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Cover:
Pillars over the main entrance to Osgoode Hall

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Freedom of Expression in Canada: "Ifs, Buts & Whereases"

Edward L. Greenspan*

The day I was invited to speak to you on freedom of expression happened to be the day that American actor Michael Moriarty, the former star of T.V.'s "Law and Order", said he was upset with the United States government's interference in free expression, said he couldn't live in the United States anymore, said he was bidding adieu to the United States and said he was moving to Canada.

Well, if Mr. Moriarty decided to come to Canada because Canada is a kinder, gentler country, then he is coming to the right place. If he is coming to Canada because he wants to live in the United Nation's top 1995 pick as the best place in the world to live, he is coming to the right place. If he has an inexplicable urge to pay much higher taxes, he is definitely coming to the right place. If he wants much less crime, much more space, cleaner air and cleaner cities, he is coming to the right place. If he wants much better whiskey, better beer, Cuban cigars, a much better view of Niagara Falls, he is coming to the right place. But to rationalize coming to Canada because Canadians have more freedom of expression than the Americans is ludicrous. Mr. Moriarty is coming to the right place for absolutely the wrong reason.

In days gone by, there would have been a natural inclination to ignore any political statement by an actor, but recent history in the United States suggests it would be foolhardy to ignore anything any actor said because it might some day represent government policy. Given my fondness for the show "Law and Order" and given my concern that others might believe Moriarty has found a freedom of expression Shangri-la, I must take this opportunity to say to Mr. Moriarty: Go home! The only place left on earth where freedom of

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expression still means something truly significant is in the United States of America. And anyone who believes Canada to be a shining illustration of true freedom of expression genuinely doesn't know what he or she is talking about and doesn't understand Canada.

Let me tell you something about Canada. Anyone who writes about Canada invariably suggests that Canada has a national character that is defined by its history. It is a history that discloses at least four facts:

1. An utter absence of revolution;
2. An utter absence of defiance of its former colonial master. Canada was never an errant child to Mother England;
3. A chronic, longstanding and debilitating fear of being unable to withstand the economic and cultural forces of the United States, originally because of vulnerability to a hostile takeover and now vulnerability to a peaceful takeover or absorption by the United States. This fear has given birth in Canada to a stubborn resistance to many things American;
4. Those loyal to England (monarchists) favoured a very strong central state at the time of Confederation in 1867. This is the reason the historian William Stahl stated that "It is clear why the Fathers of Confederation spoke of 'peace, order and good government' rather than 'life, liberty and the pursuit of happiness'." A monarchy requires subordination of the individual to the community.

Canada was a colony of France until 1759 and a colony of England until 1867. Because Canadians believe in the notion, twice bitten, thrice shy, Canadians stubbornly resist any further colonization. Canadians exhibit a nationalistic schizophrenia. Canadians claim independence, yet clung as much as possible to a colonial past. Thus, Canadians instinctively reject American ideals and principles. And every instinctive rejection of an American philosophy is a further comforting reinforcement of our separate and distinct voice in North America. We are obsessed with not being crushed by the twitchings of the giant to the South. We are obsessed with demonstrating our independence from the United States. We are obsessed with attempting to create our own culture. Yet we spend most of our time attempting to protect our own culture from American domination.

One of the greatest differences between our two countries is our constitutional histories. America has had due process guarantees since 1791. Canada has had a parliamentary system that provided no specific safeguards to liberty. This is the nature of a parliamentary system. Until 1982, Canada had no Constitutional Bill of Rights. We never looked at notions of free speech from a perspective of freedom of expression. There was hardly any discussion in Canadian courts about the value of

