Newspapers and the Law

By
Walter Tarnopolsky
Colin Wright
Gérald-A. Beaudoin
Edith Cody-Rice

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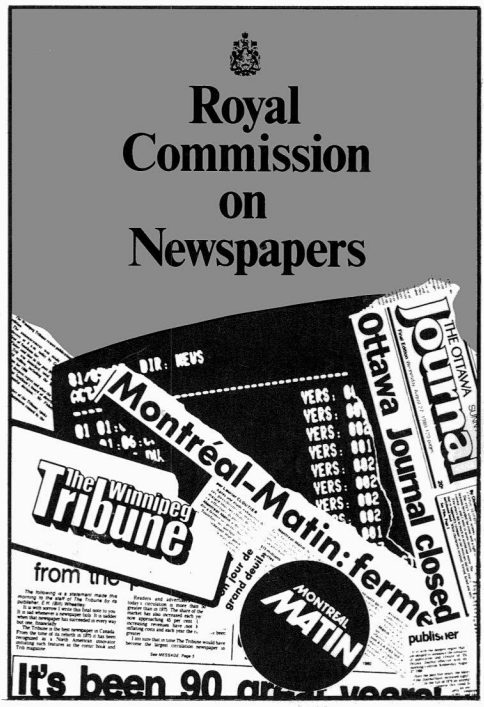

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Volume 3

Newspapers and the Law

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Note: The numbering of the volumes reflects the order in which their subject matter is taken up in the Commission's Report.

Introduction

In this volume are presented studies by four Canadian lawyers invited to provide background and opinion on areas of law which affect journalists and newspapers. Although much of the material used in Chapter 3 of the Commission's Report was drawn from these studies, any opinions expressed are those of the authors and do not necessarily reflect the views of the Commission or of the Commission's legal counsel.

The first study, which traces the evolution of the rights and freedoms of the press, was written by Walter S. Tarnopolsky. He is professor of constitutional law and director of the Human Rights Institute at the University of Ottawa. He is a member of the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights, a member of the Canadian Human Rights Commission, and a former president of the Canadian Civil Liberties Association. Among his many published works, he is probably best known for his book, *The Canadian Bill of Rights*.

Colin Wright deals with issues of law and public policy. Now in private practice, he has worked variously as a researcher with Trent University, as a teaching assistant (Canadian history) at Carleton University, and as an English-language teaching assistant at the Institut Universitaire de Technologie, Nancy, France. Before joining the legal profession, he worked for some time as a reporter with the *Globe and Mail*.

Gérald-A. Beaudoin, whose study deals with press law and the distribution of legislative powers, has taught constitutional law at the University of Ottawa since 1960. He was dean of the civil law section at that university for 10 years. He was a member of the Pépin-Robarts Task Force on Canadian Unity and is well known throughout the legal profession for his involvement in many leading constitutional cases. He is the author of several books and articles on the Canadian constitution.

Edith Cody-Rice, now also a lawyer in private practice, has wide experience in other fields, from community development work in Mexico as a nurse, teaching a range of courses at the University of Waterloo, and acting as researcher for the CBC television program, Ombudsman. She assisted in the development of a course in communications at Waterloo and later also taught communications at Seneca College, Toronto. Her study deals with the application to newspapers of the "detriment" clause in the Combines Investigation Act.

The editor of this volume was Ellen Gallagher. The co-ordinator of legal studies for the Royal Commission was its chief counsel, D.S. Affleck, Q.C. Dick MacDonald was co-ordinating editor of research publications, which were under the general supervision of Tim Creery, director of research for the Commission.

I
Freedom of the press

by Walter Tarnopolsky

Contents

I

A part of the freedom of expression

Essentially, freedom of the press is freedom of speech in written form. Since the Second World War, the trend in human rights instruments has been to combine the freedoms of speech and of the press into one: "freedom of expression". Thus, the International Covenant on Civil and Political Rights, in Article 19(2), provides that "everyone shall have the right to freedom of expression", and goes on to define this right as including "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".[1] Similarly, although the 1960 Canadian Bill of Rights made separate provision for "freedom of speech" and "freedom of the press", the proposed Canadian Charter of Rights and Freedoms, in section 2(b) provides for:

> freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. . . .

Therefore, although particular attention will be given to the ways in which "freedom of the press" has been given definition in the 20th century, particularly in Canada, it will also frequently be dealt with as part of "freedom of expression".

II

Basic to a free society

Judges on the highest courts of the United Kingdom, the United States and Canada have all emphasized that freedom of expression is basic to a free society. In the words of Lord Denning, "[T]he keystone of our political liberty is freedom of discussion".[2] Similarly, in 1937, Mr. Justice Cardozo of the United States Supreme Court said that the freedoms of speech and of the press are "the matrix, the indispensable condition, of nearly every other form of freedom".[3]

In two of the leading Supreme Court of Canada decisions on freedom of expression, similar views were put forth. The earlier of these is that of Mr. Justice Cannon in the famous *Alberta Press Bill* case.[4] He emphasized the fundamental nature of this freedom in the following terms:

> Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy. . . .Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law.[5]

In the early 1950s, in the case which set the contemporary limitations on excessive prosecutions for the offence of seditious libel, *Boucher* v. *The King*,[6] Mr. Justice Rand described freedom of discussion in the following terms:

> Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. . . .Controversial fury is aroused constantly by differences in abstract conceptions: heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability.[7]

He referred to "free criticism as a constituent of modern democratic government" protecting "the widest range of public discussion and controversy" as long as it is "done in good faith".[8]

One of the best statements on the extent of freedom of expression under the British constitutional tradition, which we have inherited, is that of Lord Coleridge, expressed soon after the turn of the 20th century.[9] Not only does he define what the extent of freedom of expression is, he also sets out the limits:

> A man may lawfully express his opinion on any public matter, however distasteful, however repugnant to others, if, of course, he avoids defamatory matter, or if he avoids anything that can be characterised either as a blasphemous or as an obscene libel. Matters of State, matters of policy, matters even of morals — all these are open to him. He may state his opinion freely, he may buttress it by argument, he may try to persuade others to share his views. Courts and juries are not the judges in such matters. For instance, if he thinks that either a despotism, or an oligarchy, or a republic, or even no government at all, is the best way of conducting human affairs, he is at perfect liberty to say so. He may assail politicians, he may attack governments, he may warn the executive of the day against taking a particular course, or he may remonstrate with the executive of the day for not taking a particular course; he may seek to show that rebellions, insurrections, outrages, assassinations, and such-like, are the natural, the deplorable, the inevitable outcome of the policy which he is combating. All that is allowed, because all that is innocuous; but, on the other hand, if he makes use of language calculated to advocate or to incite others to public disorders, to wit, rebellions, insurrections, assassinations, outrages, or any physical force or violence of any kind, then, whatever his motives, whatever his intentions, there would be evidence on which a jury might, on which I should think a jury ought, and on which a jury would decide that he was guilty of a seditious publication. . . .[10]

Finally, it is appropriate to end this part with excerpts from a report issued in 1947 by a private American Commission on Freedom of the Press, chaired by Robert M. Hutchins, entitled *A Free and Responsible Press*. The quotations are set out here at some length because they are most pertinent to a consideration of why this freedom is so fundamental to a free and democratic society, what its extent is, and how limits should be evaluated:

> Freedom of the press is essential to political liberty. Where men cannot freely convey their thoughts to one another, no freedom is secure. Where freedom of expression exists, the beginnings of a free society and a means for every extension of liberty are already present. Free expression is therefore unique among liberties: it promotes and protects all the rest. . . .
>
> Civilized society is a working system of ideas. It lives and changes by the consumption of ideas. Therefore it must make sure that as many as possible of the ideas which its members have are available for its examination. It must guarantee freedom of expression, to the end that all adventitious hindrances to the flow of ideas shall be removed. Moreover, a significant innovation in the realm of ideas is likely to arouse resistance. Valuable ideas may be put forth first in forms that are crude, indefensible, or even dangerous. They need the chance to develop through free criticism as well as the chance to survive on the basis of their ultimate worth. Hence the man who publishes ideas requires special protection.

If the freedom of the press is to achieve reality, government must set limits on its capacity to interfere with, regulate, or suppress the voices of the press or to manipulate the data on which public judgment is formed.

Government must set these limits on itself, not merely because freedom of expression is a reflection of important interests of the community, but also because it is a moral right. It is a moral right because it has an aspect of duty about it.

. . .[T]here is a vein of expression which has the added impulsion of duty, and that is the expression of thought. If a man is burdened with an idea, he not only desires to express it; he ought to express it. He owes it to his conscience and the common good. The indispensable function of expressing ideas is one of obligation — to the community and also to something beyond the community — let us say to truth. It is the duty of the scientist to his result and of Socrates to his oracle; it is the duty of every man to his own belief. Because of this duty to what is beyond the state, freedom of speech and freedom of the press are moral rights which the state must not infringe.

But the moral right of free public expression is not unconditional. Since the claim of the right is based on the duty of a man to the common good and to his thought, the ground of the claim disappears when his duty is ignored or rejected. In the absence of accepted moral duties there are no moral rights. Hence, when the man who claims the moral right of free expression is a liar, a prostitute whose political judgments can be bought, a dishonest inflamer of hatred and suspicion, his claim is unwarranted and groundless. From the moral point of view, at least, freedom of expression does not include the right to lie as a deliberate instrument of policy.

The right of free public expression does include the right to be in error. Liberty is experimental. Debate itself could not exist unless wrong opinions could be rightfully offered by those who suppose them to be right. But the assumption that the man in error is actually trying for truth is of the essence of his claim for freedom. What the moral right does not cover is the right to be deliberately or irresponsibly in error.

Though the presumption is against resort to legal action to curb abuses of the press, there are limits to legal toleration. The already recognized areas of legal correction of misused liberty of expression — libel, misbranding, obscenity, incitement to riot, sedition, in case of clear and present danger — have a common principle; namely, that an utterance or publication invades in a serious, overt, and demonstrable manner personal rights or vital social interests. As new categories of abuse come within this definition, the extension of legal sanctions is justified. The burden of proof will rest on those who would extend these categories, but the presumption is not intended to render society supine before possible new developments of misuse of the immense powers of the contemporary press.[11]

III

Without prior restraint

Very soon after the invention of the printing press, the Crown in England resorted to various forms of control and restriction of printing. Until nearly the end of the 17th century, printing was allowed only under special licences. In 1556, the exclusive privilege of printing was given to some 97 London stationers and their successors, known as the Stationers' Company. By the time of Queen Elizabeth the First, the printing of books was confined to this Company and the universities of Oxford and Cambridge. By a prerogative power of the Crown, as custodian of morals, the censorship practised through the licensing system was backed up by press offences dealt with by the Court of Star Chamber. Although the Star Chamber was abolished in 1641, censorship survived the interim period of the Commonwealth into the time of the Restoration and was then given a statutory basis through the Licensing Act of 1662.

The original Licensing Act of 1662 was kept in force by subsequent licensing Acts, although subject to increasing criticism inspired by the writings of such as John Locke and the earlier classic indictment of licensing, John Milton's *Areopagitica* (1644). However when, in 1695, the House of Commons refused to renew the Licensing Act, it appears not to have been so much out of some basis of high principle concerning freedom of expression, but rather for a whole number of reasons dealing with commercial restrictions, job opportunities, house searches under general warrants and the grievances and exactions involved in customs searches.[12]

In any event, regardless of the motives, with the refusal to renew the Licensing Act in 1695, prior censorship came to an end, except during wartime. Since then, freedom of the press has consisted of publication without prior restraint but subject to punishment for contravention of the law. The result is that, as Blackstone described it, freedom of the press "consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published".[13] Lord Mansfield gave this same definition judicial approval in the case of *The King* v. *Dean of Saint Asaph*, when he said: "The liberty of the press consists in printing without any previous licence, subject to the consequences of the law".[14] Dicey expressed Lord Mansfield's definition in a more cynical but more aptly realistic fashion: "Freedom of discussion is, then, in England little else than the right to write or say anything which a jury, consisting of 12 shopkeepers, think it expedient should be said or written."[15]

One of the earliest means of restricting publication and circulation was through deliberate taxation or costing to inhibit circulation. One of the first examples was a

Stamp Tax, introduced in 1712, which required newspapers to purchase and affix stamps which were imposed to raise the price of newspapers beyond the purchasing power of all but the wealthiest readers. These particular taxes were not removed in England until 1855. Perhaps the most famous incident involving the Stamp Tax was its imposition on the American colonies in 1765, both for the purpose of paying for the war with France and for suppressing a critical Colonial press. The reaction was so strong that the tax was withdrawn by the year following, but not before the slogan "no taxation without representation" was born as a rallying cry for the American revolutionary war. Subsequently, excessive taxation, found to be a device for limiting opposition, has been held contrary to the First Amendment and, through the "due process" clause, contrary to the Fourteenth Amendment to the United States Constitution. When Louisiana Governor Huey Long tried to deal with newspapers in New Orleans which opposed him, by taxing them out of business, the United States Supreme Court ruled that the tax was unconstitutional as "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees".[16]

Similarly, censorship can be achieved by harassment and intimidation. Perhaps the best known example of this was during the so-called McCarthy era in the United States. Near the end of this period, the kind of danger involved was brought out by the United States Supreme Court in the 1953 decision in *United States* v. *Rumely*:

> Through the harassment of hearings, investigations, reports, and subpoenas, government will hold a club over speech and over the press. Congress could not do this by law. . . .[Therefore] it may not take the first step in an enquiry ending in fine or imprisonment.[17]

Other kinds of prior censorship occur through the pressures of advertisers, and the decisions of newspapers themselves, particularly in circumstances where there is no competition or alternative news source. Each of these kinds of prior restraint are subjects in themselves,[18] but two examples will be discussed later with reference to letters to the editor and acceptance of advertisements. However, some observations on these issues, written just after the Second World War by one of Canada's most distinguished political scientists, Robert M. MacIver, are most apposite:

> . . .In a democracy certain values are accepted as being superior to minority interests, and even to majority interests. Foremost among these values is the right of every man to his own opinions and to all the opportunities necessary for the preservation of that right. Thus democracy asserts the value of personality as a universal good and implies that there is a welfare of the whole to be attained through the cultivation of that value in all men; through their free relationships and under universal rules that deny to any power group the right to impose its will upon the rest. Democracy affirms the community.
>
> This affirmation is constantly being threatened by the imperialism of powerful groups. It is the eternal problem of democracy to keep them in their place, subject to the democratic code. Every group that owns power without corresponding responsibility is a menace to it. Any group whatever, if armed with the requisite power, destroys the reciprocity of interests that democracy postulates. Every group, if it is not restrained from so doing, puts its interest above the interest of the whole. . . .

> Of all such monopolies the most immediately fatal to democracy is the monopoly of the media of opinion, or any approximation to it. Modern means of communication have most remarkably expanded the expression of opinion and the opportunities for the education of opinion. But this service has been counteracted by a disservice. The propagation of opinion may be conducted sincerely, without conscious distortion of the truth, but it frequently is exploited by interests that disregard such considerations. These interests are reckless of misrepresentation, seeking without scruple to make the worse appear the better reason, avidly appealing to the blind emotions and prejudices of their readers or hearers. There is no serious protection against these assaults except the ability of opposing opinion to gain a hearing. In the free conflict of opinions lies man's best antidote against the poisons of false indoctrination. Whichever side he espouses he no longer does it without the opportunity to choose. One of the greatest enemies to enlightenment is foiled, the authoritative pronouncement that not only condemns the cause of the opponent but forbids him to plead his cause. Democracy, which lives by the organization of opposing opinions, has the task of keeping open to all sides the powerful and ever more concentrated agencies of propaganda operating through the radio, the moving picture, television, the press and every form of literature.
>
> This task is no easy one. One of the major difficulties lies in the extension of large-scale enterprise to the media of opinion. In certain areas modern technology gives an economic advantage to the greater opinion-promulgating units and to the combination of small local units under the control of one syndicate or capitalist owner. This situation holds particularly for the newspaper and the moving picture. In other areas technological factors limit the number of competing producers, particularly in radio and television. In consequence the number of independently owned newspapers continually decreases, and many editors become the agents of one owner.[19]

Another form of censorship, which continues to the present day, is practised with respect to matter passing through the postal service or through customs. Thus, Section 164 of the Criminal Code makes it an offence to mail matter which is "obscene, indecent, immoral or scurrilous", and Section 7(1) of the Post Office Act[20] provides for interruption of such service. Similarly, there is prohibition of the importation of "treasonable, seditious, immoral or indecent" literature.[21]

At this point it might be useful to consider attempts by provinces to impose censorship. The best known of these are the various provincial film censorship Acts. Although there was some considerable doubt whether these were within the jurisdiction of the provinces,[22] in the recent case of *The Nova Scotia Board of Censors* v. *McNeil* the Supreme Court of Canada held, by a five to four majority, that provincial legislation establishing a board of censors with powers to prohibit the use or exhibition of films, was within the jurisdiction of the provinces despite the federal jurisdiction over determination of what is "obscene".[23]

Other attempts by the provinces to censor the dissemination of "ideas" have, however, been considerably less successful. One of the most famous was that of the Social Credit Government of Alberta which, in 1937, passed a number of bills to implement the radical program which had been promised in the previous election. One of these was An Act to Ensure the Publication of Accurate News and Information. By it, newspapers could be compelled to disclose the source of their news infor-

mation and could be compelled to print government statements to correct previous articles. Any contravention of the Act was punishable by prohibition from further publication. On a reference to the Supreme Court of Canada[24] this bill was held to be *ultra vires* as being part of a general scheme of Social Credit legislation, all of which was held to interfere with federal powers. Of the six Supreme Court Justices who heard the case, three went further. Chief Justice Duff (with Mr. Justice Davis concurring), and Mr. Justice Cannon, were of the opinion that the bill was an invasion of the liberty of the press and of the right of public discussion, which a provincial legislature did not have the authority to limit. Reference was made earlier to the ringing declaration of Mr. Justice Cannon as to the fundamental importance of freedom of the press. He continued in the following terms.

> Every inhabitant in Alberta is also a citizen of the Dominion. The province may deal with his property and civil rights of a local and private nature within the province; but the province cannot interfere with his status as a Canadian citizen and his fundamental rights to express freely his untrammelled opinion about government policies and discuss matters of public concern. The mandatory and prohibitory provisions of the Press Bill are. . .*ultra vires* of the provincial legislature. They interfere with the free working of the political organization of the Dominion. . .the federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion.[25]

In a similar vein, Chief Justice Duff stated that the preamble to the British North America Act showed plainly enough that the Canadian constitution was to be "similar in principle to that of the United Kingdom", and that this "contemplates a Parliament working under the influence of public opinion and public discussion".[26] He suggested that in addition to the power of disallowance, the Parliament of Canada possessed the authority to legislate for the protection of this right of free discussion. He conceded that the provinces could regulate newspapers to some degree but the limit of this regulation was reached "when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of the British North America Act and the statutes of the Dominion of Canada".[27]

A more recent decision of the Supreme Court of Canada is now the leading authority concerning provincial power to regulate the dissemination of "ideas". The case of *Switzman* v. *Elbling*,[28] which is widely known as the *Padlock* case, dealt with the 1937 Québec Act Respecting Communistic Propaganda which declared it illegal to use a house for the propagation of communism or bolshevism,[29] or to use it to print, publish or distribute a document for the same purpose. The Act provided for placing of a padlock on such a house, under the authority of the attorney-general. The Supreme Court declared, with only one dissent, that this was legislation with respect to criminal law, within federal jurisdiction, and beyond the powers of the province. Mr. Justice Fauteux suggested that such an Act could not come under Section 92(16) of the BNA Act as a "local matter" within provincial jurisdiction, because the propagation of an "idea" could hardly be considered to be a "local matter". He said:

> Seul le Parlement, légiférant en matière criminelle, à compétence pour décréter, définir, défendre et punir ces matières d'un écrit ou d'un discours qui, en raison de leur nature, lèsent l'ordre social ou la sécurité de l'Etat.[30]

Two other judgments are of interest. Mr. Justice Abbott went further than any other Supreme Court Justice and declared that not even Parliament, much less a provincial legislature, could abrogate the right of free public debate.[31] Mr. Justice Rand gave another of his classic judgments in the civil liberties field. He proceeded to show that the term "civil liberties" could never have been intended to be included, as such, in the terms "property and civil rights" or "matters of merely local or private nature" in the province. He asserted that the rights of free opinion, public debate, and discussion were clearly necessary to parliamentary government, and went on in these terms:

> This means ultimately government by the free public opinion of an open society, the effectiveness of which, as events have not infrequently demonstrated, is undoubted.
>
> But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas. Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves: and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles. Under that government, the freedom of discussion in Canada, as a subject matter of legislation, has a unity of interest and significance extending equally to every part of the Dominion. With such dimensions it is *ipso facto* excluded from head 16 as a local matter.[32]

However, it should be noted that censorship can take many forms other than direct supervision over what is said or written. To persons or groups who cannot afford to print newspapers or books, or to advertise, or who might not be given the opportunity to advertise, even if they had the money to do so, supervision of the distribution of handbills or tracts, or even posters, is a form of censorship. This form of censorship has been effected in many parts of Canada through municipal bylaws regulating the use of streets, sidewalks and parks. These bylaws usually require the approval of the chief of police or some civic official before pamphlets can be distributed. Of course, such bylaws are enacted under provincial enabling statutes passed under the power with respect to "municipal institutions in the province" — Section 92(8) of the BNA Act.

Unfortunately, the *ratio decidendi* (reason for decision) of the leading case on such censorship, *Saumur* v. *City of Québec*[33] is exceedingly obscure. The bylaw of the city forbade the distribution in the streets of the city of any book, pamphlet, circular, tract, etc., without prior permission of the chief of police. The appellant was a missionary-evangelist of the Witnesses of Jehovah. He claimed that the bylaw was *ultra vires* and void because it attempted to interfere with his rights as a Canadian citizen to express freely his opinions and to worship his God, rights which flowed from the unwritten British constitution as incorporated in the BNA Act, from the BNA Act itself, and from the Freedom of Worship Act of Québec.[34] The City pleaded that the bylaw was concerned with the cleanliness and good order of the city. The formal judgment of the Supreme Court, by a majority of five to four, was to the

effect that the bylaw did not extend so far as to prohibit the appellant from distributing religious literature in the streets. Of the majority, four would have declared the bylaw *ultra vires* as beyond what a provincial legislature could authorize. The fifth thought that the bylaw was within provincial power, but that the Québec Freedom of Worship Act protected the appellant from its effects. Of the dissenting minority, two thought that freedom of religion was a civil right within provincial jurisdiction, while the other two did not feel called upon to decide that point.

Other cases, while not holding city bylaws regulating distribution of literature in public places invalid, have tended to find that such bylaws were not intended to deal with political, semi-political or religious tracts.[35]

On the other hand, it cannot confidently be stated that such municipal censorship is invalid. For one thing, in the recent decision in *Attorney-General of Canada* v. *Dupond*,[36] the Supreme Court of Canada held, by a majority of six to three, that a Montréal city ordinance, which prohibited "the holding of any assembly, parade or gathering on the public domain of the City of Montréal for a time-period of 30 days", was valid as being of a "merely local character" and not in relation to the criminal law. In the course of making a distinction between the fundamental freedoms and the holding of demonstrations or parades, Mr. Justice Beetz, for the majority, made the following incredible observation:

> Freedoms of speech, of assembly and association, of the press and of religion are distinct and independent of the faculty of holding assemblies, parades, gatherings, demonstrations or processions on the public domain of a city. This is particularly so with respect to freedom of speech and freedom of the press as considered in the *Alberta Press Act Case*, *supra*. Demonstrations are not a form of speech but of collective action. They are of the nature of a display of force rather than that of an appeal to reason; their inarticulateness prevents them from becoming part of language and from reaching the level of disclosure.[37]

In a somewhat similar fashion, an earlier British Columbia court had upheld a city bylaw which enabled the licence inspector to revoke business licences, even of a newspaper, the *Georgia Straight*, for "gross misconduct", and held that this was not a contravention of freedom of expression, but valid property and civil rights legislation.[38]

IV

The limits

Reference was made in Part I to Article 19 of the International Covenant on Civil and Political Rights as setting out, in Subsection (2), what "freedom of expression" comprises. Subsection (3) goes on to provide that the exercise of the right set out "carries with it special duties and responsibilities" and therefore may "be subject to certain restrictions" which "shall only be such as are provided by law and are necessary":

> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

It will be seen in this Part that these internationally recognized limitations coincide largely with what have been the limitations recognized under Canadian common law. As has been indicated, freedom of the press since the non-renewal of the Licensing Act in 1695 has consisted of the absence of prior restraint, but liability for breach of the law. And the major limitations were in the law of libel — blasphemy, obscenity, sedition and defamation. To these have been added the more recent prohibitions of hate literature and group defamation as well as the older protections of courts and Parliament through contempt proceedings.

(1) Blasphemy

Before the 17th century it was the church, not the state, that exercised primary control over expression on religious matters. It would appear that the first intervention before the ordinary courts developed during the 17th century by analogy with the crime of sedition, that is, if opinions on religious matters threatened a disturbance of the public peace, it was the concern of the ordinary courts.[39] Although prosecutions for blasphemy continued to be quite frequent in the 18th century, they declined during the 19th century with the passing by Parliament of various Acts removing the disabilities of faiths other than Protestant.[40]

The passing of the Libel Act, in 1792, which transferred to the jury the whole matter in issue, including whether the expression in issue was libelous, applied to blasphemy as well, since libel included blasphemous libel. However, the number of prosecutions did not abate greatly. The turning point appears to be the judgment of Lord Chief Justice Coleridge, in 1883, in the case of *Regina* v. *Ramsay and Foote*,[41] where he advised the jury that "if the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blas-

phemy".[42] Then, in 1917, the House of Lords in the case of *Bowman* v. *Secular Society, Limited*,[43] reviewed the common law authorities and defined blasphemy as publication of any matter with reference to God, Jesus Christ, the Bible, the Hymn Book, which is intended and calculated to excite contempt and hatred against the church or religion or to promote immorality. However, expression in proper and decent language in good faith, of an opinion or argument on a religious subject, was expressly excepted.

Today, blasphemous libel is an offence in Canada under Section 260 of the Criminal Code. The offence is not defined, but Subsection (3) explicitly provides for the same exemptions as set out in the *Bowman* case. That prosecution for blasphemy has lapsed is evident from a consideration of the struggle between the Witnesses of Jehovah and the government of Premier Duplessis during the 1940s and 1950s. Although the Witnesses' literature contained scathing, and even insulting, denunciations of the Roman Catholic Church and its clergy, they were not charged under the blasphemous libel section of the Criminal Code.

(2) Obscenity

It would appear that this offence started with the conviction, in 1663, of Sir Charles Sidley for his behavior after a drinking orgy, which conviction was described in the report of the case in the following terms:

> He was fined two thousand marks, committed without bail for a week and bound to his good behavior for a year, on his confession of information against him for showing himself naked in a balcony and "throwing down bottles" (Pist in) *Vi et armis* among the people in Covent Garden *contra pacem* and to the scandal of the Government.[44]

Although, as Professor Street points out, there was more "an element of public indecency towards a captive audience" than a declaration of a separate crime of obscenity,[45] nevertheless this case was resorted to as the basis for convicting one Curl in 1727 for publishing a pornographic book. It is *Curl's* case[46] that established the crime of publishing obscene libels.

Eventually the Obscene Publications Act of 1857 was enacted, empowering magistrates to order the destruction of obscene books and authorizing the granting of warrants to search suspected premises. The offence remained with little change for just over a century until 1959, when a new Obscene Publications Act was enacted. The 1857 Act and the definition of obscenity thereunder, is best known by its exposition in the famous *Hicklin* case.[47] This case concerned a publication called The Confessional Unmasked, which purported to expose the iniquity of the confessional by allegedly publishing extracts from Roman Catholic publications. In upholding an order for the destruction of the publication, Chief Justice Cockburn provided the following definition:

> . . .I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.[48]

From its first enactment in 1892, the Canadian Criminal Code has included an offence for the publication of indecent matter tending to the corruption of morals.

Definition of "obscene matter" was not provided, and the test which was applied was the Hicklin test. In 1959, however, Parliament amended the Criminal Code to deal with the matter of obscenity in the present Section 159. The definition provided in Subsection (8) reads as follows:

> For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

Although, in his explanation of the amendment, the then minister of justice suggested that the Hicklin test was not being superseded, the Supreme Court held otherwise in the case which considered D.H. Lawrence's *Lady Chatterley's Lover*.[49] Just two years later, in *Dominion News & Gifts* v. *The Queen*,[50] the Supreme Court unanimously affirmed the dissenting judgment of Mr. Justice Freedman of the Manitoba Court of Appeal,[51] where he had suggested that the question of whether Section 159(8) was exhaustive and had superseded the Hicklin test, was still open. However, it appears that the Supreme Court of Canada was not concerned with that part of his judgment, which was *obiter* in any case, but rather with that part where he sets out how the "community standards" test of obscenity should be applied. Thus, in *Regina* v. *Cameron*,[52] the Ontario Court of Appeal suggested that the Hicklin test was superseded by Section 159(8) and the Supreme Court of Canada dismissed an appeal from that decision.[53] Similarly, in two decisions in 1970, the Manitoba Court of Appeal appeared to assume that Section 159(8) was exhaustive.[54] Finally, in 1977, the Supreme Court of Canada settled the issue when a majority held that the Hicklin test was superseded by Section 159(8).[55]

Without going into an overly detailed discussion of what might be considered the "undue exploitation of sex",[56] it would appear to be determined either by "the internal necessities" of the work itself, or by "the standards of acceptance of the community".[57] On the "internal necessities" test, expert evidence as to the literary merit of the work is relevant. On the "community standards" test, the best guide is that provided by Mr. Justice Freedman in the *Dominion News & Gifts* case:

> Those standards are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered. . . .
>
> Community standards must be contemporary. Times change, and ideas change with them. Compared to the Victorian era, this is a liberal age in which we live. . . .
>
> Community standards must also be local. In other words, they must be Canadian. In applying the definition in the *Criminal Code*, we must determine what is obscene by Canadian standards, regardless of attitudes which may prevail elsewhere, be they more liberal or less so.[58]

It would appear, however, that neither test enables one to know whether any particular publication will be held to be obscene or not because:

> . . .In the *Brodie* case, in the *Dominion News & Gifts* case, and in the *Coles* case, although ostensibly applying the same tests, the judges found themselves on opposite sides of the question whether the publication before them was or was not obscene. In the end, although both

> the Manitoba and the Ontario Courts of Appeal have held that opinion polls, representative of "Canadian" community standards, are admissible in evidence, they have also held that it is the individual who has to decide the issue, whether he be the judge under s. 160, or the members of the jury under s. 159. As objective as this individual may try to be, it is he who will decide whether the "internal necessities" of the publication, or the "community standards", are such that "a dominant characteristic" of the work is the "undue exploitation of sex".[59]

(3) Restrictions necessary for national security

The security of the particular community — whether that of a tribe, a city state, an empire, or the modern nation-state — is probably the oldest and most continuous justification for restricting freedom of expression. Whether consisting of deliberate betrayal or of careless communication, the passing of community or defence secrets to an enemy is probably one of the oldest forms of crime against the community. That it is still one of the most important concerns can be seen in the recent turmoil concerning the British and Canadian intelligence services.

Whether it was the more serious act of betraying government or defence secrets to an actual or potential enemy or, as a minimum, such criticism of the government as might incite hostility and ill will, restrictions on expression for reasons of security predated the invention of modern printing and, thus, of the press.

