

## Does Section 7 of the Charter Protect the Right to be a Professional?

Julius H. Grey

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Article abstract

This essay deals with the controversy concerning the limits of sec. 7 of the Canadian *Charter of Rights and Freedoms*. Given that it does not bestow an untrammelled right to practise a profession, does this mean that all matters in the professional field are totally excluded? In *Wilson v. Medical Services Commission*, the B.C. Court of Appeal left a role for sec. 7 in professional matters. The decision has been contested by at least one commentator. The main thrust of this essay is to defend *Wilson*.

## Does Section 7 of the Charter Protect the Right to be a Professional ?

Julius H. GREY \*

*This essay deals with the controversy concerning the limits of sec. 7 of the Canadian Charter of Rights and Freedoms. Given that it does not bestow an untrammelled right to practise a profession, does this mean that all matters in the professional field are totally excluded? In Wilson v. Medical Services Commission, the B.C. Court of Appeal left a role for sec. 7 in professional matters. The decision has been contested by at least one commentator. The main thrust of this essay is to defend Wilson.*

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*Cet essai traite du débat concernant l'application de la section 7 de la Charte Canadienne des Droits et Libertés en matière professionnelle. Étant donné qu'aucun droit absolu à pratiquer une profession n'est conféré, peut-on croire que toute la vie professionnelle est exclue de l'application de la Charte? Dans Wilson c. Medical Services Commission, la Cour d'appel de Colombie-Britannique a laissé un rôle pour la Charte en matière professionnelle. Cette décision a été contestée par au moins un auteur. Le but de cet essai est de défendre le bien-fondé de l'arrêt Wilson.*

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\* Avocat, professeur, Faculté de droit, Université McGill.

Does sec. 7<sup>1</sup> of the Canadian Charter of Rights cover freedom to practise a profession or a calling?

Until 1988 a large number of cases appeared to hold that it did not.<sup>2</sup> But those cases did not ask themselves whether in a case of total denial of such a right, a Charter issue might not arise. The cases were of two types. Firstly, they refuted claims of those who claimed an absolute right to practise a profession and thus almost an exemption from discipline.<sup>3</sup> Secondly, they denied relief to those who lost a licence or a business interest.<sup>4</sup> The issue of a total and arbitrary exclusion of someone from a profession, trade or from business in general was not contemplated.

It can thus be said that the Courts, mindful of the refusal by the Canadian constitutional legislator to enshrine property rights alongside other basic rights, declined to extend the American traditional constitutional defence of liberalism to Canada.<sup>5</sup> The relationship between the Canadian Charter and the American has been a complex one. In *Regina v. Robson* we read at p. 145:

It is of some interest that, as appears from some of the American authorities cited by Finch J., the suspension of a driver's licence has been treated as a deprivation of liberty under the United States Constitution. American decisions are not, of course, to be treated as conclusive and due regard must be had to the differences in wording between the two documents and in the history, traditions and attitudes between the two countries. Section 7, unlike the American clauses, does not guarantee the right to property. That right appears to have influenced

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1. Section 7 reads as follows:

7. [Life, liberty and security of person] Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

