**Unfinished Business: Communication Rights and the Right to Communicate in Canada**

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It is rare for me to speak personally in academic settings, but I think in this case it is fitting to provide some personal context for my brief remarks about this extremely valuable book. I was an advisor to the Law Commission of Canada from 2000-2005. The Law Commission, as many of you will know, was an independent agency at arms-length from government whose mandate was to conduct systematic review and make recommendations for law reform in areas where the law no longer reflected changing social realities in Canada, and so no longer provided for fundamental justice. The Commission had a sophisticated view of justice that leaned heavily in the direction of equality and protection or elevation of the systemically disadvantaged, and an expansive conception of law that understood it in terms of relationships rather than simply legislation or jurisprudence. During my time there, the Commission produced groundbreaking research and reports in areas such as the use of age as trigger or category in law, expanding the scope of close-adult personal relationships supported in law beyond heterosexual conjugality, strengthening legal recognition and protection of precarious and vulnerable workers (including workers in the skin and sex trades); and recognition and support of indigenous legal traditions, to name but a few. As one of the few sources of consistently progressive legal and policy advice at the federal government level, it was no surprise that the Commission was made an early target of the Conservative government of Stephen Harper, and eliminated in 2006.

Shortly before my term at the Law Commission ended, I had the good fortune to move to McGill, where I encountered my new colleague Marc Raboy, who was then heavily involved in research on communication rights and the "right to communicate," things about which I knew either very little, or, as in the case of the latter, nothing at all. For several months, I was treated to lively conversations with Marc about the growing international movement around these ideas, and about the role Canadian scholars, activists and civil society organizations were playing in it. One of the jobs of advisors to the Commission was to bring it ideas for possible areas of study and development. It did not take many conversations with Marc for me to realize that, if ever there was an area in which Canadian law had not kept up with changing social dynamics and was failing to provide for fundamental justice, especially where justice is understood to mean substantial equality and relief of systemic disadvantage, communication rights was it. The Commission had long been interested in doing some work around the emerging media environment, but its preference for understanding law reform in terms of complex networks of relationships, rather than in terms of the revision of particular statutes or institutions in isolation, made it difficult for the commission to conceive an inroad into this domain. The way in which scholars and activists working in this area had begun to conceive of communication rights in terms of the "social cycle of communication" suggested that a focus on communication rights and the right to communicate could provide just such an inroad. After a bit of persuading, the Commission agreed to explore the possibility, and asked if I would help craft a call for research -

- to be administered through the peer-review process of the SSHRC – research that would provide the Commission with material upon which it could decide whether this was an avenue worth exploring.

Fortunately, this call went out, and the funding commitments were made, prior to the Harper government's decision to scuttle the Commission. And so the research was accomplished, published in this book but, unfortunately, the project was still-born, at least in the context of the Commission. I will say more in a moment about "what might have been." But, for now, I just want to express my personal appreciation and gratitude to the authors of this volume for the outstanding work they have done here, especially given how easy it would have been to simply let it go. I would like you to know – and this is high praise indeed – that in my view this is work that honours the tradition of the Law Commission of Canada, work that lives up to the high standards for which it had become known, work that makes a material contribution to the goals to which the Commission and all those who worked for and with it were devoted. And I want to thank you all for that.

This book is so comprehensive, detailed and full of insight – it is, to invoke the book's own framework, both horizontally broad and vertically deep – that there is no way a brief commentary could do it justice. I will, however, try to frame what I see as the overarching challenge of the analysis the book provides us with, a challenge which speaks to what, for me, has been the source of a certain intellectual ambivalence towards the "campaign" for communication rights from the outset, despite my support for its intentions, goals and success. The campaign for communication rights, and for an omnibus right to communicate that might encompass these, is essentially a campaign on behalf of a certain set of *goods* or *outcomes* in relation to the social cycle of communication, goods or outcomes that are presently denied, or unequally distributed, in the political-economic context of contemporary capitalist states and markets, and which are inadequately guaranteed or promoted by existing liberal rights that bear on communication in one way or another. The list of these goods or outcomes is extensive, and would look something like a combination of the list of communication rights presented on page 30 and the constituent elements of the right to communicate presented on page 258.

