not necessarily be assumed that the sentiments are being expressed by the owner of the billboard or any other assignable entity. Nor would one assume that 'RAISE BOYS AND GIRLS THE SAME WAY', installed in 1987 at Candlestick Park in San Francisco,[14] was an opinion expressed by the Giants or the 49ers or the city of San Francisco or anyone else. Consider also sayings on T-shirts; we appreciate those independently of concerning ourselves with whose expression they are.

Even if parallels like these make plausible the claim that unattributed health warnings are no one's expression, why would that fact make a difference? U.S. courts, at least, have not found it odd for linguistic objects themselves to be defendants in free expression cases where there are difficulties in arraigning actual persons.[15] There is no precedent for the idea that it has to be established whose expression it is before something can count as expression within the scope of section 2(b). If, indeed, La Forest J. is relying on the above claim, more and better argumentation is needed than the opinion contains.

Arguably, his opinion does not rest on the above claim. The real argument La Forest J. seems to be making is this: We all know that freedom of expression as a constitutional value has to do with certain kinds of things — the Court's official values, for example.[16] It is absurd to think that every single time anything happens with a meaning, rights under section 2(b) of the Charter are called into play. A lot of what is done with language is simply regulation of human life which does not have anything to do with freedom of expression. Look at the labelling of dangerous products, for example. We humans are language users. There are ways of keeping us away from things that aren't possible for dogs and cattle. We can understand symbols and sentences. To that end, governments can warn us of dangerous products by means of symbols and sentences rather than electric fences. That's all that's going on with Drano, and all that's going on with cigarettes.

I would agree entirely with such a diagnosis of the facts. But where is the room for that line of argument in the Court's official position on coverage under section 2(b)? Essentially, the argument brings to bear on the question of whether a given expression is covered by section 2(b) external facts about the kind of expression, the circumstances of the expression, and so forth. But to do that is to fill out, or put in context, the meaning of the expression. It is to apply a content-related test for whether the expression is an expression of the kind covered by section 2(b). Exactly such an approach to the interpretation of section 2(b) is excluded by the Court's view that anything which conveys meaning is expression within the scope of section 2(b).

It is hard to construe La Forest J.'s argument as anything other than a repudiation of the Court's current view. That impression is strengthened, I believe, by other parts of the opinion. I noted above that the Court currently regards commercial expression as within the scope of section 2(b), but of low value when it comes to balancing tests under section 1. By now, the Court's jurisprudence has

identified several forms of expression as of 'low' value — commercial expression, violent expression, hate propaganda, pornography, solicitation by a prostitute — and the time might seem ripe to try to pull these individual decisions together into a coherent jurisprudence. La Forest J. seems to be attempting exactly that in his dissent in *RJR-MacDonald*. The appropriate part of his opinion deserves consideration in detail. I therefore quote at length:[17]

> In my view the harm engendered by tobacco, and the profit motive underlying its promotion, place this form of expression as far from the "core" of freedom of expression values as prostitution, hate mongering, or pornography, and thus entitle it to a very low degree of protection inder section 1. It must be kept in mind that tobacco advertising serves no political, scientific or artistic ends; nor does it promote participation in the political process. Rather, its sole purpose is to inform consumers about, and promote the use of, a product that is harmful, and often fatal, to the consumers who use it. The main, if not sole, motivation for this advertising is, of course, profit. ... The sophistication of the advertising campaigns employed by these corporations, in my view, undermines their claim to freedom of expression because it creates an enormous power differential between these companies and tobacco consumers in the 'market-place of ideas'.

The argument these lines contain is a jurisprudentially ambitious one. It is also in its present form a conflation of several different points. McLachlin J.'s rejection of his argument profits from the conflation. It remains to be seen whether a suitably refined version of his position would be open to the same objections.

Four different claims can be distinguished in the above passage:

1) An activity may forfeit [some level of] constitutional protection because it is harmful.

2) An activity may forfeit [some level of] constitutional protection because it is carried out for the profit motive.

3) An activity may forfeit [some level of] constitutional protection because it concerns a suspect value — promotion of hate, of sex, of inequality, of a harmful product.

4) An activity may forfeit [some level of] constitutional protection because it exploits an enormous power differential in the market-place of ideas.