(a) *Treason and Related Offences*

Although the present provisions in the Criminal Code of Canada dealing with treason were "modernized" in the 1953-1954 revision of the Code, there are still enough elements to show the derivation from the English Treason Act of 1351, which is still in force in the United Kingdom.[60] The current definition of treason is to be found in Section 46 of the Criminal Code. There are three forms of "high treason": harming the Queen, levying war against Canada, assisting an enemy at war with Canada or the armed forces against which Canada is engaged in hostilities even though war has not been declared. In addition two forms of (ordinary) treason are also set out: using force for the purpose of overthrowing the government of Canada or a province, and the act of treason that is pertinent to this study, which is defined in Section 46(2)(b) in the following terms:

> (2) Everyone commits treason who, in Canada,... (b) without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or a scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada....

It would appear that not one of the few cases of treason charges ever brought in Canada (associated with the war of 1812, with the rebellions of 1837-38, the Riel Rebellion of 1885, and some trials during the First World War), has involved the press. Since the First World War, the Official Secrets Act[61] was resorted to during peacetime, while during the Second World War the Treachery Act,[62] which operated during the period that the War Measures Act[63] was invoked, formed the basis

of dealing with acts that could be considered "treasonous". It would appear, therefore, that despite the long history of this offence, and the fact that as recently as 1977 the English Law Commission called it "the most serious offence in the calendar of crimes",[64] treason has not constituted a restraint on the press as much as have other offences, such as those under the Official Secrets Act. Indeed, as will be seen, the particular provision in Section 46 referred to here, that is, communicating or making available military or scientific material to an agent of a foreign state, obviously overlaps the Official Secrets Act and will be dealt with further under that topic. However, before turning to that Act, brief reference might be made to related provisions in our Criminal Code which do constitute a restraint, even if not actually resorted to in prosecutions.

Two further offences that could just as clearly be committed by writing as by speech are those in Section 53, inciting to mutiny, and Section 57, procuring, persuading or counselling a member of the RCMP to desert or to be absent without leave. Although the latter offence appears to be considered less severe, in that punishment is on summary conviction with a maximum imprisonment of two years, the offence of incitement to mutiny carries the same maximum penalty of 14 years imprisonment as would be the case of an offence under Section 46(2)(b), if committed in peacetime.

(b) *Official Secrets Act*

Before discussing the Canadian Official Secrets Act, a consideration of the United Kingdom experience is enlightening. The first Official Secrets Act in the United Kingdom was enacted in 1889, apparently in reaction to a publication by a newspaper of the particulars of a secret treaty negotiated between England and Russia which was given to it by the government clerk whose job it was to copy the document. The government tried to prosecute the clerk for removing a state document, but was not successful because no document was stolen.[65] An attempt was made to fill the gap by passing the Act, which made it a crime, *inter alia*, for a person wrongfully to communicate information which had been obtained while working as a civil servant. The Act used the standard criminal law approach of placing the burden of proof on the prosecution and defining the offences with considerable particularity.

Subsequently, in 1909, a German secret service officer came to London and openly admitted recruiting people for an espionage system for all of England. The government was advised that there was no offence for which he could be arrested. The result was the passing of a new Official Secrets Act in 1911, by which the onus of proof was shifted strongly against the accused. The Act made it a felony for any purpose prejudicial to the safety or interest of the state for anyone to approach any military or naval installation or other prohibited place, or to obtain or communicate information, or make a sketch or note, which might help an enemy. The Act also made it a misdemeanor for a person, having any information mentioned, or information entrusted in confidence by an officer of the Crown, or which was obtained as a Crown servant, to communicate that information to an unauthorized person, or to retain a sketch or other document, without any right to do so. Also, anyone receiving such document or information could be found guilty unless he proved that the communication to him was contrary to his desire. In the light of wartime experience, a

new Act was enacted in 1920. Among other amendments, the new Act made it a felony to do any act preparatory to the commission of a felony under the Act.[66]

It is particularly worthy of note that Official Secrets Acts are deliberately intended to cover more than just protection of national or state security; they are framed so widely as to cover all kinds of official information unrelated to security.

Soon after the enactment of the Official Secrets Act of 1911, the government of the United Kingdom sought means of clarifying the position of the press with respect to publication of sensitive information. The solution was to set up, in 1912, a committee (now known as the Services, Press and Broadcasting Committee) consisting of a majority of press and broadcasting members, along with the permanent secretaries (deputy ministers) of the various defence ministries. The object of the Committee is to let the press know unofficially when an offence could be committed under the Official Secrets Acts without risk of prosecution. What is involved are what are known as the "D" Notices.

The "D" Notice, which relates to defence matters "the publication of which would be prejudicial to the national interest", indicates what the government is willing to have the communications media publish or broadcast on security matters and what it does not wish the media to use, with the unofficial assurance that there will be no prosecution under the Acts as long as the press and broadcasting bodies comply. The system worked secretly and informally. On the one hand a minister could ignore the Committee; on the other, the press could ignore the "D" notice. It was not until 1961 when George Blake, an agent both for the British and the Russians, was convicted under the Official Secrets Acts that existence of the Committee first came to public notice.[67]

In Canada we do not have "D" Notice arrangements, but we do have an Official Secrets Act. In fact, the first one was enacted in 1890,[68] just a year after the United Kingdom Act. It was passed at the request of the United Kingdom and was an almost verbatim copy.[69] Two years later, the provisions of the Canadian Act were transferred to the first Canadian Criminal Code,[70] where they remained until the enactment of a new Official Secrets Act[71] in 1939. However, both the 1889 and 1911 Official Secrets Acts of the United Kingdom had specifically applied not just to the United Kingdom, but to the overseas Dominions as well. Since the 1920 Act was specifically devised not to apply to the Dominions, and since Canada did not have an Official Secrets Act in the 20th century until 1939, the 1911 Act of the United Kingdom and the Canadian Criminal Code provisions were in force in this country. When the 1939 Act was drafted, it was in effect a combination of the 1911 and 1920 United Kingdom Acts.

The Official Secrets Act is somewhat difficult to read, in that the attempt has been to cast a wide enough net while not being too vague. Essentially it covers two distinct, if somewhat similar, activities: spying (Section 3), and wrongful communication of government information, or leakage (Section 4).

It is Section 4 which is of main concern to the press. Rather than quote its terms, which can be consulted in the statute books, it would be more instructive to quote the description of the "catch-all" nature of this section provided by the United Kingdom Franks Committee on the Official Secrets Act of 1911:

> The leading characteristic of this offence is its catch-all quality. It catches all official documents and information. It makes no distinctions of kind, and no distinctions of degree. All information which a

> Crown servant learns in the course of his duty is "official" for the purposes of section 2, whatever its nature, whatever its importance, whatever its original source. A blanket is thrown over everything; nothing escapes. The section catches all Crown servants as well as all official information. Again, it makes no distinctions according to the nature or importance of a Crown servant's duties. All are covered. Every Minister of the Crown, every civil servant, every member of the Armed Forces, every police officer, performs his duties subject to section 2.[72]

What is equally important for the press is that Subsection (3) of Section 4 provides that:

> Every person who receives any. . .information, knowing, or having reasonable ground to believe, at the time when he receives it, that the. . .information is communicated to him in contravention of this Act, is guilty of an offence under this Act unless he proves that the communication to him of the. . .information was contrary to his desire.

Professor Friedland reports that of the 21 prosecutions under the 1939 Official Secrets Act, some 17 were concerned with the Gouzenko affair, just after the Second World War.[73] Since then there have been only four. Two of these[74] were concerned with Section 3, the espionage section, and so are not relevant to our topic. The third was the recent *Treu* case[75] which, although under the leakage of information section (Section 4), is also not relevant since it concerned retaining classified documents and failing to take reasonable care of such documents. The fourth case is of direct concern because it involved the Toronto *Sun*. The *Sun* had published a document which had outlined suspected Russian spying activities in Canada, and which had been designated as "top secret". Charges were brought against both the publisher and the editor under Section 4 of the Act. However, at the preliminary inquiry stage, Judge Waisberg of the Ontario Provincial Court concluded that earlier disclosures had "brought the document, now 'shopworn' and no longer secret, into the public domain".[76] He concluded that the document, even if it had ever been secret, was no longer so.

Although the approach taken by Judge Waisberg may be welcome to the press, there may be some question whether higher courts, if the case had been appealed, would have upheld such an interpretation; that is, it is not an offence to publish information, merely because some parts of it had been improperly leaked. It is interesting to note that the United Kingdom White Paper,[77] in proposing amendments to the Act following the Franks Committee report, recommended that although the "mere receipt of protected information" should not be a criminal offence, communication by the recipient should be.

(c) *Sedition*

Just when licensing laws were increasingly challenged, as the 17th century progressed, so a new doctrine of seditious libel came to be developed to attempt to restrict criticism of governments. During the 18th century, when great use was made of prosecution for sedition, punishment included jailing, torture, even mutilation. Extreme cases were called "treason" and were punishable by mutilation and death. Statements (including, of course, printed ones) which were found by a judge to be "seditious", that is, dangerous to the government, were crimes. A jury's role was

merely to decide whether an accused had actually written or printed a statement: not its truth or effect. In fact, it has been said that "the greater the truth, the greater the seditious libel". The 18th century witnessed not only the most determined attempt by the government to use prosecution for seditious libel as a control of criticism, but also a struggle between the judges, who would be likely to convict, and juries who, even within their limited role of merely determining whether the accused did or did not write or print the statement, were still moved to acquit. The century closed with a change in the law which transferred from judges to the jury the ultimate power to decide whether a libel was seditious. This struggle is well illustrated by chronicling the most famous cases of the 18th century.

One of the earliest was a case in the American Colonies concerning one John Peter Zenger, a New York editor who had criticized the colonial governor.[78] Zenger's lawyer, Andrew Hamilton, took the bold attack of admitting that Zenger had written the statement. The judge ruled that this was tantamount to confessing guilt. However, Hamilton's eloquent address to the jury of 12 colonists, arguing that liberty required that citizens should be free "to complain when they are hurt", led to Zenger's acquittal.

An equally famous trial, this in England, was that of *Rex* v. *Miller*.[79] Miller, a printer, had printed in the *London Evening Post* an open letter to King George the Third by a political commentator, one Junius (a pseudonym), which included, *inter alia*, the following: "Sir, it is the misfortune of your life, and originally the cause of every reproach and distress which has attended your government, that you should never have been acquainted with the language of truth, until you heard it in the complaints of your subjects." Junius could not be identified and so Miller was prosecuted for seditious libel. He was tried by Lord Mansfield, who instructed the jury that the writings were seditious and that their only duty was to decide whether the paper was printed and published. The jury, however, ignored this direction to convict and found Miller not guilty.

A few years later, James Erskine, one of the leading advocates of the time, successfully defended the Dean of St. Asaph in the famous sedition case of 1779. It was Erskine as well who defended Thomas Payne against prosecution for writing his *The Rights of Man*. This famous defence, despite pressure from the government, judges and his fellow lawyers, firmly established the central and fundamental principle of the English legal profession, that a barrister will not refuse to defend a client. Erskine's famous words were: "From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned to the Court where he daily sits to practise, from that moment the liberties of England are at an end."[80] Thus it was that, in 1791, Erskine seconded the motion of Charles Fox, proposing a bill to provide that it was the jury, not the judge, which was to pronounce on whether a libel was seditious. The bill, which became known as Fox's Libel Act, was passed in 1792 despite the opposition of the Lord Chancellor and other judges and their prediction that this meant the "destruction of the law of England".[81]

The result of these events was that prosecutions became very rare — no longer a tool for restricting mere criticism of governments. In the case of *Rex* v. *Burns et al*[82] the court applied the definition of seditious intention provided by Mr. Justice Stephen to the effect that:

> A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs, or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to incite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.[83]

On the other hand:

> An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill-will between classes of Her Majesty's subjects, is not a seditious intention.[84]

On this basis, with reference to the case of the prosecution of Burns and other socialists for speeches at a meeting in Hyde Park, the judge directed the jury in the following terms:

> . . .[I]f you trace from the whole matter laid before you that they had a seditious intention to incite the people to violence, to create public disturbances, and disorder, then undoubtedly you ought to find them guilty. . . .On the other hand, if you come to the conclusion that they were activated by an honest desire to alleviate the misery of the unemployed — if they had a real *bona fide* desire to bring that misery before the public by constitutional and legal means, you should not be too swift to mark any hasty or ill-considered expression which they might utter in the excitement of the moment.[85]

Upon this direction, the jury returned a verdict of not guilty.

At this point, it might be useful to note what happened with seditious libel in the United States, after independence.[86] In 1798 Congress tried to introduce the same control as that in the United Kingdom, through the Alien and Sedition Acts. Public reaction was so strong that for almost a century and a half the federal government avoided restraining the press. However, when First World War legislation, which had imposed various forms of censorship, was challenged in 1919, in the famous case of *Schenk* v. *United States*,[87] the Supreme Court held that there was a point at which speech or print becomes overt rebellion and the government has a right to protect itself. The words of Mr. Justice Oliver Wendell Holmes, to the effect that there must be "a clear and present danger that [the words used] will bring about the substantive evils that Congress has a right to prevent", became the test to be applied. As a result when, in 1940, the Alien Registration Act was enacted which revived seditious libel, there was not great protest. However, starting with the 1951 decision in *Dennis* v. *United States*[88] the U.S. Supreme Court has modified the basic test to be used for deciding the point at which the freedoms of speech and the press can be limited, as being one where there is "a sufficient danger of a substantive evil".

In Canada, the authoritative word on what constitutes sedition is the definition set out in the Criminal Code, and the interpretation of this in the important Supreme Court decision in *Boucher* v. *The King*.[89]

Section 60 of the Canadian Criminal Code defines a seditious intention as the teaching or advocating, or the publishing or circulating of any writing that advocates "the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada". Section 61, however, sets out a saving clause which provides an exemption where the only intention is, in good faith:

> (a) to show that Her Majesty has been misled or mistaken in her measures;
>
> (b) to point out errors or defects in
> (i) the government or constitution of Canada or a province,
> (ii) the Parliament of Canada or the legislature of a province, or
> (iii) the administration of justice in Canada;
>
> (c) to procure, by lawful means, the alteration of any matter of government in Canada, or
>
> (d) to point out, for the purpose of removal, matters that produce or tend to produce feelings of hostility and ill-will between different classes of persons in Canada.

The *Boucher* case arose from the struggles between the Jehovah's Witnesses and the government of Premier Duplessis in Québec. The actual prosecution was for distribution of a religious pamphlet, whose title was Québec's Burning Hate for God and Christ and Freedom is the Shame of All Canada. The pamphlet contained strong, even virulent, criticism of the Roman Catholic Church, the government and the courts in Québec. The Witness who had distributed the pamphlet was charged with sedition and was found guilty. A divided Québec Court of Appeal dismissed his appeal, but the Supreme Court of Canada, by a vote of five to four allowed the appeal and acquitted the accused. The majority held that even strong words and an intention to promote ill will and hostility between subjects, as included in Stephen's definition of sedition, is not enough: there must be an intention to incite people to violence and to create public disorder or disturbance, or unlawful conduct against Her Majesty or an institution of the state.

It was in this case that Mr. Justice Rand gave one of his classic judgments concerning our fundamental freedoms, which was quoted earlier. He characterized the Criminal Code section on seditious intention as a provision which "with its background of free criticism as a constituent of modern democratic government, protects the widest range of public discussion and controversy, so long as it is done in good faith and for the purposes mentioned".[90]

The *Boucher* case is quoted in every constitutional law text as the conclusive decision on the issue. There have been no successful prosecutions for sedition since then.

(4) Defamation

Defamation is the communication to third persons of words which would tend to cause the person about whom they are made to be shunned or avoided, or exposed to hatred and contempt or ridicule, or, at least, which would tend to lower such person in the estimation of "right-thinking" members of society generally. It is not necessary that the one making the communication have the particular plaintiff in mind. It is sufficient that the plaintiff show that others identified him or her as the subject of

the statements. On the other hand, because a plaintiff must show that the statement is about him or her, the civil law of defamation gave no protection to libel against an entire group. As will be seen in subtopic (b) hereafter, legislation was necessary to prohibit group defamation.

Traditionally, defamatory words constitute libel if the communication is in some permanent form, like writing or broadcasting; it is slander if it is in temporary form, like the spoken word. Therefore, slander will not be dealt with here. Libel can be civil or criminal — the latter being much more serious, historically involving the likelihood of endangering the public peace. However, it is by far the less commonly resorted to, and so will be discussed first.

(a) *Criminal libel*

The Criminal Code of Canada, in Section 265, provides that publication of a defamatory libel is an indictable offence punishable by imprisonment for up to two years. By Section 264, if the one who publishes the libel knows that it is false, the imprisonment may be up to five years. A defamatory libel is defined in Section 262(1) as being

> matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.

The mode of expression is defined in subsection (2):

> A defamatory libel may be expressed directly or by insinuation or irony
>
> (a) in words legibly marked upon any substance, or
>
> (b) by any object signifying a defamatory libel otherwise than by words.

The defences to a prosecution for defamatory libel are set out in Sections 267 to 279 inclusive. These include: publication of proceedings of courts of justice or of Parliament; fair reports of parliamentary or judicial proceedings or public meetings; matters which are true, or believed to be true, and which are relevant to matters of public interest, the public discussion of which is for the public benefit; fair comments on public persons or works of art; matter published on the invitation or challenge of the person alleged to be defamed; matter published in good faith for the purpose of seeking remedy or redress of a wrong.

The Criminal Code makes special provision for a responsibility with respect to newspapers, which are defined in Section 261 as

> any paper, magazine or periodical containing public news, intelligence or reports of events, or any remarks or observations thereon, printed for sale and published periodically or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two such papers, parts or numbers, and any paper, magazine or periodical printed in order to be dispersed and made public, weekly or more often, or at intervals not exceeding thirty-one days, that contains advertisements, exclusively or principally.

Section 267(1) provides that it is the proprietor of a newspaper who shall be deemed to publish defamatory matter which is published in his paper, "unless he proves that

the defamatory matter was inserted in the newspaper without his knowledge and without negligence on his part". Where, however, a proprietor gives "general authority to manage or conduct the newspaper" to an editor or other person, then the proprietor is not liable for insertion by that person of defamatory matter unless it is proved that (Section 267(2)):

> (a) he intended the general authority to include authority to insert defamatory matter in the newspaper, or
>
> (b) he continued to confer general authority after he knew that it had been exercised by the insertion of defamatory matter in the newspaper.

Actions for criminal libel are so infrequent that, apart from the literal definition of these provisions in the Criminal Code, there is little judicial authority to amplify the meanings. There are few reported cases of any significance that can provide any guidance, even though those reported are interesting and illustrative.

One case, which occurred before the First World War, actually consisted of two cases heard together. It illustrates the foundation of defamatory libel within the context of a possible breach of the peace.[91] The accused were two prominent Social Crediters who had produced a leaflet which had been entitled "Bankers' Toadies". The leaflet read:

> My child, you should never say hard or unkind things about Bankers' Toadies. God made Bankers' Toadies, just as He made snakes, slugs, snails and other creepy-crawly, treacherous and poisonous things. *Never* therefore, abuse them — just exterminate them!
>
> And to prevent all evasion
> demand the result you want
> $25.00 A MONTH
> And a lower cost to live.

On the back of the leaflet were listed nine prominent businessmen with the exhortation "Exterminate them". The accused were charged with counselling to murder, seditious libel and defamatory libel. Subsequently the first two charges were dropped, but the accused were convicted on the third. The Alberta Court of Appeal dealt with an argument (at trial) that there could be no conviction unless the libel was, by reason of its terms or the circumstances, calculated to cause a breach of the peace. The Court held that this was not so:

> It is sufficient to say that there is no law that warrants the view implied in this objection. It has been said that defamatory libel has been made a crime because such libels may have a tendency to be liable or calculated to cause breaches of the peace but that is a wholly different thing from declaring that any particular libel must have such an effect and whether it has or has not is not in any way material.[92]

However, the Court indicated that the reason for the conviction was that it was necessary to protect bankers from a hostile populace: "the state of feeling throughout the Province was such that the broadcasting of such a libel might have disastrous consequences".[93]

In 1970, a British Columbia County Court held[94] that the tests to be applied in ascertaining whether a statement published is defamatory is an objective one, and it is no defence that the statement was meant as a joke. Thus, in this particular case,

where an article compared a magistrate to Pontius Pilate, it was held that neither the defence of reasonably believing the statement to be true and showing that it was relevant to a subject of public interest, the public discussion of which is for the public benefit (Section 273), nor that it was a fair comment on a public person (Section 274), could be allowed as a defence.

(b) *Group defamation*

There is no doubt that the Supreme Court decision in the *Boucher* case[95] would preclude a successful prosecution against the dissemination of group defamation or "hate" literature. Such literature raises sharply the question of how much speech is "free speech". Those who advocate restriction argue either that freedom of expression has to be limited where it involves group defamation or "hate propaganda", or else that freedom of expression does not include the right to vilify or defame. Either argument involves restrictions on what one may say or write. This issue came into focus in Canada in the mid-1960s. As the result of Canada's ratification of the Convention on Genocide and the Convention on Elimination of Racial Discrimination, as well as a rise in dissemination of "hate" literature, a Special Committee on Hate Propaganda was appointed under the chairmanship of Maxwell Cohen. The committee reported within one year,[96] recommending additions to the Criminal Code, which were eventually passed as Sections 281.1, 281.2 and 281.3.

Section 281.1 prohibits advocacy of genocide; Section 281.2 prohibits public incitement of hatred as well as publication of hate statements; while Section 281.3 provides for seizure and confiscation of "hate propaganda" which is defined as "any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under Section 281.2".

Since there has been only one reported case on these provisions, there is no judicial indication of their meaning. In the absence of such indication, a few speculative ideas occur. Since Sections 22 and 422(a) of the Criminal Code prohibit counselling, procuring, or inciting to a crime, including the crime of murder, it is difficult to see what the advocacy and promotion of genocide adds to these provisions. With respect to Section 281.2, apart from those aspects which deal with oral communication in a public place, the main concern with respect to this study is that part dealing with group defamation in permanent form. Subsection (2) prohibits "wilfully" promoting hatred by communicating statements, while subsection (3) sets out a number of defences: truth; reasonable belief in truth coupled with public benefit; the expression or argument, in good faith, of an opinion upon a religious subject with the intention, in good faith, to point out "for the purpose of removal, matters producing or tending to produce feelings of hatred towards an indentifiable group in Canada". There are just too many questions connected with these defences to discuss them here.[97] However, it is necessary to discuss the only reported case to deal with one of these defences.

The only case that has been reported with respect to the hate literature provision is that of *R.* v. *Buzzanga and Durocher*.[98] The two accused were charged under Section 281.2(2) with wilfully promoting hatred against an identifiable group, namely, the French Canadian public in Essex County, by communicating statements contained in a handbill. From the evidence it appeared that the two accused, frus-

trated by the opposition of a majority of the school board trustees to the building of a French-language secondary school, prepared the leaflets with the object of showing the prejudice that existed towards French Canadians and exposing the truth about the denial to them of the school. The leaflet was entitled Wake Up Canadians Your Future Is At Stake and included such statements as "You are subsidizing separatism whether in Québec or Essex County", "Who will rid us of this subversive group if not ourselves?" and "the British solved this problem once before with the Acadians, what are we waiting for. . .?". The accused testified that they intended the pamphlet as a satire for the purpose of creating the kind of furor which would compel the government to act. They specifically denied any intention to promote hatred.

The trial judge stated that the term "wilful" in Section 281.2(2) meant "intentional" as opposed to "accidental" and since the object of the accused was to create controversy and furor, this was equivalent to enmity or ill will. However, the Ontario Court of Appeal unanimously quashed the conviction and ordered a new trial. The basis for allowing the appeal was the decision that the term "wilfully" did not include recklessness, nor even foresight that a certain consequence was highly probable, but rather a conscious and intentional promotion of hatred against an identifiable group or, at most, if the statements were communicated as a means of achieving another purpose, then at least the foresight that the promotion of hatred against the identifiable group was certain or morally certain to result. The court went on to hold that the "good faith" defence set out in paragraph (3)(d) of Section 281.2 was a repetition, out of an abundance of caution, of the term "wilfully" in the opening clause.

In addition to the Criminal Code prohibitions of "hate" propaganda, all Human Rights (anti-discrimination) Acts in Canada have enacted prohibitions against the publication, display or broadcasting of signs, symbols and other representations "indicating discrimination or an intention to discriminate". Although not all of the provincial Acts limit these provisions to those discriminatory practices which are specifically prohibited in those Acts, the Canadian Human Rights Act does so limit them. All the provincial Acts specifically state that this prohibition is not meant to limit the "free expression of opinion upon any subject". Perhaps because of the vagueness of the prohibition, perhaps because this is a field "occupied" by the federal Criminal Code provisions on "hate propaganda", or perhaps because of the exemption section protecting "the free expression of opinion", there have been very few judicial applications of these anti-discrimination prohibitions on expression. In fact, the only one to involve a newspaper was a decision of a New Brunswick Board of Inquiry under that province's Human Rights Act: *Levesque and Tardif* v. *The Daily Gleaner* (1974). The two complainants laid a complaint against the respondent newspaper for publishing two letters in its Letters-to-the-Editor column in which the author described French-speaking people as "a race born to connive, agitate, coerce". The chairman of the Board of Inquiry dismissed this complaint on the ground that the Act contemplated the receipt of complaints by "persons" and not complaints "by one or two people on behalf of a large group of people"; and that the freedoms of speech and of the press fell within federal jurisdiction and so the issue was beyond the power of a provincial legislature.

This categorical rejection of provincial jurisdiction may be questioned in the light of recent Supreme Court of Canada decisions.[99] It would appear that at least

those provincial provisions which prohibit publication or broadcasting of a statement indicating an intention to discriminate with respect to one of the prohibited grounds, in relation to one of the prohibited activities, will be upheld.[100] Further, the exemption of "free expression of opinion" will not avail unless it consists of a purely theoretical or abstract discussion, and not advocacy, incitement, inducement or declared specific intent.

In addition to the prohibition against publication or broadcasting of discriminatory signs, symbols and other representations, the human rights (anti-discrimination) laws of every jurisdiction in Canada prohibit the use or circulation of an application form, or publishing or advertising in connection with employment or prospective employment which expresses, either directly or indirectly, any limitation, specification or preference as to any of the grounds upon which discrimination is prohibited.

There has been only one case concerning these provisions, and although it is a decision of the Supreme Court of Canada, it probably does not apply to any jurisdiction other than British Columbia, where the case arose. In *Gay Alliance Towards Equality* v. *Vancouver Sun*,[101] the case arose from an attempt by the appellant to place an advertisement in the classified advertising section of the Vancouver *Sun*, which read:

> Subs to Gay Tide, gay lib paper $1.00 for 6 issues. 2146 Yew St., Vancouver.

There never was any suggestion that the contents of the proposed advertisement were in any way unlawful. However, the newspaper rejected the advertisement on the basis that it "was not acceptable for publication in this newspaper". The Alliance then submitted a complaint to the British Columbia Human Rights Commission alleging that this refusal amounted to a contravention of Section 3 of the Human Rights Code, which prohibits denial "to any person or class of persons [of] any accommodation, service, or facility customarily available to the public", or discrimination with respect to such accommodation, service or facility, "unless reasonable cause exists for such denial or discrimination". Subsection (2) provides that "the race, religion, colour, ancestry, or place of origin of any person or class of persons shall not constitute reasonable cause", nor shall sex, unless it related to maintenance of public decency or determination of premiums or benefits under contracts of insurance. (It should be noted at this point that the British Columbia provision differs from that of every other jurisdiction in that all the others specifically list all the prohibited grounds of discrimination rather than providing for a general prohibition "unless reasonable cause exists" and then listing some of the grounds that "shall not constitute reasonable cause".)

The two questions that had to be faced by the British Columbia Board of Inquiry which heard the complaint were: (1) is classified advertising a service or facility customarily available to the public? (2) did the newspaper have "reasonable cause" for the alleged denial of services?

The newspaper argued that it had reasonable cause on three grounds: (1) homosexuality is offensive to public decency and the advertisement would offend some of the subscribers; (2) the Code of Advertising Standards of the daily newspapers in Canada included the following: "Public decency — no advertisement shall be prepared, or be knowingly accepted which is vulgar, suggestive or in any way offensive to public decency", and the proffered advertisement did not conform to these stand-

ards; (3) the newspaper had a duty to protect the morals of the community. After hearing the evidence the Board of Inquiry concluded unanimously that no reasonable cause was shown:

> . . .[T]he real reason behind the policy was not a concern for any standard of public decency, but was, in fact, a personal bias against homosexuals and homosexuality on the part of the various individuals within the management of the Appellant newspaper.

An appeal from this decision (by way of Stated Case) was dismissed by the British Columbia Supreme Court[102] but a further appeal was allowed by the Court of Appeal, in a majority decision.[103] One of the majority judges, Mr. Justice Branca, held that a bias against homosexuals, if honestly held by the newspaper, provided reasonable cause under Section 3 of the Act, unless there was bad faith. As Chief Justice Laskin pointed out,[104] not only was this a substitution of a subjective test for the objective one that the Act clearly set out, but it involved a substitution of the appellate court's opinion for that of the trial tribunal. In addition, he questioned whether honesty and bad faith could co-exist. Chief Justice Laskin held that the Board of Inquiry was entitled to find as a fact that violation of Section 3 was based on a bias against homosexuals and homosexuality and that this was not a reasonable cause.[105]

On this point, Justices Dickson and Estey concurred.[106] On behalf of the majority, however, Mr. Justice Martland did not deal with this issue but instead turned to American authority,[107] to put forth a rather surprising view of freedom of the press which, in the amplitude of the discretion it relegates to newspapers, does not square with other authority. The exposition of his view of how freedom of the press gave the Vancouver *Sun* the justification for refusing to publish the advertisement deserves to be quoted at some length:

> . . .A newspaper exists for the purpose of disseminating information and for the expression of its views on a wide variety of issues. . . .It is true that its advertising facilities are made available, at a price, to the general public. But *Sun* reserved to itself the right to revise, edit, classify or reject any advertisement submitted to it for publication and this reservation was displayed daily at the head of its classified advertisement section.
>
> The law has recognized the freedom of the press to propagate its views and ideas on any issue and to select the material which it publishes. As a corollary to that, a newspaper also has the right to refuse to publish material which runs contrary to the views which it expresses. A newspaper published by a religious organization does not have to publish an advertisement advocating atheistic doctrine. A newspaper supporting certain political views does not have to publish an advertisement advancing contrary views. In fact, the judgments of Duff, C.J.C., Davis and Cannon, JJ., in the *Alberta Press* case. . .suggest that provincial legislation to compel such publication may be unconstitutional.
>
> In my opinion the service which is customarily available to the public in the case of a newspaper which accepts advertising is a service subject to the right of the newspaper to control the content of such advertising. In the present case, the *Sun* had adopted a position on the controversial subject of homosexuality. It did not wish to accept an advertisement seeking subscription to a publication which propa-

> gates the views of the Alliance. Such refusal was not based upon any personal characteristic of the person seeking to place that advertisement, but upon the content of the advertisement itself.
>
> Section 3 of the Act does not purport to dictate the nature and scope of a service which must be offered to the public. In the case of a newspaper, the nature and scope of the service which it offers, including advertising service, is determined by the newspaper itself. What s. 3 does is to provide that a service which is offered to the public is to be available to all persons seeking to use it, and the newspaper cannot deny the service which it offers to any particular member of the public unless reasonable cause exists for so doing.[108]

There would be no better way to respond to Mr. Justice Martland's majority judgment than to quote from the excellent rebuttal (although it should be noted it was a minority opinion) of Mr. Justice Dickson. He suggested that although "freedom of the press is one of our cherished freedoms" it is not absolute: "Publishers of newspapers are amenable to civil and criminal laws which bear equally upon all businessmen and employers, generally, in the community, for example, those regulating labour relations, combines, or imposing non-discriminatory general taxation. False and misleading advertising may properly be proscribed."[109] He went on to quote from de Tocqueville, Blackstone, Jefferson, and Lord Wright of the Judicial Committee of the Privy Council, for expressions of the uniquely important position that newspapers occupy in Western society, but went on to make the following important distinction on the issue before the Court:

> There is an important distinction to be made between legislation designed to control the editorial content of a newspaper, and legislation designed to control discriminatory practices in the offering of commercial services to the public. We are dealing in this case with the classified advertising section of a newspaper. The primary purpose of commercial advertising is to advance the economic welfare of the newspaper. That part of the paper is not concerned with freedom of speech on matters of public concern as a condition of democratic polity, but rather with the provision of a "service or facility customarily available to the public" with a view to profit. As such, in British Columbia a newspaper is impressed with a statutory obligation not to deny space or discriminate with respect to classified advertising, unless for reasonable cause. It should be made clear that the right of access with which we are here concerned has nothing to do with those parts of the paper where one finds news or editorial content, parts which can in no way be characterized as a service customarily available to the public. The effect of s.3 of the British Columbia *Human Rights Code* is to require newspapers within the Province to adopt advertising policies which are not in violation of the principles set out in the *Code*.[110]

(c) *Civil defamation*

It was stated earlier that a defamatory statement is one which tends to "lower the plaintiff in the estimation of right-thinking members of society". However, it must not be forgotten that there is also a requirement that, as a result, the plaintiff's reputation in his occupation has been injured, or he has suffered financial loss. Because this is frequently difficult to prove, or the amount of loss is not substantial, civil defa-

mation suits are probably not as frequent as the number of times that libel actually occurs. Nevertheless, such actions probably constitute one of the most important limitations on what is printed.

