

SHOULD COMMERCIAL SPEECH BE ACCORDED PRIMA FACIE CONSTITUTIONAL RECOGNITION UNDER THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS?

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I. INTRODUCTION

In *Re Klein and Law Soc'y of Upper Canada*¹ the Court held that commercial speech does not come within the ambit of the *Canadian Charter of Rights and Freedoms*² so as to allow a lawyer to advertise the price of his services contrary to the rules and regulations of the governing law society. In contrast, the dissenting opinion argued that commercial speech did fall within subsection 2(b), subject, of course, to the limitations of section 1.³ Although not a decision of the Supreme Court of Canada, the case is of seminal importance because the two approaches at once capture the essence and the parameters of the problem which will likely form the touchstone for future debate. The case raises four areas that are of concern not only to lawyers, but also to political and social scientists: bills of rights as instruments of minority protection; systemic needs of a democratic polity; judicial methodology in interpreting the fundamental freedoms in the *Charter*, in particular subsection 2(b); and, the role and capability of a court of law in this type of adjudication.

II. BILLS OF RIGHTS AS INSTRUMENTS OF MINORITY PROTECTION

One of the essential purposes of a constitutionally entrenched bill of rights is to offer legal protection, even against majority will, to certain rights deemed fundamental to human dignity. In this sense, a bill of rights

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¹ 50 O.R. (2d) 118 at 153-71, 16 D.L.R. (4th) 489 at 524-42 (Div'1 Ct. 1985).

² *Constitution Act, 1982*, Part 1, enacted by the *Canada Act, 1982*, U.K. 1982, c. 11.

³ *Supra* note 1 at 118-52, 16 D.L.R. (4th) at 489-523. Section 1 of the *Charter* states: "The *Canadian Charter of Rights and Freedoms*, guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

is first and, some would argue, foremost an instrument of minority protection. Yet even constitutionally entrenched bills of rights can be amended by the requisite majorities.⁴ This is consistent with constitutional recognition of the political reality that in a democracy no judicial body of appointed or elected officials can stand in the way to defeat a sufficiently large consensus. It is also a recognition of the ultimate “watch-dog” or preventative, rather than corrective, role of the judiciary in the matter of human rights protection. While the courts can correct individual wrongs, they cannot do so in the face of an overwhelming contrary majority will.⁵ The courts cannot *correct* a political *system* gone wrong. By correcting individual wrongs, the courts’ role is systemically preventive, to impede, if not block, the emergence of a consciousness ripe for what Alexis De Tocqueville described as the “tyranny of the majority”.⁶ In this very limited sense of being anti-majoritarian, bills of rights may be described as “anti-democratic”.⁷

In the case of commercial speech, however, the Divisional Court of Ontario has decided that the will of the majority shall govern as long as the “well-springs” of the political process itself, the conduits by which such will is expressed, remain “pure”.⁸ Absent political tyranny,⁹ there is nothing for the court to consider. It will neither recognize nor look into allegations of economic tyranny. Economic redress is a “task better left to the people’s elected representatives”.¹⁰ Thus, in the case of the regulation of an economic minority, the task is better left to the regulating majority. For Klein and the many other unemployed young lawyers, the difference between having and being denied the freedom to advertise fees for services means the difference between earning a living and being out of work.

⁴ *U.S. Const.* art. V. See also ss. 38-39 of the *Charter*. Note, however, that by sub. 41(d) of the *Charter*, the composition of the Supreme Court can only be amended by unanimous legislative consent of all provinces following resolution by both Houses of Parliament. Any amendment to sub. 41(d) itself is subject to this same rule pursuant to sub. 41(e). Although theoretically, the amending sections of a constitution could be revised to prospectively deny any changes irrespective of the size of the majority, such action has never been taken in a democratic nation.

⁵ Indeed, by virtue of sub. 33(1) of the *Charter*, the *non-obstante* clause, parliamentary or legislative supremacy over judicial review is, textually at least, preserved with respect to s. 2 (fundamental freedoms) and ss. 7-15 (legal and equality rights). Although the political difficulties attendant on invocation of the clause should not be underestimated, the clause itself has been described by one commentator as “legislative review of judicial review”. See P. Russel *The Effect of a Charter of Rights on the Policy-making Role of Canadian Courts*, 25 *Can. Pub. Admin.* 11 at 30 (1985).

⁶ A. de Tocqueville, 1 *Democracy in America* 258-73 (rev. ed. 1899).

⁷ In a larger sense, however, the measure of a truly mature democratic system may be how well it protects fundamental minority rights against majority oppression.

⁸ *Re Klein*, *supra* note 1 at 161, 16 D.L.R. (4th) at 532.

⁹ Undoubtedly, this would include such *Charter* areas as sub. 2(b) (freedom of thought, belief, opinion and expression including freedom of the press), sub. 2(c) (freedom of assembly), sub. 2(d) (freedom of association), as well as the “Democratic Rights” in ss. 3 and 4.

¹⁰ *Re Klein*, *supra* note 1 at 167, 16 D.L.R. (4th) at 538.