free speech. We had the British North America Act. It was the Canadian Constitution but it dealt with divisions of powers between the federal government and the provinces. In other words, matters of jurisdiction only. For example, when our courts dealt with censoring movies the only question for consideration was whether it was a provincial or a federal power, not whether a censor board infringed some notion of freedom of expression. These rights are just not guaranteed in a parliamentary supremacy system. Instead of "life, liberty and the pursuit of happiness", we talked about "peace, order and good government." And so we have never been as open and as protective of freedom of expression as the United States. Our emphasis was on order, not liberty. Canadians have always been deferential to authority. Our whole Constitutional process did not permit a guarantee of liberty because only a Bill of Rights can do that. Government had the right to do whatever it wanted, subject only to the question of whether it had the jurisdiction under the Constitution, and the power derived from the ballot box. And so Canadians believed, due to the political structure and as a result of the limited areas of debate left open by the absence of constitutional entrenchment on the question of freedoms, that government was not to be feared and that it was an instrument for advancing the general welfare. Canadians receive direction, not give it. We tend to be governed. Our history and our culture are based on a bedrock of paternalism. With all of that, in 1982 we became a country with a Charter of Rights and Freedoms. And rather than simply adopting the American Bill of Rights, which would have been the best course of action in my view, Canada showed the United States that we are truly independent. We showed you that we are unique. We created our own distinctive Canadian catalogue of rights. As Seymour Lipset rightly states, "Canadians have tended to define themselves not in terms of their own national history and traditions, but by reference to what they are not: Americans." And so we showed you! We showed you our own version of a Declaration of Rights — our own Declaration of Independence (from you).

A Bill of Rights, or as we in Canada call it, a Charter of Rights and Freedoms, is meant among other things to be a symbol and an expression of basic social values, the attainment of the highest of ideals. Or so I thought. When Americans look at the Bill of Rights, the first words they read, the first words they see in the First Amendment tells them about the very nature of their society. It states: "Congress shall make *no* law...abridging the freedom of speech or of the press." It declares loudly and clearly that there is something very special about speech, very special indeed. It declares that speech is very beneficial to a

democracy. By the clear reverence given by pride of place, it declares to the reader of the Bill of Rights that in this magnificent document of rights there is going to be a lot of difficulty in encroaching on free speech because free speech and freedom of press are the most precious of rights. It declares to the world that free speech is the ultimate safeguard against tyranny, the deadliest enemy of tyranny, the sacred ideal, the cornerstone of democracy that allows all ideas to be heard so that people may freely choose the course of action they wish to pursue.

Now let us look at the Canadian Charter of Rights. Our First Amendment — we call it Section 1 (right away you know this document isn't going to be so lofty) — our Section 1, our first words that set the tone for all Canadians to rejoice in our essential freedoms, the words we first read coming out of the starting gate are like a warning on a pack of cigarettes—Beware! These nice looking sticks kill! It says "People of Canada! Don't get overly excited at what you are about to read. We know this is our Charter of Rights. Soon you will inhale a pack of rights that include freedom of expression, freedom of press, right to a jury trial, the right to fundamental justice (we couldn't even bring ourselves to call it due process). But before you get too excited, we want you to know that all of the so-called guaranteed rights you are about to read are subject to reasonable limits that may be imposed by the government upon you in a free and democratic society." So in Canada the first right is the right to be restrained by government. The First Amendment is a declaration of restrictions, not of rights. I call it the disappointment clause, the "Big Brother Knows Best" clause — the clause that should have stopped Michael Moriarty from packing. We are told in Canada that the balancing of interests of rights are more important than the rights themselves. Section 1 will give any freedom-loving person a migraine headache immediately after reading it. But Section 33 of the Canadian Charter of Rights and Freedoms will cause violent, irreversible illness in a freedom-loving person because it is an opting out clause. It declares that any provincial government or the federal government can opt out of all of these wonderful rights by passing legislation that specifically provides that: Notwithstanding the Canadian Charter of Rights and Freedoms... , for example, the press cannot report on any criminal trial.

