Communism and the British Columbia Bar

ELMORE MEREDITH
Vancouver

William John Gordon Martin, a graduate of the Faculty of Law of the University of British Columbia, applied on July 30th, 1948, to the Benchers of the Law Society of British Columbia for call to the bar and admission as a solicitor. Martin was born in Canada, of Canadian parents; he is a married man with two children and during the late war served in Canada with the Royal Canadian Air Force for some three years. The train of events about to be described arose from the fact that he was also reputed to be a Communist. He had been, and was at the time of his application, a member of the Labour-Progressive Party.

Martin was questioned by the Benchers when he made his application and on two later occasions. On all three occasions he was represented by counsel. Finally, on October 30th, 1948, the Benchers refused Martin's application for reasons that were supplied to him in writing, and that were in part as follows:[1]

> The Benchers consider therefore that it is their duty in the determination of this matter to deal with it in the public interest. To this end they must form their judgment fairly and honestly on the facts of this case in the light of their knowledge of Canadian affairs. . . .
>
> Apart entirely from the general discretion which rests with the Benchers as to call and admission, they are limited to calling and admitting only such persons as are of good repute. . . .
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> The applicant is a member of the Labour Progressive Party, which is well known as a party of Communists. He is, on his own admission, a Communist or Marxian Socialist. . . .
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> Some effort was made by the applicant to argue that his beliefs and, in fact, 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. . . .
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> In the view of the Benchers a person who subscribes generally to a doctrine or belief which supports 'every revolutionary movement against the existing social and political order of things' and which has as its

[1] *Re Martin*, [1949] 1 D.L.R. 105.

express intention 'to do away with your property' and which believes that 'their ends can be attained only by the forcible overthrow of all existing social conditions' cannot conscientiously and 'without any equivocation, mental evasion, or secret reservation' take an oath which binds him to disclose and make known to His Majesty all treasons and traitorous conspiracies against him and not to 'seek to destroy any man's property'...

In consideration of the application, the Benchers have had in mind the fact that the loyalty of a Communist is not to his own country or to the democratic system of that country but to the subversive doctrines and dictates of a foreign power. . . .

It was suggested in argument of counsel that the Labour Progressive Party is a legal political party in Canada and that consideration, on this application, of the applicant's adherence to Communist doctrines is an improper consideration of his political beliefs. Political parties as such are not bodies known to law. The fact that the Government because of reasons of policy has not proceeded against Communists is not to give the so-called Labour Progressive Party any stamp of approval of legality. In the view of the Benchers the Labour Progressive Party is an association of those adhering to subversive Communist doctrines. It is not in the ordinary sense a political party at all, inasmuch as a Canadian political party must of its very nature owe allegiance to the Canadian democratic system. . . .

The applicant, through his counsel, argued that democratic principles require the Benchers in the absence of overt acts on his part, to ignore his opinions. . . . However, while freedom of thought and freedom to express opinions give the subject the right to hold and express his views this does not imply that the expression of such views is not to be taken into account when reputation or character are under consideration. . . .

The Benchers have had the advantage of observing the demeanour of the applicant in giving evidence and of hearing full argument on his behalf. They have given full consideration to such evidence and argument. They have been mindful of the fact that the adherence of the applicant to the doctrines mentioned must be considered in relation to time and place and in relation to the public interest. Their decision, in the light of all the foregoing facts and circumstances, is that at this time in Canada the applicant

(a) is not a fit person to be called to the Bar or admitted as a solicitor of the Supreme Court of British Columbia, and,

(b) has not satisfied them that he is a person of good repute within the meaning and intent of the Legal Professions Act.

Martin then, on February 14th, 1949, applied to the Supreme Court of British Columbia for a writ of mandamus to require the Benchers to call and admit him. His motion came on before Mr. Justice Coady, who refused the application. In doing so, Mr. Justice Coady said in part:[2]

Here the applicant had petitioned the Society to be called and admitted and that petition the Benchers had to consider and pass upon. The burden of establishing that the applicant was a fit person and a

[2] *In re Martin*, [1949] 1 W.W.R. 993; [1949] 2 D.L.R. 559.

person of good repute was on him. His establishing of that to the satisfaction of the Benchers is a *sine qua non* to his call and admission. . . .