Dvorak's claim, in the case decided concurrently with *Re Klein*, that he was unable to make ends meet without engaging in the impugned advertising was undisputed.¹¹ It may well be that in particular circumstances public interest against fee advertising outweighs this consideration.¹² Public interest in these circumstances may also outweigh the possible harm to the public interest itself resulting from the demoralization and debilitation of a profession for which self-confidence is particularly important. Consistent with the application of the language of section 1 of the *Charter*, it is difficult to object to this type of balancing analysis. However, the Court in *Re Klein* did not adopt such an analysis. It did not say that commercial speech is a form of expression in respect of which it may tolerate greater regulation than political speech. Rather, it held that commercial speech, both by nature and purpose, is of a form fundamentally different from the kind of speech protected by the *Charter*. In short, the Court failed to give even a *prima facie* judicial recognition of commercial speech;¹³ instead, the Court paid unqualified judicial deference to the "will" of the legislature and its creation, the Law Society.¹⁴

Consider the case of a successful, Irish Catholic immigrant. He belongs to a country club, occasionally likes to "get together with the boys" outdoors and goes to church on Sundays. He owns a business which he has built up over many years of hard work and which is the only line of work he has ever known. The *Charter* expressly recognizes freedom of religion, association and assembly. Under the decision in *Re Klein* this person can, subject to section 1, pray, socialize and gather for leisurely activity with his friends. Yet, he has no constitutionally recognized right at all to honestly and peacefully earn a livelihood in his chosen profession free from state repression. There is something particularly disturbing in a reading of a constitution that would protect a man's right to belong to a country club but would not, even *prima facie*, recognize his right to earn a living. The Court in *Re Klein* contended that pure "commercial speech contributes nothing to democratic government because it says nothing about how people are governed or how they should govern themselves. It

¹¹ The Law Society's monopoly on the practice of law would militate against the "contractual" argument that he who chooses to enter the profession consents to abide by all of its rules, especially if adherence means unemployment.

¹² For a summary of these reasons see *supra* note 1 at 137-38, 16 D.L.R. (4th) at 508-09. For American caselaw considering the dangers of in-person solicitation see *Jacques v. Virginia State Bar*, 95 S. Ct. 2004 (1975) (client solicitation undignified and unprofessional); *In re Appert*, 315 N.W. 2d 204 (Minn. 1981) (solicitation equated with intimidation, deception, overreaching and misrepresentation); *Ohralik v. Ohio State Bar*, 98 S. Ct. 1912 (1978) (conflict of interest between lawyer's pecuniary gain through solicitation and client's interest in securing the least expensive legal services in some circumstances).

¹³ *Re Klein*, *supra* note 1 at 168, 16 D.L.R. (4th) at 539: "I would conclude that there is no reason to expand the meaning of the word 'expression' in s. 2(b) of the *Charter* to cover pure commercial speech."

¹⁴ It was held that the Law Society is a statutorily created body to which the *Charter* applies. See para.32(1)(b) of the *Charter*.

does not relate to government policies or matters of public concern essential to a democratic process."¹⁵

By the same token, it can be argued that purely religious speech, properly reflecting the separation of state and church, contributes nothing to democratic government because it says nothing about how people are governed or how they should govern themselves.¹⁶ Purely religious speech relates no more to government policies or matters of public concern essential to a democratic process than does pure commercial speech. However, few would label democratic a constitution that does not recognize freedom of religious speech. The need to protect minority rights along with the common sense requirement of consistency in judicial interpretation of *Charter* freedoms should cause the courts to reconsider before excluding commercial speech entirely from the ambit of constitutional recognition. There is, however, an even larger argument militating against such exclusion.

III. SYSTEMIC NEEDS OF A DEMOCRATIC POLITY

An essential attribute of a particular political system may be described as a systemic need without which the system would be jeopardized. A political system may have a number of systemic needs that together constitute the entire system. Although a particular systemic need is a *necessary* ingredient in the political make up of such a system, it alone is not *sufficient* to sustain the system. A systemic need may be a direct need or an indirect need. An example of a direct need of a democratic system is the freedom to engage in political dialogue on matters affecting the polity. It is a direct need because its repression directly and adversely impacts upon the very foundations of the system, that is, the ability of self-governance.¹⁷ In *Re Klein* the Court considered the systemic needs of a democratic polity in the context of commercial speech and adopted a direct, politically-purposive test as the touchstone for constitutional protection under subsection 2(b) of the *Charter*. The Court observed, "[p]rima facie then, freedom of expression guaranteed by s. 2(b) of the Charter would appear to apply to the expression of ideas and opinions relating to the political and governmental domains."¹⁸ Neither the *nature* of commercial speech nor the *purposes* it serves are deemed to meet the needs of this test.

In *Whitney v. California*¹⁹ Brandeis J. addressed the reasons for

¹⁵ *Supra* note 1 at 168, 16 D.L.R. (4th) at 539.

¹⁶ Indeed, under the First Amendment's "non-establishment" clause, American courts have fiercely guarded against intrusion of religion into the political-secular realm.

¹⁷ See T. Emerson, *The Functions of Freedom of Expression in a Democratic Society*, 72 Yale L.J. 877 at 878-93 (1962).

¹⁸ *Supra* note 1 at 161, 16 D.L.R. (4th) at 532 (emphasis added).

¹⁹ 47 S. Ct. 641 at 649 (1927). For a comparative Canada-United States analysis of freedom of expression and seditious utterances see S. Braun, *Freedom of Expression v. Seditious Libel: Towards a Framework of Analysis*, 22 Comp. Jurid. Rev. 87 (1985).

constitutional protection of speech by reference to the special *self-remedial nature* of free speech in the political context of seditious utterances:

[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is an opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.²⁰

In *Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York*²¹ Renquist J., in dissent, focussed on the notion of self-remedy through counter-speech, observing that commercial speech is by its very nature a form of speech to which this notion is inapplicable. The Court in *Re Klein* quoted with approval from *Central Hudson*:

The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim "*caveat emptor.*" But since "fraudulent speech" in this area is to be remedial . . . the remedy of one defrauded is a lawsuit or an agency proceeding based on common-law notions of fraud that are separated by a world of difference from the realm of politics and government. . . . For in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence.²²

The fact that the political notion of self-remedial counter-speech is inapplicable to false, fraudulent or misleading commercial speech does not explain why all commercial speech, including that which is truthful, should be excluded from the ambit of constitutional recognition. Counter-speech may be inapplicable in such circumstances but not because it provides no remedy. It may be inapplicable because an ill does not exist for which a remedy is required. Indeed, even on a superficial level of observation it is apparent that truthful commercial speech, peacefully pursued, can often be beneficial.²³ The exclusion of commercial speech must, therefore, be grounded in a more philosophically persuasive or systemically purposive argument as to the meaning and purposes of freedom of expression in a democratic polity.