It is beyond the scope of this study to detail all of the elements that constitute the essence of the tort of libel at common law. Moreover, every province in Canada has a statute dealing with the civil law of defamation, and there are slight variations between these.[111] Nevertheless, the importance of these Acts to this topic is evident from the specific references in them to newspapers and the requirements in some provinces to register particulars of ownership, or at least to publish these in a conspicuous place in the newspaper. The definitions of a "newspaper", although varying slightly from jurisdiction to jurisdiction, are almost identical with that quoted earlier with respect to criminal defamation.

In order to see the scope of the restriction upon freedom of the press that the law of civil libel constitutes, this study will consider the defences, although not all of these will be discussed in detail.

The first line of defence to a civil defamation action is to deny that the matter complained of is defamatory. (It should be noted on this point that public figures in the United States would appear to have somewhat more difficulty in proving defamation than would their counterparts in Canada.[112]) The second line of defence would be what is known as "justification" or truth. This is a defence with some risk because, if it fails, heavier damages will be awarded. It has the advantage for the defendant, however, that, if proved, unlike the case in criminal defamation, it is not necessary to show that the publication was for the "public good". In fact, even malice or improper motive do not vitiate this defence.[113] On the other hand, a very interesting recent case[114] held that no defence of truth was established where the defendant used the word "kickback" rather than "political contributions".

It is the other two defences — privilege and fair comment — which cause the most problems of interpretation and which have been most frequently discussed.

The defence of privilege applies in circumstances where it is considered that the public interest in free speech overrides the right of private individuals not to be injured by defamatory statements. The defence of privilege is of two kinds: absolute and qualified.

Absolute privilege is not actionable under any circumstances. Its most important application is with respect to statements made in Parliament (and in provincial legislatures) or in judicial or quasi-judicial proceedings.[115] The absolute privilege for statements made in Parliament dates back at least to the Bill of Rights of 1689 in the British Parliament which stated, "The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".

There is not so much controversy over instances of absolute privilege as with respect to the defence of qualified privilege. For this defence to apply it is necessary to show that there is both a legal, moral or social duty to make the statement, and a corresponding public interest in receiving it.

Of the kinds of qualified privilege that exist, the ones most important to this study are fair and accurate reports of legislative debates and judicial proceedings. It should be noted that the statements themselves are absolutely privileged but the reporting of them receives only a qualified privilege. Thus, too, the absolute privilege

of a Member of Parliament with respect to statements in Parliament does not extend to words spoken by him outside the House, even if he is a Minister.[116] Thus, the holding of a press conference by a holder of public office is not an occasion of qualified privilege,[117] although it would appear that the defence of qualified privilege could apply if the remarks were made at a public meeting where an elected official would have a duty to inform about government affairs.[118] However, the defence of qualified privilege can be lost if the defendant does not have any honest belief in the truth of the statement,[119] or where a candidate for public office goes beyond matters which are germane to a charge made by his opponent.[120] Similarly, it would appear that since newspapers have no duty during election campaigns to report on the fitness for office of the candidates, there is no defence of qualified privilege available, but only that of fair comment,[121] which should now be considered.

It is important to note the distinction between statements which purportedly express an opinion and those which express fact. In order for a defendant to raise the defence of fair comment it is necessary to prove that the statement was comment. If it consists of facts, then justification — truth — is the appropriate defence. What usually happens, of course, is that a publication includes both purported facts and then comment based upon these facts. Where this happens, it is important to prove that the facts are correctly stated and that the comments are recognizable as such by ordinary people and not as statements of fact.[122] In addition, the fair comment defence is not available where the comment is not warranted by the facts.[123] So, also the defence of fair comment is not available where the publisher and editor do not honestly believe the facts as alleged.[124]

This leads directly to the issue which was the subject of what is now the leading Canadian case[125] on the matter of fair comment: *Cherneskey* v. *Armadale Publishers Limited et al.*[126] This was a defamation action brought by a Saskatoon lawyer and alderman against the Saskatoon *Star Phoenix* for printing a letter in its "Editor's Letter Box" section, which he claimed defamed him. The letter was written by two law students who criticized the concern and opposition expressed by him and some neighborhood representatives to the possible location of an Indian and Métis alcoholic rehabilitation centre. The letter stated that the writers were "appalled" by his position, which they suggested was "abhorrent to all concepts of the law", and "unbecoming a member of the legal profession", and concluded that "the racist resistance" which had been exhibited should be replaced by support and encouragement to the project.

The plaintiff had sued the newspaper, not the letter writers, and the application of the newspaper to join the students as third parties was refused. Further, they did not appear as witnesses at the trial. Therefore, at no time was there proof of whether the letter writers believed what they had written. At the same time, the editor admitted that he and the publisher did not believe the comment. As a result, the trial judge refused to allow the defence of fair comment to be put to the jury. The latter found the letter defamatory and awarded the plaintiff $25,000 in damages. A majority of the Saskatchewan Court of Appeal allowed the appeal.[127] In turn, a majority of the Supreme Court of Canada overruled the Saskatchewan Court of Appeal and restored the trial judgment. The main issue concerned the question of what is a "fair" comment in these instances of publication of letters-to-the-editor.

One of the majority judgments was that of Mr. Justice Martland. It was very brief and rested essentially upon the ground that the defence of fair comment exists only where it is an honest expression of the view of the person who expressed it:

> Freedom to express an opinion on a matter of public interest is protected, but such protection is afforded only when the opinion represents the honest expression of the view of the person who expresses it.[128]

Since the evidence of the editor was clear that the letter did not express the honest expression of his views or that of the publisher, and since there was no evidence as to whether the letter represented the honest opinion of the writers of the letter, Mr. Justice Martland asserted that the trial judge was properly entitled to decide not to put the defence of fair comment to the jury.

The other majority opinion was that of Mr. Justice Ritchie. He expressly considered and rejected the view that it would be sufficient for a newspaper publisher to have the honest belief that the letter represented the honest opinions of the writers. Instead, he suggested, not only must there be proof that the person writing the material had an honest belief in the opinion expressed, but that the same considerations applied to each publisher of that material, that is, the newspaper would also have to show honest belief in the material in order to sustain the defence of fair comment. Thereby, Mr. Justice Ritchie either effectively destroyed the defence of fair comment for newspapers with respect to letters-to-the-editor or provided, thereby, the same kind of censorship power with respect to letters-to-the-editor that Mr. Justice Martland gave newspapers in the *Gay* case, with respect to the advertising section.

Once again, the best response to this majority decision is the dissenting judgment of Mr. Justice Dickson, which is so important that it is quoted rather extensively:

> The important issue raised in this appeal is whether the defence of fair comment is denied a newspaper publishing material alleged to be defamatory unless it can be shown that the paper honestly believed the views expressed in the impugned material. It does not require any great perception to envisage the effect of such a rule upon the position of a newspaper in the publication of letters to the editor. An editor receiving a letter containing matter which might be defamatory would have a defence of fair comment if he shared the views expressed, but defenceless if he did not hold those views. As the columns devoted to letters to the editor are intended to stimulate uninhibited debate on every public issue, the editor's task would be an unenviable one if he were limited to publishing only those letters with which he agreed. He would be engaged in a sort of censorship, antithetical to a free press. One can readily draw a distinction between editorial comment or articles, which may be taken to represent the paper's point of view, and letters to the editor in which the personal opinion of the paper is, or should be, irrelevant. No one believes that a newspaper shares the views of every hostile reader who takes it to task in a letter to the editor for error of omission or commission, or that it yields assent to the views of every person who feels impelled to make his feelings known in a letter to the editor. Newspapers do not adopt as their own the opinions voiced in such letters, nor should they be expected to.

> The issue is broader than that. A free and general discussion of public matters is fundamental to a democratic society. The right of persons to make public their thoughts on the conduct of public officials, in terms usually critical and often caustic, goes back to earliest times in Greece and Rome. . . .Citizens, as decision-makers, cannot be expected to exercise wise and informed judgment unless they are exposed to the widest variety of ideas, from diverse and antagonistic sources. Full disclosure exposes and protects against false doctrine. . . .
>
> Newspapers will not be able to provide a forum for dissemination of ideas if they are limited to publishing opinions with which they agree. If editors are faced with the choice of publishing only those letters which espouse their own particular ideology, or being without defence if sued for defamation, democratic dialogue will be stifled. Healthy debate will likely be replaced by monotonous repetition of majoritarian ideas and conformity to accepted taste. In one-newspaper towns, of which there are many, competing ideas will no longer gain access. Readers will be exposed to a single political, economic and social point of view. In a public controversy, the tendency will be to suppress those letters with which the editor is not in agreement. This runs directly counter to the increasing tendency of North American newspapers generally to become less devoted to the publishers' opinions and to print, without fear or favour, the widest possible range of opinions on matters of public interest. The integrity of a newspaper rests not on the publication of letters with which it is in agreement but rather on the publication of letters expressing ideas to which it is violently opposed.
>
> I do not wish to overstate the case. It is my view, however, that anything which serves to repress competing ideas is inimical to the public interest.[129]

(5) Contempt

(a) *Of Parliament*

Each of the Houses of Parliament has power to punish its own members or "strangers" for contempt.[130] Since Parliament has the right to decide whether a particular act is contempt, it would be impossible to list all the offences involved. The best general statement is that these are offences against the authority or dignity of the House. Although there is no reason why even the punishment of imprisonment could not be imposed, this has certainly not happened for many decades, if indeed in this century, and even the imposition of a fine is unlikely. The most likely punishment is a reprimand or admonition, whereby the offending individual is brought before the Bar of the House and apologizes. The most recent example of this in Canada would appear to be that of Jean Charpentier in connection with his rather unflattering description of how the Members of Parliament on the NATO Committee disported themselves while in Paris. In any case, this is such a rare restriction on the press that no more time need be devoted to it.

(b) *Of court*

Contempt of court is a much more commonly used restraint on the press. It should be noted that there is both civil and criminal contempt of court. Civil contempt is not

relevant to this study, because it is essentially concerned with disobedience of the order of a superior court of record. Criminal contempt, on the other hand, is of particular importance because two of the ways it can arise is of direct relevance to freedom of expression:

> (1) the publication of matter which could prejudice a fair trial and interfere with the course of justice;
>
> (2) the publication of matter which scandalizes the court, such as scurrilous criticism of a particular judge with reference to proceedings before him.

The type of expression which can result in proceedings for the first type of contempt arises out of comments which are considered to be adverse to an accused or to either of the parties in a civil action. An example of this kind of conduct can be seen in the 1956 Ontario case of *Steiner* v. *Toronto Daily Star Limited*.[131] The case concerned a newspaper article written by a senior police reporter about a charge of fraud against the plaintiff. It was stated in the article that the accused "allegedly admitted" having committed the offence. At the time of the writing, the charge was pending. The Chief Justice of the High Court, Mr. Justice McRuer, stated that there were two interests involved in cases of this kind — freedom of the press, and the right of the accused to have a fair and unprejudiced trial before a tribunal having jurisdiction over him. He quoted with approval and applied the following judgment from Lord Goddard, in an English case some two years earlier:

> . . .[T]he essence of the jurisdiction is that reports, if they contain comments on cases before they are tried, or alleged histories of the prisoner who is on trial. . .and all misreports are matters which tend to interfere with the due course of justice. The foundation of the jurisdiction is that such reports are an interference with the due course of justice. . . .[132]

Perhaps the most famous and currently leading case on the matter of contempt of court is what has come to be known as the *Sunday Times* case or the *English Thalidomide* case. The matter arose out of the sale in the United Kingdom of the drug, thalidomide, between 1958 and 1961, by Distillers Company (Biochemicals) Limited. The drug was removed from the market in November, 1961, after a number of women, who had taken the drug during pregnancy, gave birth to physically deformed children. As a result of these births, a large number of negligence suits were brought by parents of such children, but an out-of-court settlement was negotiated before the cases went to trial. However, in 1968 a second and much larger group of actions was brought. For the next three years, attempts were made to reach a settlement similar to that agreed upon in the first set of cases.

The *Sunday Times* had reported the facts on the matter since 1967. In 1972, however, the paper published a series of articles criticizing the delay in reaching a settlement, and even the proposed amount of the settlement. The articles argued for a reform in the system of compensation. Further, the paper announced its intention to publish a future article to deal with all aspects of the thalidomide tragedy. At this point, Distillers Company complained to the attorney-general, claiming that publication of the proposed article would constitute contempt of court because there was litigation still pending. The attorney-general then obtained an injunction from the High Court, on the ground that any attempt by the newspaper to influence the settle-

ment negotiations by this kind of pressure would clearly constitute contempt of court. This decision was reversed by the Court of Appeal, but a further appeal to the House of Lords was allowed unanimously and the injunction was reinstated.[133]

Perhaps the best summation of the view of the House of Lords is the following statement by Lord Reid:

> I think that anything in the nature of prejudgment of a case or of specific issues in it is objectionable not only because of its possible effect on that particular case but also because of its side effects which may be far reaching. Responsible "mass media" will do their best to be fair, but there will also be ill-informed, slapdash, or prejudiced attempts to influence the public. If people are led to think that it is easy to find the truth, disrespect for the processes of the law could follow, and, if mass media are allowed to judge, unpopular people and unpopular causes will fare very badly. Most cases of prejudging of issues fall within the existing authorities on contempt. I do not think that freedom of the press would suffer and I think that the law would be clearer and easier to apply in practice if it is made a general rule that it is not permissible to prejudge issues in pending cases.[134]

At this point the newspaper applied to the European Commission on Human Rights, alleging that the injunction upheld by the House of Lords constituted a violation of Article 10 (right to freedom of expression) of the European Convention on Human Rights and Fundamental Freedoms. The European Commission found that the injunction constituted a restriction on the appellant's right "to impart information" and "ideas" under paragraph (1) of Article 10. Further, the Commission decided that the injunction did not come within the permissible exceptions set out in paragraph (2), for the maintaining of the "authority and impartiality of the judiciary". Since there was no claim that the proposed article affected the impartiality of the judiciary, there was no evidence to indicate that the injunction was necessary to maintain the authority of the judiciary.

Even though both the House of Lords decision and the action of the European Commission have aroused a great deal of critical comment and even though the Commission did not discuss the issue as such, it can be suggested that the Commission's decision did come somewhat closer to the American law and practice on this issue of balancing a "free press" with a "fair trial".[135]

It would be beyond the scope of this study to deal with the applicable American law except to note that the outline can be drawn with three basic cases. The first is the famous *Schenck* case,[136] which originally enunciated the "clear and present danger" test for restriction of expression. The next is the 1947 case of *Craig* v. *Harney*,[137] where it was stated that:

> The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.[138]

The third case is that of *Woods* v. *Georgia*[139] in 1962 where the test was essentially restated on the basis that the danger must constitute an imminent, and not merely a likely threat to the administration of justice. It was held that the danger must not be remote or even probable, it must immediately imperil. Based upon this

approach it is quite clear that the right of the press in the United States to comment upon court cases is much wider than that in either the United Kingdom or Canada.

In addition, there are specific provisions in the Criminal Code of Canada restricting press coverage of certain proceedings. Thus, since 1969 we have had Section 467, which provides for restriction of the publication of evidence taken at preliminary inquiries. Similarly, Section 470 restricts publication of confessions or admissons of an accused made at a preliminary inquiry. Further, the restrictions continue until the accused is discharged or until the subsequent trial is over. Other specific Criminal Code restrictions on publication of criminal judicial proceedings are to be found in Section 162, which prohibits publication "in relation to any judicial proceedings of any indecent matter or indecent medical, surgical or physiological details, being a matter or details that, if published, are calculated to injure public morals", or personal details in relation to divorce, annulment or judicial separation. So, too, Section 441 precludes publicity of the trial of an accused who is, or appears to be, under the age of 16 years, and by Section 442, a judge may order the exclusion of the public where the hearing involves juveniles, or, in the judge's opinion, it is in the interests of public morals or the maintenance of order to do so.[140]

The other major kind of conduct which can constitute contempt of court is that which may scandalize a court even after a trial and any subsequent appeal have been concluded. The essence of this kind of contempt was expressed by Chief Justice Lord Russell of Killowen in the following terms:

> Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. . . .Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or to the public good, no Court could or would treat that as contempt of Court. . . .(B)ut it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen.[141]

In a 1910 decision of the Québec Court of Appeal, *Fournier* v. *Attorney General*,[142] Mr. Justice Cross emphasized that the power of the court to cite for contempt is not so much for the protection of judges as to "prevent interference with the due course of justice, and to prevent suitors from having their confidence in the court shaken or destroyed".[143]

It is not possible to list here all the examples of criticism of a court or a judge resulting in a contempt citation.[144] It might be best to conclude with reference to what is considered one of the leading cases on the question in English jurisprudence. In *Ambard* v. *Attorney General for Trinidad and Tobago*,[145] the Judicial Committee of the Privy Council considered a newspaper article which discussed two judgments in which vastly unequal sentences had been imposed in circumstances which were substantially the same. The article called for greater equalization of punishment where similar crimes are committed in similar circumstances. The Judicial Committee held that this was not contempt. On behalf of the court, Lord Atkin declared:

> . . .(W)hether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public acts done in

> the seat of justice. . . .(P)rovided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.[146]

He went on to say that the freedom of the press "is no more than the liberty of any member of the public, to criticize temperately and fairly, but freely, any episode in the administration of justice".[147]

V

Protection of sources

The basic proposition to start with is that neither in Canada nor in England can journalists claim privilege to refuse to disclose their sources of information.[148] Probably as good a summation as can be found, particularly since it was cited with approval by the Supreme Court of Canada in two leading cases,[149] was set out by Lord Shaw of Dunfermline in the case of *Arnold* v. *King-Emperor*:

> Their Lordships regret to find that there appeared on the one side in this case the time-worn fallacy that some kind of privilege attaches to the profession of the Press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of the conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.[150]

Despite the unequivocal assertion of lack of such privilege, it is not surprising that claims for it have continued. In 1963, Lord Denning summarized, in the following terms, what that claim is:

> . . .The journalist puts forward as his justification [for the privilege to refuse to give his sources of information] the pursuit of truth. It is in the public interest, he says, that he should obtain information in confidence and publish it to the world at large, for by so doing he brings to the public notice that which they should know. He can expose wrongdoing and neglect of duty which would otherwise go unremedied. He cannot get this information, he says, unless he keeps the source of it secret. The mouths of his informants will be closed to him if it is known that their identity will be disclosed. So he claims to be entitled to publish all his information without ever being under any obligation, even when directed by the court or a judge, to disclose whence he got it. It seems to me that the journalists put the matter much too high. The only profession that I know which is given a privilege from disclosing information to a court of law is the legal profession, and then it is not the privilege of the lawyer but of his client. Take the clergyman, the banker or the medical man. None of these is entitled to refuse to answer when directed to by a judge. Let me not be mistaken. The judge will respect the confidences which each member of these honourable professions receive in the course of

> it, and will not direct him to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered. A judge is a person entrusted, on behalf of the community, to weigh these conflicting interests — to weigh on the one hand the respect due to confidence in the profession and on the other hand the ultimate interest of the community in justice being done... [i]f the judge determines that the journalist must answer, then no privilege will avail to him to refuse.
>
> ...The courts will not as a rule compel a newspaper in a libel action to disclose before the trial the source of its information. The reason is because, on weighing the considerations involved, the balance is in favour of exempting the newspaper from disclosure. The person who is defamed has his remedy against the newspaper and that is enough, without letting him delve round to see who else he can sue. It may rightly be said...that the public has an interest to see that the newspapers are not compelled to disclose their source of information; unless, I would add, the interests of justice so demand. But that rule is not a rule of law; it is only a rule of practice which applies in those particular cases....It seems to me that whenever a case arises when the interests of justice or of the public require that there should be disclosure and the judge so rules, the newspapers must disclose the source of their information; they have no privilege in law to refuse.[151]

Two of the matters raised by Lord Denning need further comment. The first is that in Canada the authorities in Ontario and British Columbia stand on somewhat opposite ends with respect to the extent of the discretion to be exercised in protecting a journalist who is a witness at a trial. On the most protective side is a decision in 1961 of Mr. Justice Wells in the High Court of Ontario, in the case of *Reid* v. *Telegram Publishing Co. Ltd.*.[152] In that case Mr. Justice Wells held that in an action for libel, unless exceptional circumstances exist, a judge should refuse to permit discovery by a plaintiff of the identity of a journalist's sources of information. On the other hand, the British Columbia Court of Appeal, in at least two cases,[153] has upheld an order to compel a journalist to reveal his sources on the ground that the Canadian practice of pretrial discovery allows for the widest possible searching examination into any area relevant to the issues raised in the pleadings. Although that divergence of views has not been resolved by a decision in the Supreme Court of Canada, it might be pointed out that the British Columbia decisions are those of the Court of Appeal, while the Ontario decision is that of the High Court (which is the trial court.) Another Ontario High Court in 1980[154] held that a reporter does not have to reveal sources in a libel action where he is pleading the defence of fair comment. Similarly, an Alberta Supreme Court judge held[155] that a defendant (in this case not a journalist), who has pleaded fair comment as a defence in a libel action, is not required to disclose sources.

Finally, on this point, the Supreme Court of Canada, in a case[156] not dealing with the requirement to disclose at the discovery stage, but rather with confidentiality in a university tenure-granting process, appeared to uphold the necessity of exercising discretion as to whether there should be a requirement to disclose. At the same time, the Supreme Court gave affirmation to the widely recognized four principles of the leading American authority on evidence, Wigmore.[157] He argued that the ques-

tion of whether a communication should be privileged should not be based so much on the relationship or on the proceeding, but rather on the following fundamental conditions:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

The four Wigmore conditions lead us naturally to a brief consideration of the situation concerning protection of news sources in the United States. The initial position, since the United States is also an inheritor of the common law, was the same as that in England. However, in 1896, the State of Maryland gave statutory recognition to the privilege of journalistic secrecy.[158] Apparently this resulted from a reporter for the Baltimore *Sun* going to jail, in 1896, for contempt of a grand jury because he refused to disclose the source of his information, which enabled him to predict accurately a pending indictment. The newspaper immediately began an editorial campaign to achieve statutory conferral of a privilege on reporters and within a few months, the law was enacted. It was, however, an additional 37 years before New Jersey, in 1933, became the second state to enact such a law. Only some 10 other states have followed.

What is more important is that the New Jersey shield law for reporters was held to be overridden by a provision in the New Jersey constitution guaranteeing a defendant's right to "compulsory process for obtaining witnesses in his favor". This provision was the result of the famous *Farber* case.[159] Farber, a reporter for the New York *Times*, investigated and wrote a series of articles on a number of mysterious deaths that had occurred at a hospital in New Jersey. His investigations and articles led to murder indictments against a physician. During the six-months-long murder trial the defendant's attorney tried to subpoena the reporter to produce certain documents. Farber and the *Times* refused. Farber was sentenced to jail for six months, plus a $1,000 fine, while a fine of $100,000 was imposed on the newspaper. On appeal, the decision was upheld by a majority of five to two, and the United States Supreme Court refused to review.[160]

This position in the *Farber* case is in line with the 1972 decision of the United States Supreme Court in the case of *Branzburg* v. *Hayes*.[161] Branzburg was a staff reporter for the *Courier-Journal* of Louisville, Kentucky. The paper published a story by him (accompanied by a photograph) describing in detail how two young people were synthesizing hashish from marijuana. He was subpoenaed by a grand jury, but refused to identify the individuals. He pleaded Kentucky's shield statute, the First Amendment to the U.S. constitution, and relevant portions of the Kentucky constitution. However, he lost at all levels up to and including the Supreme Court of the United States. The opinion of the court was stated as follows:

> The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.[162]

The judgment goes on at some considerable length to discuss the competing interests. It is too lengthy to quote here, but perhaps one should add that the court suggested that the only way for the protection to be granted would be through legislation of a new reporters' shield law. However, in the light of the decisions in the *Farber* case, it is difficult to know what sort of shield law could be enacted which would be upheld and effective. Perhaps it is impossible to have an absolute rule in any case and the only practical approach, in England, Canada, or the United States, is for a discretion to be exercised by the court in the light of the Wigmore principles.

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6. [1951] S.C.R. 265.
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17. 345 U.S. 41, 58 (1953), *per* Douglas, J.
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22. See W.S. Tarnopolsky, *The Canadian Bill of Rights* 2d, rev. ed., The Carleton Library Series No. 83, 1975, 37-8, and cases referred to in the footnotes.
23. [1978] 2 S.C.R. 662; 84 D.L.R. (3d) 1.
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26. Ibid., 133.
27. Ibid., 134-5.
28. [1957] S.C.R. 285.
29. Neither "communism" nor "bolshevism" was defined.
30. *Supra*, n.28, 320.
31. Ibid., 328.
32. Ibid., 306.
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38. *Hlookoff et al.* v. *City of Vancouver* (1968), 67 D.L.R. (2d) 219. See a discussion in L.A. Powe, "The *Georgia Straight* and Freedom of Expression in Canada" (1970), 48 *Can. Bar Rev.* 410.
39. Street, *supra*, n.18, 183-4.
40. Ibid., 184-5.
41. (1883), 15 Cox's C.C. 231.
42. Ibid., 238.
43. [1917] A.C. 406. Although s.260(3) of the Criminal Code adopts the law as set out in this case, it should be noted that, today, English law is presumably different because the House of Lords in *R.* v. *Lemon*, [1979] All E.R. 898, held that, in order to secure a conviction, it was *not* necessary to prove intention to blaspheme.
44. 1 Siderfin 168.
45. *Supra*, n.18, 126.
46. 2 Strange 788.
47. *Regina* v. *Hicklin* (1868), 3 Q.B. 360.
48. Ibid., 371.
49. *Brodie, Dansky, and Rubin* v. *the Queen*, [1962] S.C.R. 681.
50. [1964] S.C.R. 251.
51. (1963), 42 W.W.R. 65.
52. (1966), 58 D.L.R. (2d) 486.
53. (1967), 62 D.L.R. (2d) 328.
54. *Regina* v. *Great West News Ltd.* (1970), 72 W.W.R. 354, and *Regina* v. *Prairie Schooner News Ltd.* (1970), 1 C.C.C. (2d) 251.
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56. For a more detailed discussion, see W.S. Tarnopolsky, *supra*, n.22, 194-200; W.H. Charles, "Obscene Literature and the Legal Process in Canada" (1966), 44 *Can. Bar Rev.* 243; Leon Getz, "The Problem of Obscenity" (1965) 2 *U.B.C. Law Rev.* 216; L.C. Green, "Law and Morality in a Changing Society" (1970), 20 *U. of Tor. L.J.* 422.
57. See the majority judgment of Judson J. in the *Brodie, Dansky, and Rubin* case, *supra*, n.49, 705-6.
58. *Supra*, n.51, 80.
59. Tarnopolsky, *supra*, n.22, 200.
60. 25 Ed. 3 stat. 5, c.2. For a concise summary of the history, and for references to more detailed studies, see M.L. Friedland, *National Security: The Legal Dimensions*, a study prepared for and published by the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Canadian Government Publishing Centre, 1979, 8-17.
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63. Now R.S.C. 1970, c. W-2.
64. Working Paper No. 72, London, 1977, 1.
65. For an account of this event, see Street, *supra*, n.18, 207-8.
66. For the description of these various Acts see Street, ibid., 207-9.
67. Ibid., 213-16.
68. S.C. 1890, c.10.
69. For a more detailed description of this history in Canada of the Act, see Friedland, *supra*, n.60, 30-59.
70. S.C. 1892, c.29, ss. 76-78.
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77. Reform of Section 2 of the Official Secrets Act 1911, Cmnd. 7285 (London, 1978).
78. For one of the best descriptions of this case and of the related history see C.O. Lawhorne, *Defamation and Public Officials—The Evolving Law of Libel*, Southern Illinois University Press, 1971, c.3, 25-38.
79. (1770), 20 State Trials 870.
80. Quoted in Street, *supra*, n.18, 198.
81. Ibid., 198.
82. (1886), 16 Cox's C.C. 355.
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84. From his *Digest of the Criminal Law*, 56, Art. 93.
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87. 249 U.S. 47.

88. 341 U.S. 494 (1950).

89. [1951] S.C.R. 265. Very good summaries of the history of seditious libel and its meanings at various times can be found in the judgments of Justices Rand, Kellock, and Locke.

90. Ibid., 290.

91. *R.* v. *Unwin*, [1938] 1 W.W.R. 339 and *R.* v. *Powell*, [1938] 1 W.W.R. 347.

92. Ibid., *R.* v. *Unwin*, 343-44.

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94. *R.* v. *Georgia Straight Publishing Ltd. et al,* [1970] 1 C.C.C. 94; 4 D.L.R. (3d) 383.

95. *Supra*, n.89.

96. *Report of the Special Committee on Hate Propaganda in Canada*, (Cohen Committee) Ottawa: Queen's Printer, 1966.

97. For a fuller discussion, see Tarnopolsky, *supra*, n.22, 185-94; also see M. MacGuigan, "Hate Control and Freedom of Assembly" (1966), 31 *Sask. Bar Rev.* 233 and the Cohen Committee report, *supra*, n.96.

98. (1979), 101 D.L.R. (3d) 488.

99. See *Attorney-General for Quebec* v. *Kellogg's Co.,* [1978] 2 S.C.R. 211, which upheld provincial prohibition of certain advertising to children, even on television; *Attorney-General for Canada and Dupond* v. *Montreal*, [1978] 2 S.C.R. 770, which upheld a Montréal bylaw providing for prohibitions of street demonstrations; *Nova Scotia Board of Censors* v. *McNeil*, [1978] 2 S.C.R. 662, which upheld provincial film censorship.

100. So, probably would a provision by a province to stop group defamation by injunction; only Manitoba's Defamation Act, R.S.M. 1970, c. D-20, s.19, has such a provision.

101. (1979), 97 D.L.R. (3d) 577. For an excellent and detailed commentary see the case comment by W.W. Black in (1979), 17 *Osgoode Hall L.J.* 649.