2. See *Re Homemade Wine Crafts (Canada) Ltd. and A.G.B.C.*, [1986] 26 D.L.R. (4th) 468, *Re Abbotsford Taxi Ltd. and Motor Carrier Commission*, [1986], 23 D.L.R. (4th) 365 (B.C.S.C.), *Re Aluminum Company of Canada Ltd. v. H.M.T.Q. and Dofasco Inc.*, [1986] 55 O.R. (2d) 522 (Ont. D.C.), *Smith, Kline & French Laboratories Ltd. et al. v. Attorney General of Canada*, [1986] 24 D.L.R. (4th) 321 (F.C.T.D.), *Isabey v. Manitoba Health Services Commission*, [1986] 4 W.W.R. 310 (Man. C.A.), *Charbonneau v. College of Physicians & Surgeons of Ontario*, [1986] 22 D.L.R. (4th) 303 (Ont. H.C.), *Noyes v. Board of School Trustees, School District 30*, [1985] 64 B.C.L.R. 287 (B.C.S.C.), *Beltz v. The Law Society of British Columbia*, [1987] 1 W.W.R. 427 (B.C.S.C.), *Milk Board v. Clearview Dairy Farm Inc.*, [1987] 4 W.W.R. 279 (B.C.C.A.), *R. v. Quesnel*, [1986] 24 C.C.C. (3d) 78 (Ont. C.A.). See also *R. V.P. Enterprises Ltd. v. A.G.B.C.*, [1988] 4 W.W.R. 726 (B.C.C.A.) and *Whitbread v. Walley*, [1988] 5 W.W.R. 313.
3. See *Belhumeur c. Le Barreau du Québec*, [1988] R.J.Q. 1526. But Jacques J.A. in his dissent (Que. C.A.) clearly envisaged a sec. 7 application. Since, despite his doubts, Rothman J.A. did not have to answer the question, Jacques J.A. has not been contradicted on this point.
4. See the cases in fn. 2.
5. But, since the New Deal, the U.S. has been much less liberal than before. See L. M. FRIEDMAN *History of American Law*, 2nd Ed., New York, Simon and Shuster, 1985.

some of the American decisions on this question. On the other hand, there may, because of the provisions of s. 1 of the Charter which authorizes reasonable limits, be less reason to construe liberty in a narrow sense in Canada<sup>6</sup>.

It is undoubtedly true too that the authors of the Charter did not intend to turn sec. 7 into a weapon against the welfare state or any of the social programmes which often<sup>7</sup> define the difference between Canada and the United States.<sup>8</sup> Undoubtedly, it was fear of such a result that has inspired most of the restrictive interpretations of sec. 7. It would be both technically incorrect and improper for the courts to attempt to undo regulations. The refusal to defend particular business interests, contracts or jobs, even significant ones, is laudable. No one can seriously question it. But does this eliminate all possibility of protection, even in the case of extreme measures?

### 1. *Wilson v. Medical Services Commission of British Columbia*<sup>9</sup>

The cases prior to 1988 were silent because the precise issue of total and arbitrary deprivation of a right to practise did not arise and there is an established rule against gratuitous pronouncements on the Charter when there is no need for the solution of the dispute before the Court.<sup>10</sup> All of those cases, which denied sec. 7 relief, dealt with particular jobs, licences, or with disciplinary proceedings which were, in fact, fair. The paucity of precedent or arbitrary confiscation of professional rights should not surprise anyone because drastic arbitrary limitations of individual freedom are fortunately fairly rare in our society.

However, in the eighties the perceived over abundance and poor distribution of doctors pushed at least two governments, British Columbia and Quebec, into drastic action. In Quebec, foreign medical graduates were subjected to restrictions quite independent of any examination of their credentials. A first battle, *Dlugosz v. A-G. Quebec*<sup>11</sup> ended with a victory for the foreign doctors but only on administrative law grounds. A new retroactive law was passed

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6. *R. v. Robson*, [1985] 19 C.C.C. (3d) 137 (B.C.C.A.) per Esson J.A. Earlier, in a separate opinion, Nemetz C.J. had applied *Papachristou v. City of Jacksonville* [1972] 405 U.S. 156.

7. Along with bilingualism of course.

8. If one were to try an historical analysis, one would certainly not "ascribe" a "conservative" liberalism to the Trudeau administration which drafted the Charter. To interpret the Charter as the entrenchment of economic liberalism would be historically false.

9. *Wilson v. Medical Services Commission of B.C.*, 30 B.C.L.R. (2d) 97, 53 D.L.R. (4th) 171.

10. See *Moysa v. Alberta (Labour Relations Board)*, [1989] S.C.R. 1572.

11. *Dlugosz c. A-G. Que.*, [1987] R.J.Q. 2311 (Que. C.A.).

and the matter is now before the Courts.<sup>12</sup> It was, however, British Columbia, rather than Quebec which turned out to be the initial battleground for sec. 7.