The Court in *Re Klein* attempted such an explanation:

Pure commercial speech says nothing about how people are governed, or how they should govern themselves. Indeed, it stands outside of public discourse:

²⁰ *Whitney v. California*, *supra* note 19 at 649.

²¹ 100 S. Ct. 2343 (1980).

²² *Id.* at 2368.

²³ See *Bates v. State Bar of Arizona*, 97 S. Ct. 2691 at 699 (1977):

[T]he consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day.

it could be said in a tyranny or a democracy, a monarchy or a society without a government at all. Providing no support to a democracy, it did not claim constitutional protection [in the United States] until *Bigelow v. Virginia* . . . and then the *Virginia Citizens* case in 1976.²⁴

In adopting such a direct politically-purposive view of subsection 2(b) of the *Charter*, the Court found that commercial speech was not necessary to a democratic polity: “[T]he ‘free market’ is itself only an idea, one particular idea, about how goods should be distributed in society. . . . there is nothing to prevent society from deciding that some other method of allocation is better.”²⁵ At best, freedom of commercial speech is seen as desirable but not necessary. The Court cited the dissent of Renquist J. in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc.*:²⁶

While there is again much to be said for the Court’s observation as a matter of desirable public policy, there is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession.²⁷

In contrast, the Court in *Re Klein* found political speech to be both necessary and sufficient to a democratic polity:

Simply because commercial speech involves an expression does not mean that it must, somehow, be accounted for under s. 2(b). . . . this is to confuse form with substance. Pure commercial speech mimics political speech in form (both involve an expression), but not in substance or function. . . . so long as the regulation [of the economic] is the result of the democratic process and so long as the well-springs of that process are kept pure, through the protections afforded it by a Constitution, then there can be no valid complaint by the regulated. Complex economies are possible only under the shelter afforded them by the State and its institutions. Political regulation of individuals, however, is a different matter. Even if such regulation flows from a pure democratic process, it may be struck down, for in regulating the political activities of individuals a government may fetter the democratic process itself and, hence, bring democracy into jeopardy. Political speech is related to and prevents the fettering of the democratic process. It, of necessity, must fall within s. 2(b).²⁸

In assuming that only political, and not economic, regulation can fetter and jeopardize the democratic process, the Court adopted precisely the kind of artificial, formalistic view against which it spoke.²⁹ As the *Charter* has no

²⁴ *Supra* note 1 at 163, 16 D.L.R. (4th) at 534.

²⁵ *Id.* at 164, 16 D.L.R. (4th) at 535.

²⁶ 96 S. Ct. 1817 (1976).

²⁷ *Id.* at 1836.

²⁸ *Supra* note 1 at 160-61, 16 D.L.R. (4th) at 531-32.

²⁹ For a more flexible and broader approach to the protected rights in the *Charter*, albeit in a different context, see *Re Reich and College of Physicians and Surgeons of Alberta*, 31 Alta. L.R. (2d) 205 at 223, 8 D.L.R. (4th) 691 at 713 (Q.B. 1984).

express provision protecting economic or private property interests³⁰ and the search for implied protection of such rights has to date proved largely fruitless,³¹ the exclusion of commercial speech from the purview of the *Charter* becomes particularly significant. Both the assumptions and the conclusions of the Court deserve, therefore, the utmost scrutiny.

It is certainly possible to point to a dictatorship such as Chile as evidence of the Court's observation that freedom of commercial activity and of its necessary incident, commercial speech, are not synonymous with political democracy. However, one must be careful not to then confuse the issue of the sufficiency of a private sector with the question of the necessity of a private sector to political democracy.³² As a preliminary observation, it is important to appreciate the nature of the economic-political nexus.

Pure commercial speech and activity may not directly impact on how people are governed or how they should govern themselves in the way that political speech does. Rather, they *indirectly* do this by *affecting* people's attitudes and values about how they should be governed. While politics undoubtedly shapes a man's business, his business often shapes his politics. One has but to compare present expectations and perceptions of government to those of the nineteenth century. The *directness* of the political nexus, therefore, is not as important as the ultimate *fact* of that nexus. Systemically, some freedom of commercial speech and activity is more than desirable; it is necessary to political democracy, an essential attribute without which the system is jeopardized. This is not to hew to the teachings of Adam Smith nor to deny the regulatory needs of complex modern economies. *Prima facie* constitutional recognition of commercial speech is a recognition only of the fact and the importance of this *ultimate* nexus between the economic and the political. It does not equate the two,

³⁰ This should be contrasted with the situation in the United States under the Fifth and Fourteenth Amendments which clearly make reference to private property interests.