Clearly, each of these four ideas is unrelated to each of the others as they stand. Each, however, has its roots in decisions of the Court concerning freedom of expression in the last decade. I shall explain.

(1) The first reason has its roots in *Dolphin Delivery*,[18] a case concerning the limits on expression in the form of picketing. There the Court declared that 'threats of violence or acts of violence' would not be covered by section 2(b).[19] The Court has reiterated the claim three times since then as regards acts of violence,[20] although it has returned threats of violence back under the umbrella.[21] If the paradigms for excluded violent acts are murder, rape, or hitting a peace officer with a rock, then tobacco advertising does not seem 'harmful' or 'violent' in that sense. It seems at best analogous to a threat of violence. Since, however, tobacco manufacturers go to considerable lengths to conceal the harmful consequences of tobacco consumption in their advertising, even that parallel looks dubious. The claim by the government that the health of its citizens is a very important value to put in the scale against freedom of expression at the stage of section 1 analysis is surely cogent. But 'health' does not figure prominently among the values traditionally served by freedom of expression, and so that a particular expression may have harmful consequences for one's health if its meaning is taken to heart seems a weak reason for claiming that it cannot be expression within the meaning of section 2(b).

(2) The second reason given by La Forest J., the profit motive, is just a mistake of judgment on his part. There is strong support in the jurisprudence of both the U.S. Supreme Court and the Supreme Court of Canada for the proposition that the mere fact that an expression is made for profit cannot exclude it from freedom of expression. The reasoning is patent. Political speakers are often paid for their speeches; news media make money from reporting them; yet those speeches contribute to the democratic process. Artists and broadcasters of all kinds make money from artistic expression, and so on. McLachlin J. was

right to condemn this theme in La Forest J.'s opinion.[22] All the same, one can see where La Forest J. might have got the idea that the profit motive was a relevant consideration. Consider this passage which he quotes from Dickson C.J.C. in *Reference Re ss.193 and 195.1(1)(c)*:[23]

> The activity to which the impugned legislation is directed [sc. solicitation] is expression with an economic purpose. It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.

The second sentence states a plausible claim. But the first sentence states something quite different, and beside the point. What makes the claim in the second sentence plausible is the combination of 'an economic transaction of sex for money' — sex and money together. The second sentence does not underwrite any assertion that the profit motive in itself pushes an expression away from the 'core' of freedom of expression. But the conjunction of the (true, after all) first sentence with the second implies that it is the economic character, or the profit motive, in itself which is the relevant feature of solicitation for freedom of expression purposes. La Forest J. clearly picked up on this false implication.

La Forest J., in using the economic character of commercial expression as a reason for giving it lower value, appealed to another source as well — McLachlin J.'s opinion in *Rocket*.[24] There she wrote that:[25]

> The expression limited by this regulation is that of dentists who wish to impart information to patients or potential patients. Their motive for doing do is, in most cases, primarily economic. Conversely, their loss, if prevented from doing so, is merely loss of profit, and not loss of opportunity to participate in the political process or 'the market-place of ideas', or to realize one's spiritual or artistic self-fulfilment. This suggests that restrictions on expression of this kind might be easier to justify than other infringements of section 2(b).

She went on to argue that the impugned expression (dentists's advertising) enhances the ability of patients to make informed choices, and that the choice of a dentist must be counted as a relatively important consumer decision. The limitations of this argument were well exposed by La Forest J. Insofar as it is cogent at all, it relies on the increased odds that the person needing a dentist will be able to choose one which suits his or her predicament best — that his or health will be improved by the choice. As La Forest J. pungently responded:[26]

> No such argument can be made with respect to tobacco advertising. This type of expression serves to promote an activity which, in contrast to dentistry, is inherently dangerous and has no redeeming public health value.