In *Re Mia*<sup>13</sup>, McEachern C.J.C. granted an administrative law remedy, but also applied sec. 6(2) and sec. 7<sup>14</sup> of the Charter. At p. 414 he said :

In view of this history I have no doubt that freedom of movement within the province for the purpose of lawful employment or enterprise, or for the practice of a profession, trade or calling by qualified persons in any community, is indeed a right properly embraced within the rubric of liberty. Practices which purport to limit or restrict that right are invalid and must be struck down unless permitted by the Charter.<sup>15</sup>

Instead of appealing, the government corrected the administrative law problems and tried again. It was more successful at first instance, for Lysyk J. strongly refused to follow *Mia*, *supra*, and upheld the new scheme of limiting geographically the rights to practise of British Columbia physicians.<sup>16</sup> This decision was, however, reversed by the B.C. Court of Appeal.<sup>17</sup>

The Court of Appeal recognized the legitimacy of regulation and the limits of any freedom. It discussed at great length the previous jurisprudence and upheld the principle that "purely" economic rights cannot be considered part of "liberty" as defined by sec. 7.

It then considered the right to practise medicine and found that, although it had an economic component, it could not be seen as a purely economic right. The Court said :

Furthermore, we are not persuaded that the appellants are pursuing a mere economic interest in the nature of an income guaranteed by the government. The impugned enactments go beyond mere economic concerns or regulation within the profession. The appellants are all fully qualified and licensed doctors who have been excluded from pursuing the practice of their profession. It matters not whether the exclusion of the opportunity to practise is exclusion from practice everywhere in British Columbia, or exclusion from practice anywhere but specified geographic areas of the province.<sup>18</sup>

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12. *Jaeger c. A-G. Que.*, S.C. 500-05-010434-874. Taken under advisement on February 23, 1990. It is unlikely that any decision would be final. Several days later, *Boussetta c. Corporation Professionnelle des Médecins du Québec* S.C. 500-05-010168-894 was taken under advisement by another judge.

13. *Re Mia and Medical Services Commission of British Columbia*, [1985] 17 D.L.R. (4th) 385.

14. The discussion of sec. 7 starts at p. 411.

15. *Id.*, p. 414.

16. *Wilson v. Medical Services Commission of B.C.*, [1987] 3 W.W.R. 48. This is the most restrictive judgment in this area of Charter law.

17. *Wilson v. Medical Services Commission of B.C. supra*, fn. 9.

18. *Id.*, p. 193 (D.L.R.).

This violation was further exacerbated by the violation of mobility rights. Whether or not sec. 6(2) of the Charter guaranteed mobility rights within a province, one could not help including a component of mobility in liberty under sec. 7.<sup>19</sup>

As a result, the B.C. scheme offended sec. 7 and the Court went on to find that it contravened the principles of fundamental justice. The province did not attempt to justify it under sec. 1. It applied for leave to appeal to the Supreme Court, but this was denied.<sup>20</sup> The *Wilson*<sup>21</sup> case was thus definitively confirmed, at least in that context. But the controversy remained.

It must be stated that *Wilson* has been generally followed. The *Howard*<sup>22</sup> case was the most eloquent example. Mr. Justice Huddard explained the previous jurisprudence, pointing out that no untrammelled rights to practise were conferred by *Wilson*<sup>23</sup> and that the previous cases denying purely economic relief were still correct. He went on to say at p. 320:

A purely economic regulation will not touch the right to "liberty". Only when the right to liberty is touched is s. 7 engaged (I use the word "touch" advisedly given the significant difference in the French and English versions of s. 7). It is the continuing right to membership in a profession one is practising that engages concerns extending beyond the purely pecuniary, concerns so effectively expressed by the five judges who heard the appeal of Mr. Justice Lysyk's decision in *Wilson* that I need not repeat them. Once acquired, that membership is fundamental to one's human dignity and protected by s. 7. The most careful reading of *Wilson* and *Mia* [*Mia v. Med. Services Comm. of B.C.*, (1985) 61 B.C.L.R. 273, 15 Admin. L.R. 265, 16 C.R.R. 233, 17 D.L.R. (4th) 385 (S.C.)] does not permit me to view them as confining s. 7 to the protection of a mobility right, as the Attorney General would wish. Counsel for the Attorney General concedes that I cannot find them wrongly decided, although he argues that to be the case.<sup>24</sup>