³¹ The right under the *Charter* in para. 6(2)(b) "to pursue the gaining of a livelihood in any province" has, as was pointed out by the Court in *Re Klein*, been interpreted by the Supreme Court of Canada to refer to mobility rights and not to a pure economic right to work. See *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161. As well, s. 7 of the *Charter*, protecting the "right to life, liberty and security of the person" makes no mention of private property interests, unlike the American Fifth Amendment. The overwhelming body of legal opinion so far has been to confine the "Legal Rights" in this section to procedural and possibly substantive rights of an *accused* person. In a novel interpretation, however, the Manitoba Court of Queen's Bench in *Re Canada and City of Winnipeg*, 9 D.L.R. (4th) 234, [1984] 4 W.W.R. 507 (Q.B.), left open the possibility that, in an appropriate case, the Court might support the view that a person "might be so deprived of his property or economic interests that his right to security of the person, if not his liberty [under s. 7], could be said to have been violated". *Id.* at 0243, [1984] 4 W.W.R. at 518.

³² This is not to say that during a transitional period from one system to another sufficiency and necessity may not become temporarily synonymous until a new political equilibrium is established. However, it is nugatory to apply terms of systemic attributes to systems in disequilibrium unless it is the disequilibrium which is sought to be understood.

so as to devalue or endanger the special position occupied in a democracy by political speech, by denying their differences. It does not preclude the economic regulation so necessary to a mixed economy.

The majority in *Virginia Citizens* were not saying that the state cannot regulate commercial speech, only that it cannot systematically or unjustifiably allow it to be stifled.³³ In so doing the Court was recognizing the fact of the connection between political freedom and economic independence. The result is closer to the teachings of John Maynard Keynes than to those of Adam Smith. The observation of the Court in *Re Klein*, that freedom of commercial speech and activity traverses many and varied political systems, fails to recognize the very significant fact that political speech is dramatically restricted in any overwhelmingly state regulated economy, such as the Soviet Union, China, Cuba or any of the Soviet bloc states of Eastern Europe. The conclusions which ought to flow from the Court's observations should be more limited: commercial freedom *per se* is not a guarantor of political democracy. Indeed, in its more extreme, unregulated version, as demonstrated by some right-wing Latin American dictatorships, it can be a positive impediment to political democracy. Totally unregulated economic exploitation is inconsistent with mass political participation. It is, however, consistent with oligarchy.

It is a quantum leap to the other extreme, however, to suppose that because freedom of commercial speech *per se* is insufficient, and in its unregulated version a potent threat to political democracy, that some freedom of commercial speech and activity is not a necessary ingredient to political democracy. It is important to distinguish between the unregulated, the partially regulated and the virtually totally regulated. It is also important to appreciate the difference between an essential attribute of a system and the relationship between a system's essential attributes. This can be well illustrated by reference to Renquist J.'s observation in the *Central Hudson* case that in a democracy the economic is subordinate to the political.³⁴ The issue of subordination is one of separation: that which is unseparated cannot be subordinate. The degree of separation of *state* from *society*, of the political from the economic, cultural and social, ultimately reflects the embrace of the political. In the Soviet Union, *society* enjoys only a minimal separation from *state*. Matters which in Western democracies are seen as separate societal matters better resolved by society itself and, therefore, not the business of state regulation, become issues of serious *state* concern and legal coercion in the Soviet Union. Thus certain apolitical social issues in Western nations, such as the "punk rock" scene, idle youth, strange clothes and coarse behaviour, acquire political or *state* dimensions that are translated into repressive "anti-parasitic" and other criminal laws in the Soviet Union.³⁵ The economic speech of price and

³³ *Supra* note 26 at 1827.

³⁴ *Supra* note 21 at 2368.

³⁵ Art. 206(1) of the *R.S.F.S.R. Criminal Code* (1964) (*as amended*) defines the

product advertising with which the Court in *Re Klein* is concerned automatically assumes public overtones or becomes "politicized" by the very fact of state regulation. In recognizing Dvorak's right to complain to the press about the Law Society's rules regarding fees for service, though not his right to breach those rules, the Court was effectively acknowledging this very point. Viewed in isolation, the implications may not seem significant. Viewed in a larger perspective, however, they become highly disturbing.

Virtually all attempts at private price and product advertising in the Soviet Union are criminally punishable because, in practice, virtually all economic activity is subject to state control.³⁶ In a system of overwhelm-

elements of the criminal offence of "hooliganism" as "intentional actions violating public order in a coarse manner and expressing a clear disrespect toward society". Malicious hooliganism is the same action distinguished in content by "exceptional cynicism or special impudence". Such "actions which are distinguished by a high degree of impertinent, shameless conduct imbued with disrespect for generally accepted norms of morality and morals are *exceptionally cynical*". The maximum penalty is five years in prison. Transl. from *Kommentarii K Ugolovnomu Kodeksu R.S.F.S.R.*, 390-93 (Iu D. Severin, ed., M. iuridicheskaia literatura, 1980). The "anti-parasitic" law (first criminalized in 1970, having previously been an administrative offence) made it a crime for persons to 1) "avoid socially useful work and 2) lead an anti-social parasitic way of life". The law was aimed at regulating lifestyle through state socio-economic control: it did not make a specific act or omission but an entire way of living criminal. See *R.S.F.S.R. Criminal Code*, Art. 09(1), in H. Berman & J. Spindler, *Soviet Criminal Law and Procedure: The R.S.F.S.R. Codes* at 77-81 (2d ed. 1972). Since then, the wording of the law has undergone a number of changes to more directly take account of politically dissenting lifestyles. See Edict of the Presidium of the R.S.F.S.R., in *Vedomosti Verkhovnogo Soveta R.S.F.S.R.*, No. 33, Item 698 (7 Aug. 1975) ("systematically engaging in vagrancy or begging and also over a long period of time leading another parasitic form of life"). See also "Resolution of the Presidium of the Supreme Soviet of the R.S.F.S.R." in *37 A Chronical of Current Events* 58-60 (1978).