I believe that the fact situation in the first major U.S. Supreme Court case establishing a doctrine of commercial speech, *Virginia Board*,[27] constituted a most misleading precedent. The issue there, analogous to *Rocket*, concerned health — the freedom of pharmacists to advertise that they sold low-price generic drugs. It was preceded by *Bigelow*,[28] which similarly concerned advertisements addressing the availability of legal abortions. The U.S. Court seems to have been misled by the obvious public importance of such advertisements into locating the source of the good in a general freedom of commercial expression, rather than in the availability of those particular advertisements. The Supreme Court of Canada followed dutifully in *Rocket*. But, as La Forest J. here emphasized, *RJR-MacDonald* exposes the weakness of the argument.[29]

I will leave the third argument aside momentarily, and go on to (4), the reference to inequality. The appearance of this value in La Forest J.'s opinion is to be praised. As he was at pains to point out, this value does not materialize out of thin air. Precedent exists in Supreme Court opinions for regarding the creation or promotion of inequality as a constitutional value in the area of section 2 fundamental freedoms. Chief of these precedents is perhaps the remarks of Dickson C.J.C. in *Edwards*:[30]

> In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

La Forest J. quoted this passage approvingly.[31] Dickson C.J.C. himself, elsewhere in *Slaight*,[32] quoted too his own comment in *Oakes*[33] that 'the

inherent dignity of the human person' and a 'commitment to social justice and equality' are 'underlying values essential to our free and democratic society'. As La Forest J. emphasized, freedom of commercial expression typically protects corporations, not individual human persons. If dignity is the issue, then it is not clear that a corporation has 'dignity' in that sense:[34]

> In my view, it cannot be seriously argued that the 'dignity'of the three large corporations whose rights are infringed in these cases is in any way comparable to that of minority group members.

The contradiction involved in a court dedicated to 'the inherent dignity of the human person' granting constitutional protection to the activities of major corporations has been noted before by commentators.[35] However, it has not before received such argumentative prominence in a Supreme Court opinion on freedom of expression.

(3) Let us return to the third argument made by La Forest J., that an activity may forfeit [some level of] constitutional protection because it concerns a suspect value. I believe this to be the really important argument. The justification for constitutional protection of free expression can only be 'top-down'. Despite the Supreme Court's current official view, 'expression' is a constitutional term of art. Citizens make a politico-moral choice of which (in a general sense) expressive or speech activities they choose to regard as 'expression' in that technical sense which brings those activities within constitutional protection. The justification for that choice must be rooted in principled political morality. The Court's current approach[36] is anything but principled. It consists of allowing everything to count as 'expression', and creating a series of *ad hoc* arguments under section 1 analysis to serve as the basis for the final decision. The Court needs to follow here the lead provided originally by Dickson C.J.C. and now by La Forest J., and take seriously the thought that constitutional protection for free expression is justified by the relation between such protection and the promotion of three central values — the search for truth, robust self-government, and individual self-expression and self-realization. The Court should follow its own precedent, found in its approach to the interpretation of section 15 on equality,[37] and use the values served by free expression as grounds for interpreting the scope of section 2(b), for demarcating what can count as 'expression' at all. Then the Court will not have to be involved in vain calculations of the 'distance' of a form of expression from the 'core' in order to determine its constitutional status.

The issues here are deep ones having to do with the internal architecture of the Charter itself. It was well remarked in the early days of the Charter that:[38]

> It cannot be correct that the substantive rights and freedoms should be given their most expansive meaning on the ground that all control is supposed to lie in section 1, while, at the same time, section 1 is to be construed stringently because it is overriding an infringement of a substantive right or freedom.

Currently, however, the Supreme Court errs in the opposite direction, at least with regard to freedom of expression. They are far from construing section 1 stringently. Indeed there is much written about the need to be flexible and contextual in carrying out the balancing called for by section 1. But section 2(b) is also being given the most expansive meaning possible. So there is no control of jurisprudential or constitutional principle anywhere in the Court's approach to freedom of expression. Control comes only from the exercise of judgment by individual members of the Court. Whatever one's view of the integrity of the Court, that is reason for disquiet.

