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# When Freedoms Collide: A Case for our Civil Liberties

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WHEN FREEDOMS COLLIDE: A CASE FOR OUR CIVIL LIBERTIES.  
By A. Alan Borovoy. Toronto, Canada: Lester & Orpen  
Dennys Publishers, 1988, Pp. 409. U.S. and Canada \$27.95.

Reviewed by Anne Jayne\*

For Canadians who watch the news on television, the face of A. Alan Borovoy is a familiar one. As the General Counsel of the Canadian Civil Liberties Association, he has spoken publicly on virtually every civil liberties issue that has attracted media attention in Canada. Whether the issue is pornography,<sup>1</sup> the enactment of new emergency powers legislation to replace the War Measures Act,<sup>2</sup> or the actions of police in raiding gay bathhouses,<sup>3</sup> Alan Borovoy can be seen on the nightly news or quoted in the morning papers, giving the position of the Canadian Civil Liberties Association on the issue. He acknowledges that he has felt frustrated by limitations imposed by the "twelve-second television clip" and he seeks, in *When Freedoms Collide: The Case for Our Civil Liberties*, to give the reader an understanding not only of his

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1. A. BOROVY, *WHEN FREEDOMS COLLIDE: A CASE FOR OUR CIVIL LIBERTIES* 255 (1988) [hereinafter *WHEN FREEDOMS COLLIDE*]. The Supreme Court of Canada struck down the Criminal Code provisions on abortion in 1988. See *R. v. Morgentaler, Soling and Scott* 1 S.C.R. 30 (1988). The federal government has indicated that it intends to introduce new legislation on abortion in the fall of 1989. Borovoy argues that the discussion of "when life begins" is not relevant. *WHEN FREEDOMS COLLIDE, supra*, at 255. The law does not require a person to give to another, even to his or her child, an organ, bone marrow, or blood. He concludes that, "[w]hatever rights fetuses should have, they do not include commandeering the power of the state to keep them in the bodies of their non-consenting mothers." *Id.* at 258.

2. 12 Measures Act, CAN. REV. STAT. ch. W-2 (1970), *repealed by* The Emergencies Act, CAN. REV. STAT. ch. 29 (1985). The War Measures Act was invoked in peacetime on October 16, 1970 in response to the FLQ crisis in Quebec. See *Public Order Regulations*, 1980, SOR/70-444, October 16, 1970.

3. *WHEN FREEDOMS COLLIDE, supra* note 1, at 115-17. The notes at the end of the volume indicate that "[r]eports of the simultaneous raids of four downtown Toronto steambaths on the night of February 5, 1981, will be found in 'Police arrest hundreds in steambaths,' Toronto Star, February 6, 1981, p.1. As a result of the raids, more than three hundred men were arrested as 'found-ins' and fewer than twenty-five were charged with keeping a bawdy house." *Id.* at 351 note.

view on a wide range of issues, but more importantly an understanding of the approach he takes in analyzing civil liberties issues. With this book, he hopes to have a more lasting impact on the way some readers, at least, think about civil liberties. Moreover, Borovoy, as a social activist, aims to have an effect not only on the way people think, but also on the way they act in working to promote civil liberties.

Borovoy begins with a discussion of his philosophical approach and returns to this theme from time to time in the subsequent review of specific issues.<sup>4</sup> While some readers will disagree with his philosophy or with his views on individual issues, Borovoy is to be commended for his efforts to make clear to the reader his own value preferences.

First and foremost, Alan Borovoy's foundation is his commitment to the democratic process. He acknowledges that democratic government may fall short of perfection.<sup>5</sup> The people do not always vote wisely. Democratically elected governments may take action that causes harm to individuals or to minority groups. Still, so long as the fundamentals of democracy are in place, including freedom of expression, speech, assembly, and the press, those who are aggrieved have a chance to bring about change by expressing their views and urging others to use the secret ballot to vote out of office those who have caused offense, and to elect others who might do better.

Borovoy does not approach the analysis of civil liberties issues with a single formula. He takes the view that these issues must be dealt with on a case-by-case basis, seeking the solution that represents the best available alternative, or perhaps, the least unpalatable alternative. Often, there is a conflict and a collision between two values. Civil liberties issues seldom represent a struggle between good and evil. Instead, Borovoy says, "we must face conflicts between good

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4. *Id.* at 3-13.

5. *Id.* at 19.

and good, right and right, bad and bad."<sup>6</sup> In this book, Borovoy examines a series of these collisions between values. We value both social harmony and freedom of expression: ought we to prohibit pornography or the expression of hatred against racial and religious groups? We value national security and personal privacy. However, does this merit the tapping of telephones or the opening of mail by the government?