³⁶ Indeed, the very idea of private advertising is largely nugatory in a state-run economy such as that of the Soviet Union. As economic activity is almost wholly legislatized and, therefore, politicized, economic independence from the state becomes definitionally and realistically viewed as a direct threat to state political monopoly and criminally punishable. The notions of state, social, economic and official crimes reflect this integration. The *R.S.F.S.R. Criminal Code* is divided into a "general part" and a "special part". The "special part", *inter alia*, makes reference to:

1. "Crimes Against the State" — *Case of Muchkin* — where a prospector privately mined and much later privately sold the gold he had mined for personal profit. The Court held he was guilty of violation of rules on currency transaction under Art. 88(1) (Bull. S. Ct. U.S.S.R. 1964, No. 1 at 19);
2. "Crimes Against Socialist Property" — *Case of Bolotov* — here farmers privately sold grain from their collective for personal profit. The Court found all the purchasers and vendors guilty under Art. 89(2) of stealing state or socialist property (Coll. Decrees S. Ct., R.S.F.S.R. 1961-63 at 204);
3. "Economic Crimes" — *Case of Kit and Kucherov* — where "A" paid "B's" wages with fish and "B" then sold the fish. It was held that "B" was not guilty of "buying up goods for speculation" under Art. 154 but only because he did not "buy up" the fish or sell it above the established

ing state regulation, the economic is not subordinate to, but synonymous with, the political because there is no perceived or tolerated separation between the two. The economic relates in a *directly* political way to “government policies or matters of public concern”³⁷ in the Soviet Union precisely because a relatively independent economy is recognized as one essential ingredient to a democratic political process and, consequently, as a threat to state political monopoly. Thus a private economy must be suppressed.

While economic freedom alone will not guarantee political democracy, a democracy cannot endure without it. Economic politicization or statism increases with state regulation of economic activity. In a mixed economy, such regulation tempers the excesses of the free market and thereby contributes to political democracy by enhancing the stability of the state. Further, by protecting the downtrodden and the disadvantaged who would otherwise be burdened by misfortune and economic exploitation, some state economic regulation helps to keep the “well-springs” of the political process “pure” by enlarging the scope of political participation and representation. At a certain stage, however, regulation can reach the point at which the economic ceases to be substantively separate from the political. Strictly speaking, it is nugatory to speak of the economic as subordinate to the political in a democratic society. It is only in theory that the “well-springs” of the political process can be kept pure through constitutional protection of the political processes alone given systematic legislative regulation and consequent state political monopolization of the

state price (Bull. S. Ct. R.S.F.S.R. 1964, No. 7 at 7);

4. “Official Crimes” — *Case of Chimin* — where officials at a fruit and vegetable market were found to have massive spoilage of fruit and vegetables. They would have been found guilty of Art. 170 (“abuse of official position”) and Art. 172 (“neglect by an official”) if it had been shown that the charged officials and not some others were at fault for the spoilage (Bull. S. Ct. U.S.S.R. 1964, No. 6 at 35).

The implications for society flowing from the large-scale integration of the economic with the political is well illustrated in the guidelines for assessment of punishment. Thus, under Art. 32 of the “Fundamental Principles of Criminal Legislation” the court is instructed to be guided by a “socialist legal consciousness” when considering specified factors in mitigation or aggravation. See S. Butler (transl. and compiler), 4 *Collected Legislation of the U.S.S.R.*, (Fundamental Principles) Part VII, s. 8 at 19-20 (rev. ed.). Because the economic is integral to the social, wholesale politicization of the economic necessarily results in the politicization of the social. See *id.* Art. 1, *Tasks of Soviet Criminal Legislation* Art. 7, *Concept of Crime* 3-5; *Crimes Against the State*; Art. 6, *Wrecking* and Art. 7, *Anti-Soviet Agitation and Propaganda* 5. Offences against a state-run economy automatically become offences against society. Hence the importance of social considerations and the severity of punishment for socio-economic non-conformity. In the *Plunderer’s Punishment Case*, (Baku Rabochy, 24 Dec. 1985 at 4). Eng. Transl. in 27 *C.D.S.P.*, No. 52 at 7 (1976), where officials of a vegetable factory and fisheries collective engaged in organized theft of “socialist property” over a period of time, the death penalty was imposed on the ringleaders.

³⁷ *Supra* note 1 at 168, 16 D.L.R. (4th) at 539.

economy. Political independence is the very antithesis of statist economic dependence.³⁸

It is independent political participation *in fact*, not judicial protection of the political *in law*, that, in the final analysis, keeps the “well-springs” of the political process vibrant and “pure”. To suppose that the state can fetter the economic process without ultimately fettering the political process is to assign an artificial separation between the two processes unknown to the real world of political-economy. It is, therefore, essential to the democratic process that the economic is not overwhelmingly and irrevocably consumed by the political. But there is nothing intrinsic, even in a democratic political process, which would necessarily and forever assure this so as to free the courts from a watch-dog role over economic politicization. Indeed, it is the failure to appreciate the subtle growing political import of the economic in complex technologically advanced economies, rather than direct attacks on the political processes themselves, that may, in the long run, present the greatest threat to democratic government. It is unqualified judicial deference to state regulation, not judicial recognition of the limits of regulation that is more likely to encourage the erosion of political pluralism by concentrating the sources of political power in one hand, the state's. The judiciary, however, is not well equipped to correct systemic alteration — only to impede systemic erosion. *Prima facie* constitutional recognition of the political import of freedom of commercial speech and activity on democratic political processes serves to legally separate the two realms, to free economic activity in society from unlimited state intervention and, therefore, to assure that the economic remains separate and subordinate to a free and democratic political process.