Other cases which cited *Wilson* as authority include *McPherson*<sup>25</sup>, *Re Maritime Medical Care Inc.*<sup>26</sup>, and *Law Society of Manitoba*<sup>27</sup>. *Mia*<sup>28</sup>

19. But in *Howard v. Architectural Institute of British Columbia*, [1990] 40 B.C.L.R. (2d) 315, Huddart J. refused to limit *Wilson v. Medical Services Commission of B.C.*, *supra*, fn. 9, to "mobility" cases. Of course, even if one held professional rights not to be subject to sec. 7, it would still be possible to save *Wilson* as an entrenchment of mobility rights.

20. 36 B.C.L.R. (2d) xxxvii.

21. *Wilson v. Medical Services Commission of B.C.*, *supra*, fn. 9.

22. *Howard v. Architectural Institute of B.C.*, *supra*, fn. 19.

23. *Wilson v. Medical Services Commission of B.C.*, *supra*, fn. 9.

24. *Howard v. Architectural Institute of B.C.*, *supra*, fn. 19.

25. *McPherson v. Institute of Chartered Accountants of British Columbia*, [1988] 33 B.L.R. (2d) 348.

26. *Re Maritime Medical Care Inc. and Khaliq-Kareemi*, [1989] 57 D.L.R. 505 (4th) (N.S.C.A.). This case is significant since it shows another Court of Appeal favouring the same line of thought.

27. *Law Society of Manitoba v. Lawrie*, [1989] 5 W.W.R. 229 (Man. Q.B.).

28. *Re Mia and Medical Services Commission of B.C. supra*, fn. 13.

which, if anything, went further than *Wilson*, was approved in many cases, notably *Litwack*<sup>29</sup>. Perhaps most significant is the approval of *Mia*<sup>30</sup> and the broad language of *Law Society of Alberta v. Black*<sup>31</sup>. Finally, many cases reach conclusions substantially similar to *Mia* and *Wilson* without mentioning them<sup>32</sup>.

In addition, a very recent case, *International Longshoremen's and Warehousemen's Union — Canada Area Locals 500, 502, 503, 504, 505, 506, 508, 515 and 519 et al.*<sup>33</sup> strongly supports the B.C. Court of Appeal. Rouleau J. said at p. 25-26:

There are however, many judicial statements of import to the effect that section 7 is not confined to mere freedom from bodily restraint and the simple fact that an allegation infringement of section 7 might have an economic component would not exclude it from the protection of the section...

In *Mia v. Medical Services Commission of British Columbia et al.*, (1985) 17 D.L.R. (4th) 385 (B.C.S.C.), Chief Justice McEachern stated with regard to section 7, at pp. 412-15, that "there are some rights enjoyed by our people including the right to work or practice a profession that are so fundamental that

29. *Litwack v. La Commission Nationale des Libérations Conditionnelles* F.C.T.D. T-2080-85 (Walsh J.).

30. *Mia*, *supra*, fn. 13.

31. *Law Society of Alberta v. Black*, [1989] 1 S.C.R. 591. Of course, this is a sec. 6 case but when the Court approved the judgment of Kerans J.A., (1986) 3 W.W.R. 590, his words at p. 612 should be given their full effect:

The pursuit of a livelihood through a trade or calling has been, in Canada, accepted as an appropriate and vital human ambition, available to those of either sex who want or need to pursue it. Our tradition was admirably expressed by McEachern C.J.S.C. in *Mia v. Medical Services Comm. of B.C.* at p. 301:

... there are some rights enjoyed by our people including the right to work or practice a profession that are so fundamental that they must be protected even if they include an economic element...