102. [1976] W.W.R. 160.

103. [1977] 5 W.W.R. 198; 77 D.L.R. (3d) 487.

104. *Supra*, n.101.

105. Ibid., 585.

106. Ibid., 604-5.

107. Which both he and Mr. Justice Ritchie on prior occasions have rejected totally, and without explanation, as not being applicable in Canada because of a very different constitution.

108. Ibid., 590-1.

109. Ibid., 600. He then gave as examples the following cases: *Cowen* v. *Attorney General for British Columbia*, [1941] S.C.R. 321, where an injunction to prevent publication of an advertisement for the practice of dentistry was upheld because this was barred under the provincial Dentistry Act; *Benson & Hedges (Canada) Ltd.* v. *Attorney General for British Columbia* (1972), 27 D.L.R. (3d) 257, which upheld prohibition of the advertising of tobacco products; *R.* v. *Telegram Publi-*

shing Co. Ltd. (1960), 25 D.L.R. (2d) 271, where the prohibition of liquor advertising in Ontario was upheld as not being an encroachment on freedom of the press.

110. Ibid., 601-2.

111. For a summary of these Acts and a discussion of this topic see W.H. Kesterton, *The Law and the Press in Canada*, Carleton Library Series No. 100, 1976, c.V.

112. For the United States law see the leading case of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). For a discussion of the case, for subsequent decisions and for some of the comments, see M.A. Franklin, *supra*, n.86, 316ff.

113. *Price* v. *The Chicoutimi Pulp Co.*, [1915] S.C.R. 179.

114. *Baxter* v. *C.B.C. & Malling* (1979), 28 N.B.R. (2d) 114.

115. A related case of absolute privilege is that which applies to communications by one government official to another in the course of official duty. The fourth kind of absolute privilege which should be mentioned is that involving statements made by one spouse to the other.

116. *Re Ouellet (No. 1)* (1976), 67 D.L.R. (3d) 73 and *Stopforth* v. *Goyer* (1978), 87 D.L.R. (3d) 373.

117. *Jones* v. *Bennett*, [1969] S.C.R. 277; *Sykes* v. *Fraser* (1973), 39 D.L.R. (3d) 321.

118. See the cases in the previous footnote and *Lawson* v. *Chabot* (1974), 48 D.L.R. (3d) 556.

119. *Paul* v. *Van Hull* (1962), 36 D.L.R. (2d) 639.

120. *Douglas* v. *Tucker*, [1952] 1 S.C.R. 275.

121. *The Globe and Mail* v. *Boland* (1960), 22 D.L.R. (2d) 277.

122. *England* v. *C.B.C. and Clarkson*, [1979] 3 W.W.R. 193.

123. *Doyle* v. *Sparrow* (1979), 106 D.L.R. (3d) 551.

124. *Blunden* v. *Stirling* (1979), 1 A.C.W.S. (2d) 70.

125. The other, and more recent case dealing with a defence of fair comment is *Vander Zalm* v. *Times Publishers* (1980), 109 D.L.R. (3d) 531. This case concerned an action by the British Columbia Minister of Human Resources who sued for damages for an alleged libel contained in a cartoon published in the Victoria *Times*. The cartoon caricatured the plaintiff by showing him, with a tag reading "Human Resources" upon his chest, gleefully pulling the wings from a fly. The trial court held that the cartoon was defamatory, and was not objectively a fair comment: (1979), 96 D.L.R. (3d) 172. However, the British Columbia Court of Appeal allowed the appeal.

126. [1979] 1 S.C.R. 1067, 90 D.L.R. (3d) 321.

127. (1977), 79 D.L.R. (3d) 180.

128. Ibid., *Supra*, n.126, S.C.R. 1072-73, D.L.R. 325.

129. Ibid., S.C.R. 1095-97, D.L.R. 343-5.

130. R.C. Smith, *Press Law*, London: Sweet & Maxwell, 1978, 259-65.

131. (1956), 1 D.L.R. (2d) 297.

132. *R.* v. *Evening Standard Company Limited*, [1954] 1 Q.B. 578, 583-4.

133. *Attorney-General* v. *Times Newspapers Limited*, [1974] A.C. 273.

134. Ibid., 300.

135. As an example see F.A. Mann, "Contempt of Court in the House of Lords and the European Court of Human Rights" (1979), 95 *L.Q.R.* 348; V.L. Wagner,

"Human Rights: Government Interference with the Press — The *Sunday Times* Case" (1980) 21 *Harvard International Law Journal* 260; Nathaniel L. Nathanson, "The *Sunday Times* Case: Freedom of the Press and Contempt of Court Under English Law and the European Human Rights Convention" (1979-80), 68 *Kentucky Law Journal* 971.

136. *Supra*, n.87.
137. 331 U.S. 367 (1947).
138. Ibid., 376.
139. 370 U.S. 365.
140. For a more detailed discussion of all of these provisions see Kesterton, *supra*, n.111, c.II.
141. *R.* v. *Grey*, [1900] 2 Q.B. 36, 40.
142. (1910), 17 C.C.C. 108.
143. Ibid., 115. To the same effect see *Re Nicol*, [1954] D.L.R. 690.
144. For a discussion of some of the recent Canadian cases see Kesterton, *supra*, n.111, 189-93.
145. [1936] A.C. 322.
146. Ibid., 335.
147. Ibid., 337.
148. This proposition is so well-known that almost any textbook on evidence provides this information. See, for example, J. Sopinka and S.N. Lederman, *The Law of Evidence in Civil Cases*, Toronto: Butterworths, 1974, 2llff; S.A. Schiff, *Evidence in the Litigation Process*, Toronto: Carswell, 1978, 990ff.
149. *Globe & Mail Ltd.* v. *Boland*, [1960] S.C.R. 203, 208; *Banks* v. *Globe & Mail Ltd.*, [1961] S.C.R. 474, 482.
150. (1914), 30 T.L.R. 462, 468.
151. *Attorney-General* v. *Mullholland and Foster*, [1963] 2 Q.B. 477, 489.
152. (1961), 28 D.L.R.(2d)6.
153. *Wismer* v. *Maclean-Hunter Publishing Co. Ltd. and Fraser* (*No. 2*) , [1954] 1 D.L.R. 501; *McConachy* v. *Times Publishers Ltd.* (1964), 49 D.L.R. (2d) 349.
154. *Drabinsky* v. *Maclean-Hunter* (1980), 28 O.R. (2d) 23.
155. *Red Deer Nursing Home* v. *Taylor* (1969), 67 W.W.R.1.
156. *Slavutych* v. *Board of Governors of the University of Alberta* (1975), 55 D.L.R. (3d) 224.
157. J. Wigmore, *Evidence and Trials at Common Law*, Vol. 8, 3rd ed., New York: Little Brown, 1940, 527.
158. For the history of these developments see W.A. Steigleman, *The Newspaperman and the Law*, Greenwood Press, 1950, c. XIV.
159. *Farber* v. *Jascalevich*, 394 A 2d. 330 (1978).
160. For an account of this case, see D.N. Rohrer, *Freedom of Speech and Human Rights*: *An International Perspective*, Dubuque: Kendall-Hunt, 1979, c.5.
161. 408 U.S. 665 (1972).
162. Ibid., 667.

II

Issues of law and public policy

by Colin Wright

Contents

Introduction

In a country which enjoyed complete freedom of expression, anybody would be able to write for a newspaper, and put whatever he wished into the available space. As things stand, not everybody has access to the press and, those who do, cannot write anything they please.

But the question of *who* can set the tone of a newspaper becomes academic if there are such severe restrictions on what can be said that it will all come out the same anyway. There are no memorable bylines in *Pravda*.

The second part of this paper examines who has a significant degree of access to the press and who does not. The first part examines the laws that affect what may be published. Specifically, it looks at libel and contempt, the two areas of law which, on a day-to-day basis, place the major restrictions on what may be written about.

There are, certainly, other restrictions on the press which have nothing to do with either libel or contempt. But these are either not controversial or outside the mainstream. There are, for example, laws on obscenity, copyright, hate literature and blasphemy, all of which restrict to some extent what can be written in the press but none of which is central to a journalist's life. The law of trespass and privacy laws (in those provinces which have introduced them) may cramp his style but need not cripple his judgment.

There are also laws and policies whose intent is essentially to censor or manipulate what the press writes about — sometimes for legitimate reasons, more frequently, one suspects, in the interests of covering a government's flaws. What is involved in the policy area is largely extra-legal and consists of refusing information, of leaking selected materials, or hiring public relations officers to promote a particular viewpoint. The role of law in this respect is either relatively new — taking the form of freedom of information legislation — or little used, outdated, and repressive. In this latter category one might place the Official Secrets Act and some municipal bylaws which have occasionally been used to restrict freedom of expression.

Public policies are either tacit or explicit. Like Holmes's dog, which did not bark in the night, it is often the case that laws which have *not* been passed are as significant as those which have. In Canada, we are governed by two types of law: statute law, enacted by Parliament or a provincial legislature, and common law, in part inherited from Britain and in part the product of decisions by our own courts. Hence, by choosing not to act, by choosing not to introduce new law by statute, governments leave the common law in place and thereby, at least tacitly, endorse existing policy.

I

Restrictions in law

(1) Libel

To what extent is the character of Canada's newspapers determined by the law of libel? Obviously, no answer to this question can be attempted without giving at least a brief outline of the law in this area.

In order to succeed in a libel suit, a plaintiff must, primarily, show that the facts or opinions published have probably damaged his reputation "in the estimation of right-thinking members of society generally".[1] He can maintain that he has been harmed either by what the story says about him explicitly, or by what it implies through innuendo. In addition, he must show he has given notice of his claim and started his lawsuit within the time allowed by provincial statutes, normally six weeks and three months respectively from the time he became aware of the potential libel. (Libel laws vary somewhat from province to province). Also, he may (although in Canada it is unusual to do so[2]) establish that the story was written for malicious reasons, and so destroy the defences of "fair comment" and "qualified privilege" which might, otherwise, have been effective.

A newspaper faced with a libel action has two broad lines of defence. It can maintain, first, that the facts or opinions complained about were justifiably published because, in the case of facts, they were either true or partly true and those that were not did not substantially increase the plaintiff's damages;[3] in the case of opinions, that they were honestly held on matters of public interest, were based on accurate facts, and were, therefore, fair comment. The reason for protecting the publication of facts or opinions in such circumstances has been eloquently stated by Lord Denning. In the course of dismissing the outraged claim of a solicitor who had been said to have used "back-door influence" with employees of a town council, he said:

> . . .the right of fair comment is one of the essential elements which goes to make up our freedom of speech. It must not be whittled down by legal refinements. When a citizen is troubled by things going wrong, he should be free to 'write to the newspaper': and the newspaper should be free to publish his letter. It is often the only way to get things put right. The matter must, of course, be one of public interest. The writer must get his facts right; and he must honestly state his real opinion. With that being done, both he and the newspaper should be clear of any liability.[4]

A newspaper's other broad line of defence is to claim the article complained about is protected by privilege, either absolute or qualified. If absolute privilege is

claimed, the defendant must show, first, that the article is a fair and prompt report of a court hearing and, second, that it was prepared to print any reasonable correction offered by the plaintiff.[5] Obviously, the defence is only useful in extremely limited circumstances.

Qualified privilege, on the other hand, is wider in scope, although the conditions precedent to applying the defence closely parallel those required for absolute privilege. To use it successfully, a paper must show, first, that its report was a fair and accurate one; second, that it was prepared to print any reasonable correction offered by the plaintiff; third, it must refute any allegations of malice; and, finally, it must demonstrate that the subject of the article was one covered by the defence.

It is this final element which has raised the most vexed questions. There are certain subjects which are clearly sheltered. The reports of proceedings of Parliament, for example, or of any legislative or administrative body, or of public meetings, or of documents issued by the government are all listed in provincial libel legislation as being eligible for protection.[6]

But the common law has allowed other defences. These cannot be exhaustively classified or listed, for, as has been said, one cannot "substitute a catalogue for a principle".[7] Unfortunately, the courts have had some difficulty stating even the principle with any assurance or clarity. They do, however, seem to demand, as a basic requirement, a special relationship between the person writing and the person being written about.

> In. . .qualified privilege the right [to comment] is not shared by every member of the public, but is limited to an individual who stands in such relation to the circumstances that he is entitled to write. . .what would be libellous on the part of anyone else.[8]

Beyond that, there must be a duty, legal or moral, to comment — as when a professor gives a letter of opinion on a former student. The reader and the writer must share a common and legitimate interest in the subject. So, for example, a company that fired an employee for what it considered gross neglect successfully claimed qualified privilege for a circular it sent to other employees about the dismissal.[9]

It is tempting for a newspaper, faced with a libel action in which it cannot slip into one of the categories of qualified privilege allowed by statute, to claim that it is covered by common law principles. If successful, the newspaper would not have to prove the truth of its allegations.

Several commentators have maintained that it should often be successful.[10] It is difficult to see why. Qualified privilege at common law depends on a special relationship between the writer of defamatory material and the reader, and anybody can buy a paper. Nonetheless, much ingenuity has been spent arguing that newspapers can shelter under this principle. The Supreme Court of Canada, however, has been, for the most part, unimpressed. In its last word on the subject, the Court acknowledged that qualified privilege "might" apply to newspapers, but suggested that the occasions would be few and far between, and it made no attempt to define them.[11]

The Ontario Court of Appeal in 1979 held that a minister of the Crown enjoys a sufficiently special relationship with his constituency that he, and the newspapers which publish his remarks, can claim the defence of qualified privilege.[12] Similarly, a newspaper can print the remarks of an army council which is responding to a public attack on one of its officers.[13]

The open question is whether the defence of qualified privilege — as allowed by statute and as marginally enlarged at common law — is widely available to newspapers.

General criticism of the narrow range of subjects now given the benefit of this defence is that it encourages passive rather than investigative reporting. The paper which runs a story summarizing a parliamentary debate, or a ministerial comment, can claim qualified privilege if it gets something wrong. A paper which investigates on its own, and publishes a story which it merely *believes* to be true, can look for no similar protection.

A report on the British press under the chairmanship of Lord Shawcross expressed concern that newspapers were refraining from publishing matters of public interest because they could not prove them to be true. Accordingly, it recommended adding, as a category eligible for the protection offered by qualified privilege, any matter of public interest, if the paper could demonstrate that it had reasonable grounds for believing the truth of what it was printing.[14]

The recommendation is a fundamental one, and deserves serious consideration.[15] However, it should be noted that, even without the protection offered by qualified privilege, there is considerable pressure on newspapers to come up with potentially libellous stories. Indeed, there is a theory, which is overstated but which, nonetheless, contains a kernel of truth, that the only good story is one which lowers someone's reputation in the community.

Sometimes editors do press reporters to come up with derogatory stories notwithstanding the legal dangers. A recent case involving a reporter with the Ottawa *Citizen* is of particular interest in this regard. The reporter, Katie FitzRandolph, had been told to interview a number of doctors who had been charged with defrauding the Ontario Health Insurance Plan. The object of the assigned interviews was to discover, in advance, what information was likely to be produced at pending preliminary hearings. As mentioned elsewhere in this study, reports of preliminary hearings cannot generally be published. Knowing that she (and, probably, the *Citizen*) would be courting contempt charges if she did the assigned interviews and stories, Ms. FitzRandolph refused. She was disciplined. She grieved, and a board of arbitration upheld the grievance. The case established somewhat of a precedent in terms of a reporter's right to refuse an assignment where there is a matter of personal integrity (or, indeed, legal liability) involved.[16]

Nonetheless, although the proposal to extend the categories for which qualified privilege may be claimed is of fundamental importance, its adoption would be unlikely to alter greatly the character of Canadian newspapers. As the chairman of the Newspaper Publishers Association in England put it, "the frequent assertion that newspapers have in their archives hundreds of files that would reveal dreadful goings-on has never been established to the satisfaction of any conscientious witness".[17]

For its part, the Canadian Daily Newspaper Publishers Association appears content with the present state of the country's libel laws.[18] Fine tuning may periodically be required, but there seems to be an easy confidence within the Association that it will be able to get changes, if they seem necessary, made promptly.

The CDNPA has some reason for confidence. For example, in 1978, the Supreme Court of Canada, in the case of *Cherneskey* v. *Armadale Publishers*

Limited et al,[19] ruled that, in order to succeed with the defence of fair comment, a newspaper must show that the opinion published was honestly held by the newspaper and its editor, or the writer. In the view of a majority of the court, the writer must testify that he honestly believed what he had written, and the jury had to believe him. (The case involved a letter-to-the-editor written by two students who were no longer in the jurisdiction and had not been called to testify.) Upon that view, the defence of fair comment failed; newspapers across the country were left with the uncomfortable feeling that they should be checking the bona fides and credibility of every letter writer.

But not for long. By mid-1981, primarily at the urging of the CDNPA and the Ontario Press Council, five provinces plus the Yukon and Northwest Territories had amended their libel and slander statutes to overcome the effect of the *Cherneskey* decision. To succeed in the defence of fair comment in that sort of a situation it is now enough to show that a person *could* honestly have held the opinion expressed.[20]

It is, in fact, mainly at the federal level that legislation in this area has fallen out of date. In the Canadian Criminal Code there are still detailed provisions relating to libel which may well be redundant and anachronistic; certainly, they have been little used in recent years.[21] In Canada it is an offence to publish false news, and the fact that prosecutions are also infrequent under this section (despite the annual spate of April Fool's stories) makes the occasional charge seem unjustly discriminatory.[22]

As well, from time to time, the courts reach anomalous decisions on their own. For example, in *Vander Zalm* v. *Times Publishers et al* the trial court (apparently because of the way the case was argued) took a very literal-minded approach to the defence of fair comment.[23] It failed to deal with the point that editorial cartoons, like satire generally, succeed by taking a fact and stretching it almost beyond the point of recognition. The fact required for the basis of the cartoon in question — which showed a minister of the Crown gleefully pulling the wings off a fly — could have been merely that Vander Zalm had made a decision which would inflict suffering on someone who could not easily strike back. There should have been no need, as the court held there was, to demonstrate that the minister had a cruel and sadistic nature.

It seems premature, however, to conclude that *Vander Zalm* is part of a new wave in defamation actions in Canada which are likely to make the country's newspapers more and more bland. Indeed, the case has been overruled.[24]

What does seem beyond debate is that libel law is complex. Gatley's 7th edition on the subject runs to over 700 pages. An English investigation recently concluded:

> [A] mystique has come to be associated with this tort. . . .In some respects the law of defamation has become unduly complex and technical. It must, however, be borne in mind that some of the complexities stem from the need to maintain the balance between the individual's right to his reputation and the public interest to preserve free speech.[25]

In other words, if libel law is to deal with every complaint about the press that cannot be solved by agreement, it must be complex. At the same time, it should be accessible.

At this stage, it is not very accessible to the average litigant. It is a highly specialized field and the costs of failure are enormous. In one recent case, where only

nominal damages were awarded, it was estimated that the loser's costs would be some $40,000.[26]

There seem to be two possible routes toward making it easier for someone who has been defamed to obtain compensation, either in the form of money or of a published retraction. The first is to follow the American model and, in this area, abandon the tradition that costs will follow the event; that is, that costs must be borne by the loser in a suit. If each side paid its own costs in a libel action — win, lose or draw — an individual undoubtedly would be able to cross swords with a newspaper chain on a more equal footing. As a corollary, the unusual provision which allows a newspaper to seek security for its costs at an early stage in a libel action would, of course, have to go.[27]

The alternative seems to be to agree with the report of the Special Senate Committee on Mass Media (the Davey Committee) that there is a need for another forum, a press council, to deal with "medium-sized problems" which fall between "the kind of petty grievances that can be addressed by a letter-to-the-editor and the major complaints that are best adjudicated by the courts."[28] But, of the three provinces in which press councils have been established, only Québec's council can, at this point, be said to be functioning effectively.

To return to the original question: it does not appear that the character of Canadian newspapers is being determined, or at least not inappropriately determined, by the country's laws of libel. That is not to say that the laws are beyond reproach. But, for the most part, they do strike a balance between the need to preserve an individual's reputation from unjust criticism, and the need to encourage freedom of speech. In certain respects the laws appear to be slightly tilted in favor of the plaintiff; in other respects, in favor of the defendant. These anomalies only contribute to the overall balance.

(2) Contempt

Contempt is another body of law affecting what journalists can write about. In the view of one Fleet Street editor, it is of the first importance:

> I probably spend more time worrying about the possibility of contempt of court than I do about all the other legal restrictions put together. This is because the law of contempt is vague in detail, the penalties are harsh, and, usually, though not invariably, inflicted directly on the editor.[29]

The state of the law in this area can conveniently be considered in three parts.[30] In the first place, newspapers may not, to use the quaint phrase, "scandalize the court". This prohibition is based on the theory that no one should undermine public confidence in the administration of justice by publishing material "calculated to bring a Court or the Judge of a Court into contempt, or to lower his authority".[31] Journalists can criticize individual decisions, but they should do so with some moderation. As a rule of thumb, they should not conclude that the judges involved are either generally incompetent or prompted by hidden and improper motives.

For once, the dividing line does not appear to be a difficult one to draw. It was all right, for example, for André Ouellet, Minister of Consumer and Corporate Affairs, to disagree with a decision of Mr. Justice MacKay of the Superior Court of Québec, and to say that he intended to have it appealed. But it put him in contempt

to say that he could not "understand how a judge who. . .[was]. . .sane could give such a verdict".[32] Or again, it would have been quite in order for the editor of the *New Statesman* to criticize the misguided reasons for judgment given in a libel suit. But it was another matter altogether for him to suggest that the real reason for the decision was that the presiding judge, apparently a Catholic, could obviously have no time for the defendant, who was an advocate of birth control. He was promptly judged guilty of contempt.[33]

L.A. Powe Jr. has suggested that Canadian courts have managed to blur an apparently firm dividing line: they show a disturbing willingness to find contempt of court.[34] He criticizes, for instance, the decision that Tom Murphy was in contempt for a 1968 article in a student newspaper which began:

> A short while ago, I testified in the Supreme Court of New Brunswick on the Strax case. That court was a mockery of justice. I, along with any of the defence witnesses, might. . .[as]. . .well have testified to the bottle-throwing mob.[35]

But if that comment was not designed to bring a judge of the court into contempt, it is difficult to imagine what would have been.

It has also been argued that *no* criticism of a judge, outside the actual court room (a newspaper's criticism is never made anywhere else), can justify a finding of contempt. Jacob Ziegel, for example, points out that the power has been abused in the past, that respect for the administration of justice cannot be imposed by force, and that the mere possibility of a citation is stifling to free speech.[36]

But the argument does not seem to have taken hold. Canadians appear generally content to keep their criticism of the courts almost as muted and ponderous as the judicial process itself. And it may well be beneficial to allow some of the passion to seep out of debate once it has been litigated. Right or wrong, there is much to be said for accepting a decision and getting on with things.

Despite Professor Powe's assertions to the contrary, the courts, for their part, seem reluctant to make findings of contempt for scandalous criticism. Professor Ziegel found only three cases in England in the 20th century where they had exercised the power. Ronald Atkey pointed to three recent Canadian examples where motions seeking a citation for contempt were dismissed. He might have added that, even when they are granted, punishments tend to be restricted to the payment of costs, or a small fine. In any event, he concluded "the courts would seem to rule in favor of the accused where there is any doubt".[37] In other words, both the courts and the press have shown a measure of restraint toward each other in matters concerned with this part of the law of contempt.

In the second area of the law of contempt — that of restrictions placed on newspapers' reporting of matters currently before the courts — Canadian practice has tended to fall somewhere between the opposite extremes found in the United States and England.

In the United States there have been virtually no limits on what may be published before and during a criminal trial. The classic illustration of what this can lead to is the case of *Sheppard* v. *Maxwell*.[38] Briefly, Sam Sheppard, a Cleveland doctor, was suspected by the press of murdering his pregnant wife, Marilyn. One headline urged the police to "Quit stalling — bring him in." They did so the same night. Publicity then grew in intensity. "Dr. Sam faces quiz at jail on Marilyn's fears

of him," reported another headline. A local broadcaster commented that Dr. Sheppard had admitted his guilt by hiring a distinguished criminal lawyer for his defence. At the trial itself, the court was largely filled with reporters scrambling for new angles on the story. In that atmosphere, the most surprising thing was not the "guilty" verdict, but rather that it took the jury four days to arrive at it.[39]

Such reporting, if it took place in Canada, would constitute contempt. It makes a hearing by a court seem superfluous. Why have a trial when the press knows (and is only too willing to disclose) the answer to the very question the jury will be asked to decide? Moreover, as public pressure grows, it becomes increasingly difficult for a court to ignore the clamor and do its duty. This can lead to tragic miscarriages of justice. In the *Sheppard* case, for example, a new trial was ordered at which the accused was acquitted — but only after he had been incarcerated for 12 years. The reporters, editors and publishers who had contributed to the carnival, on the other hand, got off scot-free.

This treatment is to be contrasted with the alternative which has been developed in England. Again, one leading example will serve to illustrate. In 1949, the *Daily Mirror* reported, shortly after the arrest of a murder suspect, that he was a human vampire who had already confessed to the charge and to a number of others as well. The court found the paper's editor and its publisher to be in contempt, jailing the one for three months and fining the other £10,000 and costs.[40]

In Canada, the conventional judicial wisdom seems to permit publication of an outline of the circumstances of a crime, the fact that a charge has been laid, and the name and address of the accused. Any record the accused may have cannot be published with impunity, nor can any confession. Evidence given at preliminary inquiries cannot normally be printed. Comment on the merits of a case pending trial is out of the question.

Such guidelines are probably defensible.[41] But the difficulty is that they are imprecise, and newspapers and their sources — the police, litigants, lawyers, and witnesses — are constantly being urged to err on the conservative side. Silence, they are told, is always an option. Asked what should be done in cases of doubt, Mr. Justice Rand advised a journalist to delay publication.[42] Asked whether it was proper to interview witnesses to a crime, J.J. Robinette agreed that it was, but added that the results should probably not be used.[43] In fact, at the time of Mr. Robinette's comment, the Supreme Court of British Columbia had already held that it was perfectly proper for a newspaper to collect and use the statements of possible future witnesses.[44]

From the point of view of public policy, the cautious approach at least helps to ensure that the accused gets a fair hearing — that is, a verdict on the evidence and the law adduced at the trial. But what are the costs?

First, there is undoubtedly a chilling effect on the reporting of civil matters, although, as Ronald Atkey has pointed out, findings of contempt for prejudicing a civil case have virtually become obsolete in Canada.[45] But it is often convenient to refrain from further comment on the ground that some aspect of the issue is being litigated. Second, both sides in a criminal matter have become extremely secretive. The police, in particular, have taken to dealing with journalists through press releases which have been fully sanitized.

Does that matter? In extemporaneous remarks, which were later transcribed, Alfred Friendly, then managing editor of the Washington *Post*, argued persuasively that it does. He started by quoting from W. Theodore Pierson, a Washington lawyer:

> 'It would seem a relatively simple cure on the part of public officials to exclude the press entirely from places like the third floor of the basement in Dallas.' But, then, he goes on to the wider implication: 'Must we not admit on the basis of experience that the fair administration of justice and the rights of the accused are seriously threatened by police brutality, improper investigatory procedures, and isolation of the accused from counsel and friends? Consider, conversely, what a great boon such a procedure would be, — and this is *my* point — 'what a great boon such a procedure would be to the power structure of closed communities which apply a double standard for the administration of justice, one for whites, another for blacks'. . . .
>
> When the public can learn through the press about material that may or may not be presented in evidence — when the police, the prosecutor, and the defence counsel all know that it is possible for the public to learn of such matters — this helps to keep everybody straight.
>
> Another reason why the revelation of evidence seems to be necessary arises when the community is aroused and needs reassurance that the man who has been picked up is a likely suspect. Is he really the one who has been doing the stranglings, or is it a frame-up? Is somebody being engineered to jail in order to get the monkey off the back of the police chief because he knows he has to make an arrest? Is he picking up a miserable little numbers runner when there is enough evidence available to arrest the top policy czar of the town? Is he picking up a small narcotics pusher in order to take the heat off and not have to prosecute the boss-man higher up?
>
> The usual answer to these arguments is that the public will finally know. Abide your time; be patient; wait for the trial; report the trial in full. If there has been a miscarriage of justice, if there has been a fix on and the full evidence hasn't been presented, the press will be perfectly free to tell everybody what was wrong after the trial is over, how the prosecutor was corrupt or the defence counsel was a scoundrel, and so on. As a matter of real life this is an illusory remedy. . . .The whole steam's out of it at this point. Public interest is dead, and let's not say that's fine, because it is public interest that makes the wheels of our democracy go round and it is entitled to be served. Who said, "everything secret degenerates, and that includes the administration of justice"? The whole tendency toward putting a blotter of secrecy on the course of judicial administration demands a price, a price that I think is too high.[46]

There are many safeguards built into the criminal trial process which are designed to ensure that neither judge nor jury is influenced by publicity surrounding a case. They range from delaying the time of the trial, through moving the place of the trial, to declaring a mistrial.[47] Mr. Friendly also makes the point that there is scant empirical evidence that these safeguards do not work, that the courts and juries, despite what they say to the contrary, are influenced by the publicity surrounding a trial.

In the third area of the law of contempt — that area which relates to the refusal to reveal to a court the source of a story — the responsibility lies squarely with the

reporter himself. If he is prepared to risk a jail sentence to protect an informer's identity, that is his option. And it is an option courageous reporters have been prepared to exercise; for, in the journalist's world, where information is the only currency, probing questions about confidential sources are not appreciated.

Courts and tribunals have not traditionally had much sympathy for this reticence on the part of newsmen. There are a number of examples, but Lord Denning's judgment in *Attorney General et al* v. *Mulholland*[48] provides a useful focal point from which to consider the literature.

Joseph Mulholland was a journalist who, after a spy had been discovered in the Admiralty, wrote an article suggesting that officials responsible for counter-intelligence had been negligent in letting him in in the first place or at least in not discovering him sooner. The spy was not, according to Mulholland, subjected to crucial security checks because he had been vouched for by "two high-ranking officials". Parliament was understandably concerned about this allegation (among others), and a tribunal was set up to determine whether there had been negligence in the vetting of him. During the course of the inquiry, Mulholland was asked who told him about the short-circuiting of the usual security system. He refused to disclose his source.

Although there is no such indication in the report of the case, it seems reasonable to conclude that Mr. Mulholland's crucial allegations could have been adequately demonstrated or rebutted from Admiralty files available to the tribunal. If the spy was really vouched for by two high-ranking officials, the recommendations would presumably have appeared in his dossier. If he had not been subjected to the usual security checks, that fact, together with the explanation, should have been a matter of record.

In other words, a cross-examination of Mr. Mulholland's informant was not necessarily the only way, or even the best way, of testing the validity of the claim made in his article. Lord Denning held that it did not matter, and jailed Mr. Mulholland for six months. He reasoned that "the root cause of the whole inquiry was the information the newspapers published",[49] and concluded, therefore, that the sources had to be tracked down to see whether they were trustworthy.

For essentially the same reason he might have reached exactly the opposite conclusion: the newspapers *had* got the inquiry launched. It is reasonable to suppose that they would not have been able to do so without their confidential sources, and equally reasonable to suppose that these informants would not have been so talkative had they known they would later be exposed to the wrath of the "high-ranking officials".

In other words, if there is no protection for a newspaper's sources, there is no inquiry. If there is no inquiry, the slack security system is allowed to persist, and yet another spy will be allowed to slide into the Admiralty — hardly the goal toward which the law should strive.