The fourth submission of counsel is based upon this — that the effect of what the Benchers have done is to deny the applicant's constitutional rights as a citizen. The Benchers, it is submitted, penalized the applicant for his beliefs and opinions and ideologies which happen to be in conflict with those held by them. It is further argued that the applicant's social, political and economic views are no concern of the Benchers who have no right to inquire into them, and that the Benchers by so doing have allowed extraneous and alien matters to affect their decision. Good repute, it is contended, is not a matter that can be established by inquiry into one's beliefs and opinions, but has reference rather to overt acts. With the merits of these submissions I do not propose to deal. To quote the language of Sloan, C.J. B.C., in the *Sunshine Valley Co-Op.* case, *supra:*

> 'Whether its decision was right or wrong on the merits is not, I think, our concern. It is the prerogative of the council to make the decision one way or the other, provided its discretion is exercised within the limitations imposed by law and is not actuated by indirect or improper motives or based upon irrelevant or alien grounds, or exercised without taking relevant facts into consideration.'

The transcript of the evidence before me indicates that all of these matters now so forcibly urged by counsel were by him ably presented to the Benchers and were before them for consideration, and the reasons given for the decision indicate that they have not overlooked consideration of them. It is not for the Court to substitute its views for that of the Benchers.

The Legal Professions Act[3] of British Columbia made no provision for an appeal from the refusal of the Benchers to call and admit an applicant, but at the sittings of the provincial legislature in 1949 an amendment to the Act was passed giving a specific appeal to the provincial Court of Appeal.[4] Martin thereupon appealed to the Court of Appeal. Upon the recommendation of the Attorney General, Mr. Gordon S. Wismer, K.C., his costs of appeal were defrayed by the provincial government.

The appeal was argued before the Court of Appeal (all five judges being present) at its January 1950 sittings in the City of Vancouver by J. S. Burton, of counsel for Martin, and Alfred Bull, K.C., of counsel for the Benchers. On April 26th last the Court of Appeal unanimously upheld the decision of the Benchers.[5]

Each of the Judges of the Court of Appeal gave reasons. The Chief Justice (Sloan C.J.), in a succinct judgment, disposed of the appeal in these concluding words:

> It must be borne in mind that the Benchers are essentially an administrative and not a judicial body. In the exercise of their adminis-

[3] R.S.B.C., 1948, c. 180.
[4] 13 Geo. VI, c. 35, ss. 2, 3.
[5] *Martin* v. *Law Society of British Columbia*, [1950] 3 D.L.R. 173.

trative functions they have, within the Legal Professions Act, a wide discretion, and that discretion extends to determination of the qualifications and disqualifications of those who seek the privilege of becoming a member of the Legal Profession.

In this particular case the applicant is a Communist. The Benchers, considering the ideological values and motives and loyalties of an adherent of that alien philosophy, reached the conclusion that such a person was unacceptable for the reasons given, refusing his application to become a member of the Bar of this Province.

I have given careful consideration to those reasons of the Benchers. In my opinion they reflect the exercise of a proper discretion according to law. I may also add that I am in agreement with the reasons of the Benchers and with their conclusion.

Mr. Justice O'Halloran, in the course of a scholarly and comprehensive review of the philosophy of Communism, said:

Counsel for the respondent Law Society in answer confined his brief submission to what he described as the common-sense realities of the present day. He said in effect that particularly since the end of the European War in 1945 the United States, Britain and Canada have had a diverse variety of experiences with Communists at home and abroad. They have had revealing encounters with the machinations of Communist agents and doctrinaire sympathizers open and underground, and with the activities of Communists in the role of 'intellectuals' and advanced libertarians, often specially trained for the purpose, posing as the defenders of personal liberties and promoters of peace and goodwill among nations. Communists and their sympathizers have been astute to find their way into so-called peace, youth, cultural, student, welfare and various other societies and organizations, and there skilfully indoctrinate the young, the impressionable, and the irresponsible, with theories designed to weaken and destroy the foundations of our free society. . . .

But recognition of that defence to the full extent it may warrant, points up most vividly the danger of allowing a Communist to occupy any position of trust or influence.