In Canada today, if you are interested in the protection of individual freedom of expression, you must first establish an infringement of that right. Then the onus shifts to the person who seeks to sustain the limitation of a freedom or right. This definitional approach to the Charter of Rights and Freedoms in Canada gravitates towards communal rights over individual rights. Some would have us believe that

Canada has historically been a consensus society accepting accommodation and compromise as more conducive to the general welfare than individualism and its accompanying liberties. Since we never had a Charter of Rights, we never had a notion of individual liberties. Parliamentary supremacy needs very much to control the processes of society and to control the processes by a notion of collectivism. And when history gave us an opportunity to remove the shackles of parliamentary supremacy, we could not escape our own history and we created Section 1 and Section 33. And so we injected into a Constitutional bill of rights our notion that an individual's rights and liberties depend enormously upon the existence of limits and occupies a distant second seat to collective aspirations. We never could have had a Hugo Black (a free speech absolutist) under parliamentary supremacy and now under our Constitutional Charter of Rights and Freedoms we have made it impossible for a Hugo Black to ever exist, or to ever emerge. In 1952, Mr. Justice Black voted in dissent to strike down a states' "group libel" law. Black stated that the First Amendment "absolutely forbids such laws without any 'ifs' or 'buts' or 'whereases'." Free speech in Canada begins with "ifs", "buts" and "whereases".

Moriarty asked, in a recent magazine article that he apparently wrote while sitting at a Canadian café, how could Janet Reno and Robert Dole blame violent drama for real life violence. He asked rhetorically "Did Al Capone really learn everything he knew from George Raft?" Of course, Moriarty is right. The social science evidence on the causes of violence from films and books is simply non-existent, or at best ambiguous. I too doubt the capacity of books, films or paintings to influence people, either for good or for evil. Though books, films and paintings do influence people both morally and intellectually, their influence is so indirect and round about, so independent of the artist's aims and methods, and is so much filtered through every individual recipient's own consciousness, that its course cannot be charted or predicted. Bad books can have a good influence on some people, good books can have an evil one. Can literary works trigger some individuals to commit unspeakably horrible acts? They certainly can. In 1956, Stephen Nash murdered and gruesomely mutilated several children in California. In 1970, John Frazier massacred the entire family of a Santa Cruz ophthalmologist. In the early 1940's on the Belcher Islands, nine Inuit adults and children were killed by another group of Inuits. Not so long ago, in my home province of Ontario, a man and his wife allegedly baked their own little daughter in an oven. Each of these killings was inspired by a book. In the case of Stephen Nash, it was Tolstoy's War and Peace. In the case of John Frazier, it was environmental literature.

(In a handwritten note placed on the windshield of the murdered doctor's car, Frazier proposed death of everyone who "misuses the natural environment" or "does not support natural life on this planet.") The Belcher Island and Ontario murders found their sources of inspiration in the Bible.

It would be child's play to collect hundreds of examples of literary and philosophical works that served as inspiration for murder. Interestingly, it would be far more difficult to come up with examples of worthless pornographic junk serving as direct triggers for criminal acts. More difficult, but probably not impossible: very likely anything, including a pop album, as in the case of Charles Manson, is capable of inducing horrendous impulses in some twisted minds.

Such examples should humble both intellectuals and censors. So I think Mr. Moriarty is correct to be a little annoyed with Ms. Reno and Mr. Dole. Yet, his decision to come to Canada for this reason makes no sense at all. The entire Supreme Court of Canada has agreed with Ms. Reno and Mr. Dole in the Butler judgment which confirmed obscenity as a crime in Canada.

I have always been impressed by Gershon Legman's observation that "Murder is a crime. Describing murder is not. Sex is not a crime. Describing sex is." But what impresses me is of little importance. What impresses the censor is. The justification of the censor matters. And the rationale for obscenity laws had now changed in Canada from simple public prudishness to the notion that pornography harms women. Obscenity no longer just harms public morality. Without any empirical data, the justification for obscenity laws overnight became a need to protect women against violence. The censor's thesis in Canada now is that verbal or pictorial representations of sadomasochism promotes such violence. Mr. Justice Sopinka said "We cannot ignore the threat to equality (between male and female) resulting from...types of violent and degrading material. Materials portraying women as a class of objects for sexual exploitation and abuse have a negative impact on the individual's sense of self-worth and acceptance. Material which may be said to exploit sex, placing women in positions of subordination, servile submission or humiliation necessarily fails the community standards test not because it offends against morals but because it is perceived to be harmful to society, particularly to women." He concluded the objective of obscenity laws is not moral disapprobation but the avoidance of harm to society. He went on "The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to

make degradation, humiliation, victimization and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles."