For the sake of argument, let's concede that these are all outcomes that "we" – vaguely democratic, moderately enlightened, mildly progressive, basically egalitarian, somewhat critical – all agree are desirable. And perhaps let's further concede that capitalist markets and existing legal and regulatory frameworks do not adequately provide for these outcomes, and perhaps even undermine them. And so, attaining these outcomes, or even moving towards them, would require significant economic, legislative and regulatory reform aimed at a redistribution of resources and obligations, reform that would itself demand a broad range of policy commitments that would depart substantially from present norms, especially given the positive and "flanking" character of so many of the rights contemplated here. When communication is defined as a *social cycle* that includes not only speaking but also being heard and understood, learning and responding, seeking information and generating ideas, and when communication rights are defined so as to include "*all* the provisions that are required in order to ensure the realization of the social cycle," we are talking about changes that would be broad and deep. Such policy commitments would, in turn, require significant political motivation.

In light of this, I think the question is as follows: what does the political case (or, perhaps, the political *campaign* or *movement*) on behalf of these good and outcomes stand to gain or lose from its expression in the language of communication *rights* and/or a *right* to communicate?

There are, of course, well-known theoretical and principled critiques of the political implications of rights language and culture – and not all of them are necessarily conservative. For example, it has been argued that – notwithstanding Canada's attempt to constitutionalize certain group rights—rights are inherently and necessarily individualistic and privatizing (and, in this respect, highly culturally-specific) and mitigate against commitment to the sort of collective goods that many of the communicational outcomes alluded to here would otherwise seek to provide. Others would say that rights claims are inherently depoliticizing, in that they remove questions from the political domain of dialogue, debate, deliberation, contest and compromise and place them in the juridical sphere of all-or-nothing decisions between absolute and mutually exclusive alternatives, a sphere to which effective access is unequally distributed and in relation to which not all potential claimants are favourably positioned. Still, most good liberals like us would concede that the systemically disadvantaged are better off *with* rights than they are *without* them, and that the potential for someone to claim a right to a good outcome that is being denied to them is a better security for that outcome than *not* having a right to claim in the first place.

Bracketing these principled issues, there are also important pragmatic or strategic considerations to raise here. One is that investing in the language of rights invites deferral of the outcomes those rights envision, in lieu of the demand for definition and specification of the right's content, meaning, scope and application *prior* to its codification and recognition – a problem Marc Raboy and Jeremy Shtern allude to in their recounting of the history of the campaign for communication rights and the right to communicate in the international context. There is a kind of chill that rights language exerts on the possibility of reform, as powerful actors who oppose, or are threatened by, the outcomes envisioned by the proposed right are able to argue that the risk of unforeseen consequences attached to a broadly or openly-defined right is too great to bear and so is best avoided altogether. These are what the French philosopher Alain Badiou has recently called the "miserable priests": people who run around saying that unless we can account in advance for every possible outcome of a proposed reform it is safer just to do nothing and leave things the way they are, lest things change more than we might have anticipated. This, of course, is a particularly absurd position in relation to rights. First, rights are *supposed to* unleash unforeseen consequences that change the established order of things. And, second, no right is ever defined or fixed in its scope and substance prior to its recognition: the substance and scope of a right is defined through interpretation and application over time in specific, cultural, material and historical circumstances. Rights are open-ended at the time of their recognition because they could not be otherwise. And so the argument of the miserable priests when it comes to rights is bogus, but being bogus never stopped an argument from being persuasive, and the chill invoked by resort to the language of rights could inadvertently render the outcomes intended by that language more, rather than less, remote. The language of rights might disable rather than motivate the sort of political courage that would be needed to undertake the policy changes necessary to materialize the outcomes for which the right to communicate expresses a hope.