Ideally, the law should be working toward two goals in this area, not just one; unfortunately, the two are largely incompatible. Society has an interest in encouraging the free flow of information; therefore, a newspaper's sources should be protected. Society also has an interest in testing the validity of that information; therefore a newspaper's sources should not be protected. The law can and should work toward reconciling these two interests and, to the extent that they cannot be reconciled, make a judgment on which should prevail.

In the *Mulholland* case, for example, it could have obliged the tribunal to check the newspaper's allegations in every possible way — except through the newspaper's confidential sources. The ensuing investigation might well have uncovered adequate evidence that the spy had been welcomed briskly aboard by "two high-ranking officials". In that case, there would have been no need to disturb the confidential sources. Alternatively, an investigation might have uncovered evidence that there was no short-circuiting of the usual security procedures, or (although the possibility seems unlikely in this particular case) that it was impossible to find out one way or the other. In that case, there would have been a need to expose and cross-examine the sources. But that step should have been taken as a last resort.

The approach is not unprecedented. It has been adopted at common law for police informants, where closely analogous interests are at work. In their dealings with police informants, the courts started from the position that a militant journalist might take today: the source was absolutely privileged. Period.[50] It is reported that Lord Kenyon dealt with the question summarily in 1790: "the defendant's counsel have no right, nor shall they be permitted to enquire the name of the person who gave the information of the smuggled goods."[51] However, in the 19th century the courts were showing an awareness that the privilege would have to be qualified in order to reconcile, or choose between, conflicting interests.[52] In 1957, the U.S. Supreme Court outlined how this might be done.

> The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. . . .Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable. . . .
>
> A further limitation on the applicability of the privilege arises from the fundamental requirement of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. . . .In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication.[53]

In that case the court decided the informant had information which was essential to the defence and which could not be obtained elsewhere. It gave the police the alternative of revealing their source, or dropping the charge. However, in a more recent U.S. case, the court held that, while the information was important to the defendant's case, it could (admittedly with more difficulty) be obtained without relying on the government informers, and that the privilege should apply.[54]

It is clear that the common law is not developing in the same way for newspaper sources as it has for police informants. Legislation at both the provincial and federal level[55] will be required to put the two on a parallel course. In the interests of creating a more vigorous Canadian press, it is desirable that the appropriate legislation should be introduced.[56]

II

Owners and journalists

It has often been pointed out, and now seems beyond debate, that those who write for a free press should not all be of one mind. If any justification is needed for this premise, the opinion of Mr. Justice Black of the U.S. Supreme Court is often cited:

> It would be strange indeed. . .if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . .The First Amendment. . .rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free country.[57]

It is not self-evident that ownership has any bearing on the pursuit of this ideal. Indeed, Murray Burt, managing editor of the Winnipeg *Free Press*, recently suggested it is a "red herring".[58] Would it matter, to take the theoretical extreme postulated by the Davey Committee,[59] if every newspaper in the country was owned by the same company?

Regardless of ownership, newspapers often collect a "diverse and antagonistic" group of people to work in their editorial departments. Among others, there have been bullies, journeymen, intellectuals, artists, prima donnas, businessmen, and eccentrics. Members of the last group spring most readily to mind. Some are oddly brilliant, other are just odd. Some exploits have been written down; others are just passed on by word of mouth.

There is, for example, Heather Robertson's delightful account of the "terrible men" who used to work on the Winnipeg papers.[60] There is old Craw, a legendary journalist created, but not wholly created, by John Le Carré. Explicitly, the character is based on the career of an eminent far eastern correspondent.[61] There is the Old Mess, who specialized in writing tiresome little stories on the decline in the quality of shoe laces.[62] The Old Mess is entirely fictional, but certainly his near equivalent is an exasperating reality in the newspaper world. To quote Robertson again, her first newsroom seemed to be filled with

> dwarves, cripples, editors with tics and stammers, a fat woman with a terribly scarred face, reporters with wooden legs and wooden heads, . . .refugees, drunks, the retarded, the neurotic, misfits and has-beens, the wounded of the world.[63]

The raw copy is, of course, largely produced by such disparate elements in a newsroom. In addition, there are three other major sources of material to fill the blank pages — the wire services, the readers themselves, by way of their letters, and the advertisers.

In other words, the sources a newspaper can draw on are both diverse and prolific. The reporters normally receive a measure of protection and independence under their collective agreement, but it is the editors, who are not so sheltered, who say what goes into the paper and who give some priority and form to the material that pours in. The editors hand out the assignments. They select, revise, and place the rest of the copy around the advertising. Obviously, the role is crucial. And, to repeat, they are given scant protection by labor law in Canada.

Kenneth Thomson maintains they do not need it. As a proprietor, he claims that his organization voluntarily refrains from interfering with the editor's role. "I believe if you own a chain of newspapers and you delegate authority, the public interest is protected. . .although it is hard to refute the argument that someone in the future may abuse the privilege."[64] There is evidence that this sort of hands-off policy is widespread. A study in *Journalism Quarterly* concludes that the typical publisher of a paper, particularly of a large paper, has very little to do with the day-to-day decisions of the newsroom.[65] After surveying many instances where the editorial content of a paper had, allegedly, been tampered with, the Davey Committee concluded that the "*deliberate* suppression of the news by owners-publishers. . .[was not]. . .much of a problem."[66]

Still, there are two hazards connected with the policy set out by Lord Thomson in the short passage quoted. First, one can hardly expect a proprietor to give his editor a blank cheque; he will want to retain authority to approve at least the global budget submitted to him. And second, if the editor is to be allowed a wide discretion in how the owner's money is spent, the proprietor will want to retain the right to choose him and dismiss him.

Both these qualifications seem eminently reasonable and (except for the most credulous, trusting or disinterested of owners) inevitable. But once accepted, what happens to the gap which Lord Thomson suggests should be maintained between editor and proprietor? Is there anything wrong with the thesis that a newspaper's independence is sufficiently protected by proprietors voluntarily picking an editor and then delegating wide authority to him within a defined budget?

There are at least two things wrong with it. The first is suggested by Lord Thomson himself: if the system is a voluntary one, there is nothing to prevent abuse. In the past, there have been frequent examples of proprietors who have turned their newspapers into personal fiefdoms. Anthony Sampson, for example, comments authoritatively on the English situation, where "the old public hatred of the Press Lords, of Beaverbrook or the first Rothermere, was associated with their political ambitions and with the ruthless exploitation of their ownership to swing their readers in their direction".[67]

In the second place, the power to pick the editor, and to designate the departments or individuals who are preferred for budget, affects the editor's independence and, perhaps even more significantly, his staff's. In the view of one former employee of the Toronto *Star*, the influence of Beland H. Honderich, chairman of Torstar Corporation, is omnipresent at that paper:

> The *Star*'s editing process. . .is governed by a single, unshakeable rule: What will B.H.H. think? In any collision between the interpretation a reporter puts on an analytical story, and the interpretation the desk thinks the boss will want, the reporter doesn't stand a chance.[68]

Certainly, on papers in a chain, the presence of the owner is more remote than is Honderich's at the *Star*. But ideally, it should not be allowed to become too remote for, if it does, there will be difficulty in getting approval for new budget initiatives. If there is a lack of interest in the editorial department, there is also likely to be a lack of financial support. James Rennie, the former executive editor of the Ottawa *Journal*, has been critical of the distant way in which Thomson Newspapers treated that newspaper before they closed it down:

> . . .[We] were exposed to absolutely a wall of silence. . .there was very, very little communication, and any communication that we received, was not to inquire about how well we were doing. They really didn't seem to care about how much circulation they had. . . .[They] had no plans for that paper from the very day they purchased it.[69]

Indeed, as the interest of the proprietor increases, the quality of the paper tends to improve. Lord Thomson seems to be perfectly correct in saying that his organization, as a general rule, keeps its newspapers at arm's length. But consider the Davey Committee's assessment (and it is a typical one) of what those newspapers are like: "almost uniformly disappointing".[70] The chain would almost certainly be a better one if Lord Thomson were more interested in the welfare of his organization's individual papers. But his increased interest would result in decreased independence. There seems at present to be no way out of this dilemma.

Theoretically, at any rate, the first problem with the delegation theory — the danger of abuse — could, given the voluntary nature of the system, be cured by compelling proprietors to delegate most of their authority. There would remain, of course, the problem that a proprietor might choose to "delegate" to a sychophant instead of to an independently-minded editor of stature.

A proprietor inevitably has some influence on a newspaper's character. Yet the argument is constantly and forcefully made that an owner does not affect news coverage; for in the news pages, it is contended, any good paper will say it like it is and let the chips fall where they may. The phrases have become clichés through constant repetition. Still, to be fair, there are examples of newspapers that have refused to back off stories which offended particular advertisers.[71] And it is hard to doubt Murray Burt's sincerity in the following excerpt from his brief to the Royal Commission:

> One radio reporter, in an interview with a Free Press executive, had the temerity to suggest that as operators of the lone paper in town, the publisher and editors would be free to inject their own biases into the news.
>
> Not only is the suggestion of such dishonesty preposterous, it is a slur, an affront, to the professionalism of the 100 or so journalists working at the paper who are no less professional for the closing of the Trib than they were when it existed. And it demonstrates an appalling lack of understanding by a person in the media of how journalists work.
>
> A standard public response when we apply usual news judgment and refuse to comply with a request that something be published or covered is "Well, what can I expect from the Free Press, now that it is the only game in town?" [72]

Murray Burt's faith in the existence and fairness of "usual news judgment", as a basis for selecting and placing stories, may seem a shade naive. At a particular time, most reporters sense the kind of story they will be able to sell to their editors, be it on the evils of inflation, the rising cost of health care, or the alienation of the West. It is next to impossible to know just where the fashions in news coverage come from but appearances can often be worrying.

For example, it is a fact that, in the fall of 1980, the *Globe and Mail* launched a campaign to double its circulation in the West.[73] It is also a fact that, in the fall of 1980, it carried on an editorial campaign against Prime Minister Pierre Trudeau which, in the view of one Western reader, had become a bore. "It is apparent," he said, "that on [any] issue, regardless of the nature of Mr. Trudeau's stand, your editorial will be negative."[74]

Or, to take an example from 10 years earlier, it emerged (in July, 1970) that, according to the Davey Committee:

> . . .the chairman of the New Brunswick Water Authority, the body charged with, among other things, enforcing anti-pollution laws against pulp mills, was also for a time secretary-treasurer and general manager of the New Brunswick Forest Products Association — a lobbying organization for the pulp and paper industry! There are newspapers in this country which would have joyously trumpeted a fact like that, and probably forced the official's resignation from one body or the other. No daily newspaper in New Brunswick did, however. The uncharitable might be led to suspect that this lack of journalistic enterprise was connected to the fact that K.C. Irving, owner of one of the province's largest pulp mills, also owns all five New Brunswick English-language dailies.[75]

The story was broken by *The Mysterious East*, which Davey referred to as a "young muckraking monthly published in Fredericton". K.C. Irving, Limited and associated companies were subsequently charged under the "merger" and "monopoly" sections of the Combines Investigation Act. The trial judge convicted, the Court of Appeal overturned the conviction (in the process scolding the trial judge for even getting involved with the question of control) and the Supreme Court of Canada upheld the appeal.[76]

The *Irving* case demonstrates that the link between such facts (as revealed in the quotation above), if, indeed, there is one, will be extremely difficult to establish. And the more important question is this: is it worthwhile trying? Probably not.

Every editor is going to have some set of personal values on which he will draw in making his news judgments. It is very doubtful whether he should be condemned, in a criminal court, for having one set of values rather than another. The key is to allow that other set some exposure as well.

By way of summary, Canadian labor laws, the Combines Investigation Act and, more significantly, the general lack of regulation in the field, have assisted in making the proprietors the key element in the world of the daily newspapers. They determine the general character. And while they may or may not *directly* influence the news and editorial coverage, they cannot, because of their other interests, be seen to be completely objective.

Have Canadian laws, as well, influenced at all the number of proprietors involved, forcing them either to break up or consolidate more than they otherwise would have done?

Probably not. It might be claimed that the Combines Investigation Act has deterred consolidation, but, in the light of the *Irving* decision, it is a difficult argument to press. *Irving* was the first time the Act had been invoked against a newspaper, and it seemed to be the extreme case. K.C. Irving, Ltd. controlled all five English-language dailies in New Brunswick; the circulation of other newspapers in the province was negligible; and the company had admitted it had purchased the fifth paper in order to forestall any competition from a rival chain which was also interested. Yet the conviction was set aside on appeal. In these circumstances, it seems unlikely that a conviction will ever be registered against a newspaper while the Act remains in its present form. It is even possible that the weakness of the existing Act has encouraged newspapers to consolidate further, in anticipation of proposed amendments which could make consolidation more difficult.

Indeed, it can be more logically claimed that, to the extent that Canadian laws have had any influence at all on the number of newspapers, they have tended to reduce the number of proprietors involved. But even this argument is often overstated and is based primarily on tax considerations.

First, it is argued that a shareholder is taxed when dividends are distributed. He is therefore amenable to permitting his companies to retain earnings, probably using them to purchase more newspapers, if newspapers happen to be their field.[77] As retained earnings pile up, the price per share will increase and the shareholder can eventually sell, paying tax on the capital gain, to be sure, but only on half the gain. The flaw in this thesis is that major tax concessions are already available to shareholders receiving dividends from Canadian corporations. Indeed, it has been estimated that a taxpayer with no other income could receive up to $50,000 a year in dividends from Canadian corporations without paying any tax at all.[78]

Second, it is claimed that small newspapers are forced to sell out on the death of a proprietor in order to meet the tax obligations imposed by the fact that, in Canada, there is a capital gains tax on deemed dispositions at death. It is sometimes argued that consideration should be given to increasing the small business rollover in the case of family-owned newspapers, but it is difficult to see justification for treating newspapers as a special case.

Third, newspapers which have been profitable at all have tended to be very profitable indeed. As there is no excess profits tax in Canada, the money, in many cases, has been retained and spent on further acquisitions. And, finally, the Canadian Daily Newspaper Publishers Association has resisted with great vigor the imposition of an excise tax on advertising supplements carried as inserts in newspapers. (These supplements, until 1980, were tax exempt if inserted in newspapers.) It is the Association's view that the tax will be the last straw for certain small papers which are struggling to maintain an independent existence.[79]

Canadian law, then, has permitted a proprietor to determine the character of his papers. It has permitted, or encouraged, proprietors to consolidate their holdings. It has also encouraged them to stay Canadian.[80]

Defenders of the status quo point, first, to the few cities where new and competitive papers have developed. It can happen. Second, and more generally, they rely on the fact that there is still a substantial number of owners of the other media. The Davey Committee reported, for instance, that, at the time of its investigation, in the seven-county area served by the London *Free Press*, there were also 13 radio sta-

tions, two television stations and 36 non-daily newspapers — all of which were owned by interests which had no connection with the *Free Press*.[81] But Davey also noted that this competition was not of a very forceful nature.[82]

In the U.S. courts, the argument has already been made, and lost, that bimonthlies (and by extension weeklies) are just as vital as dailies to the well-being of a nation.[83] Dailies have not lost their pre-eminent importance in the face of the new technology. They still tend to break the stories. Murray Burt, in his brief to the Royal Commission, went to the trouble of digging out the statistics for one period and region:

> In October this year [1980], the log of *Free Press* items used by Canadian Press totalled 340. These were all available to radio stations on the BN [Broadcast News] wire. Twelve radio stations in Manitoba provided 61 items, and half of these came from one station, CJOB.[84]

He criticized the electronic media, and doubtless with some reason. But the comparative failure of radio and television stations in the field of news gathering may not be attributable just to a failure of will. What they need is a snappy quotation or, to use the cameraman's jargon, a good "visual". There is not the air time to probe matters deeply, even if the inclination is there.

In the third place, reliance is placed on the fact that there is still significant inter-urban competition,[85] and it is true that a metropolitan daily, with a few regional reporters, does supply some measure of competition to the local paper in the cities in which it circulates. But the limits of that competition are well-illustrated by a 1972 series in the *Globe and Mail*, one of the metropolitan dailies available in Kitchener, where the *Record* is the local paper.

The series revealed that the *Record* had agreed to suppress a story on plans for a major downtown redevelopment project. Eventually, when it became clear that the plans were going to be kept secret until they were in a virtually final and unalterable form, the story was broken by a rebellious journalist at the *Record*. But it was broken in the local student newspaper. By the time the *Globe* series appeared, construction on the $15 million complex was about to begin, "barring a last-minute court upset or an Ontario Cabinet veto".[86] In other words, it came a little late.

There are indications that metropolitan dailies will gradually increase local coverage in the cities they serve. Regional additions are becoming more common with the development of the technology required to slide appropriate local sections into the main paper. But at the moment, a distant metropolitan paper cannot really compete for a local story with the paper that is on the spot. And there is little indication that, in future, the situation will change substantially.

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III

Newspapers and constitutional competence

by Gérald-A. Beaudoin

Contents

Introduction

Canada is a federation. This means that legislative jurisdiction, legislative power, is divided between the two levels of government — federal and provincial — according to the provisions of the Canadian constitution.

Our constitution is primarily the British North America Act of 1867 and its amendments. However, the word "constitution" embraces also all the laws and rules and documents which allocate and regulate governmental power. As well, usages, customs, conventions and judicial interpretation supplement and amplify the scope and meaning of our basic constitutional document.

This study is concerned with the division of constitutional powers particularly as that division relates to newspapers and journalists. Newspapers and the people who work for them operate within the federal framework. Some of their activities are regulated by the federal Parliament, others by provincial legislatures. Living as we do in a time of constitutional reform, it is natural to ask whether the Canadian constitution is adequate to the needs of newspapers and journalists today. But to answer the question it is necessary, first, to consider the nature of the division of powers and, second, whether this division corresponds to current needs.

I

Structure of legislative powers in Canada

Any study of the division of legislative powers in Canada should begin with an examination of the wording of Sections 91 to 95 of the British North America Act and other related sections. Such a study must also consider the interpretations given to the sections by the courts, principally by the Judicial Committee of the Privy Council and the Supreme Court of Canada. It is further necessary to look at the administrative arrangements that have been worked out between the two levels of government in the course of the many Canadian constitutional conferences.

This study looks first at provincial jurisdiction in the field of journalism, then at the powers of the federal Parliament in this area. Thereafter, consideration is given to *lex consuetudinem parliamenti*, parliamentary privilege, to the fundamental freedoms and to the celebrated Section 121 of the BNA Act, which deals with the free flow of commerce between the provinces.

(1) Provincial jurisdiction over newspapers

Provincial legislatures have extensive powers over the activities of journalists and newspapers in addition to their power to regulate newspapers as business enterprises. Indeed, it is doubtful that many legislatures are aware of the full extent of their legislative jurisdiction over newspapers.

(a) *Property and civil law*

The fundamental jurisdiction granted to the provinces in this respect is found under Head 13 of Section 92, which is entitled "Property and Civil Rights". Civil rights in this context do not refer to civil rights in the sense of civil liberties; rather, they refer to "private rights" — proprietary, tortious, contractual. The power conferred by Head 13 is the foundation of provincial autonomy.

(i) *Property*

The provinces have passed a great deal of legislation in relation to property. In some instances it is all-encompassing, as in the case of Québec's Civil Code. In others it is of a more specific nature; real estate, agricultural lands and other property, for example, are all subject to a large number of provincial laws. Generally, however, this field of activities has not given rise to many constitutional conflicts.

(ii) *Natural resources*

Basically, under Section 109 of the BNA Act, the provinces own the natural resources within their boundaries. In addition, under Section 92(5), they have

jurisdiction over the management of forests. These two sections therefore have a bearing on the supply of newsprint.

(iii) *Civil law*

The most extensive area of provincial jurisdiction is that which bears on civil law. There is an abundance of jurisprudence on the subject, much of it with the obvious (although unacknowledged) aim of safeguarding the special character of Québec's civil law. The Judicial Committee of the Privy Council led the way in this respect in the *Parsons* case.[1] Civil law, however, includes a number of areas.

Section 92(13) is the basis for much of the civil law, particularly law as it concerns persons, property, contracts, torts and civil responsibility. This head also covers labor relations at the provincial level,[2] the regulation of professions,[3] consumer protection,[4] local commerce,[5] local transportation,[6] advertising,[7] and provincial marketing schemes.[8]

(iv) *Civil liability*

Provincial legislatures may make laws with regard to the civil liability of newspapers and journalists, such as libel and slander laws. They may also rely on such general principles as those found in Section 1053 of the Québec Civil Code, which provides that every person capable of discerning right from wrong is responsible for the damage caused to another person, by his fault — whether the damage be caused by a positive act, imprudence, negligence, or by want of skill. Commission of such torts generally result in simple actions for damages, examples of which abound in our jurisprudence. Legislatures can, of course, provide for other forms of redress through special legislation.

The provinces can enact legislation to establish press councils to exercise a form of discipline over their members. Legislatures may regulate the responsibilities of journalists and newspapers and provide for procedures whereby people who deem themselves to have been ill-treated may seek civil remedies. They may also specify the forms of retraction or correction, the kinds of action to be taken, and the extent of redress.

(v) *Labor relations*

The courts have consistently held that, with one important exception, labor relations come within the ambit of provincial authority; the exception is when federal employees or employees of companies whose activities fall within exclusive federal jurisdiction (CBC employees, for example) are involved. Since labor relations include collective agreements, working conditions in general and the right to strike, an extremely broad spectrum of activity is reserved to the provinces. There is a Canada Labor Code, but there are also provincial labor Acts and Codes.

(vi) *Professional groups*

In their interpretation of Section 92(13), the courts have recognized the competence of the provinces to legislate with regard to the professions. Québec, accordingly, has enacted a Professional Code which regulates, among other things, the most venerable as well as the most recent professions and callings. This legislative jurisdiction empowers the provinces not only to regulate the professions as a whole but, as

well, to delegate regulatory powers to agencies and supervisory boards, to delegate control over admissions to professions, and to delegate the formulation and adoption of professional codes of ethics. In other words, the legislature can regulate both admission to a profession and the standards which govern that profession.

Thus, there is nothing to prevent a legislature, should it wish to do so, from recognizing journalism as a "profession", or from making more explicit provisions for regulating the rights and privileges of journalists.

Should journalists be "professionals", in the sense of the legal and medical professions? The question poses no difficulty in a constitutional sense: it is a matter of policy. There are, of course, both advantages and disadvantages to professional status. But there is nothing whatever to stand in the way of a "non-professional" group which chooses to adopt a professional code of ethics to govern its members.

(vii) *Advertising*

Provincial legislatures may also legislate in the area of advertising. The *Kellogg's*[9] decision handed down by the Supreme Court in 1978 leaves no doubt as to provincial jurisdiction in this matter. While not exclusively in the provincial domain, advertising is subject to provincial jurisdiction in a number of respects. By virtue of the various heads in Section 92 of the BNA Act, property and civil rights, civil law, consumer protection, the protection of youth generally, and other related subjects, all fall within the jurisdiction of the provinces. Advertising, in principle, comes within the ambit of many of these.

(viii) *Contracts and local commerce*

Canadian case law is extensive with regard to contracts. Civil contracts come within the exclusive jurisdiction of the provinces. As well, all trade in its local or provincial aspect[10] is outside federal jurisdiction and, hence, a provincial matter. The federal Parliament may legislate with respect to local commerce, but only in exceptional cases or only indirectly or peripherally.[11]

(ix) *Co-operatives*

If the activities of co-operatives are limited to the provincial activities provided for in the constitution, they fall, in principle, within provincial jurisdiction. However, Parliament has the power to regulate the activities of co-operatives when those activities pertain to subject matters enumerated in Section 91.

(x) *Information*

Legislatures may, within the limits of their authority, pass laws on information. Thus it is possible to have both a federal statute and a number of provincial freedom of information Acts — provided that each level of government restricts itself to the sphere of legislative competence allocated to it by the constitution.

(xi) *Marketing*

Both the Judicial Committee of the Privy Council and the Supreme Court of Canada have handed down large numbers of decisions on this subject.[12] Generally, it may be said that marketing carried on entirely within the boundaries of a province

comes wholly under provincial jurisdiction; a marketing operation which extends to other provinces or to a foreign country falls exclusively under federal jurisdiction. However, some distinctions and qualifications are usually necessary in the examination of any specific case: in practice, simple conclusions are not always easy to arrive at. Nonetheless, the general principle remains true.

(xii) *Transportation*

In a general way, case law, judicial interpretation, has divided legislative jurisdiction over this matter in half. Local and intra-provincial transportation are allotted to the provincial legislatures; transportation beyond provincial boundaries and international transportation fall exclusively under federal authority.[13]

(xiii) *Provincial competition*

Up to a point, a province may regulate competition within its borders by relying on its constitutionally assigned powers such as its licensing power,[14] or the power deriving from Section 92(13) of the BNA Act, which authorizes it to regulate local commerce.

(xiv) *Property and civil law*

Under Section 92(13) of the BNA Act, provincial legislatures have exclusive jurisdiction over property and civil rights. The words "property and civil rights" in Section 92(13) have been handed down from Section VIII of the Québec Act, 1774. This Act, passed 11 years after the formal cession of Québec by France to England, reinstated the pre-conquest system of French civil law. It is Head 13 of Section 92 which enables Québec to enjoy a civil law system that reflects its unique character. Indeed, Québec is the only province which has a French-inspired civil law system, a legacy from Sir Georges-Etienne Cartier, who was responsible for getting the civil laws of Lower Canada codified. The Napoleonic Code served as the model, but was adapted to the particular needs of Québec.

These historical facts have consequences both for property rights and for civil liability in Québec. Although there are similarities with the English common law system — with regard to torts for example — there are, nonetheless, really two distinct civil law systems in Canada, which each community wishes to keep intact.

The result is that the Québec civil law system differs from the system in use in other provinces, not because Québec has greater or lesser powers than other provinces but, rather, because Section 92(13), Section 94, and Section 129 of the BNA Act have allowed Québec to preserve its civil law system — the Civil Code of Lower Canada — which came into effect on August 1, 1866, 11 months before Confederation.

It should be mentioned in passing that, since the concept of property is also involved in combines, competition, and criminal law, there can be differences between Québec and other provinces in these two areas as well.

With regard to civil libel, the setting of damages, types of damages, fault and so forth, it is obvious that there are differences between the Québec system and that in use in other provinces which must be taken into account. The offence (*délit*) and the quasi-offence (*quasi-délit*) in civil law do not always correspond to the tort in com-

mon law or to a statutory offence. There are thus two systems of civil law in Canada, each operating according to its own particular nature.

It is not intended here either to minimize or to exaggerate the differences between the two systems, but it is necessary to point out that differences do exist.

Since, under the terms of the BNA Act, Québec may adopt a civil law system of its own choosing, it should occasion no surprise that Québec laws are also somewhat different from those of the other provinces with respect to newspaper ownership and the civil liability of journalists.

(b) *Powers of taxation*

Both levels of government have the power to tax. Section 91(3) provides that Parliament may raise money by any "Mode or System of Taxation" and Section 92(2) provides that the provinces have the right to levy "Direct Taxation within the Province. . .for Provincial Purposes". The provinces may also raise revenues by the granting of licences under Section 92(9). It has been recognized in the jurisprudence, however, that a similar power belongs to the federal government. Parliament and the legislatures may be reimbursed for their services, and they may also charge royalties on the natural resources within their jurisdictions.

These powers may also affect the operations of a newspaper.

(c) *Administration of justice*

Section 92(14) of the BNA Act gives provincial legislatures the power to create courts of justice to deal with both civil and criminal matters within the province and every provincial legislature has exercised this power widely. Legislatures may establish administrative tribunals and supervisory boards in those areas which are within the legislative competence of the provinces. However, given the presence of Section 96 in the BNA Act, a question frequently arises as to whether a court of justice or an administrative tribunal presided over by a provincially-appointed judge has jurisdiction in a particular area.

A very important problem is involved here since conflicts and uncertainties may arise. Briefly, Section 96 limits the scope of Section 92(14) with respect to the appointment of provincial court judges and members of administrative tribunals established by the provinces. Under Section 101, Parliament may set up courts of justice "for the better administration of the Laws of Canada". In connection with matters under federal jurisdiction, it may also establish administrative tribunals and advisory boards. Only the federal government has jurisdiction with respect to the appointment of judges to federal courts of justice and administrative tribunals.

Nonetheless, the provinces enjoy considerable power in respect to the administration of justice.[15] They may legislate with regard to contempt of court.[16] And, under Head 15 of Section 92, they may also decree penalties in order to compel compliance with the laws they pass.

(d) *Local and private matters*

The courts have recognized a modicum of residuary power for the provinces — power which must be drawn from the federal residuary power. It has happened more than once that the courts have dealt with Sections 92(13) and 92(16) together with-

out bothering to distinguish between them. (Head 13 refers to "Property and Civil Rights"; Head 16 deals with "Generally all Matters of a merely local or private Nature in the Province".) Yet there is, in law, a definite distinction to be made, especially since the powers conferred by Head 16 may expand or contract according to judicial decision. However, for the subject under discussion, this aspect need not engage our attention further.

(e) *Education*

By the powers granted to them by Section 93 of the BNA Act in educational matters, the provinces may, if they wish, establish schools or faculties of journalism. Provincial jurisdiction over education has been liberally construed and constituted one of the key points of the historic compromise of 1867.[17]

(2) Federal jurisdiction

It may be said at the outset that the legislative power of the federal Parliament with regard to the press and the activities of journalists is vast. This power is based primarily on criminal law and procedure, but it also flows from other heads of power enumerated in Section 91.

(a) *Copyright*

By virtue of Section 91(22) and (23), Parliament has exclusive jurisdiction over copyrights and intellectual property. This provision empowers the federal government to regulate certain important activities of journalists and newspapers, to protect their rights and their works.

The importance of copyright for the literary, artistic and journalistic world cannot be overstated. Under its power to conclude international treaties, the federal government has signed a number of international agreements or conventions on this subject. Once a treaty has been signed, the federal government has absolute jurisdiction to implement the treaty's provisions with respect to copyright, in as much as that is a subject matter which the BNA Act has assigned to it exclusively. The 1937 *Labour Conventions* decision[18] leaves no doubt in this regard.

(b) *Other powers*

The federal Parliament also has jurisdiction over customs, tariffs, interprovincial, and international trade, telecommunications, satellites, immigration, exports, extradition, and taxes — to mention only those matters which spring readily to mind. These will be discussed later but, first, federal jurisdiction over criminal law will be examined.

(c) *Criminal law*

Federal jurisdiction over criminal law, an exclusive power and one which has been generously construed by the courts,[19] empowers Parliament to legislate not only on those crimes which are usually described as "classic" — defamatory libel, blasphemous libel, seditious libel, treason, and obscenity — but as well the "new" crimes, such as unfair competition, conspiracy in restraint of trade, "crime comics", wiretapping, and hate propaganda.

Section 91(27) of the BNA Act is also the basis for federal authority to legislate with respect to national security, subversion, and counter-espionage.

The federal government has enacted legislation on all the crimes enumerated above. It has also legislated with respect to bribes, false news and false advertising. It is up to Parliament, and to Parliament alone, to amend the Criminal Code to meet the needs of our present-day society. To journalists, the crime of defamatory libel is perhaps of particular importance. However, suffice it to say here that Parliament has full jurisdiction over these traditional or classic kinds of crime.

Nevertheless, an analysis of some recent decisions by the Supreme Court of Canada — in particular, the *Hauser*, *Di Iorio*, *Dupond*, *McNeil*, *Labatt Breweries* and *Boggs* cases,[20] — leads one to conclude that the scope of the expression "criminal law" as it is used in Section 91(27) is not unlimited. This subject will be discussed later. Criminal jurisdiction should bear on public wrongs rather than provincial activities which do not have the character of a public wrong. But where does the right to "criminalize" end?

For the moment, let us direct our attention to the so-called "new" crimes, such as unfair competition and combines, wire tapping and hate propaganda. A word will also be said about national security.