This kind of collision between values is demonstrated in the present debate in Canada over the hate propaganda and false news sections of the Criminal Code. The Criminal Code prohibits the distribution of hate propaganda, which includes advocacy of genocide and incitement of hatred against any identifiable group in certain circumstances.<sup>7</sup> It also prohibits the dissemination of "false news"; it is illegal to publish a statement that one knows is false and that causes or is likely to cause injury or mischief to a public interest.<sup>8</sup> In recent years, one man was charged in Ontario under the false news sections for distributing publications claiming that the Holocaust never occurred.<sup>9</sup> Another man was charged in Alberta under the hate propaganda section for teaching the students in his high school science class that there was a worldwide Jewish conspiracy.<sup>10</sup> Many Canadians support the prohibition of racist expression and believe that it should not be protected by the Charter. Alan Borovoy, however, views such prohibitions as inherently vague, contending that blanket prohibitions may have the effect of suppressing legitimate political speech.

Borovoy notes that since the early 1960's when these

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6. *Id.* at 3.

7. Canadian Criminal Code, CAN. REV. STAT. §§ 318-320 (1985).

8. *Id.* § 181 (1985).

9. *R. v. Zundel*, [1987] 56 C.R.(3d) 1, 58 O.R.(2d) 129 (Ont. C.A.) (Retrial ordered). Zundel was convicted a second time. An appeal is pending.

10. *R. v. Keegstra*, [1984] 19 C.C.C.(3d) 254 (Alta. Q.B.). The conviction was overturned on appeal, as the Court of Appeal concluded that the hate propaganda section of the Criminal Code violated the freedom of expression under the Charter of Rights and Freedoms. *R. v. Keegstra*, [1988] 43 C.C.C.(3d) 150, 65 C.R.(3d) 289. Appeal to the Supreme Court of Canada is pending.

Criminal Code provisions were adopted, there have rarely been prosecutions against genuinely racist individuals.<sup>11</sup> For example, some young people were charged after they distributed leaflets with the words "Yankee Go Home" at a Toronto parade; the charges were later dropped.<sup>12</sup> Two French Canadians were prosecuted for distributing anti-French literature which they had distributed in an effort to generate a pro-French reaction during a local dispute over the funding of French language education. Their convictions were subsequently reversed on appeal.<sup>13</sup> In addition, investigations have been launched through police or custom officials of such materials as Leon Uris' novel, *The Haj*, a film on Nelson Mandela, and the film *Red Dawn*.<sup>14</sup> These actions indicate the wide sweep that such laws encourage.

Undoubtedly there was widespread support in Canada for the two recent prosecutions under these sections of the Criminal Code as a way of discouraging the dissemination of anti-semitic material. However, like many other Canadians, Borovoy expressed concern about the platform that was given to these individuals. Before the trials, both defendants were obscure. During and after the trial, national publicity followed. It is not so much that these two individuals attracted followers to their cause; as Borovoy notes, Canadians are relatively resistant to the message of hate-mongers.<sup>15</sup> Rather, he says, the trials themselves, with accompanying media attention, constituted an affront to dignity and common

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11. WHEN FREEDOMS COLLIDE, *supra* note 1, at 42.

12. *Id.* As a note at the end of the volume states, "[f]or more on the 'Yankee Go Home' incident, see 'Hate literature charges against 3 to be dropped', *Globe and Mail*, July 4, 1975, p.1, and its editorial 'A law full of dangers,' July 2, 1975, p.6." *Id.* at 324 note.

13. *R. v. Buzzonga and Durocher*, [1979] 49 C.C.C.(2d) 369 (Ont. C.A.).

14. WHEN FREEDOMS COLLIDE, *supra* note 1, at 43. As a note at the end of the volume states, "[r]egarding the questionable investigations the anti-hate law has provoked, see 'Library won't ban Leon Uris book that Arab groups have called racist', *Toronto Star*, September 26, 1984, p. A6; 'Mandela film is screened for possible hate content', *Globe and Mail*, December 24, 1986, p. A14; and 'U.S. movie incites hatred lawyer charges', *Sunday [Toronto] Star*, September 2, 1984, p. A17." *Id.* at 324 note.

15. *Id.* at 49.

sense.<sup>16</sup>

For Borovoy, freedom of expression is a value that is entitled to particularly keen solicitude, as it is foundation for the democratic process. Despite the risks to society posed by those who would disseminate hate propaganda, the greater risk is the chilling of legitimate dissent.