Catharine MacKinnon, who happened to teach law at Osgoode Hall Law School in Toronto for a brief time, helped to write the brief in the Butler case that was filed by the Women's Legal Education and Action Fund. Although she has been unable to persuade any court in the United States to accept her heretical nonsense, her Janet Reno-Robert Dole nonsense, our Supreme Court in 1992 recognized, accepted and embraced her thinking.

So go home Mr. Moriarty. The Janet Renos and Bob Doles of this world will come and go, but we in Canada are very unlikely to unshackle ourselves from the tragedy of the Butler case as clearly enunciated by the Supreme Court of Canada.

Hate speech is protected by the First Amendment. Throughout American history the First Amendment guarantees freedom for cherished thoughts and hated ideas. Very hurtful words can be said without fear of criminal prosecution and punishment. Any and all ideas may be heard. Free speech means that the government shall not prescribe what people can say in politics, religion, nationalism or other matters of opinion.

By now you should have guessed that hate speech criminal laws flourish in Canada. The Canadian Criminal Code (we have one Code for the entire country) prohibits statements that wilfully promote hatred against groups distinguished by colour, race, religion or ethnic origin. The Canadian Charter of Rights and Freedoms did nothing to change our hate speech laws.

The psychological damage, the social damage, the overriding values of equality and multiculturalism make it unprotected speech by Section 1, according to the highest court in the land.

In fact, criminal laws relating to hate speech existed in Canada long before it became a major issue. Is it because Canadians don't have the same tradition of individual rights as the United States? Yes. In protecting hate speech the United States is unique. In your present debate those who want hate speech laws in America constantly refer to Canada. It is because the United States is unique that you cannot look to Canada. In the area of freedom of expression you are without doubt the land of the free. You always have been. The entire world looks to the United States as the ultimate nation of freedom and you are. Anyone who has known

oppression wants to come to the United States. And for good reason. Please stay that way.

Several questions have emerged in this recent debate. Can hate laws be enforced fairly and not ultimately used against the very people they were designed to protect? Is it possible to draft hate speech legislation that does not ultimately threaten the expression of controversial but important ideas?

Let me tell you about the Canadian experience. Our laws were enacted in response to a committee report in the '60's that documented hate literature directed at Jews, Catholics, Blacks and immigrant groups. The hate propaganda provisions have seldom been used.

In the mid-70's charges were laid against a group of students who were carrying signs that said "Yankee go home" in protest of a Shriner's convention. These charges were ultimately withdrawn after the students had spent some time in jail when the Attorney General refused to consent to the prosecution.

A conviction was recorded in the case of Robert Buzzanga and Jean Wildred Durocher - two ardent French Canadian patriots deeply distressed over the repeated failure of the Essex County School Board to build a French language high school. Strong opposition to the school emanated from a group of narrow-minded but highly vocal ratepayers whose letters were published in the Windsor Star newspaper. (Windsor is where Detroit gambles.) The letters were scurrilous and perhaps even defamatory of the French-speaking minority in Essex County and the French-speaking population of Quebec. Were these people prosecuted — certainly not. Incredibly, Durocher and Buzzanga were prosecuted after they published a satirical pamphlet filled with anti-French propaganda in an attempt to force the issue and dramatize the situation. So they, two proud members of the French-speaking minority, were charged with promoting hatred against an identifiable group - and the identifiable group, the French-speaking minority in Essex County.

When the Ontario Court of Appeal overturned the conviction because the judge had not properly considered that the promotion of hatred must be "wilful" the response of the various pressure groups was that that requirement should be removed and that the need for the Attorney General's consent to prosecute should be removed - For what? - in order that Buzzanga and Durocher could have been convicted or that the anti-American students could have spent more time in jail? The Canadian experience should demonstrate the grave potential for abuse.

Harvard's Henry Louis Gates Jr., in his essay "Critical Race Theory and the First Amendment" points out that if the United States adopted "an historically oppressed provision in a hate speech law" that he

suspects "it would just be a matter of time before a group of black women in Chicago are arraigned for calling a policeman a 'dumb Polack'. Evidence that Poles are an historically oppressed group in Chicago will be in plentiful supply; the policeman's grandmother will offer poignant testimony to that." He is right. Look to Canada and learn from us that hate speech laws can and will be subverted in unconscionable ways. But it is not for me to suggest anything to you at all - that is a matter entirely for you. I am here merely to place Canada in a context that might assist those who may wish to make reference to the Canadian model during the hate speech, harassing speech debate.

