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### Legal Education's Mission

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## Banned from Lawyering: Gordon Martin, Communist<sup>1</sup>

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Hindsight judges harshly.

Such has been the fate of those who blocked Gordon Martin’s admission as a barrister and solicitor<sup>2</sup> sixty years ago. Martin held a recognized law degree, had served the required period of apprenticeship (“articles”), and had met all other requirements for admission -- save one. He was blacklisted by the organized legal profession’s governing body (the “Benchers”) and the courts entirely because of his political beliefs. It was accepted that his “personal morals . . . cannot be questioned, that he was a hard worker at the University and conscientious in his work.”<sup>3</sup> But he was a “Marxist communist.”

Their judgment was severely criticized by some of their contemporaries, and history has condemned them.<sup>4</sup> One distinguished jurist, Roland Penner, criticized the incident as “a scandalous act of political discrimination. . . . [E]ven more scandalously, the courts in British Columbia upheld the Law

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<sup>1</sup> Thanks to Robert Russo for research assistance; the late Alfred Watts, Q.C., for propelling me to think carefully about this case; Mary Mitchell and the UBC Law Library for help in locating resources; Chris Moore for sharing some of his research on the history of the British Columbia Court of Appeal with me; Hamar Foster, John McLaren and Dale Gibson for advice and comments; and Robert Russo and Robert Diab for comments on a draft of this paper. Jamie Disbrow was gracious in sharing her M.A. thesis on the Martin case with me: Jamie Disbrow, *Exclusion by Due Process – Martin v. Law Society of British Columbia: A Cold War Eclipse of Civil Liberties*. Ottawa: University of Ottawa, 1996. I regret it came to my attention only as final copy-editing was underway.

<sup>2</sup> Lawyers in all common-law provinces become barristers and solicitors virtually simultaneously now, with the result that few are aware that these are distinct professions with different roles and obligations. Lawyers in 1948 were more alive to this and, though little turned on it in the *Martin* case, addressed the requirements for call to the bar and enrolment as a solicitor as distinct matters.

<sup>3</sup> *Re Legal Professions Act, Re Martin*, [1949] 1 D.L.R., 105 at 109 (Reasons of the Benchers of the Law Society of British Columbia) [henceforth “Benchers’ ruling”]. The Benchers of the day were *R. H. Tupper*; *Sherwood Lett*; C. B. Garland, K. C.; A. D. Crease, K. C.; *Hon. J. W. de B. Farris*, K. C.; G. Roy Long, K. C.; T. R. Selkirk; *W. H. M. Haldane*; *Elmore Meredith*; A. C. Des Brisay, K. C.; C. M. O’Brian, K. C.; and T. G. Norris, K. C. The Benchers’ Minutes show unanimity amongst those taking part in the decision (shown in italics) with Lett and Norris being mandated to prepare a statement of reasons.

<sup>4</sup> See Jamie Disbrow, “Exclusion by due process: Martin v. Law Society of British Columbia: a cold war eclipse of civil liberties” (M.A. Thesis, History, University of Ottawa) 1996

Society's decision."<sup>5</sup> Vancouver lawyer Harry Rankin described the processes that left-wing applicants were put through as a "private inquisition," a "Star Chamber tribunal," a "witch hunt," and a "most undemocratic procedure . . . simply political intimidation" designed to dissuade law students from "any real thinking about change."<sup>6</sup> I have piled on too, accusing the Benchers of acting on a "whim" and the courts of substituting politics for legal reasoning and failing "miserably to live up to their role as guarantors of liberty."<sup>7</sup>

Such assessments bite but gloss far too quickly over the complicating contexts of mid-century administrative law and of then-prevalent notions of "character" and the legal profession. An indication of the gap that separates their notions of "character" from ours is found in the words of the oaths required of new lawyers. Barristers were called upon to swear "so help me God," their commitment to adhere to a distinct professional role:

You are called to the degree of barrister to protect and defend the rights and interests of such persons as may employ you. You shall conduct all causes faithfully and to the best of your ability. *You shall neglect no man's interest, nor seek to destroy any man's property.* You shall not refuse causes of complaint reasonably founded, nor shall you promote suits upon frivolous pretences. You shall not pervert the law to favour or prejudice any man, but in all things shall conduct yourself truly and with integrity. In fine, the King's interests and your fellow-subjects you shall uphold and maintain according to the constitution and the laws of this Province.<sup>8</sup>

The Barristers' Oath (which was identical to the Solicitors' Oath) was in the following form:

I, A.B. do sincerely promise and swear . . . that I will be faithful and bear true allegiance to His Majesty King George VI as lawful Sovereign of Great Britain . . . and of this Dominion of Canada, and that *I will defend him to the utmost of my power against all traitorous conspiracies or attempts whatsoever which shall be made against his person, crown and dignity, and that I will to my utmost endeavour to disclose and make known to His Majesty, his heirs or successors, all treasons or traitorous conspiracies and attempts which I shall know to be against him or any of*

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<sup>5</sup> Roland Penner, C. M., *A Glowing Dream: A Memoir* (Winnipeg: J. Gordon Shillingford Publishing, 2007), p. 121. Penner had an intense personal interest in the matter during the 1950s as he too was a communist who sought a career in law. Admitted without difficulty in Manitoba, his subsequent career included service as attorney general for Manitoba and as dean of law at the University of Manitoba.

<sup>6</sup> H. Rankin, *Rankin's Law: Recollections of a Radical* (Vancouver: November House, 1975), pp. 65, 71, 72.

<sup>7</sup> W. Wesley Pue, *Law School: The Story of Legal Education in British Columbia* (Vancouver: Continuing Legal Education Society of British Columbia and Faculty of Law, University of British Columbia, 1995), p. xx. A fully documented version of this work can be found as *A History of Legal Education in British Columbia* at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=897084](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=897084).

<sup>8</sup> Benchers' ruling, at 110. The emphasis is as provided in the reasons for the decision.

*them; and all that I do swear . . . without any equivocation, mental evasion, or secret reservation. So help me God.*<sup>9</sup>

These words, the solicitors' status as officers of the court, and their understandings of the roles of the legal profession steered the outcome. By contrast, today's "Barristers' and Solicitors' Oath" in British Columbia expunges all reference to loyalty to Crown, country, or Constitution along with obligations to "neglect no man's interest," to respect property, and to obstruct treason:

Do you sincerely promise and swear (or affirm) that you will diligently, faithfully and to the best of your ability execute the offices of Barrister and Solicitor; that you will not promote suits upon frivolous pretences; that you will not pervert the law to favour or prejudice anyone; but in all things conduct yourself truly and with integrity; and that you will uphold the rule of law and the rights and freedoms of all persons according to the laws of Canada and of the Province of British Columbia?

Contemporary understandings are found in the written reasons of the Benchers, in a ruling of Mr. Justice Coady, and in the separate reasons of five justices of the British Columbia Court of Appeal.

### **The Benchers' Ruling**

Martin's communism was beyond doubt. He had run for election to the provincial legislature as a Labour Progressive Party (communist) candidate and was president of the University of British Columbia's student Communist Forum.<sup>10</sup> There was "nothing covert . . . about him. . . . [H]e was a doctrinaire Communist."<sup>11</sup>

Upon applying for admission to the legal professions, Martin was called upon to demonstrate that he was a "fit and proper person." The Benchers' power was derived from the following provisions of the British Columbia Legal Professions Act:

39(3) They may call to the Bar and admit to practise as a barrister in British Columbia: --  
 ( a ) Any person, being a British subject of full age and good repute, who . . . [here follow the educational, age, and service requirements];

<sup>9</sup> Benchers' ruling, at 109–10. The emphasis is as provided in the reasons for the decision.