Marxism exercises a strange power over its adherents. . . . Communism is a complete philosophy of life. . . . No person in our day who is not blind to realities can fail to recognize the strange but menacing potentialities present and future that the Marxist philosophy engenders. . . .

Karl Marx in his German Ideology (4 Marx, Sochineniya 65 (Moscow 1933)) had written: 'Only in the *collective* can the individual find the means of giving him the opportunity to develop his inclinations in all directions; in consequence, personal freedom is possible only in the collective'.

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.

Mr. Justice Robertson, in an incisive review of Communism,

the activities of Communists in Canada and their objectives and underlying principles, held:

> Everyone knows that many Trade Unions are expelling Communists from their organizations. I think that neither the Government of Canada, nor that of the United States, nor that of England knowingly would employ a Communist.
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> Experience gained from the prosecution and conviction of such men as Fuchs and May in England and Boyer in Canada, all of whom had taken the oath of allegiance to His Majesty, leads to the belief that Communists' protestations of loyalty are not to be accepted, and that they consider their first obligation to the Communist Party. Under these circumstances it is not to be expected that an avowed Communist is to be believed who denies that he personally adheres to all the principles of that Party, one of which is stated in the Communist manifesto, *viz.*, that their ends can be attained only by the forcible overthrow of all existing social conditions; coupled with a warning to the ruling classes to tremble at a Communist revolution.

Mr. Justice Smith took the view that the Benchers had wide discretionary powers and in the circumstances had exercised their powers in a proper manner. In conclusion he said:

> In my view an organization that aims at the overthrow of the Government by force is unlawful at common law. Even if it were not, still, membership in that is something that the Benchers are entitled to treat as making an applicant an undesirable member of their Society.
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> In connection with this point it was argued for the appellant that no man can be penalized for 'mere opinions' without any overt act, and that the Benchers could not exclude a man because of his 'politics'. I quite agree with the latter point, so long as the man belongs to a company whose objects are wholly lawful. But advocating the overthrow of the Government by force is not a matter of politics at all; it is in the nature of conspiracy. If a man joins a body that is in effect conspiring against the Government he goes beyond mere opinion; his very joining is an overt act. . . .
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> I agree with the views of the Benchers. But that is not necessary for my decision. . . . 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.

The concluding paragraphs of Mr. Justice Bird's judgment were:

> 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.
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> In these circumstances I consider that the decision of the Benchers was right and that the findings made by them disclose a lawful and proper exercise of the discretion and public responsibility imposed upon them under the Legal Professions Act.

In the result it has been made clear that the Benchers at least had the power to refuse to admit Martin into practice. Whether that power was exercised wisely and justly remains an issue.

The Benchers are an administrative body to which the Legal Professions Act gives the control of admissions. They may, in an honest exercise of discretion, refuse to admit anyone on any grounds of unfitness thought proper by them. The Act prescribes certain qualifications prerequisite to admission, namely: citizenship, academic qualifications, service under articles, and evidence that the applicant is of good repute. The Benchers held that because Martin was a Communist he was not a fit person to be called to the Bar and that in any event he was not, for the same reason, of good repute.

The Legal Professions Act also requires, as a prerequisite to practice, that a person called and admitted must take an oath, which includes the words:

> . . . and that I will defend him [His Majesty] 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 do 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 them; and all that I do swear without any equivocation, mental evasion, or secret reservation. So help me God.

Martin finally stated that, although he adhered to Communism, he would oppose the use of violence to bring about the overthrow of government, and would and could conscientiously and honestly take the prescribed oath. In this he was not believed. The Benchers were of the view that Martin, being a Communist, could not be taken honestly to observe the oath. In the Communist philosophy, the ultimate and paramount allegiance is to Communism. Anything, no matter how evil, may properly be done to serve its objectives. Deception, falsehood, misrepresentation are approved and acceptable means to its ends.