Even a brief look at other aspects of the Court section 1 analysis in *RJR-MacDonald* reveals the potential difficulties. The 'contextual approach' was most recently glorified by McLachlin J. in *Rocket*,[39] and La Forest J. quoted her eloquence here.[40] He did so in the course of arguing that the 'contextual approach' leads to upholding the *Tobacco Products Control Act*. McLachlin J. herself, as mentioned, wanted to strike down the relevant sections of the Act. So what was her response to this use of her own ideas? It amounted to nothing more than: 'There are contexts and contexts, and when I said "contextual", I didn't mean "contextual".'[41] The net effect of La Forest J.'s contextual approach in *RJR-MacDonald* is deference to the legislature. McLachlin J. objected to the degree of *de facto* deference which La Forest J.'s holding implied. But she did not, and cannot, argue that his holding is substantively wrong. She can only argue that she sees the context, and the degree of deference to the legislature appropriate for that context, differently from the way that he does. That way of phrasing the disagreement is all that the contextual approach allows, and it will not help to

build up a body of serious and coherent jurisprudence on constitutional questions.

The downside of flexibility is also evident in the discussion of whether the Act contains but a minimal impairment of the section 2(b) freedom. Again, McLachlin J. and La Forest J. did little more than push buttons to vote. La Forest J. began from the benchmark of total ban on smoking, from which mark the total ban merely on certain forms of advertising looks like a minimal impairment. McLachlin J. began from a benchmark of a totally free marketplace of ideas, from which point the total ban on certain forms of advertising looks like a great deal more than a minimal impairment. Each of them quoted in support McLachlin J.'s assertion in *Comité* that 'a limit prescribed by law should not be struck out merely because the Court can conceive of an alternative which seems to it to be less restrictive'.[42] Of course La Forest J. thought that to strike down the Act is to do exactly that, while McLachlin J. eschewed any such thought.

My point is not to argue for a strict approach to the balancing called for by section 1. Because of the wide scope of the full set of Charter rights and freedoms themselves, such a huge variety of issues turn out to be justiciable under the section that rigidity is impossible. My point is to show how flexibility towards section 1 analysis, when combined with an indiscriminate approach to the interpretation of section 2(b), produces an area of constitutional litigation wrapped in jurisprudential mist — where landmarks can be seen but dimly, and it is easy for the Court to lose its way. *RJR-MacDonald* is an excellent supporting illustration, since the two main contesting opinions, on the points on which they most substantively disagree, have no resources to deploy in reasoning, but can only in the style of a school-yard argument trade slogans and generalities.

The Court needs to take up the challenge presented by the important parts of La Forest J.'s opinion, and formulate a principled view of the scope of section 2(b) freedom of expression based on a coherent picture of the contribution made by freedom of expression to human flourishing.❑

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Endnotes

1. *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1995] S.C.J. 68 (all further S.C.C. references are to paragraph numbers).

2. SC 1988, c.20.

3. 'Activity is expressive if it attempts to convey meaning': *Irwin Toy* v. *Quebec (Attorney-General)* (1989), 58 D.L.R. (4th) 577 at 606 (S.C.C.), per Dickson C.J.C.: 'I am of the view that section 2(b) of the Charter protects all content of expression irrespective of the meaning or message sought to be conveyed': *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man)* (1990), 56 C.C.C. (3d) 65 (S.C.C.), per Lamer J. (as he then was) at 108. I criticize this approach elsewhere: 'Advertising and Freedom of Expression' (1995) 45 Univ of Toronto L.J. 179 at 190-1.

4. *R.* v. *Oakes* (1986), 26 D.L.R. (4th) 200.

5. Cf. *RJR-MacDonald* at para. 127, per McLachlin J.

6. *R.* v. *Keegstra* (1990), 61 C.C.C. (3d) 1 at 51.

7. Hate propaganda (*Keegstra, ibid.*), pornography (*R.* v. *Butler*, [1992] 1 S.C.R 452) solicitation by a prostitute (*Reference re ss. 193 and 195.1(1)(c), supra* note 2).

8. Freedom of expression absolutism ('Congress shall make NO, and I mean NO, law ...') is a third option, but it does not surface much in Canada.

9. Para. 113ff.

10. By 'covered' I mean 'comes within the scope of'. Coverage is different from protection; whether something is protected by the Charter will be a matter of section 1 analysis as well as the scope of the relevant other section. The important distinction between 'coverage' and 'protection' is due to F.F. Schauer, *Freedom of Speech: A Philosophical Enquiry* (New York: Cambridge U.P.) at 89-90.

11. *Slaight Communications Inc. (Operating as Q107 FM Radio)* v. *Davidson* (1989), 59 D.L.R. (4th) 416 (S.C.C.).