<sup>10</sup> "Red' Law Student Okay'd by Benchers: Secret Inquiry into Political Beliefs Clears Norm Littlewood," *Vancouver Sun*, 31 July 1948 [henceforth "Red' Law Student"].

<sup>11</sup> Mr. Justice Lloyd McKenzie, interview by Professor Marilyn MacCrimmon, 24 May 1995 [henceforth "McKenzie interview"].

- ( 4 ) They may admit as solicitors of the Supreme Court: --  
 ( a ) Any person, being a British subject of full age and good repute, who . . . [here follow the educational and age requirements].<sup>12</sup>

Garfield A. King appeared to represent Martin, and a number of witnesses gave evidence as to his “character.” One of the witnesses, Lloyd McKenzie, recalled that

he asked me, as president of the class, to speak on his behalf as a character witness, which I did, before the Benchers. . . . [A]nd I remember being cross-examined by Senator Farris. . . . He was questioning me, “Do you think he can take an oath of allegiance being a Communist and all that?” . . . I was waiting outside the Benchers’ room. . . . While I was out in the hall I was talking to John Stanton. . . . John Stanton was a Communist at that time and the *News Herald*, the morning paper of the day, had a headline story about this and said that two well-known Communists, Lloyd George McKenzie and John Stanton, were waiting to give evidence. . . .<sup>13</sup>

Although Martin admitted to being communist, he initially refused to answer questions about his views on the ground that the Benchers did not “have the authority to inquire into mine, nor anyone else’s politics.”

The Benchers took a simple view of their statutory obligations (a matter within the field that lawyers know as “administrative law”): the discretion to admit was entirely theirs. Their decision did not need to be based on evidence in any ordinary sense of the word, and their only duty was to “exercise their discretion honestly in the public interest and upon considerations of good sense.”<sup>14</sup> Within those bounds, they said, they were immune from oversight. A bolder assertion of discretionary power and a narrower scope for external constraint can hardly be imagined: they believed themselves to be fully empowered as gatekeepers to the profession, and their decisions were irreversible as long as they did not act dishonestly or in deliberate bad faith.

Martin “adduced evidence in the form of statements, letters and statutory declarations” portraying him as “a man of good repute and . . . a fit person to be called to the Bar and admitted to the practice of a solicitor in British Columbia.”<sup>15</sup> The evidence of those who knew him was, however, brushed aside,

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<sup>12</sup> *Legal Professions Act*, R.S.B.C. 1936, c. 149, as cited in Benchers’ ruling, at 106.

<sup>13</sup> McKenzie interview.

<sup>14</sup> Benchers’ ruling, at 114.

<sup>15</sup> Benchers’ ruling, at 108.

replaced by the opinion of those who did not. The Benchers doubted the “qualifications for the purpose” of the individuals attesting to his good repute<sup>16</sup> and emphasized that any testimony regarding his reputation for hard work, conscientiousness, or good personal morals was irrelevant to the question as to whether his communist beliefs *in themselves* constituted grounds for exclusion.

Martin testified that he could swear the necessary oaths in good faith<sup>17</sup> and that “the beliefs of the Communists in British Columbia do not entail adherence either to the Marxist doctrine of the overthrow of constituted authority by force or the subversive doctrines and activities of certain Communists in Canada.”<sup>18</sup> That might have disposed of the objection. The benchers, however, disregarded his stated beliefs in favour of their own conjecture. They thought his testimony “evasive”<sup>19</sup> and considered him tainted by association with convicted subversives: his testimony was deemed unbelievable.<sup>20</sup> Martin’s efforts to explain the benign meaning of key passages in the writings of Marx and Engels, which seemingly advocate violent revolution and the abolition of private property, were dismissed as attempts “to show that they had a meaning other than what an ordinary reader would take from them.”<sup>21</sup> In a word, Martin was a liar.

In remarkably circular reasoning, his claim that he could take the necessary oaths in good faith served to prove his dishonesty:

When Mr. Martin states that he can conscientiously take such an oath, in view of his subscription to and general acceptance of the Marxist Manifesto, the Benchers find it difficult to believe in his sincerity or intellectual honesty.

Their opinion is that in spite of his statements to the contrary he would be taking the oaths unscrupulously.<sup>22</sup>

And dishonesty in this regard negated all testimony as to his character:

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<sup>16</sup> Benchers’ ruling, at 109.

<sup>17</sup> Benchers’ ruling, at 110; also see “‘Red’ Law Student.”

<sup>18</sup> Benchers’ ruling, at 109.

<sup>19</sup> Benchers’ ruling, at 107.

<sup>20</sup> Benchers’ ruling, at 109.

<sup>21</sup> Benchers’ ruling, at 110. Anyone exposed to Marxian theory in graduate school -- or anyone exposed to legal education, for that matter -- might be somewhat more sympathetic to Martin on the matter of words meaning other than they seem.

<sup>22</sup> Benchers’ ruling, at 110.

An applicant who takes such an oath unscrupulously is in their opinion not a person of probity or of good repute, regardless of the general opinion as to his character held by persons who know vaguely of his beliefs. Such persons cannot be expected to be aware of the incompatibility of those beliefs with the requirements of the oaths to be taken by a barrister and solicitor in the Province of British Columbia.<sup>23</sup>

The Benchers accepted as common knowledge that communists are liars. Martin was an admitted communist. Hence, he was a liar and, ipso facto, not of good repute -- matter disposed of. Once having admitted to being a communist, Martin could not shed the taint. The Benchers found that he had failed to satisfy them “that he is a person of good repute within the meaning and intent of the *Legal Professions Act*.” Hence, he was “not a fit person to be called to the Bar or admitted as a solicitor of the Supreme Court of British Columbia.”<sup>24</sup>

A storm ensued. Students at the University of British Columbia mobilized in his support, including “even members of the Young Liberals who had a sense of fair play.”<sup>25</sup> The student newspaper attacked the law society,<sup>26</sup> and 1,500 students converged, passing a resolution asking “the Attorney-General to prevent any action by the society based on political discrimination against a legally-constituted organization”<sup>27</sup> such as the Labour Progressive Party.

### **Judicial Review in the Supreme Court of British Columbia**

Although the Legal Profession Act of the day provided no avenue of appeal, Martin was able to bring the matter to the Supreme Court of British Columbia (immediately below the British Columbia Court of Appeal) through a process known as “judicial review.” He hoped to persuade the court that the Benchers

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<sup>23</sup> Benchers’ ruling, at 110–11.

<sup>24</sup> Bencher’s ruling, at 114.

<sup>25</sup> Rankin, *supra* note 67 at 65.

<sup>26</sup> “*Ulysses Hits Law Society*,” *Colonist*, 29 September 1948, p. 1. It is reported that the student newspaper “strongly attacked action of the British Columbia Law Society in refusing Gordon Martin admission to the Bar.” “Martin had stated he presumed the refusal was based on his political views.”