Rights we have enjoyed for centuries include the right to pursue a calling or profession for which we are qualified, and to move freely throughout the realm for that purpose. These are rights our people have always taken for granted. Who would question them until now?

The Supreme Court decision in *Black* is replete with hints that a "liberal" attitude is favoured in defence of livelihood.

32. See *Taylor v. Institute of Chartered Accountants of Saskatchewan*, [1989] 75 Sask. R. 153., *Brand v. The Council of the College of Physicians of Saskatchewan*, [1989] 77 Sask. R. 252, *Douglas et al v. Sask. Human Rights Commission*, [1989] 79 Sask. R. 44.

One should mention, too, *Pearlman v. Law Society of Manitoba Judicial Committee*, [1990] 1 W.W.R. 178. The Manitoba Court of Appeal dismissed a sec. 7 argument because the payment of costs, which was in issue, was a purely economic matter. By implication, other aspects of law practise would qualify for sec. 7 relief. The minority opinion, not contradicted on this point, states at p. 184 (per O'Sullivan J.):

In my opinion, it is now settled that deprivation of the right to practise law is an interference with liberty. Such interference can be justified under the Charter only in accordance with the principles of fundamental justice, which include substantial justice as well as procedural justice.

33. *International Longshoremen's and Warehousemen's Union — Locals 500, 502, 503, 504, 505, 506, 508, 515 and 519 et al. v. Her Majesty the Queen*, F.C.T.D. T-2557-86, March 8, 1990.

they must be protected even if they include an economic element...". That conclusion was confirmed by the British Columbia Court of Appeal in *Wilson v. Medical Services Commission of British Columbia et al*, [1989] 2 W.W.R. 1, wherein the Court stated at pp. 17-18 :

To summarize : "Liberty" within the meaning of s. 7 is not confined to mere freedom from bodily restraint. It does not, however, extend to protect property or pure economic rights. It may embrace individual freedom of movement, including the right to choose one's occupation and where to pursue it, subject to the right of the state to impose, in accordance with the principles of fundamental justice, legitimate and reasonable restrictions on the activities of individuals.

He then went on to quash a law which provided no imprisonment, but a fine and certain restrictions on labour union activity — not a concept strikingly different from professional rights. It is true that there was, in that case, a "possibility" of imprisonment under art. 787(2) of the Criminal Code but, unless the Charter is applicable to rights with an economic component this would have led not to the nullity of the labour legislation but to a future contestation of art. 787(2). There is thus no doubt that Rouleau J. strongly reaffirms the liberal trend of interpreting sec. 7.

Two earlier cases had foreshadowed these developments<sup>34</sup>. The only case which did not apply *Wilson*<sup>35</sup> did not disapprove it<sup>36</sup>, but rather found that there was entirely analogous binding Ontario jurisprudence. Moreover this was a typical collective bargaining issue of the type which is considered purely economic and therefore compatible with *Wilson*<sup>37</sup>. A Quebec case, *Normand*<sup>38</sup> is also perfectly consistent with *Wilson*<sup>39</sup>. In it, Forget J. says at p. 26 :

Le procureur du demandeur veut rattacher le droit d'exercice d'une profession au concept de "sécurité". La Cour d'appel a rejeté cet argument dans l'arrêt *Belhumeur c. Savard*. La Cour a déclaré que ce droit d'exercice ne pouvait être absolu.<sup>40</sup>

34. *Donald v. Law Society of British Columbia*, [1984] 48 B.C.L.R. 210 (B.C.C.A.) and *Re Branigan and Yukon Medical Council*, [1986] 26 D.L.R. (4th) 268.

35. *Wilson v. Medical Services Commission of B.C.*, *supra*, fn. 9.

36. *Re Arlington Crane Service Ltd.*, [1989] 67 O.R. (2d) 225, (Ont. H.C.).

37. *Wilson v. Medical Services Commission of B.C.*, *supra*, fn. 9.

38. *Normand c. La Régie de l'Assurance Maladie du Québec* C.S. Montreal, 500-05-012998-884. (1989-03-21) (JE 89-680).