Not too long ago a member of Canada's Parliament, Pierrette Venne called for the criminal prosecution of Mordechai Richler for publishing a book that "invited hatred against Quebec for calling Quebec's history 'anti-semitic'." It may be trite to say that one cannot call for a criminal prosecution in the absence of a criminal statute.

Oliver Wendell Holmes said it is better to allow those who preach racial hate to expend their venom in rhetoric rather than to be panicked into embarking on the dangerous course of allowing the government to decide what its citizens must say and hear. Canada has proved that Holmes was right.

In Moriarty's newly-adopted home, someone recently carried a placard intended to bring attention to what the protester called the "Star Chamber" trials of several accused in a notorious child abuse case in the Province of Saskatchewan. Among the protester's complaints were allegations against an investigating officer and a social worker. These complaints were found to be a "cruel and outrageous" criminal libel. The judge concluded that the protester's comments were knowingly false. The protester got two years in jail. The judge warned the press not to broadcast or publish details and ordered that the reasons for the sentence and the basis of the libel could not be reported. The protester's spouse joined him in his reckless and foolhardy endeavour. She, too, was found guilty and she got 22 months in jail.

To provoke reaction, possibly to cause a public inquiry into police conduct in the foster children's case, the protesters lost their liberty. It is a crime in Canada to speak or publish a defamatory libel, that is, words that are likely to injure someone's reputation by exposing that person to hatred, contempt, ridicule or insult. A defamatory libel may be expressed directly or by insinuation or irony (Art Buchwald would be a criminal recidivist in Canada). If you know the defamatory libel is false (Section 300) it's up to a maximum of five years in jail. If you don't know it is false or it is true (Section 301) it is up to a maximum of two years in jail in Canada. And a newspaper proprietor is deemed to publish defamatory matter unless he or she proves the defamatory matter was inserted in the newspaper without his knowledge and without negligence in his or her part.

A blasphemous libel (Section 296) will get you a maximum of two years in jail in Canada. Although, in fairness, it is a defence if one expresses the blasphemous libel in good faith and in decent language or if one attempts to establish by argument used in good faith and conveyed in decent language an opinion upon a religious subject.

And in the land of Anne Murray, Neil Young, Bryan Adams and Celine Dion it is a criminal offence to cause a disturbance in or near a public place by singing (Section 175). You can go to jail for a maximum of six months. That is probably why it was so quiet where Mr. Moriarty was sitting at his Canadian café writing his article.

Either Mr. Moriarty was badly informed when he came to Canada or, more likely, he hasn't necessarily disclosed his true purpose for leaving the United States. I have no doubt that by now our Ambassador is seriously wondering why he invited me. I should say I would never be so foolish to utter these remarks in Canada. It's something about the molecules in the air in Washington. I have only one further area to cover, Mr. Ambassador.

Like in the United States, stupidity is a basic human right in Canada. But unlike the United States, which has a Bill of Rights to counter-act governmental stupidity, Canada has Section 1. In the United States, Federal Courts have declared unconstitutional codes of student conduct that punish offensive speech based on race, religion, gender and other characteristics. The new fad of punishing speech that denigrates, insults, vilifies or causes emotional distress blurring the line between speech and action has caught on in Canada with a vengeance. All our universities are inundated with sexual harassment officers, race relations officers, male alternate sexual harassment officers, ombudspersons, directors of equity services, commissioners for gay, lesbian and bisexual issues, students with disability commissioners. At least in the United States you get the chance to strike these codes down. In Canada, there is no fear of that. Recently, the president of the University of British Columbia hired a lawyer, one Joan McEwan to write a report on whether there was sexism and racism in the graduate political science faculty. She gladly wrote a 174 page report. She gladly sent a bill for $237,897.68 (true, it is only Canadian money). She gladly stated her verdict that there was a genuine basis for allegations of pervasive sexism and racism in the graduate political science faculty. The president gladly paid the bill, gladly accepted the drivel in the report, and gladly suspended admissions to the graduate program in the political science department until it becomes harassment and discrimi-