<sup>27</sup> “Students Ask Law Society to Explain Stand,” *Colonist*, 17 October 1948. About 1,500 students attended a meeting to protest the law society’s refusal to admit Martin.

had acted outside the scope of their statutory powers.<sup>28</sup> King presented four arguments on Martin's behalf. First, he said that the law society could not demand an Oath of Allegiance of applicants. Second, he asserted that an apprenticing lawyer (the technical terms are "articled clerk" on the solicitors' side and "student-at-law" on the barristers' side) was entitled to be dealt with under the procedures specified for the law society's "Discipline Committee" rather than directly by the Benchers. Both arguments failed on straightforward statutory interpretation.<sup>29</sup>

Martin's status as an articled clerk and student-at-law raised a more difficult, though subtle, point. Martin had enjoyed such status since 1945 on the basis of the law society's acceptance of the required certificate of good moral character. This, King argued, established an inchoate right to admission triggering an obligation for the Benchers to act "judicially" and not with unbounded discretion. Having previously been deemed of "good character" and having completed three years of formal legal education and apprenticeship, he could, so the argument went, properly expect to become a lawyer. For the Benchers to deny him this as a result of changing their minds as to his character was, under the then-prevailing understandings of administrative law and "natural justice" (due process), a very different matter from declining to grant a privilege: closer conformance to normal judicial standards of evidence and proof would be required,<sup>30</sup> and the outcome likely would have been different. There was no *evidence* that Martin was dishonest, treasonous, bent on violent overthrow of His Majesty's government, or anything other than a constitutionally minded, politically engaged, aspiring lawyer who happened to hold strongly left-wing views. Mr. Justice Coady, however, held that the "certificate of good moral character" required on commencing apprenticeship was distinct from the "further evidence" required to satisfy the

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<sup>28</sup> The form of proceeding was "by way of *mandamus* directed to the Law Society of British Columbia to show cause" why he should not be permitted to become a barrister and solicitor. *Re Legal Professions Act, Re Martin*, [1949] 2 D.L.R. 559 at 559, at para. 1, per Coady J. [henceforth "BCSC"].

<sup>29</sup> On the first argument, BCSC, para. 7, "s. 2 of the *Oaths of Allegiance Act* clearly indicates that the taking of the oath may be required as a statutory condition to the acceptance of the office." The reasoning on the second argument was in two parts. First, the Discipline Committee was engaged only in the face of a complaint, and there was no "complaint" against Martin. Second, status as an apprenticing lawyer did not make him a "member of the society" under the Legal Profession Act. Consequently, Martin remained an *applicant* for admission who bore the burden of persuading the Benchers of his fitness, not a member being subjected to discipline (at paras. 10–11).

<sup>30</sup> BCSC, at para. 16.



Benchers of the “good repute” needed for admission to the professions.<sup>31</sup> “Good repute” turns out to be both conceptually distinct from “good moral character” and a higher standard.

Who knew?

Much follows. Any *right* to become a lawyer, inchoate or otherwise, evaporates in the face of an explicit obligation imposed by statute on the Benchers to exercise their *discretion* in satisfying themselves as to this distinct requirement.

They are not in such inquiry as they may conduct, bound by strict rules of evidence, nor do they require to have before them strict proof of every matter or thing which they are entitled to consider. . . . They are not deprived of their discretionary power by the enrolment of the applicant nor by the acceptance of the evidence of good moral character submitted at that time. . . . The statute here, rather than imposing a duty on, grants a power to the Law Society, which in turn is exercised by the Benchers. Notwithstanding the enrolment of a student-at-law or articled clerk, the discretionary power to call or admit is, it seems to me, in no way thereby curtailed or abrogated. It still remains in the absolute discretion of the Benchers and so long as that discretion is exercised honestly, fairly and reasonably, and from no indirect or improper motives and on no irrelevant or alien grounds, it is not open to review. . . .<sup>32</sup>

Martin’s final argument also failed. It asserted that the Benchers had taken “irrelevant or alien grounds” into consideration. In passing the Legal Professions Act, he argued, the legislature could not be presumed to have intended the Benchers to engage in political screening because penalizing a person for his or her beliefs, opinions, or ideologies was a violation of the constitutional rights of a citizen. In pre-Charter days, a provincial legislature would likely have been able to do this had it *explicitly* stated that objective.<sup>33</sup> But the courts, so the argument went, should not import a legislative desire to violate fundamental freedoms into their reading of the statute. King argued that “the Benchers . . . have allowed extraneous and alien matters to affect their decision.”<sup>34</sup> These are important terms of art. Any decision-making body resting its decision on irrelevant considerations proceeds unlawfully and can be corrected by the courts. Had this argument succeeded, the Benchers’ decision would have been quashed, and Martin would have proceeded to his legal career. Coady J., however, would hear none of it: “It is not for the

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<sup>31</sup> BCSC, at para. 15.

<sup>32</sup> BCSC, at para. 16.

<sup>33</sup> Subject to questions relating to the division of powers between the provincial and dominion tiers of government.

<sup>34</sup> BCSC, at para. 17.

Court,” his lordship said, “to substitute its view for that of the Benchers.”<sup>35</sup> The Benchers would have the last word.

In the normal course of events, this should have been the end of the road. Martin had struck out both at the Law Society and on judicial review, and the relevant statute provided no avenue of appeal. The notoriety of the case, however, provoked amendments to the Legal Professions Act. Under the new legislation, “Any person whom the Benchers have refused to call to the Bar or to admit as a solicitor may appeal from such refusal to the Court of Appeal. . . . [T]he Court of Appeal may, in whole or in part, either reverse or confirm the decision of the Benchers or refer the matter to the Benchers for further inquiry.”<sup>36</sup>

### **Martin’s Day in the Court of Appeal**

Martin’s appeal was heard by five justices, each of whom wrote an opinion. The outcome is clear (all five ruled against Martin), but multiple judgments serve to obscure the legal principles relied upon. Three legal issues needed to be decided.

1. What was the proper role of the Court of Appeal in reviewing the Benchers’ decision?
2. Were the Benchers more properly characterized as an “administrative” body or as a “judicial” body whose decisions affected “rights”?
3. Had the Benchers conducted themselves properly in reaching the conclusion that Martin was unfit to become a barrister and solicitor?

Background understandings of communism mattered to all this, of course. The Benchers’ decision effectively created a class of individuals ineligible to become barristers or solicitors as they had come “to the conclusion that the Marxist philosophy of law and government, in its essence, is so inimical in theory and practice to our constitutional system and free society, that a person professing them is *eo*

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<sup>35</sup> BCSC, at para. 18.

<sup>36</sup> *Legal Professions Act*, s. 41A as enacted by 1949, c. 35, s. 2, as cited in *Martin v. Law Society of British Columbia*, [1950] 3 D.L.R. 173 [henceforth “BCCA”], at para. 2, per Sloan, C. J. B. C.

*ipso*, not a fit and proper person to practise law in this Province, and hence cannot be of ‘good repute’ within the meaning of the *Legal Professions Act*.<sup>37</sup>

An extravagance of anti-communist rhetoric is the most memorable feature of the judgments. Chief Justice Sloan thought it an “alien philosophy,”<sup>38</sup> while O’Halloran J. A. explained at great length that adherents to that “pernicious creed”<sup>39</sup> were determined to “weaken and destroy the foundations of our free society”<sup>40</sup> and help “Soviet Russia . . . to obtain mastery of the world.”<sup>41</sup> Marxism, he said, had a “strange power over its adherents” similar to the “blind passion” that had motivated Hitler’s “Nazi youth.”<sup>42</sup> Communists rejected “our conception of ethics and morality”<sup>43</sup> and such a person was “little else than a fifth columnist (designedly or not) to assist an unfriendly country to destroy the rights and privileges a free people have established in Canada.”<sup>44</sup> Sidney Smith J. A. expressed agreement with the Benchers on the merits. He accepted that they were entitled to conclude that “it is one of the tenets of the Communist movement that they be prepared to overthrow existing Governments by force if necessary.”<sup>45</sup> Robertson J. A.’s judgment elaborated the evils of communism, barely touching on the legal issues before the court. Communist parties, Robertson said, were agents of “the Russian dictatorship.”<sup>46</sup> As they sought violent revolution and conspired “to conquer and rule the world by any means,”<sup>47</sup> protestations of loyalty were not credible.<sup>48</sup> Mr. Justice Bird also believed that communists, operating as a “Fifth Column,” were unworthy of trust.<sup>49</sup>

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<sup>37</sup> BCCA, at para. 9.