Borovoy notes, in his introductory remarks, that he began work on this book in 1980. Two years later, most of the Canadian Charter of Rights and Freedoms took effect.<sup>17</sup> The provisions of the Charter are comparable to those in the Universal Declaration of Human Rights<sup>18</sup> or the United States Bill of Rights,<sup>19</sup> and are indeed similar to the earlier Canadian Bill of Rights. However, while the Canadian Bill of Rights was a legislative enactment, the rights and freedoms secured by the Charter were entrenched in written constitutional law. The Charter is part of the supreme law of Canada, not subject to alteration by the government of the day. The federal and provincial governments must comply with the Charter. For Canadians, this represented a significant departure from parliamentary supremacy.

Many civil libertarians welcomed the Charter with enthusiasm. Alan Borovoy did not. He discussed at some

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16. *Id.* at 48.

17. Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act of 1982, was enacted by Schedule B of the Canada Act 1982 (U.K.), 1982, ch.11, § 155. Section 15 of the Charter, the equality rights section, took effect three years later on April 17, 1985. CONSTITUTION ACT part I, § 15(1)(2). The three-year delay was planned to allow provincial and federal governments to review legislation and make any necessary changes to bring statutory law into compliance with the equality rights section. Section 15 of the Charter of Rights and Freedoms reads:

(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of condition of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

*Id.*

18. G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

19. U.S. CONST. amends. I - X.

length his deep concerns about the entrenchment of the Charter in written constitutional law. He agrees that the action of the majority in restricting the fundamental rights of minorities can undermine the democratic process by preventing the aggrieved minority from attempting to achieve peaceful change.<sup>20</sup> However, constitutional rights do not enforce themselves: that job falls to the judiciary.<sup>21</sup> There is no great harm if courts can overrule the actions of the administrative side of the government, such as the police forces and welfare departments, but it is a different matter if the judges, who are appointed, are in a position to overrule the decisions of elected officials in the legislative branch.<sup>22</sup> Those who serve in the legislature are accountable to the electorate, appointed judges are not.

Those who supported entrenchment of fundamental rights and freedoms argued that the judges, with their secure tenure, would be better able to protect the rights of minorities than those who might fear losing the next election if they champion the rights of the minority. For Borovoy, however, the judges constitute a special elite<sup>23</sup> and in a democracy, he believes it no more justified to confer, on this elite, the power to overrule the legislature, than it would be to give such powers to any other elite, whether feudal aristocracy or revolutionary vanguard.<sup>24</sup> For all its shortcomings, the democratic method of electing representatives who are accountable to the people to govern the nation works better than any other.<sup>25</sup>

Before Canada entrenched these fundamental rights and freedoms into a written constitution, thereby entrusting the judiciary with the job of protecting these rights, it was possible

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20. WHEN FREEDOMS COLLIDE, *supra* note 1, at 200.

21. *Id.* at 201.

22. *Id.*

23. *Id.* at 201-02.

24. *Id.* at 202.

25. *Id.*

to consider how well the judiciary had performed in other countries which have incorporated a bill of rights into a written constitution. He suggests that the experience of the United States is particularly worthy of consideration.<sup>26</sup> However, to Borovoy the record is not impressive.<sup>27</sup> In some instances the United States Supreme Court has acted to protect civil liberties,<sup>28</sup> but there were many occasions on which the Court failed to do so.<sup>29</sup> Even though the decisions in recent years on the civil rights of black people has been relatively positive, those decisions were preceded by many Supreme Court decisions that utterly failed to protect the rights of this minority.<sup>30</sup> Nor has the Court acted during times of emergencies to protect the civil liberties of vulnerable minorities. For example, he notes that the Court declared constitutional the forced relocation of Japanese-Americans during World War II.<sup>31</sup> Additionally, the Court upheld the validity of the Smith Act,<sup>32</sup> which outlawed groups who conspire to overthrow the government.<sup>33</sup>

Even if the Supreme Court has been more progressive in recent years, it is hardly reassuring, as the Court can easily

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26. *Id.* at 203.

27. *Id.* at 203-05.

28. *Id.* at 204. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

29. WHEN FREEDOMS COLLIDE, *supra* note 1, at 204-05. Borovoy discusses the series of cases dealing with regulation of employment, beginning with *Lochner v. New York*, 198 U.S. 45 (1905) (New York statute limiting work week to 60 hours in bakeries); *Adkins v. Children's Hospital of District of Columbia*, 261 U.S. 525 (1923) (minimum wages for female workers); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (Kansas law prohibiting employers from demanding that employees agree not to join unions); *Adair v. United States*, 208 U.S. 161 (1908); *Adams v. Tanner*, 244 U.S. 590 (1917). Eventually, the Supreme Court of the United States began to reverse its position. *West Coast Hotel v. Parris*, 300 U.S. 379 (1937).