12. *Moore* v. *Canadian Newspapers Co. Ltd. et al* (year) 60 D.L.R. (4th) 113 (OHC).

13. Sponsored by the Public Art Fund.

14. Sponsored by Artspace, San Francisco.

15. Cf. e.g., *US* v. *One Book Called 'Ulysses'*, 5 FSupp 182 (1933) (SDNY), affirmed 72 F2d 705 (2nd Cir) (1934); *US* v. *12 200Ft Reels*, 413 US 123 (1973).

16. See text associated with note 6, *supra*.

17. Paras. 75, 76.

18. *Retail, Wholesale & Department Store Union, Local 580 et al* v. *Dolphin Delivery Ltd* (1986), 33 D.L.R. (4th) 174 (S.C.C.).

19. *Dolphin Delivery, ibid.* at 187, per McIntyre J.

20. *Irwin Toy, supra* note 3 at 607; *Reference Re ss. 193 and 195.1(1)(c), supra* note 3 at 109; *R.* v. *Keegstra, supra* note 7 at 24.

21. *R.* v. *Keegstra, ibid.* at 26 (per Dickson CJC).

22. Cf. para. 171.

23. *Reference Re ss. 193 and 195.1(1)(c), supra* note 3 at 74.

24. *Rocket* v. *Royal College of Dental Surgeons of Ontario* (1990), 71 D.L.R. (4th) 68 (S.C.C.). One source of amusement in La Forest J.'s opinion is the extent to which he uses quotations from earlier opinions by McLachlin J. in arguing against her opinion in *RJR-MacDonald.* I will mention two further instances later.

25. *Ibid.* at 79.

26. Para. 108.

27. *Virginia State Board of Pharmacy et al* v. *Virginia Citizens Consumer Council Inc et al*, 425 US 748 (1976).

28. *Bigelow* v. *Virginia*, 421 US 809 (1975).

29. I have suggested elsewhere that in both the U.S. and Canada all of the early commercial speech/expression cases had misleadingly idiosyncratic fact situations which made the decision to strike down the restriction on expression independently appealing. Cf. Roger A. Shiner, 'Freedom of Commercial Expression', in W.J. Waluchow, ed., *Free Expression: Essays in Law and Philosophy* (Oxford: Clarendon Press, 1994) 91-134 at 100-105.

30. *R.* v. *Edwards Books & Art Ltd* (1986) 35 D.L.R. (4th) 1 at 49 (S.C.C.); repeated by him in *Slaight, supra* note 11 at 423.

31. Para. 116.

32. *Slaight, supra* note 11 at 427.

33. *Oakes, supra* note 4 at 225.

34. Para 110. He is contrasting the instant case with the protection given to speaking a language in such cases as *Ford* v. *Quebec (Attorney-General)* (1988), 54 D.L.R. (4th) 577 (S.C.C.) and *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

35. Allan Hutchinson, 'Money Talk: Against Constitutionalizing (Commercial) Speech' (1990) 17 Can. Bus. L.J. 2-34; Wayne A. MacKay, 'Freedom of Expression: Is It All Just Talk?' (1989) 68 Can. Bar Rev. 713; Lorraine E. Weinreb, 'Does Money Talk? Commercial Expression in the Canadian Constitutional Context', in David Schneiderman, ed., *Freedom of Expression and the Charter* (Toronto: Thomson Professional Publishing, 1991) 336-357; Roger A. Shiner, *supra* note 29.

36. An approach which is fuelled by the misguided (if originally well-intentioned) desire to be flexible and contextual — but that is another story. See Shiner, *supra* note 29 at 125-128.

37. See *Law Society of British Columbia et al* v. *Andrews et al* (1989), 56 D.L.R. (4th) 1 at 10 (S.C.C.).

38. *Re Cromer and BC Teachers' Federation* (1986), 29 D.L.R. (4th) 641 (BCCA) at 652, per Lambert J.A.

39. *Rocket, supra* note 24 at 78.

40. Para. 71.

41. Cf. paras. 133-134.

42. *Comité pour la République du Canada* v. *Canada*, [1991] 1 S.C.R. 139 at 248.