<sup>38</sup> BCCA, at para. 6.

<sup>39</sup> BCCA, at para. 14, quoting Lord Chief Justice Goddard.

<sup>40</sup> BCCA, at para. 12.

<sup>41</sup> BCCA, at para. 13.

<sup>42</sup> BCCA, at para. 17.

<sup>43</sup> BCCA, at para. 23.

<sup>44</sup> BCCA, at para. 54.

<sup>45</sup> BCCA, at para. 77.

<sup>46</sup> BCCA, at para. 63, quoting Oneal and Werner, *American Communism* (1947).

<sup>47</sup> BCCA, at para. 61, quoting a pamphlet on “Communism and Education” published in 1948 by the Committee on Un-American Activities, US House of Representatives.

<sup>48</sup> BCCA, at para. 67.

<sup>49</sup> BCCA, at paras. 98, 99.

Chief Justice Sloan and Mr. Justice Sidney Smith explicitly addressed the first of the legal questions. Each concluded that the matter was most properly treated as an appeal from the decision of an “administrative” body rather than as a retrial (“trial de novo”). This conclusion severely limited the scope of matters that the Court of Appeal would consider:

The amendment simply states that there shall be an appeal to this Court, and nothing more. Had it been the intention of the Legislature that we should embark on new proceedings, nothing would have been easier than to say so. The appeal is from a decision of the Benchers, and in my opinion the Benchers are an administrative body. That being so, the usual and well-known principles governing appeals from such bodies apply here; and so we can only interfere with their finding if their procedure was wrong, or if they acted in bad faith or against all reason or the public interest, or if they formed their opinion upon grounds never brought to appellant’s notice.<sup>50</sup>

Sloan C. J. B. C. also viewed the new procedure as “an ordinary type of appeal from an administrative body,”<sup>51</sup> meaning that the only question for the court was “whether the discretion vested in the Benchers was properly exercised according to law.”<sup>52</sup>

Three judges addressed the question of whether an applicant who met the statute’s specified objective standards of education, training, and citizenship had a “right” to be admitted. Hoping to trigger an obligation to act judicially, Martin’s counsel (John S. Burton) argued that Martin “had established the right to be called and admitted since he had complied with the academic and service requirements prescribed by the *Legal Professions Act* and had introduced evidence of his good character and repute.”<sup>53</sup>

Sidney Smith J. A. rejected this argument:

Ill repute completely disqualifies; but good repute is only the beginning of the matter. The truth is that there is nothing in the whole of the *Legal Professions Act* that entitles any person to be admitted to the Society (and in this I include call to the Bar). There are various sections stating that the Benchers may admit an applicant who complies with such and such conditions; but no section says that they must admit anyone. The whole is left to their discretion. And we must take the Act and the amendment as we find them. We cannot add to or detract from them. . . . [C]ompliance imposes no obligations on the Benchers.<sup>54</sup>

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<sup>50</sup> BCCA, at para. 70, per Sidney Smith J. A.

<sup>51</sup> BCCA, at para. 3, per Sloan C. J. B. C.

<sup>52</sup> BCCA, at para. 4, per Sloan C. J. B. C.

<sup>53</sup> BCCA, at para. 93, per Bird J. A.

<sup>54</sup> BCCA, at paras. 71, 72, per Sidney Smith J. A.

Mr. Justice Bird rejected this argument on similar grounds, viewing the applicant as carrying the onus of satisfying the Benchers as to his suitability for membership.<sup>55</sup> Mr. Justice O’Halloran also rejected the view that anyone might acquire a “right” to be admitted to the professions. The Legal Professions Act would not confer a discretion in the Benchers if this was the legislature’s intent, he thought. In any event, there was a logical need to protect the public from those who might use their influence as lawyers to “destroy our Canadian constitutional democracy.”<sup>56</sup> The hardship to an applicant turned away after investing three years in training did not evoke the court’s sympathy. The duty to protect the public interest was paramount. In any event, their lordships no doubt agreed with the Benchers that “any hardship is of his own creation.”<sup>57</sup>

The characterization of the Benchers as “an administrative and not a judicial body” with a “wide discretion” in determining “the qualifications and disqualifications of those who seek the privilege of becoming a member of the Legal Profession”<sup>58</sup> dictated a light-touch review. Absent enormous procedural blunder (such as not giving Martin a chance to address the question of his fitness to the profession) or conduct tantamount to bad faith, the court would not interfere. The Court of Appeal implicitly endorsed the Benchers’ understanding that in “exercising a discretion which may depend upon considerations of policy and practical good sense . . . they must, of course, act honestly. That is the total of their duty.”<sup>59</sup>

More pointedly, they were not required to base their decision on a rational interpretation of evidence. They could, they said, form their judgment on the basis of their own hunches about “matters of

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<sup>55</sup> BCCA, at para. 93, per Bird J. A.

<sup>56</sup> BCCA, at paras. 50, 53, per O’Halloran J. A.

<sup>57</sup> Benchers’ ruling, at 113. Had the appellate justices been polled on the matter, it seems certain that O’Halloran and Robertson, J.J. A., would have agreed. Their anti-communist fervour is beyond doubt. Although the other judgments make more of the limited role of an appellate court and the deference (not their language) to be accorded to the Benchers, each of the other justices went out of his way to indicate his agreement with the substantive outcome.

<sup>58</sup> BCCA, at para. 4, per Sloan C. J. B. C.

<sup>59</sup> *Leeds Corporation v. Ryder*, [1907] A.C. 420 at 423, per Lord Loreburn L. C., as cited in Benchers’ ruling, at 107.

general information.”<sup>60</sup> They had it on good authority that this would not be arbitrary “except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions; impressions which may lie beneath consciousness without losing their worth.”<sup>61</sup> Martin’s supporters might be forgiven if they viewed this as licence for irrational bias.

The lowered threshold allowed the court to endorse the Benchers’ intuition-based decision making. It also allowed a US Supreme Court decision finding no evidence that “Communists advocated the overthrow of Governments by force” to be distinguished. A *judicial proceeding* involving depriving a person of vested rights, such as that before the US Supreme Court, required a different quality of proof than an *administrative decision* denying a “privilege to a Communist.”<sup>62</sup> Sidney Smith J. A. was prepared to assume an absence of evidence sufficient to “establish a conspiracy” against the government in a court of law. But, he said, “the Benchers do not require such evidence; they are entitled to exercise their evidence upon probabilities; and there is quite enough evidence on which an *administrative body* could reasonably hold that the Communist movement probably advocates the overthrow of government by force. The Benchers need go no further to justify their acts.”<sup>63</sup>

The court was unanimous in upholding the Benchers’ decision. In Sidney Smith J. A.’s view,

We have the right to override them if they act dishonestly against all reason or against the public interest. Appellant’s counsel admitted below that he did not challenge their *bona fides*. And I find that I cannot say that their refusal to admit the appellant is either against all reason or against the public interest. Therefore I see no ground for interfering with their decision.<sup>64</sup>

Chief Justice Sloan thought their reasons reflected “the exercise of a proper discretion according to law,”<sup>65</sup> while Bird J. A. agreed “that the findings made by them disclose a lawful and proper exercise of

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<sup>60</sup> Benchers’ ruling, at 107.