39. *Wilson v. Medical Services Commission of B.C.*, *supra*, fn. 9.

40. *Normand c. Régie de l'Assurance-Maladie du Québec*, *supra*, fn. 38. It is interesting that "security of the person" rather than the more usual "liberty" is invoked. While liberty seems to be the established rubric, a somewhat cryptic passage of *A-G. Que. v. Irwin Toy Limited*, [1989] 1 S.C.R. 92 at p. 1003 certainly suggests the possibility of a future for "security of the person". But this would be a distinction without a difference.



The inclusion of rights to a profession as a potential charter-protected right thus seems firmly established.<sup>41</sup>

## 2. Critique of the Development

Was *Wilson*<sup>42</sup> rightly decided? It is submitted that it was, and indeed that any other decision would be an unreasonable limitation of the Charter.

In a somewhat vehement critique, David Lepofsky asks that the case be ignored<sup>43</sup>. With respect, the learned author makes two errors which prove a fatal flaw to his reasoning.

First, at the outset, he assumes that *Wilson*<sup>44</sup> grants an absolute right to practise a profession or to hold property rights. The opposite is true. *Wilson*<sup>45</sup> specifically upholds regulation and discipline; it explicitly approves the "property rights" cases. In fact, many cases which follow *Wilson* and approve it, in fact deny relief on the grounds that the regulation either does not violate the right to liberty or does not violate fundamental justice.<sup>46</sup>

Secondly, he assumes that *Wilson*<sup>47</sup> contradicts previous jurisprudence, especially that originating from Ontario. This is not so. The previous jurisprudence is reaffirmed and clearly all the earlier cases would likely have been decided in the same way. Thus, *Wilson* is neither a radical departure nor a panacea for the dissatisfied professional. What it does is state categorically that here, as in almost all walks of public life, there is a limit beyond which the Charter will not allow authority to operate. One can hardly see the interest of anyone to defend the right of provinces to take away someone's entire livelihood in an arbitrary or fundamentally unjust manner.

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41. A possibly incompatible judgment *Archambault c. Le Comité de Discipline du Barreau du Québec*, [1989] R.J.Q. 688 (C.S.), Brassard J. seems to have been decided per incuriam. At p. 26 Brassard J. makes it clear that the "only" case cited in favour of Charter protection was *Re Branigan and Yukon Medical Council*, *supra*, fn. 34. Moreover, the facts seem to be of a type which, unless the procedure were judged to be arbitrary, would not be affected by *Wilson v. Medical Services Commission of B.C.* *supra*, fn. 9, since the B.C. Court of Appeal explicitly recognized the rights of self-governing professions to discipline their members. Thus the incompatibility may be more apparent than real.

42. *Wilson v. Medical Services Commission of B.C.*, *supra*, fn. 9.

43. D. Lepofsky, *A Problematic Judicial Foray Into Legislative Policy-Making*, (1989) 68 *Can. B. Rev.* 615.

44. *Wilson v. Medical Services Commission of B.C.*, *supra*, fn. 9.

45. *Id.*

46. See, for instance, *Re Maritime Medical Care Inc. and Khaliq Kareemi*, *supra*, fn. 26 and *Howard v. Architectural Institute of B.C.*, *supra*, fn. 19.

47. *Wilson v. Medical Services Commission of B.C.*, *supra*, fn. 9.

There are two situations where the Charter protection might prove effective. Firstly, it will limit schemes to relocate professionals or totally restrict their rights such as the British Columbia effort which was struck down. Suppose that the doctor surplus pushes a government to deny access to “any” new doctor, including recent graduates or, arbitrarily, to suspend, say, the practice of 1988 graduates for several years. Surely a judicial intervention would be in order.

A similar example can be given with respect to property rights. If the original Quebec Civil Code articles 31–38 prohibiting, among others, members of religious orders from owning property were revived, would not the Charter have a role to play? And, would this affect the general rule that property rights, as opposed to rights to hold property, were not affected?<sup>48</sup>

The second class of affected cases was suggested by *Howard*<sup>49</sup> and *Khaliq-Kareemi*<sup>50</sup> where disciplinary proceedings are not compatible with fundamental justice. Presumably, those will be rare, but there is no reason to rule them out in advance.