A second strategic consideration also goes to this question of whether a campaign for communication rights or a right to communicate in Canada would be likely to elicit sufficient

political motivation for the sort of policy and regulatory reforms that would be required to realize the outcomes talked about in this book. The question, I think, is about the circumstances under which campaigns for rights are most likely to move people politically. It would seem straightforward to assume that campaigns for rights are most likely to be motivational in those contexts where the rights in question are systematically denied or absent. On the other hand, we might say that what motivates people to demand a right is not so much that they want the right *itself* as it is that they want whatever it is that the right would guarantee them – equality, political representation, property, compensation, whatever. The right is simply a device for securing access to concrete goods, including those which cannot be imagined in advance. This can go both ways: some people are moved simply because they want the right but not necessarily that to which it entitles them; for others, the right is simply instrumental to concrete outcomes to which they are genuinely committed. In either case, it is a perceived lack that moves them to press for recognition of the right.

Does such a lack exist in Canada at present, such that it might motivate a campaign on behalf of communication rights and/or the right to communicate? Do we lack these rights? Are we denied the outcomes they would guarantee?

Among the many interesting things about this book, one is the abiding ambivalence its authors would seem to harbor regarding this question. On the one hand, each of them clearly documents the absence in Canada of many of the formal communication rights and entailments of the right to communicate treated in the book. As Marc and Jeremy put it in the introduction "There is no way to sugar-coat this: our view of communication rights in Canada is a highly critical one." They also show unambiguously that the concrete conditions necessary to support a fundamentally democratic social cycle of communication in Canada do not exist. And yet, on the other hand, a few lines later they also say this: "Despite our critical assessment of the state of communication rights in Canada, it is still our impression that the realization of communication rights in Canada is, if not quite ideal, as strong as it is anywhere in the world." And so, it remains unclear, in the end, whether a case made on behalf communication rights and/or the right communicate could provide sufficient political motivation for action in favour of the broad list of conditions and outcomes contemplated by these rights, and presently lacking or underdeveloped in Canada.

This remains a tantalizingly open question, a question that this work surely would have motivated the Law Commission to pursue to its end, had it not been unceremoniously dismantled. As the authors observe in the book's preface: "there is a great distance between institutions and people in Canada where communication is concerned…people do not generally understand their communication rights and very rarely push hard enough to claim them." They pledge their book as an attempt to bridge that distance and to engage activists, community groups, non-governmental organizations and other researchers in these issues and equip them with the literacy required to make effective contributions to policy debates alongside government and industry. But they acknowledge their limitations as academics in this regard, and rightly so.

And this is what gives the story a sad ending. For the aspirations these authors have for their excellent and important work on communication rights and the right to communicate express precisely what I saw the Law Commission of Canada accomplish repeatedly in relation to a

range of similar issue over the course of its existence. If the Commission had survived, this work would have been the *beginning* of something, not the *end*. Based on the findings in this book, additional, targeted research would have been commissioned; collaboration would have been facilitated between the Commission, researchers and civil society organizations; one of the writers of this book would have been brought to the Commission as a scholar-in-residence to work closely with the Commission and its staff on developing their expertise in this area; a discussion paper would have been written, and circulated across the country; this would have become the basis for public debate and consultation with a broad range of citizens, advisers, stakeholders and experts in several communities; essay contests on the right to communicate would have been sponsored in Canadian schools; roundtables would be held at scholarly meetings; more research would be commissioned to fill the holes. In the process, a vast network of scholars, activists, legal professionals, community groups and citizens would have been generated, and an invaluable cache of knowledge and resources accumulated. And then, after a few years of this percolation, a report would have been written, with recommendations for reform, and it would have been read in Parliament, and the Minister of Justice would have been statutorily obliged to respond. Activists, scholars, stakeholders and the public would have commented upon the adequacy of that response. References to the report would have been made by strategic litigants in Charter cases, such as described in the book by Simon Grant, and would maybe even have appeared in the reasons given by judges in those cases. All this might have happened. That it did not is a tragedy; but that we at least have this book is a small victory.