<sup>61</sup> Benchers’ ruling, at 107, citing *Chicago, Burlington & Quincy R. Co. v. Babcock* (1907), 204 U.S. 585, at 598, per Holmes J., as quoted by Thorson P. in *Pure Spring Co. v. Minister of Nat’l Revenue*, [1947] 1 D.L.R. 501, at 522, 530 D.L.R. [Exchequer Court of Canada]

<sup>62</sup> BCCA, at para. 78, per Sidney Smith J. A., referencing *Schneiderman v. U.S.* (1942), 320 U.S. 118.

<sup>63</sup> BCCA, at para. 81, per Sidney Smith J. A. (emphasis added).

<sup>64</sup> BCCA, at para. 82, per Sidney Smith J. A.

<sup>65</sup> BCCA, at para. 7, per Sloan, C. J. B. C.

the discretion and public responsibility imposed upon them under the *Legal Professions Act*.<sup>66</sup> Robertson J. A. endorsed the Benchers' conclusion and had "little to add to what has been said by them."<sup>67</sup>

Mr. Justice O'Halloran's reasons merit detailed consideration. His extensive comments about communism (bad) and Anglo-American political culture (good) provide little direct insight into his thoughts on the legal issues before the court. On those matters, it is reasonable to infer that O'Halloran J. A. agreed with the comments of his colleagues, at least in broad outline. He emphasized that Martin had been heard personally and was represented by counsel before the Benchers and that they had issued "extended written reasons" for their decision.<sup>68</sup> The crux of the matter was of far greater importance than the minutiae of administrative law:

I dismiss the appeal on the broad ground (although narrower grounds may be found) that a Marxist Communist *cannot be a loyal Canadian citizen*; at best his loyalty must be divided between Canada and the Communist leadership outside Canada which is engaged ideologically through him (whether he knows it or not) and others of like indoctrination in promoting disruptively in Canada and other countries what Lenin called "the class struggle of the proletariat" for the world revolution.

I would dismiss the appeal.<sup>69</sup>

The legally minded reader will be intrigued by the possibilities suggested in the first parentheses and by the words I've rendered in italics, while those with insight into human psychology (Martin's and O'Halloran J. A.'s) will be intrigued by the second parentheses. His lordship's apparent casualness about law is matched by his fear of an epidemic of virulent communist indoctrination, spreading invisibly and corrupting beyond even what its victims imagined. Only demon possession bears comparison. Deep currents lie beneath these obviously troubled waters.

### **O'Halloran J. A. and Anglo-American "Freedom"**

Mr. Justice O'Halloran's judgment was the longest of the Court of Appeal judgments by far.<sup>70</sup> Wide-ranging and unremitting in its excoriation of "Marxist Communism" (in contradistinction to

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<sup>66</sup> BCCA, at para. 100, per Bird J. A.

<sup>67</sup> BCCA, at para. 58, per Robertson J. A.

<sup>68</sup> BCCA, at para. 8, per O'Halloran J. A.

<sup>69</sup> BCCA, at paras. 57–58, per O'Halloran J. A. (emphasis added).

“constitutional or Christian Socialist” politics<sup>71</sup>), it is clearly and colourfully expressed. The observation that “For a Communist to talk about personal freedom of action, expression and thought is like the devil talking about the delights of Heaven”<sup>72</sup> is representative.

Intriguingly, much of the judgment is given over to fierce criticism of American thought. Thinking USA cases unduly soft on communism, O’Halloran J. A. directly repudiated the “neutral and detached view of Communism” of “the majority of the United States Supreme Court, as it was constituted between 1937–1947.”<sup>73</sup> The judges of that day were, he said, “detached” and “quixotic,” misled by an anti-authoritarian philosophy that supported “fictions and formulae difficult to reconcile with the realities of modern life.” Judgments produced by “slim majorities” of a foreign court, produced in “disturbed periods,” should be cautiously approached.<sup>74</sup>

Oliver Wendell Holmes, one of the most celebrated of USA jurists, turns out to be the root of much evil. His lordship labelled Holmes as “something more than a constitutional Judge,” a sort of judicial ideologue who “[w]ith John Dewey, Veblen, Beard and Robinson (see Toronto Saturday Night Editorial March 21, 1950) . . . was the proponent of a distinctive American philosophy, which he introduced assiduously and vigorously. . . .”<sup>75</sup> These comments echo at a distance a breakthrough work in political theory that appeared in 1949. Morton White’s *Social Thought in America: The Revolt against Formalism*<sup>76</sup> was a major contribution:

White’s demarcation of the major American thinkers of the late nineteenth century, including John Dewey, Charles Beard, Oliver Wendell Holmes, James Harvey Robinson, and Thorstein Veblen, as antiformalists marked the first work of intellectual history dedicated to a broad theorization of this period. He was the first to treat these individual critiques of historical analysis, philosophical speculation, and economic discourse as part of a shared intellectual project. What united these thinkers, according to White, was the growing sense that theirs was a

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<sup>70</sup> Forty-nine paragraphs and 6,506 words. Cf. Sloan C. J. B. C. (seven paragraphs, 522 words), Robertson J. A. (ten paragraphs, 1,049 words), Sidney Smith J. A. (fourteen paragraphs, 1,445 words), and Bird J. A. (sixteen paragraphs, 1,340 words).

<sup>71</sup> BCCA, at para. 43, per O’Halloran J. A.

<sup>72</sup> BCCA, at para. 20, per O’Halloran J. A.

<sup>73</sup> BCCA, at para. 28, per O’Halloran J. A.

<sup>74</sup> BCCA, at para. 38, per O’Halloran J. A.

<sup>75</sup> BCCA, at para. 38, per O’Halloran J. A., citing “American Philosophy,” *Saturday Night*, 21 March 1950, p. 6.

<sup>76</sup> Morton White, *Social Thought in America: The Revolt against Formalism* (New York: Viking, 1949).



period of transition, that the social revolution prompted by the corporate form had fundamentally altered the social and cultural framework of modern society. Consequently, all of these thinkers were preoccupied with delegitimizing the standards of the past and projecting an outline for the future. The “revolt against formalism,” then, entailed a rejection of “intellectual and moral rigidity” and an attachment to “the moving and the vital in social life.”<sup>77</sup>

Each of these disparate thinkers rejected “the ‘formalism’ of abstract and deductive approaches to the study of philosophy, economics, law, politics, and history.”<sup>78</sup> Holmes famously observed that “The life of the law has not been logic: it has been experience.”<sup>79</sup> It has been said that the larger group “realized that the life of the mind has not been logic but experience. As a result, they appreciated that thinking inevitably involves evaluating, willing, and acting to shape a culture’s perception of itself rather than attempting to frame ideas according to presumably abstract and unchanging logical rules.”<sup>80</sup> In short, they decoupled thought and policy making from claims of authority based on cultural inheritance, tradition, or God’s will. Theirs was radical stuff, questioning all other faiths save their own profoundly deep faith in rationality, evidence, and reason.

Freedom of conscience, speech, and political commitment provided an acute focal point for such ideas. Two phrases from judgments of Mr. Justice Holmes, uttered in cases involving “Russian anarchists” prosecuted for seditious publications during World War I and a foreigner denied naturalization on the ground that her pacifism was inconsistent with an Oath of Allegiance to the United States, caused especial offence. In those cases, Holmes endorsed “*the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate*” -- and asserted that “*the best test of truth is the power of the thought to get itself accepted in the competition of the market.*”<sup>81</sup> The fuller context of these statements is as follows:

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<sup>77</sup> Robert Genter, “The Challenge of Morton White and the Politics of Antiformalism,” review of *Social Thought in America: The Revolt against Formalism*, Morton White, *H-Ideas* July 2000, <http://www2.h-net.msu.edu/reviews/showrev.php?id=4345> [accessed 18 January 2009].