30. WHEN FREEDOMS COLLIDE, *supra* note 1, at 204. See *Plessy v. Ferguson*, 163 U.S. 537 (1896) ("separate but equal" transportation systems); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

31. WHEN FREEDOMS COLLIDE, *supra* note 1, at 203. See *Korematsu v. United States*, 323 U.S. 214 (1944).

32. Smith Act, ch. 439, title I, §§ 2, 3, 5, 54 Stat. 670, 671 (1940) (codified as amended at 18 U.S.C. § 2385 (1982)).

33. WHEN FREEDOMS COLLIDE, *supra* note 1, at 203.



change directions in the future.<sup>34</sup> It is not invariably the case that the courts protect the disadvantaged minority against the powerful majority. There have been occasions in the United States when the legislature has attempted to protect those who are vulnerable and the courts have struck down the legislation as being constitutionally invalid.<sup>35</sup>

Despite his opposition to entrenchment of the Charter, however, Borovoy urges readers to attempt to use the Charter for the promotion of civil liberties in Canada.<sup>36</sup> He is concerned that the Charter will be used not only to protect the disadvantaged and secure the rights of oppressed minorities, but will also be used by those with power and influence to advance their own interests.<sup>37</sup> Borovoy is not optimistic that only good things will come from Charter litigation. He has long warned civil liberties activists against concentrating too heavily upon test cases, including Charter challenges, because this approach places the decision-making power in the hands of one of the most conservative elements in Canadian society - the judiciary. He urges readers to continue to press for the protection of civil liberties and human rights through political advocacy as well.<sup>38</sup> Coalition-building and political advocacy are not only cheaper than litigation, but they promote grassroots participation in the political process, rather than shutting out those most concerned about an issue by handing over the case to a few lawyers and a judge.<sup>39</sup>

The best way to ensure protection of civil liberties is through the enactment of legislation specifically addressing particular problems.<sup>40</sup> The courts are more likely to

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34. *Id.* at 206.

35. *Id.* at 204-05.

36. *Id.* at 212.

37. *Id.* at 206-08.

38. *Id.* at 213.

39. Personal communication with Alan Borovoy, General Counsel of the Canadian Civil Liberties Association (November 1987).

40. WHEN FREEDOMS COLLIDE, *supra* note 1, at 212.

implement the will of the legislature when presented with such specific legislation.<sup>41</sup>

For Borovoy, there must be a balance between thought and action. So far as possible, action should be based on thoughtful analysis, but it will often be the case that action must be taken even though the available information is inadequate. He tells the story of an exchange that he heard at a conference between a radical professor and a liberal lawyer. The professor referred disparagingly to the lawyer as a "disjointed incrementalist," as the lawyer approached problems on a "piecemeal" basis instead of developing a broad theoretical base.<sup>42</sup> Borovoy was intrigued by the label "disjointed incrementalist," which he regarded as a rather sensible approach to take in life. In dealing with one problem area at a time, it is possible to seek a solution which is appropriate in the circumstances, considering the costs of the remedy. This "disjointed" method, Borovoy believes, is more apt to take into account the needs of the people who are affected. For those who work on civil liberties and human rights at the grassroots level, he believes that it is important to keep in mind that a remedy which may appear merely "incremental" from a historical perspective may in fact have a profound impact on the lives of the people concerned.<sup>43</sup> Moreover, major social change may be the result of the cumulative effect of many small changes. While Borovoy does not think that "disjointed incrementalism" is the only approach one should take, he is convinced that it may be the best alternative in some circumstances.<sup>44</sup>

This book presents a fine overview of a broad range of contemporary Canadian issues: anti-hate sections in the Criminal Code; pornography; the powers of the new Canadian Security Intelligence Service; the powers of the police; public

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41. *Id.* at 212-13.

42. *Id.* at 310.

43. *Id.* at 311.

44. *Id.*

inquiries and pre-trial publicity; commercial liberty; the administration of the welfare system; involuntary civil commitment; and anti-discrimination legislation. Borovoy extends his concerns beyond domestic civil liberties matters and embarks on the topic of war and peace. Alan Borovoy speaks from the perspective of a civil liberties activist who has spent a considerable amount of time on the barricades during his twenty years of work with the Canadian Civil Liberties Association. This is a valuable and useful book for those who work for justice.