(d) *The "economic" crimes*

The fight led by federal authorities against conspiracies in restraint of trade might well be termed a judicial odyssey. At the start of its lengthy quest, the federal government suffered many setbacks: the *Board of Commerce* decision,[21] *inter alia*. In 1931, however, its repeated efforts were finally crowned with success. In the *P.A.T.A.* case,[22] the Judicial Committee of the Privy Council accepted Head 27 of Section 91 (the federal authority over criminal law) as the constitutional basis for the regulation of competition. A number of decisions followed. The Combines Investigation Act was amended several times. Federal administrative powers in this area were extended by federal legislation.

In face of all this, can one assume that the validity of this statute, its enforcement and its administration are now to be based solely on Head 27 of Section 91? This question is even more apposite in light of recent decisions narrowing the scope of Section 91(27) which, hitherto, had been liberally construed. There is certainly room for questions.[23] Should one fall back on the federal power to regulate trade and commerce, in Section 91(2)? But, if so, what then about local competition? Will the principles arising from the *Caloil* decision (discussed earlier) be applied here by analogy?

Creating a crime is one thing; regulating a field of activity is another. Local trade is outside Parliament's jurisdiction, as the *Margarine Reference* showed. What about civil remedies? The courts, and the Supreme Court in particular, have all had to make decisions with regard to civil remedies, civil redress or compensation which may, or which should, accompany the basic criminal provisions concerning competition or other matters.

On the constitutional level, there is genuine difficulty in this regard, and there are sometimes contradictions in the court decisions. The *Ross*,[24] *Zelensky*,[25] and *Vapor*[26] decisions are not easily reconciled. In the *Ross* case, Mr. Justice Pigeon remarked that "it should now be taken as settled that civil consequences of a crimin-

al act are not to be considered as 'punishment' so as to bring the matter within the exclusive jurisdiction of Parliament. . .". The *Zelensky* decision concerned a provision of the Canadian Criminal Code with respect to federal legislation in the matter of an order for compensation or restitution, a provision which the Supreme Court upheld; the provision in question authorizes courts to sentence criminals to pay compensation to their victims.

In the *Vapor* case, on the other hand, the Supreme Court struck down a federal provision which created a civil remedy in relation to competition, on the grounds that it encroached on Head 13 of Section 92. In the *Syncrude Canada Ltd.*[27] case, the Alberta Court of Appeal upheld the validity of Section 31.1 of the Combines Investigation Act, which provides a civil cause of action to any person suffering loss or damage as a result of conduct contrary to any provision of Part V of the Act. It is to be hoped that the Supreme Court will have another opportunity to rule on the subject, unless, of course, during the constitutional reform process, an amendment to clarify the issue is proposed.

(e) *Interprovincial and international trade*

In construing Section 91(2) of the BNA Act, the courts have broadly apportioned jurisdiction in relation to trade as follows: local trade is within provincial jurisdiction under Section 92(13), while Parliament has exclusive jurisdiction over interprovincial and international trade under Section 91(2). This is the general rule; however, distinctions have been made, in particular cases as, for example, in the *Carnation* and *Caloil* cases, cited earlier.

In recent years, the Supreme Court has appeared to give Section 91(2) an interpretation somewhat broader than that given by the Judicial Committee of the Privy Council (although care should be taken not to exaggerate the two tendencies). It is interesting to speculate whether the Supreme Court will agree to allow Section 91(2) to serve as the basis for action against unfair competition. The door to this possibility was left open by Lord Atkin in 1931 and, again, by Mr. Justice Duff in 1936. Professor Hogg has referred to this possibility. It is a subject which merits much more study. But, the need to strike a balance at all times in relation to the division of powers must be constantly kept in mind.

(f) *Wiretapping*

Wiretapping has been the subject of federal legislation in recent years. The federal government has the power to intervene in this area on the basis of Section 91(27), but there is also protection in civil law.[28]

(g) *Hate propaganda*

Hate propaganda has been the subject of a number of governmental studies and legislative provisions. The purpose of the federal statutes is to protect the rights of groups as opposed to those of individuals; the authority is based on Section 91(27).[29] One province, Manitoba, has a "group defamation" law. By Section 19 of the Manitoba Defamation Act, an action may be brought for defamation of the members of a particular race or religion.

(h) *National security*

National security is not a subject expressly mentioned in the BNA Act, but it too poses a major problem. As has already been said, it is not always easy to draw a firm dividing line between criminal procedure, which is under federal jurisdiction, and the administration of criminal justice, which belongs to the provinces. This was shown, *inter alia*, in the *Di Iorio*,[30] *Hauser*,[31] and *Keable*[32] cases.

An effort to clarify this matter is needed, whether through constitutional amendment or interpretation by the courts. The point at issue is whether national security falls exclusively under Section 91(27). The answer, for the most part, must be in the affirmative, in as much as Parliament alone may legislate in respect of substantive criminal law and criminal procedure; it may also legislate on sedition, treason, counter-espionage, sabotage and terrorism.

But, it must be remembered, here, that Parliament also has exclusive power to legislate in respect of national defence, postal service, immigration, customs, and extradition. It also has emergency powers, which will be discussed later. In addition, it may legislate with respect to official secrets.

In sum, the federal authority commands a vast array of powers in areas which directly affect national security. There is, however, one important exception: the administration of criminal justice, which belongs exclusively to the provinces. The *Di Iorio* case is clear on this point. It might be concluded from the *Hauser* decision that the administration of the other heads of power enumerated in Section 91 comes within the federal ambit, but this is not the case for Section 91(27).

(i) *Power to levy taxes*

Since the federal government, under Section 91(3), may levy taxes by any mode or system of taxation, its power over newspapers in this respect may be considerable.

Unlike the provincial legislatures, Parliament is not limited to direct taxation measures. Its taxing powers are not wholly unrestricted, however: a federal measure to raise a tax must have (according to the Judicial Committee of the Privy Council) more than merely an appearance of legality.[33]

(j) *Postal service*

This power is within the exclusive jurisdiction of Parliament and allows the latter to legislate on postal services, the various classes of mail, stamps, costs, and so forth. The wording of Section 91(5) is clear. Federal jurisdiction over the postal service and criminal law empowers Parliament to enforce a degree of censorship over the mails in order to prevent the use of the mails for the dissemination of certain types of pornography, hate literature, and to protect national security.

(k) *Telecommunications*

The *Radio Reference*[34] in 1932 and the *Capital Cities*[35] and *Dionne*[36] cases in 1978 leave no doubt concerning federal jurisdiction in the area of radio and telecommunications. It is an important chapter of the constitutional revision. However, since this particular issue is not directly germane to this study, the point is mentioned only in passing.

(l) *Emergency powers*

(i) *In wartime*

We end this study of federal jurisdiction with a discussion of emergency powers. According to leading Privy Council decisions later followed by the Supreme Court of Canada, Parliament has emergency powers in time of war. This was established in the *Fort Frances*[37] decision in 1923, which dealt with newsprint supplies during wartime and in the immediate postwar period. This emergency power, which is considerable, was defined by Mr. Justice Beetz of the Supreme Court in 1976 in the *Reference re Anti-Inflation Act*, as giving to Parliament:

> for all purposes necessary to deal with the emergency, concurrent and paramount jurisdiction over matters which would normally fall within exclusive provincial jurisdiction. To that extent, the exercise of that power amounts to a temporary *pro tanto* amendment of a federal Constitution by the unilateral action of Parliament.[38]

In other words, in case of war, invasion or insurrection, whether real or apprehended, principles of the division of powers are held in abeyance, and the intricate interplay between Section 91 and 92 is suspended. Of course, by its very nature, such a suspension is temporary, although, according to the jurisprudence, it may extend past the period of conflict in order to ensure an orderly transition from war to peace.

The extent of the federal government's powers over newspapers and written material when a state of emergency is proclaimed in the country is considerable. The federal powers provided for in the War Measures Act are vast and pervasive.

I have written elsewhere that such emergency power should be provided for in the constitution. I would state further that the criteria for invoking it, the procedure for its enforcement and its duration should be clearly spelled out in the constitution in order to avoid possible abuses. In any case, however, the Supreme Court would have the last word with respect to the validity of invoking emergency measures in any given situation.[39]

(ii) *In peacetime*

In the 1976 *Reference re Anti-Inflation Act*,[40] the Supreme Court of Canada recognized the existence of a federal peacetime emergency power. The Act in question was intended to deal with a high rate of inflation coupled with a high rate of unemployment. Obviously, it is only in truly exceptional circumstances that a state of emergency might be said to exist in peacetime: one example might be an economic crisis.

Once again, it would seem greatly preferable that the constitution should be amended to make express provisions for such rare cases in order to protect the balance of powers between the two levels of government. In addition, where fundamental freedoms are involved, it is important to distinguish between wartime and peacetime. With the exception of war, invasion or insurrection, there is no need, for example, to limit the scope of fundamental freedoms. In peacetime, the government's attitude toward the press should differ from that which it might take during an armed conflict, for example.

(3) *Lex consuetudinem parliamenti* and contempt of court

The powers and duties of journalists with regard to the reporting of parliamentary debates and court trials have come under scrutiny in a long line of cases.[41] The *lex consuetudinem parliamenti* (parliamentary privilege) adds another dimension to the reporting of parliamentary debates: in our system, the legislative chambers have an inherent right to adopt rules of conduct. Members of Parliament enjoy certain immunities. Under the constitution, legislative bodies may pass laws with regard to their privileges and immunities[42] (provincial legislatures under Section 92(1) and Parliament under Section 18). There is such a thing as contempt of Parliament, and it should not be forgotten, although it has become increasingly rare that a journalist is called before the Bar of the House for contempt of Parliament.[43]

With respect to trials, an entire code of ethics has arisen from case law which dictates how journalists may report testimony, court orders and decisions handed down by the courts. The courts have an inherent power to sentence individuals for contempt of court; an unbroken chain of case law confirms this right. Under Section 92(1), which provides the provincial power of constitutional amendment and Section 92(14), which refers to the administration of justice in the province, provincial legislatures may further define and regulate the activities of journalists with respect to trials and parliamentary debates.

Further elaboration on this subject seems unnecessary since, under our constitution, both levels of government may rely on the *lex consuetudinem parliamenti*. Parliament and the legislatures have sufficient powers in this area. They have committees on privileges and elections. And they may create special parliamentary committees on the press.

Canadian parliamentary privilege follows a long tradition which comes to us from the United Kingdom, from the Mother of Parliaments. Throughout history, parliamentarians have been jealous of their immunities, and the courts have respected the *lex parliamenti*.[44]

(4) Fundamental freedoms

The fundamental freedoms have already been the subject of special studies; understandable in view of the great importance of this matter to newspapers and journalists.

In this section, we will consider the subject of fundamental freedoms only from the viewpoint of the division of legislative jurisdictions in Canada.

It is not easy to apportion jurisdiction in this matter. Few authors have tried.[45] Certain parameters have been developed in the jurisprudence which, today, may appear rather modest. Most authors have held that our fundamental rights are, for the most part, subject to concurrent jurisdiction, in the sense that either Parliament or the legislatures may intervene, depending on the protection of whose freedoms are involved. This, by the way, explains why both levels of government, while remaining within their respective spheres, have adopted charters of rights and established human rights commissions. The freedom of the press is recognized, in principle, in all of these instruments.

(a) *Validity of charters*

We know of no court which has had to rule on the validity of the 1960 Canadian Bill of Rights, or on equivalent provincial legislation, such as Québec's Charter of Human Rights and Freedoms. For a number of judges, the Bill of Rights is only a statute or a canon of interpretation; for others, since the *Drybones*[46] decision, it is a binding standard, but none has dealt with the issue of its validity.

Can Parliament or a provincial legislature bind itself by a *non obstante* provision in legislation? It seems that that may indeed be the case. It is a question of procedure and form. Case law seems to support this interpretation.[47] But, surely, if Parliament or a legislature may bind itself by a mere statute, it may also unbind itself by the same means.[48]

The procedure provided for in the Bill of Rights does not have the same value that it would have if it were *entrenched*. Parliament may derogate from the provisions of the bill by so expressly providing in the legislation,[49] and it may repeal or amend the Bill of Rights by another statute.

Justices Laskin and Beetz of the Supreme Court have stated that the Canadian Bill of Rights is a quasi-constitutional instrument or statute.[50]

But let us return to the question of the division of powers. It is important to raise the issue, because the freedom of the press, of expression, of conscience, and of speech are freedoms protected by our charters. These freedoms are our major concern here.

(b) *Division of powers*

It should be noted at the outset that fundamental rights do not enter into the residuary federal powers. The jurisprudence has established that. Moreover, the expression "civil liberties" is not synonymous with "civil rights", the words which appear in Section 92(13), although provincial legislatures may enact provisions to ensure respect for freedoms in a number of areas.

A number of authors — such as W.S. Tarnopolsky, Bora Laskin, F.R. Scott, P.B. Mignault, A. Tremblay, J.Y. Morin, P. Garant, D. Schmeiser and P.E. Trudeau — have examined the jurisdiction of the two levels of government in this respect. Some have assigned the lion's share of responsibility to the federal Parliament, while others, like Patrice Garant, have awarded it to the provincial legislatures.[51]

Some writers, including Chief Justice Bora Laskin, have seen political freedoms as an area of exclusive federal jurisdiction. Others maintain that both levels of government have jurisdiction in this area, depending upon the perspective from which the protection of fundamental freedoms is viewed. In short, this matter seems to be governed by the well-known "double aspect" doctrine.

It cannot be said that case law has settled the question thus far. At most, it has defined some parameters.

On the one hand, it is known that some public freedoms have been protected under civil law and others under criminal law. The first category includes the *Chaput*,[52] *Roncarelli*,[53] and *Lamb*[54] cases; the second includes the *Switzman*[55] case, which deals with freedom of opinion and expression, and the *Boucher*[56] case. The *Saumur*[57] and *Chaput* cases deal with freedom of religion, the *Roncarelli* case with equality before the law and the *Lamb* case with arbitrary arrest.

As previously stated, it is not easy to apportion jurisdiction specifically with regard to public freedoms. Some writers maintain that Parliament may unquestionably regulate freedom of expression; others doubt that it can curtail that freedom, even by relying on its jurisdiction in criminal matters. In my view, the provinces could decree or stipulate conditions under which that "fundamental" freedom may or may not be exercised (at least enlarged, if not curtailed). And the provinces may, of course, enact legislation on civil libel.

(c) *Implied guarantees*

The courts have read implied guarantees into the constitution, such as the guarantee of freedom of discussion. The famous decision in *Reference re Alberta Statutes*[58] is a case in point. In that case, three Supreme Court justices reached the conclusion that, because our political system is based on the principles of parliamentary democracy inherited from Great Britain, it must, therefore, be founded on freedom of discussion.

A provincial legislature may not abridge this freedom. Mr. Justice Cannon was of the opinion that such interference with the freedom of the press comes under criminal law which is, of course, under federal jurisdiction. Several justices referred to the preamble to the BNA Act, which declares that Canada's constitution is, in principle, similar to that of the United Kingdom. In the "*Padlock*" [59] decision, Mr. Justice Abbott stated, *obiter*, that not even Parliament could abrogate this right of discussion and debate.

In the *Boucher* case, Mr. Justice Rand asserted that freedom of discussion is the basis of parliamentary democracy. In the *Winner*[60] case, the same Justice also wrote that a province may not prevent a citizen from earning his living. Mr. Justice Kellock dealt with implied guarantees in the *Saumur* case. Several Supreme Court justices referred to the concept of an implied bill of rights in the *Oil, Chemical and Atomic Workers*[61] and the *McKay*[62] cases.

The basic reason why the jurisprudence has not more clearly delineated the division of powers in relation to fundamental freedoms is that the cases submitted to it have not required that this be done. In the *Dupond*[63] decision, Mr. Justice Beetz stated several basic principles, and in the *McNeil*[64] case, the Supreme Court cast some light on the subject of local public order, a provincial matter under Section 92(16) and public order in the criminal sense, which comes under Section 91(27). Large grey areas remain, which will be eliminated only as cases are decided.

(d) *Express guarantees*

Sections 20 and 50 of the BNA Act proclaim certain democratic rights: a session of Parliament must be held at least once in every year; the length of a Parliament, except in cases of emergency, must not exceed five years. Language guarantees are found in Section 133 of the BNA Act and in Section 23 of the Manitoba Act, 1870, as witness the *Blaikie*[65] and *Forest*[66] decisions.

(e) *Entrenchment of rights*

There remains the question of the entrenchment of fundamental rights. When a Charter of Rights and Freedoms is incorporated into the Canadian constitution, it will be up to the courts to examine federal and provincial statutes, when called upon

to do so in a particular case, and to rule on the conformity or non-conformity of these measures with the Charter of Rights. Legislative measures will have to meet two criteria: they must respect the legislative division of powers, and must conform to the basic principles set forth in the Charter. The only way to derogate from an entrenched Charter will be by following the procedure specified in the amending formula or by having recourse to the "notwithstanding" clause in the cases provided for.

(5) Section 121 and economic powers

Section 121 of the BNA Act is designed to ensure the free flow of commerce between the provinces. This section provides for the abolition of tariff barriers between the provinces, as is usual in a federal state. However, a number of legal scholars have pointed out that the free flow of commerce and capital is far less assured in Canada than in the United States and Australia, two other examples of federal systems.[67] The free flow of services as such is not assured.

Economic powers are divided. Civil law and local commerce are within the power of the provincial legislatures, but imports, exports, customs, tariffs, bankruptcy, interest, the banking system, indirect taxation, and extra-provincial trade are under the jurisdiction of Parliament. Both levels of government may make laws concerning business firms on the basis of the powers granted them by the constitution: some sectors of activity are federal, others provincial. The same holds true for public or private enterprises. To determine whether a given sector of activity is regulated by Parliament or the provincial legislatures, it is necessary to examine the legislative division of powers.

II

Division of powers and current needs

(1) Proposals for constitutional reform

The present division of jurisdictions is subject to constitutional reform. In the last decade, this issue has been examined in a number of reports, including the Molgat-MacGuigan Report, the Pépin-Robarts Report, the Canadian Bar Association report, the *Beige Paper* and reports submitted by a number of provinces.

More attention must be paid to areas of overlap. If, in a number of reports, the sections dealing with the division of powers all make the same point, that is a matter for reflection and consideration. The idea of regrouping the areas of jurisdiction into broad sectors seems admirable in terms of reform, but will take some time.

(2) Centralization and decentralization of powers

Federalism is essentially a matter of balances. It is appropriate to centralize in some areas and to decentralize in others. Since the constitution may be adapted to suit our needs, its usefulness depends on how well it meets these needs. Even though the possibilities for centralization or decentralization of powers are many, and the courts may play a large role in this respect, there comes a time when constitutional revision is required and it is necessary to set to work on it. In Canada, it seems, that time has arrived. However, it is apparent that the remedy does not lie solely in complete centralization or decentralization extended indiscriminately to all sectors. Each particular sector must be scrutinized and account taken of the needs of the various regions and of the whole of Canada.

(3) Clarification of powers

What needs to be done, in so far as possible, is to clarify jurisdiction, eliminate grey areas, fill in gaps and do away with out-dated provisions. A perfect reorganization is probably impossible but, at some point, an intensive effort toward clarification must be made.

In Canada, a number of major conferences devoted to the subject of constitutional revision have been held. For many years these tremendous efforts have not been crowned with a great deal of success, but much has been learned from them, knowledge which will be of use when the time comes to place the division of powers on the agenda.

Emergency powers in wartime and peacetime, and the section dealing with trade might be made clearer, and there could be express provision for the jurisdiction of

both levels of government in the field of labor relations. These are a few areas pertinent to our study.

(4) Possible transfers of power

If a thorough revision of the constitution were under discussion, one could certainly contemplate possible transfers of powers. As far as newspapers are concerned, the initial problem is perhaps one of clarification. The question is whether more powers should be given to the federal government so that it may fight more effectively against the movement toward concentration of press ownership. At the very least, Parliament's express and direct jurisdiction should be recognized. However, the preservation of the balance of powers, which lies at the heart of a viable federalism, must not be left out of the reckoning.

Although we have been urging some reforms or amendments with regard to the division of powers, it is necessary to remember the paramount role which the courts should play in this matter. It is incumbent on them to give life to the constitution, since amendments, by their nature, can only be few and infrequent.

(5) Inter-relationships: division of powers and other issues

It must be remembered that reform in the division of powers cannot be isolated from the revision of other parts of the constitution. A federation is a whole. Thus, for example, the system of the distribution of powers is linked to judicial interpretation and to the method of amendment. The division of powers and a greater or lesser tendency toward centralization or decentralization cannot help but greatly influence the powers of a reformed Upper Chamber. All these factors must be borne in mind when undertaking major constitutional revision.

III

Conclusions and recommendations

I have often had the occasion to consider the issue of the division of powers and to propose reforms.[68] I am still of the opinion that, in the course of revising the constitution, it will be necessary at some point to further clarify the organization of powers, fill in certain gaps, make express provisions for certain powers which are now linked with the residuary power or with implied federal jurisdiction. It will also be necessary to provide expressly for and, at the same time, delimit certain exceptional powers of federal intervention, such as the emergency power and spending power, draw a sharper line, if possible, between federal power over criminal procedures and provincial power over the administration of criminal justice, and define the powers over culture, health and social welfare.

In the matter at hand — newspapers and journalists — it seems that the division of powers requires better definition first in the area of competition, next, in the area of emergency powers, and, finally, with respect to the scope of Section 121, to mention only the most obvious of the reforms which come to mind.

Finally, a more equitable balance between the rights of citizens and the freedom of the press must be struck. The freedom of the press should be entrenched in the constitution along with traditional individual rights. The proposed resolution tabled before Parliament and the charters adopted by the provinces contain provisions in this area which are of interest in this connection.

Is it a good idea to grant special status to journalists and newspapers? The journalist at present enjoys no such status in Canada, unless a particular statute is passed which grants it to him.

It is to be hoped that ordinary legislation concerning journalists and newspapers will be brought up to date. This is needed, for example, in the case of the *Press Act* and the *Newspaper Declaration Act* in Québec. Parts of these Acts are out of date. Modern media, such as radio and television, and open-line techniques should be studied. Legislation has lagged behind in these areas. The right of response urged by Vallières and Sauvageau in their book *Droit et journalisme au Québec* seems a good idea. I would support this recommendation.[69]

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3. *Underwood McLellan Associates Ltd.*, and *Association of Professional Engineers* (1980), 103 D.L.R. (3d) 268

4. *Kellogg's Co. of Canada* v. *Attorney-General of Québec*, [1978] 2 S.C.R. 211.

5. *Parsons*, *supra*, n.1; *Carnation Co. Ltd.* v. *Québec Agricultural Marketing Board*, [1968] S.C.R. 238; *Canadian Federation of Agriculture* v. *Attorney-General of Québec* (*Margarine Reference*) , [1951] 1 A.C. 179.

6. *Winner* v. *S.M.T.* (*Eastern*) *Ltd. and Attorney-General of Canada*, [1951] S.C.R. 887; *Attorney-General of Ontario* v. *Winner*, [1954] A.C. 541.

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8. *Shannon et al* v. *Lower Mainland Dairy Products Board et al*, [1938] A.C. 708; *Margarine Reference*, *supra*, n. 5; *Attorney-General of British Columbia* v. *Attorney-General of Canada* (*Natural Products Marketing*) , [1937] A.C. 377; *Ontario Farm Products Marketing Reference*, [1957] S.C.R. 198; *Attorney-General of Manitoba* v. *Manitoba Egg and Poultry Association*, [1971] S.C.R. 689; *Caloil Inc.* v. *Attorney-General of Canada* [1971] S.C.R. 543; *Reference Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198; *Burns Food Ltd.* v. *Attorney-General of Manitoba*, [1975] 1 S.C.R. 494; *Central Canada Potash Co. Ltd.* v. *Government of Saskatchewan*, [1979] 1 S.C.R. 42.

9. *Kellogg's*, *supra*, n.4.

10. See the cases cited in n. 5.

11. See the *Caloil* case, *supra*, n. 8. In an emergency, Parliament can, of course, legislate in this matter.

12. See cases, n. 8.

13. See, *inter alia*, the *Winner* case, *supra*, n. 6.

14. BNA Act, Section 92(9).

15. See *inter alia Di Iorio & Fontaine* v. *Warden of the Common Jail of Montréal et al*, [1978] 1 S.C.R. 152.

16. Jean-Charles Bonenfant, "Outrage au Parlement", *Cahier des Dix*, Québec, 1974, pp. 171-187.

17. *Reference re Adoption Act, etc.*, [1938] S.C.R. 398 at 402. Chief Justice Duff stated that "The responsibility. . .for the proper education and training of youth, rests upon the province. . ."

18. *Attorney-General of Canada* v. *Attorney-General of Ontario* (*Labour Conventions*) , [1937] A.C. 326.

19. See *Attorney-General of Ontario* v. *Hamilton Street Railway*, [1903] A.C. 524 at 529.

20. *R.* v. *Hauser*, [1979] 1 S.C.R. 984; *Attorney-General of Canada* v. *Dupond*, [1978] 2 S.C.R. 770; *Di Iorio*, *supra*, n. 15; *Attorney-General of Nova Scotia* v. *McNeil*, [1978] 2 S.C.R. 662; *Labatt Breweries of Canada Ltd.* v. *Attorney-General of Canada*, [1980] 1 S.C.R. 914; *Boggs* v. *The Queen and Attorney-General of Canada and Attorney-General of Alberta* (1981), 35 N.R. 520.

21. *Re Board of Commerce Act, 1919 and Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191. On the question of competition, read P.W. Hogg, *Constitutional Law of Canada*, Toronto, Carswell, 1977, pp. 281-285; Gérald-A. Beaudoin, *Le partage des pouvoirs*, University of Ottawa, 1980, pp. 155-156. See also *Proprietary Articles Trade Association (P.A.T.A.)* v. *Attorney-General of Canada*, [1931] A.C. 310; *Reference re Section 498a of the Criminal Code*, [1936] A.C. 363; *Reference*

re the Privy Council, [1937] A.C. 368; *Reference re Dominion Trade and Industry Commission Act*, [1936] S.C.R. 379; [1937], A.C. 405; the famous case of *Goodyear Tire and Rubber Co. of Canada Ltd. et al* v. *The Queen*, [1956] S.C.R. 303; *R.* v. *Campbell* (1966), 58 D.L.R. (2d) 673. *MacDonald* v. *Vapor Canada Ltd.*, [1977] 2 S.C.R. 134. A decision by the Supreme Court is awaited on the application of the Combines Investigation Act to the legal profession; specifically, with respect to advertising. Involved is the *Jabour* case — *Jabour* v. *Law Society of British Columbia et al* (1979), 98 D.L.R. (3d) 442 (B.C.S.C.); [1981] 2 W.W.R. 159 (B.C.C.A.). One of the matters at issue is whether a professional society (created by provincial statute) can exercise complete control over what advertising a member of such a society may place or whether, in fact, Section 32(6) of the Combines Investigation Act (a federal statute) may be contravened by prohibitions contained in provincially legislated professional codes of ethics.

22. *P.A.T.A.*, *supra*, n. 21.
23. Hogg, *supra*, n. 21 at p. 284. Hogg says, "As Canadian competition law becomes more sophisticated it becomes harder to support it under the criminal law power."
24. *Ross* v. *Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5.
25. *R.* v. *Zelensky*, [1977] 1 W.W.R. 155.
26. *Vapor*, *supra*, n. 21.
27. *Henuset Bros. Ltd.* v. *Syncrude Canada Ltd.* (1980), 114 D.L.R. (3d) 300. See to the contrary *Seiko Time Canada Ltd.* v. *Consumers Distributing Co. Ltd.* (1980), 29 O.R. (2d) 221 (Ontario Supreme Court) and *Rocois Construction Inc.* v. *Québec Ready Mix Inc. et al*, [1980] 1 F.C. 184, 51 C.C.C. (2d) 516 (Federal Court, Trial Division).
28. On the privacy of conversations, see the study by Pierre Patenaude, *La protection des conversations en droit privé; étude comparative des droits Américains, Anglais, Canadiens, Français et Québécois*. Paris, LGDJ, 1976.
29. Maxwell Cohen. *Report of the Special Committee on Hate Propaganda in Canada*. Ottawa, Queen's Printer, 1966.
30. *Di Iorio*, *supra*, n. 15.
31. *Hauser*, *supra*, n. 20.
32. *Attorney-General of Québec and Keable* v. *Attorney-General of Canada et al*, (1978), 90 D.L.R. (3d) 161, [1979] 1 S.C.R. 218.
33. *Attorney-General of Alberta* v. *Attorney-General of Canada* (*Bank Taxation*) , [1939] A.C. 117.
34. *Re Regulation and Control of Radio Communication in Canada* (*Radio Reference*) , [1932] A.C. 54.
35. *Re Capital Cities Communications Inc.*, [1978] 2 S.C.R. 141.
36. *Régie des services publics* v. *Dionne*, [1978] 2 S.C.R. 191.
37. *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co. Ltd.*, [1923] A.C. 695.
38. *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373.
39. Beaudoin, *supra*, n. 21, pp. 84-86.
40. *Supra*, n. 38.
41. See Marc Lalonde, "Les Journaux et la loi au Canada", *Cité Libre*, 1966, April-May; June; July-August; Nos. 86, 87, 89. See also Nicole Vallières and Florian Sauvageau, *Droit et journalisme au Québec*, *inter alia*, p. 38 ff.
42. For the case of the provinces, see *Fielding et al* v. *Thomas*, [1896] A.C. 600.

43. The parliamentary records cite the case of J.E.E. Cinq-Mars in 1906. See also Bonenfant, *supra*, n. 16.

44. See *inter alia The King* v. *Irwin*, [1926] Exch. C.R. 127.

45. See W.S. Tarnopolsky, *The Canadian Bill of Rights*, McClelland and Stewart, 1975. Chap. II and III.

46. *R.* v. *Drybones*, [1970] S.C.R. 267.

47. See B.L. Strayer, *Judicial Review of Legislation in Canada*, University of Toronto Press, 1968, pp. 140-141.

48. Beaudoin, *supra*, n. 21, p. 131.

49. It did so during the 1970 crisis. See Gérald-A. Beaudoin, *Essais sur la Constitution*, p. 315; and Beaudoin, *Le partage des pouvoirs*, p. 75.

50. Mr. Justice Laskin so held in the case of *Hogan* v. *R.*, [1975] 2 S.C.R. 574, as did Mr. Justice Beetz in *Attorney-General of Canada* v. *Canard and National Indian Brotherhood and Manitoba Indian Brotherhood*, [1976] 1 S.C.R. 170.

51. Beaudoin, *supra*, n. 21, pp. 123-124.

52. *Chaput* v. *Romain*, [1955] S.C.R. 834.

53. *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121.

54. *Lamb* v. *Benoit*, [1959] S.C.R. 321.

55. *Switzman* v. *Elbling*, [1957] S.C.R. 285.

56. *Boucher* v. *The King*, [1951] S.C.R. 265.

57. *Saumur* v. *City of Québec*, [1953] 2 S.C.R. 299.

58. *Reference re Alberta Statutes*, [1938] S.C.R. 100.

59. *Switzman* v. *Elbling*, *supra* n. 55.

60. *Supra*, n. 6.

61. *Oil, Chemical and Atomic Workers International Union* v. *Attorney-General of British Columbia* (1964), 41 D.L.R. (2d) 1.

62. *McKay* v. *R.*, [1965] S.C.R. 798.

63. *Supra*, n. 20.

64. *Supra*, n. 20.

65. *Attorney-General of Québec* v. *Blaikie*, [1979] 2 S.C.R. 1016.