<sup>78</sup> James T. Kloppenberg, “Morton White’s *Social Thought in America*,” *Reviews in American History* 15, 3 (1987): p. 508.

<sup>79</sup> Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, 1881), p. 1.

<sup>80</sup> Kloppenberg, “Morton White’s *Social Thought in America*,” p. 512.

<sup>81</sup> As quoted in BCCA, at para. 31, per O’Halloran J. A.

[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate. . . . I would suggest that the Quakers have done their share to make the country what it is. . . . I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount.<sup>82</sup>

If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law . . . abridging the freedom of speech."<sup>83</sup>

These fuller passages locate the principle of free expression within a historical context as a fundamental ground rule that early-twentieth-century USA liberals believed to be essential to democratic governance in a pluralist society. And it offended Mr. Justice O'Halloran immensely.

"Should we not hate what is wrong?"<sup>84</sup> he asked. He located truth in a moral certitude derived from tradition, not in a process of continuous contestation of ideas: "the principles of constitutional democracy upon which free society is established, cannot be based upon pragmatic values, determinable by circumstance and consequentially variable. They must be based on certain absolute values, justice, truth and reason. That is why inalienable rights were written into the United States Constitution. That is why we have *Magna Carta*."<sup>85</sup> Holmes and his sort failed to "recognize moral limitations," producing an exaggerated tolerance for even the most offensive speech and thought. Holmes had failed to "recognize a distinction between propaganda as such, and *reasoned statements founded upon historical experience*."<sup>86</sup>

Communists cannot enjoy freedom of speech, his lordship declared, because we cannot "permit them to

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<sup>82</sup> *United States v. Schwimmer* (1929), 279 U.S. 644, at 654–55, per Holmes J.

<sup>83</sup> *Abrams et al. v. United States* (1919), 250 U.S. 616, at 630–31, per Holmes J.

<sup>84</sup> BCCA, at para. 33, per O'Halloran J. A.

<sup>85</sup> BCCA, at para. 34, per O'Halloran J. A.

<sup>86</sup> BCCA, at para. 32, per O'Halloran J. A. (emphasis added).

use it to destroy our constitutional liberties, by first poisoning the minds of the young, the impressionable and the irresponsible. Freedom of expression is not a freedom to destroy freedom.”<sup>87</sup>

Holmes, we are told, was “so remote from the common currents of life that he did not read the newspapers.”<sup>88</sup> His out-of-date “anti-authoritarian philosophy” had supported “fictions and formulae difficult to reconcile with the realities of modern life.”<sup>89</sup> Confusing true freedom with the “unrestrained or abstract licence contained in the anti-authoritarian formula of liberty emotionalized by Rousseau,” his approach “sought to elevate science almost into the position of religion.”<sup>90</sup> Having retired from the bench in 1932 (at ninety-one), Holmes could not have fully understood the course of history and “[t]he plain menace of the tyrant state and the conditions which beget it.”<sup>91</sup> In any event, because materialist groundings were similar,<sup>92</sup> Marxist communism was a “logical product of the philosophy of Holmes, Dewey and Beard.”<sup>93</sup> Unpleasant fellow travellers indeed.

### **O’Halloran J. A. and the Professionalism of Canadian Barristers or Solicitors**

His lordship also elaborated on another aspect of British-Canadian distinctiveness, the role for the legal profession. “The Law,” Mr. Justice O’Halloran declared, “is a profession; it is not a business or trade.”<sup>94</sup>

As such, it stands outside market relations:

[T]he law student’s training is not manual training, but is training of the mind, not only in law, but if he wishes to be something more than a mere legal mechanic, he must study logic, history, in particular constitutional history, political science and economics, a certain amount of philosophy and acquire a reasonable familiarity with English literature, and know something at least of the literature of other countries. The job of the lawyer is basically to advise people upon all manner of things arising out of the complexities of life and the frailties of human nature. As such he cannot fail in time to acquire an influence upon others, impossible to reduce to purely

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<sup>87</sup> BCCA, at para. 34, per O’Halloran J. A.

<sup>88</sup> BCCA, at para. 32, per O’Halloran J. A. The quotation is attributed to Mr. Justice Frankfurter. Although not sourced in Mr. Justice O’Halloran’s judgment, it appears to be from *Craig v. Harney*, 331 U.S. 367 (1947), at 391–92, per Frankfurter J., dissenting.

<sup>89</sup> BCCA, at para. 38, per O’Halloran J. A.

<sup>90</sup> BCCA, at para. 39, per O’Halloran J. A.

<sup>91</sup> BCCA, at para. 40, per O’Halloran J. A.

<sup>92</sup> See BCCA, at para. 41, per O’Halloran J. A., pointing to “Pandit Nehru, Einstein, and Mauriac” in critique of Soviet and US materialism.

<sup>93</sup> BCCA, at para. 43, per O’Halloran J. A.

<sup>94</sup> BCCA, at para. 50, per O’Halloran J. A.

material terms. It is not too much to say that the training and experience a lawyer undergoes fits him for leadership to a greater or less degree. Obviously such men should not be partial to political philosophies and movements that conflict with the interests of their own country.

By reason of these things, all countries throughout the ages have given the lawyer a correspondingly high place in society -- particularly so in the case of the lawyer who pleads in the higher Courts. The object of law training is to attract young men of high character, and to train them in a manner that they will be trustworthy, honourable and competent in the performance of their legal duties, and will use such influence as they may have to maintain and improve but not to destroy our Canadian constitutional democracy. They are to be the defenders and not the destroyers of liberty. They are expected to be sufficiently well-informed and experienced to distinguish between liberty and licence.

. . . If every person had the right to practice law upon passing the University law examinations, there would be no protection for the public. It is the duty of the Benchers to protect the public by refusing admission to the practice of law, not only the type of person who will prey upon the public for his own selfish ends, but also the type of person who professes a political philosophy alien to our free society, and who in a time of "cold war" is little else than a fifth columnist (designedly or not) to assist an unfriendly country to destroy the rights and privileges a free people have established in Canada.<sup>95</sup>

Three aspects stand out as particularly jarring to twenty-first-century sensibilities. First, O'Halloran J. A. thought it "obvious" that no lawyer should hold viewpoints "that conflict with the interests of their own country." Specific articles of faith were required:

Those who accept common-law theory and practice confess to a belief in inherent rights of the individual diametrically opposed to the Hegelian and Marxist concepts of the state. . . . One dividing point appears clearly on the subject of inherent individual rights as adopted by Locke (who wrote the political philosophy of the Constitutional Revolution of 1688) and later with some variations, by Jefferson, when contrasted with the denial of these inherent rights by Hegel, Marx, Lenin and others upon whose political philosophy any type of totalitarian state is based. Hegel is the source of modern Fascist and Communist perversions.<sup>96</sup>

Lawyers, in short, were bound tightly to the existing British-Canadian constitutional structure, and communism was not a legitimate "political opinion" in the proper meaning of the term.<sup>97</sup> Holmes's notion of the Constitution as "an experiment" would have seemed as abhorrent as Martin's Marxism.

Second, O'Halloran J. A. thought that the Benchers' duty to "protect the public" was not limited - as we now generally think -- to ensuring baseline competencies and screening out amoral individuals who might "prey upon" unsuspecting clients for their "own selfish ends." High standards of personal

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<sup>95</sup> BCCA, at paras. 52–54, per O'Halloran J. A.

<sup>96</sup> BCCA, at para. 48, per O'Halloran J. A.