The observation of the majority in *Re Klein*³⁹ that commercial speech did not enjoy constitutional protection in the United States until the case of *Virginia Citizens*⁴⁰ in 1976⁴¹ is more demonstrative of a judicial recognition of a fundamental change in the social order than of any inherent lack of political significance of free commercial speech. Simply put, there was no need to engage in judicial mental gymnastics to recognize the systemic relevance of free commercial speech to a democracy in the free-wheeling hey day of nineteenth century laissez-faire and pre-World War II economic liberalism. With the emergence of the post-war “social welfare state”, the

³⁸ A good example of this is the situation of the Blacks in South Africa. As part of the political-racist policy of Apartheid, Blacks, *inter alia*, are severely restricted in their economic activity and mobility. In so restricting them, the government is keenly aware of the importance to White political monopoly, of Black economic dependence on Whites and, in particular, on the White state. Without the political clout which comes from relative economic independence, even an oppressed majority is severely debilitated in its effort to open and maintain the “well-springs” of the political process to mass political participation.

³⁹ *Supra* note 1.

⁴⁰ *Supra* note 26.

⁴¹ *Supra* note 1 at 163, 16 D.L.R. (4th) at 534.

decision to extend some recognition to commercial speech was, in part, a response to the perceived dangers ultimately to the political process itself of unlimited state regulation of the economic order. The resulting judicial quagmire of American constitutional litigation from which the Court in *Re Klein* recoiled should not detract from this response. The American difficulties are testimony to the doctrinal and theoretical complexities that exist in establishing a link in particular cases between commercial regulation and political democracy. As the link is ultimate and cumulative, rather than specific and direct, the American judiciary has come to emphasize the more direct purposes of freedom of economic speech, such as its informational value, as the basis for constitutional protection.⁴² This "retreat" is evidence more of the United States courts', any court's, desire to ground decisions in less theoretical and more judicially manageable principles than of any inherent lack of validity in the commercial-political nexus itself.

IV. JUDICIAL METHODOLOGY IN INTERPRETING SUBSECTION 2(B) OF THE CHARTER

Although the majority in *Re Klein* would not extend even *prima facie* constitutional recognition to freedom of commercial speech, Henry J. in dissent⁴³ was willing to do so. The two approaches are significant not only with respect to methodology but also with respect to substantive implications. Callaghan J. for the majority viewed subsection 2(b) of the *Charter* in the absolutist way in which the fundamental freedoms are written in the United States Constitution. In the American context, however, there can be no recourse to an express constitutional limitation equivalent to section 1 of the *Charter*. United States courts have had to create their own limitations, while at the same time defining the substantive nature of the absolute rights.⁴⁴ In contrast, the dissenting opinion of Henry J. obviates the need for a conclusive substantive definition of the ambit of freedom of expression in the context of commercial speech. His analysis renders it unnecessary to distinguish aspects of such speech from protected expression in order to determine how such differences should be reflected in the Law Society regulations. The substantive analysis would be overshadowed by a section 1 balancing analysis.

The difficulty of adopting a methodology more in keeping with the language of the United States Constitution than that of the *Charter* lies in the former's greater tendency to require, in each case, a judicial demon-

⁴² *Supra* note 21 at 2350.

⁴³ *Supra* note 1 at 123-52, 16 D.L.R. (4th) at 494-533.

⁴⁴ The Court in *Re Klein* rejects the suggestion that the difference in constitutional language had, for the American Court, and should have for the Canadian courts, a bearing on the decision whether or not to protect commercial speech. *Id.* at 166, 16 D.L.R. (4th) at 537.

stration of the ultimate nexus between commercial speech and political democracy as the basis for any decision rendered in favour of the impugned commercial speech. This is because in the all-or-nothing substantive approach warranted by the language of the United States Constitution, it must be shown that the impugned speech subject to the regulation, is or is not integral to political democracy. Though this approach has conceptual merit in articulating the systemic link, it is a tenuous legal tool, practically speaking, in justifying particular judicial impediments to economic regulations having less than obvious political import. The ultimate nexus, as the American courts have learned, can be very difficult, if not impossible, to show, in the context of the individual case, especially at a stage in social development where there is still a substantive separation between state and society, between the political and the economic. Thus, there has been an apparent retreat by United States courts to a more judicially manageable focus on the more immediate or direct purposes of commercial speech, such as its informational value⁴⁵ or on specific kinds of interest balancing peculiar to the particular situation.⁴⁶ The majority in *Re Klein* sought to avoid this conceptual conundrum. But by choosing to analyze the issue through a direct formulation, the Court was driven by the problem of its own approach into an exaggerated perception of the practical inutility of judicial protection of commercial speech absent a unifying test demanded by their formula.⁴⁷ In the end, the Court failed to recognize the political-economic link.⁴⁸ The position of the Court weakens its role as ultimate guardian of political democracy. Its watch-dog role is enervated and the spectre of an "after-the-fact" systemically corrective role, for which it is neither designed nor well-equipped, looms larger.

A *prima facie* recognition of commercial speech coupled with the limitations imposed by section 1 of the *Charter* would do much to obviate this problem. A court of law is not well equipped to engage in political theorizing as the basis for both its decisions and the evolution of judicially

⁴⁵ *Central Hudson, supra* note 21. Even here a larger basis for protection was implicit in the decision, as reflected by the rigour of the test imposed. The Court formulated a two-fold test which required firstly, that the state demonstrate a *substantial* interest justifying its restriction of freedom of commercial speech and secondly, that the interference be proportional to the state interest being served. The test was affirmed in *In re R.M.J.*, 102 S. Ct. 929 (1982).