66. *Attorney-General of Manitoba and Georges Forest* v. *Attorney-General of Canada et al*, [1979] 2 S.C.R. 1032.

67. See the report *Towards a new Canada*, Canadian Bar Association, 1978, pp. 98-100.

68. See Gérald-A. Beaudoin, *Essais sur le Constitution*, pp. 377-391.

69. See Vallières and Sauvageau, *supra*, n.41, p.17 ff. See also Lord Shaw's statement in *Arnold* v. *The King-Emperor* (1914), 30 T.L.R. 462, p.468:

> The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and, in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

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IV

The treatment of the term "to the detriment or against the interest of the public"

by Edith Cody-Rice

Contents

Introduction

This study is concerned with the interpretation of the term in the "monopoly" and "merger" provisions of the Combines Investigation Act, "to the detriment or against the interest of the public". In particular, the study considers how it has been applied to newspapers. There has been, to date, only one case before the Canadian courts in which the owners of newspapers were charged under the "monopoly" and "merger" provisions of the Act. That case involved the Irving family, which owns all five English-language newspapers in New Brunswick.

The treatment of detriment and public interest in that case did not differ significantly from its treatment in other cases decided under these provisions of the Act. Since the way in which interpretation of the term has developed in Canadian jurisprudence is very important in assessing its application to the newspaper industry, much of this study is devoted to considering the judicial interpretation of "detriment" in cases not involving newspapers. How that judicial interpretation affected the consideration of "detriment" in the *Irving* [1] case and in the three reports of the Restrictive Trade Practices Commission which have concerned newspapers is also discussed.

No doubt, a similar approach will be applied to future cases unless there is substantial amendment to the Combines Investigation Act or unless specific legislation applicable to the newspaper industry is forthcoming.

1

Historical development of combines legislation

The first Canadian legislation designed to control the development of combines appeared in 1889 when Parliament enacted "An Act for the Prevention and Suppression of Combinations formed in restraint of Trade".[2] This was a criminal statute and was embodied in successive Criminal Codes.[3]

In 1910, a civil statute, the first Combines Investigation Act, was enacted. Its full title was "An Act to Provide for the Investigation of Combines, Monopolies, Trusts and Mergers". This Act was repealed in 1919 and replaced by the Combines and Fair Prices Act, which was enacted along with the Board of Commerce Act. In 1921 both Acts were declared *ultra vires*, or beyond federal legislative jurisdiction, by the Judicial Committee of the Privy Council, which held that they dealt with an area of jurisdiction awarded to the provinces under Head 13 of Section 92 of the British North America Act; that is, the provision dealing with property and civil rights in the province.[4]

A second Combines Investigation Act was passed in 1923.[5] This Act was declared valid. The Privy Council held that it dealt with combines under the federal criminal law jurisdiction as well as under Head 3 of Section 91 of the BNA Act (the raising of money by any mode or system of taxation) and Head 22 (patents of invention and discovery).[6]

Section 2 of the 1923 Act defined "combine" thus:

> (a) The expression "Combine" in this Act shall be deemed to have reference to such combines immediately hereinafter defined as have operated or are likely to operate *to the detriment of or against the interest of the public*, whether consumers, producers or others; and limited as aforesaid, the expression as used in this Act shall be deemed to include (1) Mergers, Trusts and Monopolies so called, and (2) the relation resulting from the purchase, lease, or other acquisition by any person of any control over or interest in the whole or part of the business of any other person, and (3) any actual or tacit contract, agreement, arrangement, or combination which has or is designed to have the effect of (i) limiting facilities for transporting, producing, manufacturing, supplying, storing or dealing; or (ii) preventing, limiting or lessening manufacture or production; or (iii) fixing a common price or a resale price, or a common rental, or a common cost of storage or transportation; or (iv) enhancing the price, rental or cost of article, rental storage or transportation; or (v) preventing or lessening competition in, or substantially controlling within any particular area or district

or generally, production, manufacture, purchase, barter, sale, storage, transportation, insurance or supply; or (vi) otherwise restraining or injuring trade or commerce. [Emphasis added.]

Alongside the 1923 Act ran Section 498 of the Criminal Code containing the conspiracy provisions. These provisions were incorporated into successive Criminal Codes down to R.S.C. 1953-54. Section 411 of the 1953-54 Code read as follows:

> (1) Every one who conspires, *combines*, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing, or dealing in any article,
>
> (b) to restrain or injure trade or commerce in relation to any article,
>
> (c) to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably the price thereof, or
>
> (d) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of an article, or in the price of insurance upon persons or property,
>
> is guilty of an indictable offence and is liable to imprisonment for two years.
>
> (2) For the purpose of this section, "article" means an article or commodity that may be a subject of trade or commerce. [Emphasis added.]

The definition of "combine" in the Combines Investigation Act of 1923 remained substantially the same, with only some rearrangement of wording, down to the Combines Investigation Act of 1952.[7] Section 2(a) of that Act defined "combine" in this way:

> "Combine" means a combination having relation to any commodity which may be the subject of trade or commerce, of two or more persons by way of actual or tacit contract, agreement or arrangement having or designed to have the effect of
>
> (i) limiting facilities for transporting, producing, manufacturing, supplying, storing or dealing, or
>
> (ii) preventing, limiting or lessening manufacture or production, or
>
> (iii) fixing a common price or a resale price, or a common rental, or a common cost of storage or transportation, or
>
> (iv) enhancing the price, rental or cost of article, rental, storage or transportation, or
>
> (v) preventing or lessening competition in, or substantially controlling within any particular area or district or generally, production, manufacture, purchase, barter, sale, storage, transportation, insurance or supply, or
>
> (vi) otherwise restraining or injuring trade or commerce, or a merger, trust or monopoly, which combination, merger, trust or monopoly *has operated or is likely to operate to the detriment or against the interest of the public*, whether consumers, producers or others. [Emphasis added.]

The offence of forming or operating a combine was contained in Section 32(1) as follows:

> Every person who is a party or privy to or knowingly assists in the formation or operation of a combine is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding two years or to both.

Section 32(2) added a proviso that anyone charged under that section of the Act could not also be charged under Section 498 (subsequently 411) of the Criminal Code on the same information or indictment. This would indicate that the offences under the two statutes were interpreted as being the same.

In 1960, the Combines Investigation Act was substantially revised by an "Act to Amend the Combines Investigation Act and the Criminal Code".[8] This Act created two new definitions which included aspects of the former definition of "combine". They were:

> "merger" means the acquisition by one or more persons, whether by purchase or lease of shares or assets or otherwise, of any control over or interest in the whole or part of the business of a competitor, supplier, customer or any other person, whereby competition
>
> (i) in a trade or industry,
>
> (ii) among the sources of supply of a trade or industry,
>
> (iii) among the outlets for sales of a trade or industry, or
>
> (iv) otherwise than in subparagraphs (i), (ii) and (iii), is or is likely to be lessened *to the detriment or against the interest of the public*, whether consumers, producers or others;
>
> "monopoly" means a situation where one or more persons either substantially or completely control throughout Canada or any area thereof the class or species of business in which they are engaged and have operated such business or are likely to operate it *to the detriment or against the interest of the public*, whether consumers, producers or others, but a situation shall not be deemed a monopoly within the meaning of this paragraph by reason only of the exercise of any right or enjoyment of any interest derived under the Patent Act, or any other Act of the Parliament of Canada. [Emphasis added.]

Section 411 of the Criminal Code was repealed in the 1960 revision and incorporated into a new Section 32(1) of the Combines Investigation Act. It reads as follows:

> Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article,
>
> (b) to prevent, limit or lessen, unduly, the manufacture or production of an article, or to enhance unreasonably, the price thereof,
>
> (c) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of an article, or in the price of insurance upon persons or property, or

(d) to restrain or injure trade or commerce in relation to any article,

is guilty of an indictable offence and is liable to imprisonment for two years.

A new Section 33 was added which picked up the offence formerly contained in Section 32. The offence now, however, specifically referred to "monopoly" and "merger":

> Every person who is a party or privy to or knowingly assists in, or in the formation of, a merger or monopoly is guilty of an indictable offence and is liable to imprisonment for two years.

No definition of "combine" remains in the Act; certain prohibited conduct set out in the former definition of "combine" disappeared from the new definition section. There is only the general provision that it is an offence for a person to operate a class of business that he substantially or completely controls to the "detriment or against the interest of the public" (monopoly) and it is an offence to acquire a business with the result that competition is lessened or is likely to be lessened "to the detriment or against the interest of the public" (merger).

In 1975 the Act was again amended. One of the principal changes was to extend the Act to cover services as well as articles. As a result, the word "product" which, by definition, includes an article and a service, replaced the word "article" in Section 32. Section 32(1)(d) was revised to read: "to otherwise restrain or injure competition unduly" instead of the previous "to restrain or injure trade or commerce in relation to any article".[9]

In an effort to clarify the meaning of "unduly", a new subsection, (1.1), was added to Section 32:

> For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in violation of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate completely or virtually, competition in that market.

It is to be noted that a new Section, 32.1, was added to the Act as part of the 1975 amendments making it an indictable offence for a company to implement in Canada a conspiracy, combination, agreement or arrangement entered into outside the country if such conspiracy, combination, agreement or arrangement would have been in violation of Section 32 had it been entered into in Canada.

2

The public interest to be protected

The object of the Combines Investigation Act is to assure to the public the benefits of competition. This has been stated and restated in the Canadian case law, commencing with *R.* v. *Elliott*, in which Mr. Justice Osler commented:

> The right of competition is the right of every one and Parliament has now shewn that its intention is to prevent oppressive and unreasonable restrictions upon the exercise of this right; that whatever may hitherto have been its full extent, it is no longer to be exercised by some to the injury of others.[10]

In the leading case of *Weidman* v. *Shragge* Chief Justice Fitzpatrick, in the Supreme Court of Canada, said with reference to a contract between two scrap dealers and to the object of parties to an agreement:

> . . .the mischief aimed at is the undue and abusive lessening of competition which operates to the oppression of individuals or is injurious to the public generally. And it is for the courts to say whether in the circumstances of each particular case the mischief aimed at exists.[11]

He then made the following comments about the purpose of the legislation:

> Parliament has not sought to regulate the prices of commodities to the consumer, but it is the policy of the law to encourage trade and commerce, and Parliament has declared illegal all agreements and combinations entered into for the purpose of limiting the activities of individuals for the promotion of trade; and preventing or lessening unduly that competition which is the life of trade and the only effective regulator of prices is prohibited.[12]

This principle has been enunciated throughout the case law.[13]

(a) *Why protect competition*?

In the reported cases dealing with the subject of competition, it is stated that it is not only competition itself which is being protected but that it is being safeguarded in order to prevent a particular development: the enhancement of prices. This was the position originally taken by Lord Parker in the Judicial Committee of the Privy Council, in the *Adelaide Steamship* case,[14] which was applied in Canada in *R.* v. *Morrey et al* in 1956.[15]

In the *Adelaide Steamship* case Lord Parker stated:

> The chief evil thought to be entailed by a monopoly, whether in its strict or popular sense, was the rise in prices which such monopoly might entail.[16]

In *Weidman* v. *Shragge*, quoted earlier, Chief Justice Fitzpatrick indicated that it was not the intention of Parliament to regulate prices but to encourage trade and commerce and competition as the only effective regulators of prices.

There appears to have been some judicial difference of opinion with regard to this basic concept, for our jurisprudence indicates that evils to be prevented have been interpreted to encompass matters beyond enhancement of prices. In *R.* v. *Canadian Import Co. et al*, at the trial level, the court had the following comments concerning the enhancement of prices:

> It has been pointed out that enhancement of price, actual or potential, was also an essential element. The enhancement of price is one way of committing the offence, as the definition of the offences shows, when unreasonable or to the detriment of the public interest; but the element of price, in my opinion, is not necessarily included in the offence as it can be committed otherwise than by the fixation or enhancement of prices.[17]

In the *Canadian Breweries* case,[18] Chief Justice McRuer, in the Supreme Court of Ontario returned to the principle enunciated in the *Adelaide Steamship* case and referred to Lord Parker's statement quoted above in the course of dealing with the question of whether a monopoly in the production and distribution of beer was to the detriment or against the interest of the public. Chief Justice McRuer concluded that:

> In the last analysis, the object of the Act is to protect the public interest against the enhancement of prices that will likely flow from combines as defined in the Act. It matters not whether they arise out of agreements, mergers, trusts, or monopolies.[19]

In the case of *R.* v. *Canadian General Electric Company Ltd. et al*,[20] Mr. Justice Pennell brought some clarity to a confused situation. Referring to the consignment system used by the accused, he said:

> Generally, prices and quality are the aspects of competition in which the public is most interested. When the product is homogeneous, price is *a fortiori* the most important aspect of competition. It may well be that in commodities of certain types (homogeneous products sold according to standard specification) price competition is the only real competition that is in any way beneficial to the public. "Without genuine and active competition in price. . .with each firm setting its own price based upon the efficiency of its operations and in the exercise of its independent judgment. . .the other elements wilt, become of negligible value, and tend to disappear altogether: *R.* v. *McGavin Bakeries Ltd. et al* (*No. 6*) (1951), 18 C.P.R. 26 at p. 41, [1952] 1 D.L.R. 201 at p. 215, 101 C.C.C. 22 at p. 38, 13 C.R. 63 at p. 77.[21]

Although it would appear that the original and primary purpose of protecting competition was to protect the public against the enhancement of prices, there has been an extension of the application of the Act so that, while the question of price is a consideration, it is not necessarily the only or even controlling one. The Act has been extended to apply to a variety of factors, and, in consequence, stretched to the limits of applicability and even credibility. The difficulties which have been encountered in so doing are highlighted in the one newspaper case tried in Canada, *R.* v. *K.C. Irving, Ltd. et al*, which is discussed later.

(b) *Who is the public*?

The Combines Investigation Act includes, as members of the public, consumers, producers, and others. The inclusion of producers has been significant in the development of the jurisprudence in respect to the concept and interpretation of detriment to the public interest. It has allowed the benefit to the producer to be interposed as a balancing factor in determining whether, in fact, detriment has occurred. In *R.* v. *Morrey et al*, Mr. Justice Sidney Smith of the British Columbia Court of Appeal stated that he adopted the view of public interest taken by Lord Parker in the *Adelaide Steamship* case decided in 1913. In that case Lord Parker said:

> It was also strongly urged that in the term "detriment to the public" the public means the consuming public, and that the Legislature was not contemplating the interest of any persons engaged in the production or distribution of articles of consumption. Their Lordships do not take this view, but the matter is really of little importance, for in considering the interests of consumers it is impossible to disregard the interests of those who are engaged in such production and distribution. It can never be in the interests of the consumers that any article of consumption should cease to be produced and distributed, as it certainly would be unless those engaged in its production or distribution obtained fair remuneration for the capital employed and the labour expended.[22]

Thus, in determining the matter of detriment, a fair return to the producer may be taken into consideration. Mr. Justice Pennell, in the Ontario High Court reiterated this in the *General Electric* case:

> Whether the acts of those who control the market may be considered detrimental is a question of fact for the Court to determine. Their acts must be considered in relation to the market and industry of which they are a part. In this connection, I acquiesce to the accused's submission that the public interest includes a fair return to the accused and the agents for their capital investment and labour.[23]

(c) *Development of jurisprudence on "detriment"*

Since the public interest to be protected is the right to competition, it stands to reason that acts which thwart that competition would be detrimental to or against the interest of the public. Although this is not directly stated in the Combines Investigation Act, it appears to be the thrust of Section 32(1), which prohibits certain specific acts. Each of the results or effects designated in that section is prohibited precisely because it would operate to the detriment or against the interest of the public.

This view is substantiated by the definition of "combine" under the pre-1960 legislation. There, agreements which had essentially the same effect as those set out in Section 32(1) of the present Act were specifically prohibited and the present Section 32(1) (which was then contained in the Criminal Code) duplicated the prohibited effects, with the exception that offences in the Criminal Code related to "conspiring" to effect those results and, further, that they had to be effected to an undue degree.

There was a further prohibition in Section 32(2) of the 1952 Act which forbade charging a person on the same information or indictment under both that section and Section 498 of the Criminal Code. In view of this, an observer might assume that the

treatment of "to the detriment or against the interest of the public" in the definitions of "monopoly" and "merger" and that of the prohibited activities under Section 32 of the present Act would closely parallel each other. In fact, their judicial development has taken quite different paths.

3

Conspiracy, monopoly, and merger

In Canadian legislation, it has never been an offence to lessen competition, but only to reduce it to a point at which the public sustains injury. In the Criminal Code provisions, which were incorporated into the present Combines Investigation Act as Section 32(1), it was an offence to conspire, or to combine or to agree, or to arrange, to commit acts which had the prohibited effects to an "undue" degree.

In offences under Section 33 of the present Combines Act, which are controlled by the definitions of "monopoly" and "merger" in Section 2 of the Act, there is no longer a list of separate effects which constitute offences as there was in the pre-1960 legislation, but the controlling provision requires a finding that a business has operated, or is likely to be operated, "to the detriment or against the interest of the public" (monopoly) or that competition is or is likely to be lessened with similar effects (merger). In what is now the conspiracy section of the Act (Section 32), the controlling provisions are the *conspiracy* on the one hand and the *undue effect* on the other. It would appear that Sections 32 and 33 are aimed at the same evils, particularly in light of the fact that, in predecessor legislation, the offence provision under the Combines Investigation Act, which was the forerunner of Section 33, was similar in wording to the offence of conspiracy which was then under the Criminal Code.

The direction of judicial interpretation has differed with regard to the two sections so that the results obtained in prosecutions differed significantly for a period of time. This divergence grew out of the treatment of the controlling words "conspiracy", "unduly", and "to the detriment or against the interest of the public".

In the early case of *R.* v. *Canadian Import Co. et al*, Mr. Justice Laliberté, at trial, had this to say about the relevant provisions of the Criminal Code and of the Combines Act:

> Under both these laws, the evil results *attained* seem to replace the intention. When the combinations or agreements were not operated to have and do not have the specific results, it is essential that it be proved that they were *designed* to have that effect and to be against the public interest. In fact they do have that effect when the agreements themselves are such by their nature and content that their inevitable and necessary consequence must be to unduly prevent or lessen trade within the meaning of the statutes.[24]

In the case of *R.* v. *Morrey et al*, Mr. Justice Sidney Smith commented on what he perceived to be the difference between Section 498 of the Criminal Code (now Section 32 of the Combines Act) and the offence of forming a combine under the Combines Investigation Act of 1952:

> At the trial no direct oral evidence was adduced to show any detriment to the public. So much is common ground. But the learned Judge pointed out in effect that if the jury found any lessening in competition they could regard that as operating to the detriment of the public. The jury must have adopted and applied this view in order to find the verdict of "guilty" under (c) and (d). But under (e) their verdict was "not guilty" thus expressly finding no "preventing or lessening competition". When this was put to Crown Counsel in this Court, he replied that on this count the jury's verdict was perverse. This rejoinder would seemingly come ill from one who listened (presumably with silent approval) to the Court's direction that the jury could properly find guilty under (c) and (d) and not guilty under (e). But it is difficult to see what other answer counsel could have made without abandoning the whole spirit of the Crown's contentions and submissions before this Court. The further comment should be made that there was no cross-appeal from the jury's finding under (e).
>
> Before us the Crown did not present the point in quite the same way as did the Judge to the jury. Here it was argued that whether or not the jury could assume "detriment" depended upon the extent to which competition had been prevented. Were it wholly so, or almost so, then the jury were justified in finding affirmatively. The question, it was said, was thus one of degree. True; but where the line should be drawn between "yea" and "nay" was all in doubt: and was for the jury.
>
> However, in my respectful opinion, there is no authority for either view. If I may say so without presumption, I think the learned Judge may have been thinking rather in terms of "conspiracy" under Cr. Code s. 498 (now s. 411) than in terms of "combination" under the Combines Investigation Act. *Useful guidance can no doubt be obtained from the authorities under a kindred statute provided the differences in the enactments are kept steadily in mind. Here the Act speaks for itself; preventing or lessening competition is not enough. The Crown must go further with its proof and show the activities complained of* "(*had*) *operated or* (*are*) *likely to operate to the detriment or against the interest of the public, whether consumers, producers or others*".[25] [Emphasis added.]

This statement seeds the later interpretation that, while under the conspiracy section of the Act, the only requirement is that there be an agreement to carry on an activity which is designed to have the prohibited effect, under the monopoly and merger provisions of the Act, detriment must be shown to have occurred or to be likely to occur regardless of intention or design.

This view is expressed in the *Howard Smith Paper Mills* case in which Mr. Justice Taschereau had these comments to make about a charge of conspiracy unduly to lessen competition with regard to book and other fine papers:

> It has been argued on behalf of the appellants that the offence is not complete, unless it has been established by the Crown beyond a reasonable doubt, that the agreement was detrimental to the public, in the sense that the manufacture or production was effectively lessened, limited, or prevented, as a result of the agreements entered into. It has also been suggested that there is no offence, if it is shown that the acts complained of were beneficial to the public. With these submissions I entirely disagree. Conspiracy is a crime by itself, without the necessity of establishing the carrying out of an overt act.[26]

In the same decision, Mr. Justice Cartwright took this view one step further to point out that, once there is an agreement, there arises a presumption of detriment:

> In other words, once it is established that there is an agreement to carry the prevention or lessening of competition to the point mentioned, injury to the public interest is conclusively presumed, and the parties to the agreement are liable to be convicted of the offence described in s. 498 (1)(d). The relevant question thus becomes the extent to which the prevention and limitation of competition are agreed to be carried and not the economic effect of the carrying out of the agreement.[27]

The most important aspect of these comments is Mr. Justice Cartwright's statement that, once there is an agreement, there is a presumption of detriment which may be applied. This was the most significant difference to that date between the treatment of the "combine" offence under the Combines Investigation Act and an offence under the conspiracy provisions then in the Criminal Code.

This difference was taken up by the accused who contended that the word "unduly" in the Criminal Code should be interpreted by calling in aid the provisions of the definition of "combine" in the Combines Investigation Act, in which a combine was defined, *inter alia*, as a combination which "has operated or is likely to operate to the detriment or against the interest of the public". The accused contended that, if Section 498(1)(d) of the Criminal Code was to be construed without reading similar words into it, parties to the same agreement might be found guilty if charged under Section 498(1)(d) without proof of public detriment while they would go free on the same evidence if charged under the Combines Investigation Act.

Without determining the validity of this argument, or whether there was, in fact, a difference between the two statutes, Mr. Justice Kellock simply stated that, if such a difference existed between the described offences, Parliament must have so intended.[28]

In the *Howard Smith* decision the court again stated that it is not a defence to demonstrate public benefit flowing from the agreement:

> The public is entitled to the benefit of *free competition*, and the prohibitions of the Act cannot be evaded by good motives. Whether they be innocent and even commendable, they cannot alter the true character of the combine which the law forbids, and the wish to accomplish desirable purposes constitutes no defence and will not condone the undue restraint, which is the elimination of the free domestic markets.[29]

The presumption of detriment upon proof of a conspiracy to limit competition "unduly" and the inability to use as a defence the possible public benefit from the conspiracy distinguish prosecutions under the conspiracy section from prosecutions under the monopoly and merger provisions. In monopoly and merger prosecutions the courts have held that there is no presumption of detriment and have allowed evidence of public benefit to be led as a defence.

In cases under the monopoly and merger provisions, judicial interpretation has led to the necessity of proving detriment or likely detriment to the public interest as a separate element of the offence. The sole exception to this body of interpretation is the *Eddy Match* case.[30] This case was tried under the 1952 Act where specific prohibited acts remained outlined in the definition of "combine". The court found that

if a business is operated so that virtually all possibility of competition is eliminated, then it may be presumed that it is operating to the detriment or against the interest of the public.

Commenting on the argument that there was no evidence of public detriment under the Act, Mr. Justice Casey stated in the appeal decision that:

> The appellants concede that "the policy of the law has been stated by the Supreme Court of Canada to be the preservation of free competition". I do not quarrel with this statement but, in dealing with a problem such as the present one, and at the risk of making a distinction without a difference, I prefer to take as my starting point the fundamental principle that everyone is entitled to the benefits that flow from free competition. This is what was stated or assumed in *Rex.* v. *Elliott* (1905), 9 O.L.R. 648, 9 C.C.C. 505, in *Weidman* v. *Shragge*, supra; *Stinson-Reeb Builders Supply Co.* v. *The King*, [1929] S.C.R. 276, 52 C.C.C. 663 D.L.R. 331 and *Container Materials Ltd.* v. *The King* supra. From this it follows that anything which limits or restricts this freedom of competition is an encroachment on the public right.
>
> By enacting the Combines Investigation Act, Parliament has given evidence of its acceptance of the fundamental principle. At the same time, however, it has refused to label as an evil to be avoided, all encroachments on the public right. Only those which cause or are likely to cause detriment are forbidden. But Parliament has not enacted as a condition *sine qua non* that actual detriment be demonstrated. If it had intended to do so, it would not have added the words "or is likely to". These words broaden the field of forbidden encroachments by bringing within that class those whose very nature creates a presumption that they will probably prejudice the public right.
>
> What we have here is the activity envisaged by s. 2(4)(b) — the control of a class of business: a control that, as revealed by the evidence, excluded for all practical purposes, the possibility of any competition. *Such a condition creates a presumption that the public is being deprived of all the benefits of free competition and this deprivation, being the negation of the public right, is necessarily to the detriment or against the interest of the public.*[31] [Emphasis added.]

Later cases do not take this view and, in fact, at the present time, detriment has to be separately proven even if all competition has been eliminated.

Mr. Justice Davey, in his dissenting judgment in *R.* v. *Morrey et al*, echoes the view that detriment should not have to be shown as a separate element of the offence; however, it is well to remember that he was considering charges under the 1927 Act which set out certain effects of acts which were specifically prohibited. In the *Morrey* case, both the Crown and the accused agreed that the "detriment to the public interest" had to be separately proven and the appeal proceeded on that basis. Mr. Justice Davey disputed the necessity of proving detriment separately:

> The conception (sic) that detriment to the public is an ingredient of the offences charged seems to stem from an office consolidation of the Combines Investigation Act, in which an important departure from the punctuation and arrangement employed in s.2 of the Act has caused a significant change in meaning.

The departure in this particular edition of the office consolidation, reproduced in *Eddy Match Co.* v. *The Queen* (1953), 18 C.S. 357 at 361, and on which that judgment proceeded, lies in s.2(1)(f). A semicolon has been substituted for the comma which appears after the word "commerce", and the remainder of the clause has been extracted from its setting and appended to the whole of ss.(1), in a way that relates it to cls.(a) to (e) as well as cl.(f), thus:

> "2. In this Act, unless the context otherwise requires,
>
> (1) 'Combine' means a combination having relation to any commodity which may be the subject of trade or commerce, of two or more persons by ways of actual or tacit contract, agreement or arrangement having or designed to have the effect of. . .
>
> (f) otherwise restraining or injuring trade or commerce; or a merger, trust or monopoly, which combination, merger, trust or monopoly has operated or is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others."

In the Act, cl. (f), now numbered cl. (vi) of (1), now lettered (a), reads:

> "2 (a)(vi). . .otherwise restraining or injuring trade or commerce, or a merger, trust or monopoly, which combination, merger, trust or monopoly has operated or is likely to operate to the detriment or against the interest of the public, whether consumers, producers or others."

In my opinion, the arrangement of that section and its clauses shows Parliament in enacting s. 2 did not intend to import the additional element that such combines shall operate or be likely to operate to the detriment or against the interest of the public into the definition of those particular combines that have, or are designed to have any effect described in cls. (a) to (e) inclusive, that is, fixing or enhancing prices, etc. I think Parliament did not do so because it was decided that a combine having any effect so described in cls. (a) to (e) inclusive is *per se* against the interest of the public and consequently a crime; therefore it becomes unnecessary to require the Courts to pass upon the question of detriment in the case of charges laid under those clauses.

On the other hand cl.(f) recognizes that mergers, trusts, and monopolies are legitimate commercial instruments, which may or may not operate to the detriment of the public; likewise that there may be combinations which injure trade or commerce in other ways than those specified in cls. (a) to (e) but which may or may not operate to the detriment of the public on the balance of the results. It is only in such cases falling under cl. (f) that the Crown is required by the Act to prove that the combination or the merger, trust or monopoly has operated or is likely to operate to the detriment or against the interest of the public, for that is the element that brings the subject within the purview of criminal law under the BNA Act, which is the source, or at least one of the sources, of this aspect of Parliament's legislative authority. . . .[32]

Such an interpretation would have rendered a conviction easier to obtain under the Combines Investigation Act than under the conspiracy section in the Criminal Code for there would have been no requirement to prove "undueness" or "detriment

to the public interest" as separate elements of the offence. It could be argued that Parliament wished to incorporate the same substantive offence into the Act as that contained in the Criminal Code but that it wished to make the *result* rather than the *intent* of the action prevail. From the interpretation of Mr. Justice Davey, no proof of intention would be necessary as the offence would consist of operating a combine which had the *effect* of lessening competition. Thus, the Crown, in proceeding against the accused would be relieved of proving the element of *mens rea* (intent) as well as the element of detriment resulting from reduced competition.

In *R.* v. *Morrey et al* the view of Mr. Justice Davey did not prevail and, in assuming that detriment had to be separately shown, the Court raised the onus of proof under the "combine" section above that of the "conspiracy" offence.

The revision of the Combines Investigation Act in 1960 removed the validity of the argument of Mr. Justice Davey. The word "combine" was deleted from the definition section; Section 411 of the Criminal Code, containing the word "unduly", was incorporated as Section 32 of the revised Act.

New definitions of "monopoly" and "merger" were added and, under these, a monopoly or merger, in ordinary parlance, is not a monopoly or merger for the purposes of Section 33 — unless operated, or likely to be operated, to the detriment or against the interest of the public. Further, detriment came to be treated as *overall* detriment and the question of public benefit resulting from the concentration of power became relevant in assessing whether an offence had been committed.

For a time, then, and at the time of the *Irving* trial, it was easier to obtain a conviction under the conspiracy section of the Act than under the monopoly or merger provisions. This has since been altered, however, by the cases of *R.* v. *Aetna Insurance Company et al*,[33] and *Atlantic Sugar Refineries Co. Ltd. et al* v. *Attorney-General of Canada*.[34] Judgment in the latter case was delivered by the Supreme Court of Canada on July 18, 1980.

Until these decisions were rendered, the relevant consideration in the conspiracy provision was that there be an agreement which lessened, or would lessen, competition unduly. This being the case, injury to the public could be presumed and a conviction would result. In the *Aetna* case, Mr. Justice Ritchie removed this presumption of injury and stated:

> The burden lying upon the Crown in this case is to establish beyond a reasonable doubt first, that the respondents intended to enter into a conspiracy, combination, agreement or arrangement and, secondly, that that conspiracy, combination, agreement or arrangement *if* it were carried into effect would prevent or lessen competition unduly.[35]

This approach does not place emphasis on the *intention* of the conspiracy but rather on the actual *result* and, therefore, the Crown is forced into the realm of speculation and must prove the result of the agreement as a separate element quite apart from the intent of the agreement itself.

Chief Justice Laskin, dissenting in *Aetna*, found that the trial judge had made two significant errors:

> (1) in accepting evidence of public benefit and allowing that evidence to constitute a defence;
>
> (2) in holding that it was necessary for the Crown to prove that there had, in fact, been a lessening of competition, irrespective

> of the fact that the object of the conspiracy was to inordinately lessen competition.[36]

In the *Atlantic Sugar Refineries* case, with Supreme Court Justices Pigeon, Martland, Ritchie, Dickson, Beetz, and McIntyre concurring, the court refused to uphold a conviction of conspiracy to reduce competition unduly because — while a possible tacit agreement among sugar refineries to adhere to a price formula reduced competition significantly — it did not *suppress* it.[37] The majority of the court was unable to make a finding of intent because there was no evidence as to an overt agreement, only as to a course of conduct.