<sup>97</sup> BCCA, at para. 45, per O'Halloran J. A.

integrity and ethics were required, but the leadership roles of lawyers demanded more: conformity to the requirements of “common-law theory and practice.” The office of barrister or solicitor involved a positive and expansive duty to state and community not confined to narrow conceptions of role. Lawyers were not to be mere mouthpieces or guns for hire to do their clients’ will. Protecting the public meant more than protecting clients.

And third, O’Halloran J. A. emphasized the moral role of lawyers in the community. His observation that their “influence over others” was “impossible to reduce to purely material terms” points to the importance of moral influence, broadly understood. Lawyers brought moral compass to bear in matters of business and in “the complexities of life and the frailties of human nature” in all their dimensions. A full-service paternalism that acknowledges clients as personal, familial, moral, social, economic, and spiritual beings puts lawyers’ character into play in a way that simply cannot be imagined if the professional role is narrowed to serving instrumental or economic objectives in isolation.

When professionalism is so conceived, the conclusion that beliefs “inimical to his country” are “repugnant to the ancient and honourable profession of law”<sup>98</sup> is inevitable. And communist exclusion followed.

### **Historian as Quizmaster**

How, then, are we to judge?

The *Martin* case tests the limits of liberal tolerance for diversity of political viewpoints. A cliff edge is approached, and the possibility of extensive, privacy-intruding investigations of the personal opinions and characters of prospective lawyers looms. Historical “context” cannot excuse the judges and benchers from blame. They were called upon to exercise judgment, and no outcome was predetermined by “context.” Their decisions were widely criticized by mainstream Canadians at the time as well as by subsequent commentators or adherents to far-left-wing politics. Neither their peers elsewhere in Canada

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<sup>98</sup> BCCA, at para. 46, per O’Halloran J. A.

nor their immediate successors in British Columbia had the stomach for thoroughgoing ideological screening. No Canadian McCarthyism took seed; no subsequent case approached the abyss.

The university was a place of tolerance, and leftist students were able to pursue three years of legal studies without obstruction. At the University of British Columbia law faculty, they were able and willing to return as good as they received in political argument. Although some “professors were openly hostile” to Harry Rankin’s politics, “many could remain objective.”<sup>99</sup> Well-known socialists such as Dalhousie’s John Willis and McGill’s Frank Scott ranked among the most capable and highly respected Canadian law teachers of the day, and it seems likely that most of the law-teaching profession had little taste for political repression.

Manitoba’s lawyers declined to follow British Columbia’s lead when a well-known young communist war veteran, Roland Penner (later provincial attorney general and dean of law at the University of Manitoba law faculty), decided to pursue a legal career.<sup>100</sup> British Columbia’s law society continued to police the bounds of political belief but did so ineffectually. Immediately following Martin’s exclusion, four law students were selected for a political inquisition, and each gained admission.<sup>101</sup> Rankin viewed the exercise as one in simple “political intimidation, the Law Society letting a whole generation of law students know that it was unacceptable to do any real thinking about change.”<sup>102</sup> Sherwood Lett, who chaired the law society’s credentials committee, required him to swear an affidavit in the following terms:

I, Harry Rankin, do solemnly swear that I am not a communist or a member of any association holding communist views, that if called to the Bar I can take the Barristers’ Oath without reservations of any kind and that I have no intention of following any communist association in the future.

That I do not and will not advocate nor am I a member of any organization that advocates the overthrow of democratic government by force or violence or other constitutional means.<sup>103</sup>

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<sup>99</sup> Rankin, *Rankin’s Law*, p. 62. Mr. Justice O’Halloran criticized the universities for their different understandings. BCCA, at paras. 45, 46.

<sup>100</sup> Penner, *A Glowing Dream*, p. 125.

<sup>101</sup> Norman Littlewood, Harold Dean, Ike Shulman, and Harry Rankin.

<sup>102</sup> Rankin, *Rankin’s Law*, p. 62.

<sup>103</sup> As quoted in *ibid.*, p. 70.

Accepting that the Benchers and judges exercised choice in acting as they did, I want to suggest nonetheless that attention to context makes moral judgment more difficult than might at first seem. By way of conclusion, I wish to suggest, first, that the courts took the proper approach to reviewing the Benchers' decision; second, that, despite their rhetoric, there was less emotional irrationality to their anti-communism than seems; and, third, that, odd though it may appear, the expansive view of lawyers as especially charged with a mission in service of king and constitution was the proper understanding of their time.

Each of the appellate judges emphasized their agreement with the Benchers' view that communists were *eo ipso* barred from admission to the legal profession. This view, and their lordships' many pages of impassioned, almost hysterical prose, distract from the formal reasons for decision (the *ratio decidendi*) of the case. The distinction is important. It is possible both that their views on the essential nature of communism were wrong and that the legal decision to uphold Martin's exclusion was correct.

The legal outcome of the case before the courts was simply that the courts should not seek to second-guess the judgment of the Benchers because the legislature had granted them a power to decide. The legislative scheme had to be respected. As there was no evidence of *mala fides* or improper motivation, and as Martin had been accorded an opportunity to explain himself, there was no reason to interfere. For a generation of lawyers who have different attitudes toward administrative decision making and who are conditioned by the Charter to imagine that courts can always "trump" the legislature, this approach can be hard to appreciate. Current legal fashion does not imagine a bright-line distinction between "privileges" and "rights" and does not categorize tribunals as "administrative" or "judicial." Twenty-first-century legal culture may take a more favourable attitude toward substituting the views of judges for the decisions of other bodies. Contemporary legal authority, however, supported the approach

of the courts in *Martin*.<sup>104</sup> The narrow reasons for decision were certainly correct under the prevailing legal doctrine of the time.<sup>105</sup>

Seemingly eccentric understandings of the role of lawyers also appear less strange in context. Our generation is disinclined to view lawyers as anything other than commercial service providers who complete business transactions, do solicitors' work, and deal with the courts on behalf of their clients. Consequently, we view the ends of regulation as nothing more mystical than protecting clients from incompetent or unscrupulous individuals. Lawyers' ethical codes, like those of pharmacists and used car salespersons,<sup>106</sup> regulate a market for services. Massive transformations during the sixty years separating us from the *Martin* case have profoundly changed the character of the legal professions.<sup>107</sup> Viewed through our demystified, democratized lenses, earlier understandings of lawyers' roles appear puffed up, inflated, arrogant, implausible, and ridiculous. It matters little to us if a lawyer cannot honestly swear fidelity to the queen -- or that he or she might be disinclined to subvert "treasonous conspiracies."<sup>108</sup> However, the view that lawyers, through their mundane work, play a key role in social cohesion and constitutional governance, that their influence and importance cannot be reduced to "purely material

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<sup>104</sup> And, it must be noted, even modern Canadian administrative law finds ways of carving out a wide swath of deference to the substantive decisions of certain administrative tribunals.

<sup>105</sup> The substantial legal argument put forward by *Martin*'s counsel turned on the harm that *Martin* suffered in being denied entry to the legal profession after having invested three years in training and his "inchoate right" being interfered with. The practical consequence of this argument, if successful, would have been to turn the matter from an administrative decision into a judicial one, triggering a higher standard of review. This was in essence an argument to transform settled authority, however, and the earlier BC case of *Hagel v. Law Society of British Columbia*, *In Re Hagel and Law Society of British Columbia*, [1922] B.C.J. No. 33; 31 B.C.R. 75 (March 1922), per Hunter, C. J. B. C., was treated as determinative of the rights/privilege matter: "it was the intention of the Legislature to entrust the decision to the Benchers, and therefore in the absence of any power being given to review their decision, the Court has no jurisdiction to substitute its own view for what is sufficient proof for that [good character and reputation] of the Benchers" (at para. 2).