After *Andrews*<sup>51</sup> it is clear that removal of a professional for a discriminatory reason<sup>52</sup> would be struck. What, however, if without being discriminatory a procedure were arbitrary, totally devoid of natural justice or purely discretionary? It would be absurd to deny relief in such a case. Sec. 7 seems to be the only reasonable legal basis for intervention.

An example, here, will also be instructive. If a law allowed the Bar of a province to strike off the roll without notice any professional it deems unworthy, there would be no reason to shelter it from Charter review. Yet sec. 7 seems to be the only available weapon.

Lepofsky argues that it is unfair to favour professionals over other workers. In his view this would be snobbish or elitist. Undoubtedly, no limitative list of professions exists. In *Litwack*<sup>53</sup> a “businessman” prevented by his condition of parole from engaging in “business” was granted relief. There is no reason why an arbitrary confinement of an “electrician” to a

48. If any doubts remained about this, they should have been dispelled by *Re Skalbania*, [1989] 60 D.L.R. (4th) 43 where the B.C. Court of Appeal without retreating one inch from *Wilson v. Medical Services Commission of B.C.*, *supra* fn. 9. which it approved, refused to extend it to protect freedom to make particular contracts.

49. *Howard v. Architectural Institute of B.C.*, *supra*, fn. 19.

50. *Re Maritime Medical Care Inc. and Khaliq-Kareemi*, *supra*, fn. 26. See also *Re Branigan and Yukon Medical Council*, *supra*, fn. 34.

51. *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143.

52. As happened in *Martin v. Law Society of B.C.*, [1950] 3 D.L.R. 173 (B.C.C.A.) long before the Charter.

53. *Litwack v. La Commission Nationale des Libérations Conditionnelles*, *supra*, fn. 29.

specific town would not be actionable. Yet the professions have certain elements which do make them different. One must take into account the lengthy preparation required for joining them. More important, the monopoly of the professions makes it almost impossible for the person affected to pursue his calling outside the corporation. In *Howard*<sup>54</sup> we read a perfectly plausible explanation of the favoured treatment of professions at p. 319 :

The economic component in this matter derives from the essential nature of a profession. Each self-governing profession has been given a monopoly over the provision of specified services to the public. However well qualified to provide a particular professional service, a person cannot provide that service unless he is a member in good standing of the relevant professional society. A governing body regulates each profession as prescribed by the statute establishing the monopoly and the by-laws passed by the members.

It would be a travesty, as well, to term the right to practise a calling or profession<sup>55</sup> a mere economic interest. *Wilson*<sup>56</sup> is surely right in connecting a person's pride, sense of well-being and dignity with such a right<sup>57</sup>. It suffices to read the Code of Ethics of almost any profession to see that membership is not seen only as a licence to make money. One should be astounded if many serious professionals joined Lepofsky in arguing the opposite.

The mere presence of an economic element or interest cannot rule out a Charter application. At most, it may add nothing to enhance it. Many Charter-protected interests have an economic component. The equality rules, for instance, clearly apply to professions because of *Andrews*<sup>58</sup> and have even been applied to employment<sup>59</sup>. Established instances of sec. 7 application, such as arbitrary deprivation of a driving licence<sup>60</sup> also have an economic side. The word "economic" should therefore not become a sacramental formula for refusing relief. It may be helpful to applicants in some cases or be totally irrelevant in others but it cannot act as an automatic bar. *Wilson*<sup>61</sup> clearly makes this point.

The criticism of *Wilson*<sup>62</sup> is thus unfounded or based on a massive misunderstanding of the judgment.

54. *Howard v. Architectural Institute of B.C.*, *supra*, fn. 19.

55. This author does not exclude trades or limit the professions to the liberal ones. No elitist intention is present.

56. *Wilson v. Medical Services Commission of B.C.*, *supra*, fn. 9.