natory-free. There was no attempt in the report to identify any single case. There was no attempt to verify the allegations. One story was that "a white male professor told a white female student that 'even an undergraduate would understand this'." - Guilty of sexism. Another white male professor discounted the Marxist perspective of certain students - Guilty of racism and sexism. Another white professor discounted the 'anti-multinational corporate investment/free trade perspective' of a Jewish female MA student - Guilty of racism and sexism. For these reasons, an entire department was found guilty of intolerance towards non-mainstream perspectives, the silencing of women and people of colour in the classroom. The reputations of the professors in the department have been ruined without any particularized charges, without any trials, without any findings by tribunals, without due process or fundamental fairness.

Now, there is a cry for the professors to issue an apology, take mandatory re-education courses where they would explore their reluctance to lose the power and prestige which they have cultivated so long as their natural right. The United States will always have the First Amendment to put the brakes on this nonsense. We have nothing in Canada to stop this.

Last Thursday, the Supreme Court of Canada, in a 5 - 4 judgment, struck down certain provisions of the Tobacco Products Control Act that banned or put limits on tobacco advertising (like unattributed health warnings) saying lifestyle advertising or ads aimed at children may be unconstitutional. They decided that although all laws prohibiting Canadians from smoking anywhere in or out of Canada are constitutional, nevertheless it is unconstitutional to deny these same Canadians the opportunity to read advertisements about a product they can't smoke. Some people believe that this was merely a judicial attempt at kick-starting an otherwise sluggish economy. I believe the Supreme Court of Canada got a hold of my speech last Wednesday and came out with this judgement in a feeble attempt to sabotage my speech and embarrass me. Mark my words, this judgment will *not* impact on any other area of public policy and will be regarded in years to come as an aberration in smoke-free but not advertisement free Canada.

Mark Twain said "It is by the goodness of God that in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience and the prudence never to practice either of them." Americans can smile at this observation because they would recognize it as a clever, flippant comment. If the observation were applied to Canada, Canadians would recognize this statement as a truism and wonder why everyone thought Mark Twain was a humorist.

Dr. Johnson's Clubs

Ian A. Hunter*

For three centuries the literary club, where members regularly foregather to discuss books and ideas, has been a discriminating, albeit minority, taste. Today with books being supplanted by C.D. Roms, and thoughtful conversation drowned by the vacuous cyber-babble of the Internet, perhaps the literary club is a brontosaurus about to topple over into extinction. If so, let us raise a glass to its passing, and remember its origins.

In the winter of 1749 Samuel Johnson — years away from being "Dr." Johnson, the legendary John Bull character that James Boswell would immortalize — was an impecunious Grub Street hack, in his own words "a harmless drudge" toiling in obscurity on the first comprehensive dictionary of the English language. Intensely lonely, Johnson craved convivial company and good talk. He took to meeting his friend, John Hawkins, a solicitor who was to become Johnson's first biographer, every Tuesday evening at the King's Head, Paternoster Row, a tavern near St. Paul's. Other acquaintances turned up regularly and thus was born the Ivy Lane Club. When membership was formalized, it was restricted to nine; more than ten meant separate conversations occurring simultaneously and this, Johnson held, defeated the purpose of a club.

None of the original members of the Ivy Lane Club was noteworthy; indeed none would be remembered today but for their Tuesday association with Johnson. A bookseller, a merchant, a journalist, a vicar and theologian of sorts, three physicians, Johnson and Hawkins. Of one of the physicians, Richard Bathurst, Johnson told Hester Thrale many years later that he "... loved him better than ever I loved any human character", adding "... dear Bathurst ... was a man to my very heart's content: he hated a fool, and he hated a rogue, and he hated a *whig*; he was a very good *hater*".

Meetings began with supper, including wine, and the talk usually continued until midnight. The cost of the evening was divided equally among those attending. When John Hawkins objected to paying his

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