The action of the Benchers in refusing Martin's application, and the subsequent decisions of the courts, produced a flood of controversial writing and discussion, some of it critical and some approving. Criticism of the decisions of the Benchers and the courts was based mainly on the proposition that Martin had been arbitrarily and unreasonably deprived of his choice of occupation and that thereby a blow had been struck at his essential and inalienable rights. It was argued, for instance, that there was nothing in the profession of law to distinguish it from any other occupation in this respect. A Communist in Canada, it was asserted, has an equal right with all other citizens to the enjoyment of life

and the pursuit of his chosen occupation. The weekly, Saturday Night, commented editorially that in this respect the professions of law and, for instance, dentistry could not be distinguished.

A columnist whose newspaper devoted much space to his commentary on the case declared:

> There will be some fools who believe the Gordon Martin case is a victory for Capitalism or 'free enterprise' or even for democracy. It is nothing of the sort. It is a resounding victory for Communism.

The newspaper editorially disagreed, however, and supported the action of the Benchers. Comment in the editorial columns of the press, as elsewhere, has taken widely divergent lines.

Lawyers and those who understand the obligations of the legal profession are, generally and in so far as can be known, in agreement with the decision taken. In addition to the oath required of lawyers, the following is prescribed in the Code of Ethics adopted by the Canadian Bar Association:

> [The lawyer] owes a duty to the State to maintain its integrity and its law and not to aid, counsel or assist any man to act in any way contrary to those laws.

The Immediate Past President of the Canadian Bar Association, Mr. Stanley H. McCuaig, K.C., put it very well in his address before the American Bar Association in St. Louis last September, when he said:

> We belong to a profession which is the custodian and upholder of almost all the rights and privileges which in our day constitute peace, order and good government: independence of Bench and Bar, the right to enjoyment of life and property, free speech, a free press.

Lawyers *are* singled out from the other professions. The legislature requires that a lawyer, before admission to practice, must take a special oath of allegiance. All lawyers are officers of the courts and are recognized as an essential part of the administration of justice. They are granted special rights and privileges by law on condition that they observe, and counsel observing, the constitution and the essential framework of our society. Judges are all chosen from the legal profession, but no one could be found, outside Communism itself, to justify the appointment to the bench of a Communist.

Lawyers are, and since time immemorial have been, the self-delegated defenders of civil liberty, the guardians of the rights of individuals, and crusaders for the essential freedoms. It is charged that in this instance, where their own interests are involved, lawyers have betrayed their trust, have failed to champion the cause of an individual who has become embroiled with his craft. Martin's

case forced the issue of a choice between two duties, the duty to the individual and the duty to society. The Benchers took the view that the public interest was paramount and must prevail.

It is asserted by some that the proscription of Communists should be left to Parliament and not undertaken by lesser authorities. This is not the view of many labour unions, who have legislated Communists out of their organizations. Still less can it be the view of a body charged with the responsibility of the Law Society of British Columbia.

Unanimity on so difficult a question is hardly to be expected — certainly not until the fundamental differences that now divide the world have been smoothed away. Meanwhile the members of the Law Society content themselves with the thought that membership in its brotherhood will not, on this occasion at least, be made use of to defeat its essential purposes, to bring it into disrepute in the community and to make possible under its cloak the sabotage of our public institutions.

Government and the Professions

Economic expansion, the growth of industry, the multiplying of metropolitan cities and the new relations calling for adjustment and new problems of ordering the conduct of enterprises and the relations involved in them have called for the type of office I have described. It is a natural and inevitable response to them. But even more the professional ideal is menaced by the development of great government bureaus and a movement to take over the arts practiced by the professions and make of them functions of the government to be exercised by its bureaus in a superservice state that may become a service super-state. For the idea of a profession is incompatible with performance of its functions or the exercise of its art, by or under the immediate supervision of a government bureau. A profession postulates individuals free to pursue a learned art so as to make for the highest development of human powers. The individual servant of a government exercising under its supervision a calling managed by a government bureau can be no substitute for the scientist, the philosopher, the teacher, each freely exploring his chosen field of learning and exercising his inventive faculties and trained imagination in his own way, not as a subordinate in a bureaucratic hierarchy, not as a hired seeker for what he is told to find by his superiors, but as a free seeker for the truth for its own sake, impelled by the spirit of public service inculcated in his profession. (Roscoe Pound, The Professions in the Society of Today. The New England Journal of Medicine, September 8th, 1949)