⁴⁶ See, e.g., *Friedman v. Rogers*, 99 S. Ct. 887 (1979), where the use of trade names by a practising optometrist was upheld.

⁴⁷ The distinction is reflected in the different emphases of the two opinions in *Re Klein*. While Henry J., working from the perspective of a *prima facie* articulation of commercial speech protection, could afford to focus his opinion on the weighing of specific pros and cons of fee advertising by the legal profession, the majority, hampered by their attempt to formulate a substantive definition, were driven to a wide-open examination of the problem much in the nature of a political science debate.

⁴⁸ One might wonder whether it was the practical difficulties in applying the concept which drove the Court to reject the nexus or rejection of the nexus itself which made the practical difficulties seem insurmountable. In all probability, the Court's thinking was circularly influenced by both considerations.

manageable principles of precedential value. A *prima facie* recognition would provide a tentative or skeletal recognition subject to derogation through section 1.⁴⁹ Until it is fleshed out by that section its ambit and scope remain in a kind of theoretical limbo. It is, therefore, much easier to accept and to judicially articulate such a framework as, unlike a substantive definition, it does not provide the definitive word on the subject. It is also a more flexible tool than its American counterpart. Due to the fact that the final word must await the outcome of a balancing and weighing of competing interests, judicial focus shifts away from the general and theoretical and towards the specific and concrete. The court can move more easily along a gradated ladder of protection reflecting the special needs of the particular circumstance. There is no need to first articulate a larger, all-embracing substantive theory. In the event of progressively greater integration of state and society, of economy with polity, the ultimate political-economic nexus can be expected to become more evident in judicial analysis. In the meantime, *prima facie* judicial recognition pushes the substantive definitional issue to the side and focusses on the less theoretical weighing of concrete interests. Admittedly, to the extent that larger grounding of the particular in the general is thereby lacking, a certain philosophical or conceptual vacuum is created.⁵⁰ A perceived result may be the fragmentation in the American decisions which so disturbed the Court in *Re Klein*. However, perceptions are, in part, governed by the expectations flowing from the particular formulation of the problem. A conceptually weak result is less likely to be perceived in Canadian decisions given a proper adoption of the different wording of the *Charter*. Conceptually, *prima facie* recognition is a more suitable framework for judicial political theory. The ultimate nexus is assumed, loosely unifying particular decisions under its larger rubric, but is not substantively dissected to directly reflect a particular concrete decision. Thus adapted and overshadowed, the basis of the protection will be less at issue in particular cases of economic regulation than would be the case with a substantive definition of the right in each case.

V. THE ROLE AND CAPABILITY OF A COURT OF LAW IN THIS TYPE OF ADJUDICATION

The foregoing analysis raises a fundamental question which is at once theoretical and practical: the role and capability of a court of law in this area of constitutional adjudication. Callaghan J. pointed to a litany of truncated American adjudication on commercial speech. These decisions

⁴⁹ Although a *prima facie* recognition is not inconsistent with complete extinguishment of the right if warranted by the circumstances of a *particular* case, it would be inconsistent with complete extinguishment of the right in *all* cases.

⁵⁰ On the question of certainty and predictability in the laws, see *The Role and Capability of a Court of Law in this Type of Adjudication infra*.

have no satisfactory unifying theme similar to that found in the area of political speech. This lacuna formed the basis for the practical argument that the matter was best "left to the people's elected representatives".⁵¹ The holding amounts to an *a priori* declination, notwithstanding the broader language of the *Charter*, to exercise the courts' new "watch-dog" jurisdiction as protector of minority rights and systemic needs. The Court exhibited a pre-*Charter* judicial mindset in which, under the doctrine of Parliamentary Supremacy and its concomitant traditional Canadian legal training, courts felt more comfortable separating and excluding from judicial scrutiny the political from the legal.⁵² To the extent that the substantive American formulation compels such integration it is particularly foreign and difficult terrain for a Canadian court.

An entrenched bill of rights however clearly calls for a more liberal approach to constitutional questions and legal precedent than the traditionally strict statutory interpretation used by Canadian courts. Courts must take into account the more subtle social, political and economic relations underlying the law.⁵³ Moreover, the task for Canadian courts is easier than that of their American counterparts in one significant respect. Whereas the American courts are driven to elicit substantively grounded

⁵¹ *Re Klein*, *supra* note 1 at 167, 16 D.L.R. (4th) at 538.

⁵² Writing from the larger perspective of the creation and enforcement of "constitutional obligation" by convention, Donna Greschner and Eric Colvin have expressed pessimism about Canadian courts' present capacity to delve into broad political theory:

The resolution of "legal" questions often demands some inquiry into "political" matters. Consider, for example, the interpretation and application of the abstract concepts which are included in charters of rights and freedoms. . . . Indeed, if judges are to engage in legal work at all, they must take preliminary positions on recognitory criteria, and therefore, on matters of political theory. It is only conditions of substantial political stability and consensus, under which recognitory criteria operate as implicit assumptions, which enable this facet of judicial reasoning to be disguised. . . . The Canadian experience cautions against optimistic expectations of the courts' present capacity to appreciate and handle questions of political theory.

D. Greschner & E. Colvin, *Expanding the Boundaries of Constitutional Obligation: Lessons from the Canadian Experience*, 2 *Comp. Jurid. Rev.* 3 at 18 (1985).