57. As opposed to the right to practise in a particular law firm or hospital which is a "mere economic" incident of the right to practise, even if it involves matters of great value.

58. *Andrews v. Law Society of B.C.*, *supra*, fn. 51.

59. *Commission des Droits de la Personne du Québec v. Ville de Brossard et al.*, [1988] 2 S.C.R. 279; *Canadian National Railways v. Action Travail des Femmes*, [1987] 1 S.C.R. 1114.

60. *R. v. Robson*, *supra*, fn. 6.

61. *Wilson v. Medical Services Commission of B.C.*, *supra*, fn. 9.

62. *Id.*

It is submitted that a desire to exclude *a priori* such an important part of human endeavour in the public sphere with potential effects on mobility and basic dignity, is a misreading of the many Supreme Court decisions which call for a broad purposive interpretation of the Charter<sup>63</sup>. Would not the Charter be a sterile and technical document if it protected us from confiscation of our driving licence<sup>64</sup>, and from relatively short imprisonment for non-payment of a fine<sup>65</sup> but not from the confiscation of that which is probably one of the most important factors in a person's view of himself, his profession? Or, if it protected the right to merge of big law firms<sup>66</sup> without giving any protection at all to a smaller practitioner who is typically confined to one province? The flexible, open-minded approach of *Wilson*<sup>67</sup> seems infinitely preferable.

## Conclusion

The recent developments stemming from *Wilson*<sup>68</sup> effect no revolution and reverse no established line of jurisprudence. They pose no threat to regulations of professions or any other aspect of Canada's welfare state. But they do establish that the right to practise a profession or calling may be protected by the Charter if threatened by arbitrary state action. This is the natural evolution of Charter law<sup>69</sup> and, although it will change the outcome of relatively few cases it should be welcomed by everyone as another protection against arbitrary action which the Charter was intended to curb.<sup>70</sup>

63. *Law Society of Alberta v. Black*, *supra*, fn. 31, *Andrews v. Law Society of B.C.*, *supra*, fn. 51, *R. v. Edwards Book and Art Ltd.*, [1986] 2 S.C.R. 713, *R. v. Oakes*, [1986] 1 S.C.R. 103, *Reference Re Sec. 94(2) of the Motor Vehicle Act B.C.*, [1985] 2 S.C.R. 487, *Gamble v. The Queen*, [1988] 2 S.C.R. 595 can be quoted as examples. See also *Action Travail des Femmes v. Canadian National Railway Co. et al.*, *supra*, fn. 59.

64. *R. v. Robson*, *supra*, fn. 6.

65. *R. v. Burt*, [1988] 1 W.W.R. 385 (Sask. C.A.). See also *Reference re sec. 94(2)*, *supra*, fn. 58.

66. *Black v. Law Society of Alberta*, *supra*, fn. 31 decided under sec. 6(2).

67. *Wilson v. Medical Services Commission of B.C.*, *supra*, fn. 9.

68. *Id.*

69. Even before the Charter Dickson J. as he then was, said in *Kane v. University of B.C.*, [1980] 1 S.C.R. 1105 at p. 1113:

A high standard of justice is required when the right to continue in one's profession or employment is at stake. *Abbott v. Sullivan*, at p. 198; *Russell v. Duke of Norfolk*, *supra*, at p. 119. A disciplinary suspension can have grave and permanent consequences upon a professional career.

In an extreme case, a Charter protection would seem proper. It is true that in *R. v. Wrigglesworth*, [1988] 1 S.C.R. 581 the Supreme Court passed an opportunity to decide the issue, but, given the Court's awareness of it, the failure to grant leave to appeal in *Wilson v. Medical Services Commission of B.C.*, *supra*, fn. 9, while not conclusive, cannot be deprived of all significance.

70. In the *Prostitution Reference*, May 31, 1990, SC 20581, the majority of the Supreme Court «explicitly» declined to decide the issue (per Dickson CJC). Therefore it remains open.