<sup>106</sup> <http://www.canadianautodealer.ca/index.php/In-The-News/National-code-of-ethics-now-a-reality.html> [accessed 1 January 2009].

<sup>107</sup> See, for example, Constance Backhouse and W. Wesley Pue, eds., *The Promise and Perils of Law: Lawyers in Canadian History* (Toronto: Irwin Law, 2009).

<sup>108</sup> The citizenship requirement was done away with only in 1989 and then by a majority Supreme Court of Canada decision that turned on Charter analysis in *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143 (Dickson C. J. and McIntyre, Lamer, Wilson, Le Dain, La Forest, and L'Heureux-Dubé JJ.).



terms,” has an ancient lineage.<sup>109</sup> Indeed, the modern structures of Canadian legal professionalism, including self-regulation of the profession, codes of ethics, and patterns of legal education, were all derived from just such a professional ideology.<sup>110</sup> The views of Martin’s antagonists were consistent in this regard with the highest aspirations for the legal professions as they were then understood. If those individuals are to be treated as objects of ridicule on this count, it can only be because we judge their time ridiculous.

What, then, are we to make of the legal establishment’s vehement anti-communism? Both the vehemence and the “anti” are beyond doubt. Their passion seems irrational. Gordon Martin would engage in treason; it did not matter that his behaviour was exemplary or that he affirmed his good faith intentions to swear allegiance to His Majesty. Gordon Martin would seek to subvert “property”; it was irrelevant that he testified otherwise. Gordon Martin would act as a fifth columnist in the Russian cause; neither his denials nor the absolute absence of evidence mattered. The court offered its own interpretation of Marxist doctrine as authoritative, not Martin’s. The fact that his explanation differed from the court’s could only be because Martin was lying or dangerously deluded. The notion that, *as a matter of definition*, a communist could not be a “good Canadian” verges on tautology. To elevate this to a common-law rule seems ridiculous. All seven reasons for decision in the *Martin* cases are clear that “evidence” in any legal sense was neither required nor desired. Considering the case from the point of view of communists who aspire to become lawyers, the rationale and outcome are outrageous. The thought that a war veteran, the son of a prominent communist member of the Winnipeg city council, might be denied admission to the legal profession despite his personal and familial records of service to community and country seems

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<sup>109</sup> See, for early expressions of this view in relation to the English legal profession, W. Wesley Pue, “Guild Training versus Professional Education: The Department of Law at Queen’s College, Birmingham, in the 1850’s,” *American Journal of Legal History* 33 (1989): pp. 241–87.

<sup>110</sup> See, for example, W. Wesley Pue, “The Canadian Legal Profession: The Historical Context,” in *Professional Responsibility in Canada*, ed. Alice Woolley, Brent Cotter, Iwan Saunders, and Richard Devlin (Markham, ON, LexisNexis Canada, 2008), pp. 93–128.

repulsive.<sup>111</sup> The full horrors of Stalin and Mao were not fully appreciated, and many idealists had reason to imagine that Marxism might be liberating.

It does not, however, take enormous leaps of imagination to see things from the opposite viewpoint.<sup>112</sup> However unjust the outcome may have been, Gordon Martin was emphatically not the victim of a witch hunt, picked out for discriminatory treatment as a result of a search for “reds under the bed,” on account of rumour and innuendo, loose associations, or involvement in unions. The Benchers had an authentic “red” before them. Moreover, communism then seemed frightening, just as newer terrorist ideologies have seemed frightening in more recent times. The war against the Nazis was only recently finished, Nuremberg’s trials had revealed the dangers of extremist political ideology, and the Soviet Union had mounted aggressive offensives against its former allies. The possibility of the Cold War escalating to the battlefield would have seemed all too likely to a generation conditioned by the experience of two world wars. Communist declarations of *bona fides* weighed lightly against the experience of the

developments which have occurred since the cessation of hostilities in 1945. The revelations made in the Report of the Royal Commission on Communist Espionage in 1946 which discloses the debauching by Communist influences of Canadian public servants occupying positions of public trust, despite oaths of allegiance and office which they had taken, I am satisfied have created in the public mind an utter distrust of that philosophy as well as of its adherents. That distrust has been accentuated by the disclosure of similar activities in Great Britain, *i.e.*, the Fuchs case and also the Alger Hiss and other like proceedings in the United States.

Communism and all that pertains to that philosophy I think is now recognized as having a connotation equivalent to Fifth Column. It is common knowledge that Governments on this continent, public and private organizations, more particularly among Trades and Labour Unions, alive to the danger of Communist infiltration and influence are now alert to the menace, and are actively moving towards its elimination.<sup>113</sup>

Although the extent of a communist threat at the time remains unclear, British Columbia’s legal authorities had reason to be concerned. Their views on the matter are intelligible. Just as the full evils of

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<sup>111</sup> Penner, *A Glowing Dream*.

<sup>112</sup> The context is explained in Thomas Berger’s thoughtful treatment. See Thomas R. Berger, “The Communist Party and the Limits of Dissent.” *Fragile Freedoms: Human Rights and Dissent Canada*. (Toronto/Vancouver: Clarke, Irwin & Company Limited, 1981), 127-162.

<sup>113</sup> BCCA, at paras. 98–99, per Bird J. A.

Stalin and Mao were not fully appreciated in 1950, so too the possibility of a democratic form of communism playing within the rules of constitutionalism had yet to be manifest.

It is possible that the benchers drew the line in the wrong place. Certainly, the result was unjust to Gordon Martin. Hindsight, however, is perfect. Their field of vision was powerfully shaped by the dramatic events of their time. Only if we either dismiss their fears as palpably ridiculous or subscribe to Holmes's radical notion of a marketplace for ideas can we rush to judgment. If we allow that the political values of prospective lawyers might ever be properly taken into account, then things become more complex.<sup>114</sup>

Hindsight requires a degree of humility.

### **Postscript**

Gordon Martin “found work for a few years as a faller and in a sawmill in Nanaimo before starting a television repair shop from home, Active TV service”. An RCMP report in 1963 stated that he was a “good family man” with a successful business. Martin died of cancer in Nanaimo in 1974. Nearly a quarter century later and fifty years after his exclusion from the legal profession, the Law Society of British Columbia issued a formal apology. In 1998, its’ Treasurer (i.e. President), Trudi Brown, explained to the *Victoria Times-Colonist* that “‘It’s a sorry tale,’... But it could not happen now because ‘we are only concerned if a person is competent.’ A person could be a Communist or a Nazi and become a lawyer ‘so long as they have not broken the law.’”<sup>115</sup>

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<sup>114</sup> Cf. the decision of the Illinois State Bar to exclude one Matthew Hale on the ground that his racist beliefs rendered him unfit for the profession. *Hale v. Committee on Character & Fitness of the Ill. Bar*, 99-1349, Supreme Court of the United States, 530 U.S. 1261; 120 S. Ct. 2716; 147 L. Ed. 2d 982; 2000 U.S. Lexis 4348; 68 U.S.L.W. 3789; and Theresa Keeley, “Comment: Good Moral Character: Already an Unconstitutionally Vague Concept and Now Putting Bar Applicants in a Post-9/11 World on an Elevated Threat Level,” *University of Pennsylvania Journal of Constitutional Law* 6 (2004): pp. 844–79.

<sup>115</sup> Roger Stonebanks, “Law Society’s apology comes 50 years late: Gordon Martin was” *Times-Colonist*, (Victoria, B.C.) December 19, 1998, B.1