⁵³ This is not intended as a complete or textually definitive statement on Canadian and American approaches to judicial review of their respective constitutions. Other sections of the constitution may be interpreted to invite a contrary conclusion. For a more comprehensive analysis and guarded view of the scope of judicial review generally, see B. Strayer, *The Canadian Constitution and the Courts* (2d ed. 1983). However, it would be unfortunate if Canadian courts adopted a technical, legalistic approach in a case where a more probing purposive analysis would be more representative of the spirit of the *Charter*. For example, the rather unusual possibility of legislative review of judicial action under s. 33 may be construed as a limitation on judicial prerogative under the *Charter*. Under a more probing analysis, however, the focus would not be on the implications for judicial review drawn from the mere recognition of the textual existence of this section in the *Charter* but on a constitutionally purposive approach based on the use or non-use of this legislative power in particular instances. Under this more dynamic view, the decision by the legislature not to invoke s. 33 would be seen as grounds justifying much more vigorous judicial review.

principles of legislative restraint from the reservoirs of their own jurisprudence, Canadian courts need only look to section 1 of the *Charter* for express constitutional authorization to impose principles of legislative restraint. In difficult areas other than commercial speech, such as the jurisprudential quagmire of those obscenity cases where the various forms of expression at issue have no socially redeeming purposes, political or otherwise, Canadian courts, both before and after the adoption of the *Charter*, have not recoiled from exercising their “watch-dog” jurisdiction.⁵⁴ This is not to deny the very real and peculiar difficulties in evolving judicially manageable principles in an area as complex and multi-faceted as commercial speech.⁵⁵ But all starts are difficult. Recognition of commercial speech, even in American jurisprudence, is still very much in its infancy.⁵⁶ Testing of the waters, by sometimes frivolous, sometimes highly political claims to protection, is to be expected. Once sufficient precedent has been accumulated, the elements of certainty and predictability now lacking in the caselaw will begin to appear. In the context of a *prima facie* recognition, this is likely to be even more true. The question is not so much a practical one of whether the decisions *can* become more certain, predictable and conceptually coherent — they undoubtedly can — but a normative one of whether such judicially manageable principles *should* be evolved.

VI. CONCLUSION

There are four persuasive reasons to support *prima facie* constitutional recognition of commercial speech under subsection (b) of the *Charter*. Constitutional recognition would: eliminate the kind of judicial inconsistency that affords constitutional protection to the right to socialize, to pray and even to view some X-rated films but that refuses to recognize a *prima facie* right to honestly and peacefully pursue a livelihood free from state repression; recognize the ultimate systemic needs of a democratic polity in the Western mould; recognize the systemically cleansing and “watch-dog” role of a post-*Charter* judiciary no longer bound to

⁵⁴ Thus, in *R. v. Dominion News & Gifts (1962) Ltd.*, [1964] S.C.R. 251, 42 C.R. 209, where the accused admitted that the impugned magazines “Escapade” and “Dude” dealt solely in the exploitation of sex and had no literary, political, social or artistic purpose whatever, the Supreme Court of Canada, accepting the rather open-ended judicially developed community standards test applied by the Court below, held that this characterization alone was insufficient to cause the Court to uphold suppression of the materials.

⁵⁵ As the Court in *Re Klein* observed, in referring to the plethora of American cases reviewing various regulatory schemes: “Since the nature of such schemes depends on the nature of the product or service or industry to be regulated, the purpose of the regulation, and the parties involved, each scheme has had to be the subject of judicial scrutiny.” *Supra* note 1 at 167, 16 D.L.R. (4th) at 538.

⁵⁶ “[Commercial speech] did not claim constitutional protection until *Bigelow v. Virginia* . . . and then the *Virginia Citizens* case in 1976”. *Id.* at 163, 16 D.L.R. (4th) at 539.

“slavishly” defer to the will of an electoral majority; redress the lack of an express constitutional recognition of *any* private economic interest in the *Charter*⁵⁷ to provide additional protection of individual and minority rights in an era of large-scale state intervention in the economy.

⁵⁷ It can, of course, be argued that this was precisely the intention of the drafters of the *Charter* who, after much publicized debate on the matter, decided to exclude any reference to economic interests. By the same token, the founding fathers of the American Constitution would probably be amazed at what judicial interpretation has found in the “penumbre” of their Constitution and the powers the court has arrogated to itself. *See, e.g., Roe v. Wade*, 93 S. Ct. 705 (1973) (privacy); *Reynolds v. Syms*, 84 S. Ct. 1362 (1964) (reapportionment); *Brown v. Board of Education*, 75 S. Ct. 753 (1955) (busing). This is not to say that the proper role of a court, even one charged with interpreting an entrenched bill of rights, is to legislate. As a general rule, where the constitutional intention is clear, the process of constitutional amendment, not the judiciary, should be looked to for necessary change. The Canadian situation, however, is rather unique, differing from the more grass-roots impetus which gave a politically “purer” birth to the United States Constitution. The *Constitution Act, 1982, enacted by the Canada Act, 1982*, U.K. 1982, c. 11, is not merely the old constitution with some new provisions. It is a fundamentally different constitution, radically altering the traditional Canadian way of doing things. Unlike the American Constitution, the *Constitution Act, 1982* was superimposed upon an already highly developed political system, under the prodding, pleading and threats of a particular political party. Indeed, one of the original founders of the Canadian Confederation 1867, the province of Quebec, does not to this day recognize the new Constitution. *See* D. Greschner & E. Colvin, *supra* note 53 at 9-10. Certain protections for private property interests, such as compensation for expropriation, have long been recognized in Canadian jurisprudence, the silence of the *Charter* notwithstanding. While the argument for a more politically selective interpretation may, therefore, seem more political than legal and somewhat perverse by the standards of traditional constitutional thinking, the Canadian situation *is* unique and does warrant equally unique thinking. Indeed, it is arguably more perverse to interpret the *Charter* as guaranteeing a democratic polity, while at the same time denying the existence of private property interests in that polity.