These two cases clearly place a more onerous burden of proof on the Crown under the conspiracy section of the Act than that exacted under earlier judicial interpretation. This finding was made, notwithstanding Section 32(1.1), which expressly indicates that the offence may be committed without virtual elimination of competition. Mr. Justice Pennell, in the *General Electric* case, had adopted Mr. Justice Laskin's (as he then was) view of the meaning of "unduly" — that is, that only a serious lessening, not a suppression, of competition was necessary to constitute "undueness".[38]

As will be seen later, the wheel has come full circle, for, in earlier case law with respect to combines legislation, the conspiracy offence and the offence of forming a combine placed a similar burden of proof on the Crown; then, as the jurisprudence developed, a divergence also developed, so that a conviction under the conspiracy section of the legislation was easier to obtain than under the provisions relating to combines, mergers or monopolies (depending on the revision of the Act involved). It is now equally difficult, if not, indeed, impossible, to obtain a conviction under any of these provisions of the Act, be the charge one of conspiracy, merger, or monopoly.

4

"Unduly" and "Detriment"

Before one can begin an analysis of the way in which "to the detriment or against the interest of the public" has been judicially interpreted, it is necessary to note the interrelationship between the judicial interpretation of the word "unduly", under the conspiracy section of the Act, and the word "detriment", under what are now the monopoly and merger sections.

A significant body of jurisprudence has developed around the meaning of the word "unduly" as found in section 32 of the present Combines Investigation Act. The case law has approved the interpretation given by Mr. Justice Osler in the case of *R.* v. *Elliott* in 1905:

> In other words, competition is not to be prevented or lessened *unduly* that is to say, in an undue manner or degree, wrongly, improperly, excessively, inordinately, which it may well be in one or more senses of the word, if by the combination of a few the right of the many is practically interfered with by restricting it to the members of the combination.[39] [Emphasis added.]

A good survey of the law regarding the interpretation of this word is available in the judgment of Mr. Justice Pennell in the *General Electric* case.[40] There, after reviewing the law and particularly the *Howard Smith Paper Mills* case, he concluded that one line of cases interpreted the word "unduly" to involve a virtual elimination of competition. This is in accord with the view taken by Manitoba Chief Justice E.K. Williams in the *B.C. Sugar* case where he said, "The Crown must also establish a virtual stifling of competition."[41]

There is, however, another line of cases which interprets the word "unduly" in a less stringent manner. The essence of this position is contained in the words of Mr. Justice Batshaw in *R.* v. *Abitibi Power and Paper Co. Ltd. et al*:

> I conclude, therefore, that it cannot be accepted as our law that only those conspiracies are illegal that completely eliminate or virtually eliminate all competition. To say that the prevention or lessening of competition must be carried to the point where there remains no competition, or virtually none, is tantamount to considering the words "prevent" or "lessen" as synonymous with "extinguish". Giving to words their ordinary meaning, it would seem that what the legislators intended by "prevent" or "lessen" is something less than "extinguish".[42]

This view was adopted by Mr. Justice Laskin (as he then was) in *R.* v. *J.J. Beamish Construction Co. Ltd. et al*, in his dissenting opinion, in which he expressed

the view that only a serious lessening of competition need be established.[43] Mr. Justice Pennell adopted this latter interpretation of the term "unduly" in his judgment in the *General Electric* case.

In comparing the term "unduly" to the term "to the detriment or against the interest of the public", early jurisprudence saw "unduly" as being included in the latter concept. This was the position of Mr. Justice Raney of the Ontario Supreme Court in *R.* v. *Alexander Ltd. et al*:

> After the best consideration I have been able to give the matter, I am of the opinion that the words — "to the detriment or against the interest of the public" — of the Combines Act were intended to be inclusive of "unreasonably" in clause (c) and of "unduly" in clause (d) of s. 498. It is highly probable, I think, that the draftsman of the Combines Investigation Act had before him the interpretation by Mr. Justice Osler of the words "unduly prevent or lessen competition" in *Rex* v. *Elliott*. . .when framing s. 2 of the Act:
>
> "Competition is not to be prevented or lessened *unduly*, that is to say, in an undue manner or degree, wrongly, improperly, excessively, inordinately, which it may well be in one or more of these senses of the word, if by the combination of a few, the right of the many is practically interfered with by restricting it to the members of the combination."
>
> Could there be a more apt summing up of this paragraph in a few words than is contained in the language of s. 2 of the Combines Act — "to lessen or prevent competition. . .to the detriment or against the interest of the public?" [44]

In the *Howard Smith Paper Mills* case Mr. Justice Kellock did not accept that the two terms should be interpreted in an equivalent manner. Confronted with the contention that inequity would result should the definition of "unduly" not be interpreted by equating it with "to the detriment or against the interest of the public", he simply commented that if there was a difference between the statutes, Parliament must have so intended. He did not elaborate further.

In *R.* v. *Canadian Breweries Ltd.*, the first case to be tried under the "combine" provision of the Combines Investigation Act of 1952, Chief Justice McRuer did call upon the assistance of the interpretation of the term "unduly", in what was then Section 411 of the Criminal Code. Following his review of the jurisprudence on Section 411, he extracted three principles:

> (1) the enactment is for the protection of the specific public interest in free competition,
>
> (2) all agreements which, if carried into effect, would prevent or lessen competition unduly are illegal,
>
> (3) in deciding whether the agreed limitations on competition are undue the Court does not consider the advantage to be gained by those that are parties to the agreement, nor is the Court called upon to be a judge of what the economic welfare of the public may be from time to time.[45]

He then went on to say:

> I think it was made quite clear that the legal meaning to be attributed to the word unduly is a question of law. As I interpret

> Cartwright, J.'s language, it means this: If the agreement in question, when carried into effect, would give the parties to it the *power* to carry on their business virtually without competition, the agreement would be an agreement to unduly lessen competition.
>
> This brings me to deal with the application of these principles to the provisions of the Combines Act under which the charge against the accused is laid. It is not all combines that come within the statute, but only those that "have operated or are likely to operate to the detriment or against the interest of the public". These words are used in a legal sense and not in a social sense. They must be related to the restraints on trade mentioned in the section and as applied to this case, particularly the restraints on competition. Crown counsel argue, and I agree with them, that for the purposes of this prosecution the words have substantially the same meaning as the word "unduly" as used in its context in s. 411 of the Criminal Code.[46]

In the *B.C. Sugar* case, which was tried in the Manitoba Court of Queen's Bench, Chief Justice Williams did not equate "unduly" with "to the detriment or against the interest of the public"; rather, he used the word "undue" to modify "detriment". He concurred with Chief Justice McRuer with regard to the comparison of "unduly" and "to the detriment or against the interest of the public" but, in summation, he said:

> I agree that it is not all combines that come within the operations of the Combines Act but only those that have operated, *unduly*, or are likely to operate *unduly* to the detriment or against the interest of the public and that it is for the tribunal of fact, on relevant and admissible evidence to say where the line should be drawn.[47]

This interpretation places a very heavy onus on the Crown and it was adopted by Mr. Justice Limerick in the New Brunswick Court of Appeal, in the *Irving* case.

In 1976, Mr. Justice Pennell took strong issue with this interpretation in his consideration of the meaning of "detriment" in the *General Electric* case. He said:

> To be met next is the argument that the detriment to come within the ban of the Act must be undue. This is contrary to the plain wording of the Act. It arises, I think, out of a strained extension of past legal authority. In conspiracy cases, the standard which existed under s. 498 of the Criminal Code R.S.C. 1927, c. 36, namely "to unduly prevent or lessen competition". . . has been equated with "preventing or lessening competition. . .to the detriment. . .of the public" set out in the Combines Investigation Act, R.S.C. 1952, c. 314. The equation may be explained in this way. Proof of an undue lessening of competition has been held to constitute detriment: see *Weidman* v. *Shragge*; supra; *Howard Smith Paper Mills* v. *The Queen*, supra. But the detriment itself was not undue. I do not think the equation can be carried into the monopoly section of the Act. The matter is clarified, as it seems to me, in the 1960 amendment. Sections 33 and 2 dealing with monopoly and its definition respectively, make no mention of the word "unduly" but retain detriment. Nowhere do I find the warrant to insert the word "undue" before the word "detriment". Section 32, dealing with conspiracy, on the other hand, makes no reference to detriment but looks to the lessening of competition itself to determine if same was undue.

> The standard in each instance has been set by the definition of the offence. To require that detriment be undue would alter the standard provided by the statute.[48]

With these words, Mr. Justice Pennell brought the onus upon the Crown into clearer perspective.

5

The parameters

(a) *Relevant market*

In determining the interest of the public, and the possible detriment which certain activities may cause, the concept of relevant market is vital.

Each product and service is sold in a definable market and the determination of the parameters of that market will affect the finding of detriment. The market may take several forms or a combination of forms. It may be a geographical area in which the product or service is sold, it may be a particular segment of the population to which the product or service is directed, or it may be a particular time span (as in the case of a morning or an afternoon newspaper).

In addition to defining the market, it is necessary, in order to determine whether a person controls a class of business, to determine whether control of his particular product or service constitutes a class of business in itself or whether it is only one element in a larger class. In order to do this, one must consider all products or services which consumers and producers might consider to be reasonably interchangeable, taking into consideration such aspects as price, physical characteristics, and function.

(b) *Detriment under "merger" and "monopoly"*

It is clear from the judicial interpretation now accorded to the merger and monopoly sections of the Combines Investigation Act that the undue lessening of competition by itself, without further independent evidence of detriment, is not to be construed as an offence under the Act.

Further, the courts have indicated that any detriment must be shown to flow from the merger or monopoly itself; it is not sufficient for a conviction that an undesirable situation be maintained or enhanced by a merger or monopoly if that situation was operative before the happening of the triggering event which brings the provisions of the Act into play.

In the *B.C. Sugar* case, there was a merger between two monopolies, each of which controlled a certain geographical sector of the market before the merger. Each had operated exclusively in its relevant market and, before the merger, there had been a price-fixing formula in operation. Chief Justice Williams found that there had been no offence because the evil complained of did not flow from the merger itself, but had existed prior to the merger taking place. He quoted with approval the opinion expressed by Chief Justice McRuer in the *Canadian Breweries* case (although that case was actually decided on other grounds). The court found that individual consumers in each of the areas where the particular accused had operated

were not adversely affected because there had been little competition before the merger and this situation had not changed.

(c) *Degree of elimination of competition*

The degree of elimination of competition which would be necessary to constitute detriment under the monopoly and merger provisions of the Combines Investigation Act is closely related to the interpretation given to the word "unduly" in Section 32, the "conspiracy" section. A discussion of the interpretation of that word occurs earlier in this study.

There are at present two lines of judicial interpretation of the term "unduly". According to the first, a virtual stifling of competition is necessary before consideration will be given to possible detriment; the second holds that only a serious lessening of competition is necessary, a view bolstered by the addition in 1975, of subsection (1.1) to Section 32. It must be remembered, however, that, even if competition is completely stifled, detriment to the public still must be proven.

Within these parameters, it may happen, as in the *Irving* case, that, although there is virtually no competition within the relevant market, the courts may find that no detriment has occurred. This is different from a prosecution under Section 32 of the Act by which the lessening of competition to an undue degree — quite apart from public harm — is the relevant consideration.

(d) *Relevance of intent*

Although intent is a key element in determining the commission of an offence under the "conspiracy" section of the Act, the courts have found it to be irrelevant in the determination of detriment to the public. Chief Justice Williams said this in so many words in the *B.C. Sugar* case.[49]

This interpretation has serious evidentiary implications for, in his judgment in the *Canadian Breweries* case, Chief Justice McRuer said that, since intent was irrelevant, any evidence led to show the intention of the parties to an agreement would be inadmissible:

> At the conclusion of the Crown's case I ruled that the evidence of collateral agreements entered into by the accused which may have violated other provisions of the Act or provisions of the Code were not relevant to prove that the merger has operated or is likely to operate to the detriment or against the interest of the public. My view was then, and still is that the evil, whether it be the effect on competition or on anything else, which constitutes the offence as here charged, must be shown to flow from the merger and not from collateral acts which might have been the subject of another charge, and which might have been committed by the corporation *qua* corporation, whether it was a merger or not.[50]

This view was approved by Chief Justice Williams in the *B.C. Sugar* case, by Mr. Justice Pennell in the *General Electric* case and by Mr. Justice Limerick in the New Brunswick Appeal Court decision in the *Irving* case.

(e) *Standard and onus of proof*

As indicated in the discussion of the historical development of the Act, the jurisdictional limitations on the federal Parliament indicate that the Combines Investigation

Act must be criminal in nature in order to fall within the powers of that body. The standard of proof to be applied is thus "beyond a reasonable doubt" rather than the less onerous "balance of probabilities" standard applicable in civil cases. In the *Canadian Breweries* case, Chief Justice McRuer set out the stringent requirements to be met by the Crown:

> In coming to a conclusion in this case I have to remind myself that the onus is on the Crown from the beginning to the end of the case to prove the accused guilty beyond a reasonable doubt. That onus never shifts and extends to every element that must be established to support the charge. In addition, the rule with respect to circumstantial evidence has some application: Where the guilt of the accused depends on circumstantial evidence *the circumstances beyond a reasonable doubt, must be consistent with the guilt of the accused and, beyond a reasonable doubt, they must be inconsistent with any other rational conclusion.*
>
> There is one other principle of the criminal law to be applied: Where on the construction of a penal statute, there are two reasonable constructions open, one more favourable to the accused than the other, the one most favourable to the accused must be adopted. In other words, the Act I have to construe is a penal statute and it must be construed strictly against the Crown.[51] [Emphasis added.]

These principles are reiterated in the *B.C. Sugar* case, in the *Canadian General Electric* case, and in the *K.C. Irving* case at the trial level.

If detriment could be presumed upon the finding of the requisite control over a business, or class of business, as was contended in the *Eddy Match* case, then the onus would in fact shift during a trial and the Crown would have a much easier task. In the *Irving* case, in the Supreme Court of Canada, Chief Justice Laskin approved the contention that no presumption of detriment arises and detriment or the likelihood of detriment must be proven as a separate element of the offence. Such proof is difficult to establish, for the Crown faces an evidentiary blockade: it cannot bring to bear any evidence which might show the intention of defendants to operate "to the detriment or against the interest of the public". Intent is irrelevant according to the leading authorities. And, since intent is irrelevant, evidence of collateral agreements which might show the intent of the parties is (according to Chief Justice McRuer) also inadmissible.

(f) *Proving detriment*

The cumulative effect of these principles has made it all but impossible to obtain a conviction under Section 33 of the Act. First, detriment must be shown to flow from the operation of a controlled business and any detriment which predated a merger or the formation of a monopoly will not be considered as detriment for purposes of the charge. If the business has operated for some time before a charge is laid or a trial commenced, the Crown faces an established situation and will not have the benefit of comparing it to the situation existing before the events occurred that created the control alleged to be detrimental. Particularly if the controlled business is well established, any change which actually lessened competition could, in all likelihood, be attributed to a number of social or economic factors. It is then most difficult for the Crown to establish, in retrospect, that it was the operation of the monopoly or the

merger which caused the lessening of competition. It may have been due to a natural attrition in business in the area, for example, and any doubt must be construed in favor of the accused.

Second, in order to prove likelihood of detriment which has not yet occurred, the Crown must, of necessity, speculate (even if from an experiential base) as to the likelihood of the operation of the business having a certain effect. It is possible to bring to bear the effects of the operation of similar businesses, in similar situations but, again, the absence of some unique feature which might have given rise to detriment in one situation will be construed in favor of the defendant. Speculation is, of necessity, based on a "balance of probabilities" but the onus on the Crown is to establish proof "beyond a reasonable doubt". It would require that the Crown find an identical situation to the one at hand and that it show detriment flowing from that situation in order to gain a conviction.

Third, the Crown faces a crippling evidentiary restriction in that it is prohibited from adducing evidence as to the intent of the defendants in their operation of the business in question. Evidence of collateral agreements having been declared inadmissible, it is frequently impossible to assess, or even to see, the situation as a whole. For example, if participants in a merger or monopoly have the intention of excluding a competitor from the market and the competitor, or potential competitor, decides not to enter the market, the Court, without the benefit of evidence as to intent, might look at all of the factors which might naturally keep this competitor out of the market. It might thereupon decide that it is not the operation of the accused but some other element which caused the would-be competitor's reluctance. This doubt alone would be enough to defeat a conviction. If the court could be made aware of all the circumstances, findings might differ.

The only solution appears to be that, if there is any evidence at all of any agreement among participants, charges must be laid under both the conspiracy and monopoly sections of the Act if there is to be any hope of a conviction. If only one monopoly is operating (that is, if it is a monopoly, in the dictionary sense of the word) there may well be no conspiracy or agreement and thus the monopoly may carry out an intent to keep out competition with impunity. The conspiracy section will not be applicable and, because the evidence of intent is inadmissible under the monopoly and merger sections, no conviction is likely to be registered there either. Even if, charging under both sections of the Act, all of the relevant evidence may be adduced, hope for conviction remains slim in view of the heavy onus placed on the Crown by the *Aetna Insurance* and *Atlantic Sugar Refineries* cases discussed earlier.

6

Development of the monopoly

R.J. Roberts writes, in his recent book, that, up until the decision of the Supreme Court of Canada in *Irving*, there was good reason to believe that the deliberate elimination of competition would lead to illegality in the formation of a monopoly. This, he states, is the case under American legislation as evidenced by the decision of Judge Learned Hand in *United States* v. *Aluminum Co. of America*.[52] According to Roberts:

> Whether illegality existed in the origin of a monopoly depended upon the examination of its growth. If it grew through the deliberate elimination of competitors, it was illegal. It would not be illegal, however, to have progressed "naturally" to a monopoly position.[53]

He goes on to explain that Judge Learned Hand said that a survivor out of a group of active competitors who has survived due to his superior skill, foresight, and industry should not be penalized as, "the successful competitor, having been urged to compete, must not be turned upon when he wins".[54]

With due respect to Professor Roberts, it was not the *Irving* decision which determined that there would be no distinction in Canadian law between arriving naturally at a monopoly position and deliberately eliminating competition. In the *Breweries* case, Mr. Justice McRuer stated that:

> . . .I do not think it is an offence against the Act for one corporation to acquire the business of another merely because it wishes to extinguish a competitor. It is not the motive of the merger that is important, but what is important is whether it has operated to the detriment or against the interest of the public, or is likely to do so.[55]

This position was adopted by Chief Justice Williams in the *B.C. Sugar* case. The *Irving* case, in not taking into account the manner of the takeover of control of the newspaper industry in New Brunswick, was simply following the established line of Canadian jurisprudence.

7

"Good" monopoly and "bad" monopoly

Roberts observes that Canadian jurisprudence has indicated that public detriment cannot be presumed merely by showing complete control of a business. He asks what other evidence would be necessary to show detriment and concludes that the use by the accused of unfair practices — industrial spying, predatory pricing, use of extravagant channels of distribution causing consumers to bear the increased prices (which practices were shown to have been used in the *Eddy Match* case) — could be considered by the Supreme Court to be evidence of operation, or likely operation, to the detriment of the public.

He then goes on to say that this view would result in a "good" monopoly and "bad" monopoly approach and that the assessment of unfair practices would designate a monopoly as being in the "bad" category. Such an approach, if taken, might not assist the Crown, however, since the accused would be able to present evidence to show that public benefit had resulted from the operation of the monopoly.

Since, under the jurisprudence as it has developed, the Crown is not permitted to lead evidence as to collateral agreements, or as to intent on the part of the accused, it seems likely that certain types of evidence of unfair practices might be excluded as well. Hence, showing that there had been unfair practices — that is, attempting to establish a "bad" monopoly — could itself be highly problematical. As well, an accused under Section 33 is, at present, permitted to lead evidence to show that there has been a collateral public benefit (such as creation of jobs or improvement of facilities) in defending an allegation that he is operating, or is likely to operate, to the detriment or against the interest of the public.

Thus, the precise result of judicial interpretation which Roberts feared now operates in Canadian competition law.

8

The defences

Under the present interpretation of the phrase "to the detriment or against the interest of the public", the accused may avail himself of several defences, even after the requisite control of a class or species of business has been established. These defences may be grouped under three general headings: absence of effect, just cause, and collateral public benefit.

(a) *Absence of effect*

The essence of this defence is that no detriment has occurred as a result of the operation of a controlled business or, alternatively, if detriment has resulted, it is not attributable to the merger or monopoly.

This defence was successfully put forward in the *B.C. Sugar* case. In that case it was held that the price fixing of which the Crown complained had been in operation long before the merger involved took place; therefore, any detriment which occurred had not occurred as a result of the merger itself.

(b) *Just cause*

This defence arises out of the reasoning in *R.* v. *Morrey et al* in which it was established that the interest to be protected includes the interest of the producer in obtaining a fair remuneration for his product.

This was successfully used in the *General Electric* case. In that case the court found that, although there had been price fixing, it could not be said that the prices were unreasonable and that unreasonableness could not be assumed without proof. In the course of making this finding, Mr. Justice Pennell said:

> To my mind, the evidence did not furnish an adequate guide to the ascertainment of the reasonableness of prices charged to different classes of customers. It may well be there was justification for the segmentation of the market and the price discrimination. It may well be that certain accounts were easier to sell, required less servicing or were more stable in their demands. It may well be, on the other hand, that there was no justification for the segmentation of the market and price discrimination. But I cannot speculate. The onus is on the Crown. The short answer is that the Crown has not discharged the onus.[56]

This defence might well be used in future to show that a combination was necessary in order to prevent destructive price slashing or so that the parties involved could avail themselves of certain services or technological advantages.

(c) *Collateral public benefit*

A third defence which may be relied upon in a prosecution under Section 33 is that, as a result of the monopoly or merger, certain public benefits have accrued which may offset any detriment. Mr. Justice Pennell, in the *General Electric* case, opens up this possibility:

> I am of the opinion that the concept of public interest as used in the Act also embraces the principles of a free competitive system. The Court thus has the obligation to weigh the proven benefits against the proven evils to determine if detriment has resulted. To avoid becoming lost in a maze of single instances, there must be a sifting and scrutinizing of the whole of the evidence.[57]

R.J. Roberts questions the wisdom of putting the court in the position of weighing the interest of the public. In his discussion of the question of admitting the defence of public benefit, he says:

> This puts the trial court in the unenviable position of having to rank the various public interests that the Crown claims were injured versus the other public interests claimed by the accused to have been benefited. Trial judges are ill-equipped to do this. The ranking of various public interests is normally a job for the legislature. Further, trial courts are not equipped to judge how well an industry has performed. The courts are not economists. Even an expert review panel of economists would have difficulty determining the existence of public detriment upon such a standard.[58]

Basically, Roberts' view is valid. It is true, however, that, in every prosecution, the courts attempt to weigh public benefits against public detriment. The essential problem is that the economic questions are frequently so complex that a court is hard put to untangle them, particularly since the legislation itself offers little guidance as to what constitutes detriment.

It is true that judges are seldom trained economists, although their prior experience in similar cases may bring to them significant knowledge to aid them in their judgments. It can be argued that it is a great imposition on the courts to expect them to answer questions and sort out priorities which are the proper province of the legislature. Mr. Justice Robichaud in the *Irving* case, quoted the trial judge in the *Howard Smith Paper Mills* case, who said "a court is not trained to act as an arbitrator of economics" and he refused so to act. It appears, however, that this is what the courts are now undertaking. Chief Justice Williams commented in the *B.C. Sugar* case that, although counsel had pointed out to him that he was not sitting as a Royal Commission to investigate the sugar business, that is what he felt he was doing.

Indeed, in this sort of case, the court is almost put into the position of embarking upon an investigation rather than sitting in impartial adjudication, due primarily to the amorphous mass of evidence.

9

Restrictive trade practices reports and Irving

There has been only one prosecution under the Combines Investigation Act which involved the newspaper industry, although the Restrictive Trade Practices Commission (RTPC) has issued three reports concerning newspapers between 1960 and 1981. This section will deal with the *K.C. Irving* trial and appeals, and with the following Commission reports:

(i) The report concerning the production and supply of newspapers in the city of Vancouver and elsewhere in the province of British Columbia, 1960.

(ii) The report on the production, distribution and supply of newspapers in the Sudbury-Copper Cliff area, 1964.

(iii) The report relating to the Thomson Newspapers' acquisition of the Fort William *Times-Journal*, 1965.

(a) *Public interest to be protected*

As stated earlier, the major public interest to be protected under the Combines Investigation Act is the public interest in the benefits of competition and the lowest possible prices. The second and third of the reports mentioned above deal with the question of newspapers from this perspective. Their emphasis is primarily on the financial aspect of the situation. The report concerning the Sudbury area was, in fact, an investigation of an allegation that the Sault to Sudbury Press Limited, a subsidiary of Thomson Newspapers Limited, had launched a weekly paper, the Sudbury *Scene*, expressly to drive a fledgling competitive weekly, the Sudbury *Sun*, out of business. In their investigation, the Restrictive Trade Practices Commission concentrated on the financial management of each paper, comparing advertising costs and the ability of each to attract advertisers.

In the report which relates to the acquisition by Thomson Newspapers Limited of the Fort William *Times-Journal*, the Commission again concentrated on the financial aspect of the lessening of competition, on the lineage cost of advertising, and the choices offered to advertisers.

It is in the investigation into the supply of newspapers in the city of Vancouver that another form of detriment is investigated: the detriment to the public interest in the lessening of diversified reporting of events. The RTPC, in this instance, was investigating the formation of Pacific Press Limited by the Vancouver *Sun* and the Southam company, and the subsequent control by Pacific Press of all three Vancouver papers, the *Herald*, the *Province* and the *Sun*. Pacific Press closed the *Herald*

and converted the *Province* from an evening to a morning paper. Only one evening and one morning paper remained in the city. The partners in Pacific Press had arranged that Southam should control the appointment of the *Province*'s editorial board and the Sun Publishing Company should control the editorial board of the *Sun*. In its conclusions, the Commission commented:

> The conduct of our affairs in a democratic manner both locally and nationally is dependent upon the formation of public opinion. If the public cannot get the significant facts about what is going on, if it cannot get them sorted out in a significant way, if it is not enlightened by discussion that points out the possible consequences of the alternative courses of action before the community, too many opinions will be ill informed and muddled and likely to be temporary and unstable. If well-informed public opinion is an essential of sound public policy then the channels through which information flows to the members of the public have an importance which cannot be overemphasized.[59]

The Commission concluded that public detriment had been suffered but accepted that there was some protection for independent editorial comment because of the arrangement with regard to appointing the editorial boards. Certainly under the Combines Investigation Act, as then interpreted, it would have been doubtful whether a conviction could have been obtained had a charge been laid, since the focus in combines cases at that time was on financial detriment. There had been no evidence of detriment to the financial interests of either advertisers or readers.

The RTPC, in its report, upheld the importance of an "independent" press. Just what constitutes a truly independent press may well be open to argument. However, what the Commission sought to protect was a *diverse* press. The clear question raised is "can a diverse press exist when ownership of all papers is in the hands of one company"? The Commission, while acknowledging that the public might be deprived of some diversity, concluded that the detriment need not be substantial, given that certain conditions applied.[60]

In the case of *R.* v. *K.C. Irving, Ltd. et al*, charges were laid under the merger and monopoly provisions of the Combines Investigation Act when a number of companies owned by members of the Irving family acquired controlling interest in all five of the English-language newspapers in New Brunswick. The acquisitions which prompted the action took place between 1948 and 1971. The case was tried in 1972.

In this case, the Crown, for the first time, put the interest in diversity forward as an interest to be protected and as an interest which could be affected by a lessening of competition. At trial, Crown counsel, in his opening statement, delineated the detriment which he sought to prove in this way:

> My Lord, the detriment which I mentioned earlier, which will be proven in this case, I suggest takes its genesis in that there must be freedom of the press — a freedom — should I say for an opportunity of diversity of ideas. There have been a number of Royal Commissions and reports on the press, and I suggest. . .that one of the outstanding ones and one of the ones that is harked back to time and time again is the United Kingdom Royal Commission on the Press, 1947-49, and they put it this way:
>
> 'The danger in a newspaper monopoly — that is, a newspaper without any competition — is that the monopolist by its selection of the

> news and the manner in which it reports it, and by its commentary on public affairs, is in a position to determine what people shall read about the events and issues of the day, and to exert a strong influence on their opinion. Even if this position is not consciously abused, a paper without competitors may fall below the standards of accuracy and efficiency which competition enforces. What are the safeguards against these dangers where only one provincial daily is published in a particular area, or two dailies are in the same ownership?'[61]

He continued somewhat later in his comments:

> . . .many of the combines cases — as you undoubtedly are aware, and which will be cited to you during the course of argument — deal with economic detriment, and some cases have held that there ought to be an economic detriment. Some cases have held otherwise. In this particular case we say that the issue here is so fundamental — *the necessity for a well-informed public opinion* — that this is the type of detriment which results when a monopoly owns all the daily newspapers in a province, such as happens in New Brunswick.[62] [Emphasis added.]

At trial, no evidence was adduced to show that the financial interest of advertisers or readers had been harmed: in fact, Mr. Justice Robichaud agreed with the defence that no detriment had been suffered with respect to circulation rates, advertising rates and content, or with respect to quality and quantity of news in the New Brunswick papers after the Irving acquisition. Having determined this, Mr. Justice Robichaud declined to determine the effect of the acquisitions upon the diversity of editorial comments or control but, rather, made a presumption of detriment on the basis of the extent of the control.

He adopted the reasoning used in the *Eddy Match* case: that is, once the requisite control has been established, the Crown has proven the elements of the offence, a presumption of detriment arises and the onus then shifts to the accused to rebut the presumption.[63] He appears to have confused the tests applicable to Sections 32 and 33 of the Act, for he said:

> The prime question of the fact that I have to decide is whether or not the result of the alleged *monopoly*. . .of the alleged *combine* — and of the alleged *merger*. . .amount to *undue prevention or lessening of competition in violation of the statute*. . . .[64]

With respect to monopoly and merger, Mr. Justice Robichaud's task was not to determine whether there had been undue lessening of competition but rather if such lessening had been detrimental, or was likely to be detrimental, to the public interest. Thus, by confusing the issue to which his attention was to be directed he presumed detriment. It was on this portion of his judgment that he was overturned on appeal.

As no determination had in fact been made as to the detriment, or the likelihood of detriment, to the editorial aspects of the Irving newspapers, the appeal courts found that the conviction was unsubstantiated. The appeal courts accepted the contention of the companies that, although ownership of all the papers was in one hand, each paper was left completely free to determine editorial policy.

In the course of his judgment on appeal, Mr. Justice Limerick raised the question of whether the interest in diverse points of view is one that can be protected under combines legislation:

> I concur with the finding of the trial judge that a newspaper is an article or commodity which is the subject matter of trade or com-

> merce. It is an article which is bought and sold on the open market and can be the subject matter involved in an offence against The Combines Investigation Act. . .broad enough in its application to prevent monopolies or combines which affect newspapers to the extent that they are the subject matter of trade or commerce. . . .
>
> The Combines Investigation Act, however, when read as a whole applies to commercial transactions, trade and commerce, the buying and selling of such articles as newspapers, paper plates or any other commodity. It does not and was not intended to control or restrict the expression of ideas, editorial comment or editing of news.[65]

In the Supreme Court of Canada, Chief Justice Laskin found this view somewhat incongruous but he left the point open:

> Limerick J.A. made a point, however, in separating the newspaper as a physical object consisting of pages of newsprint, from the expression of ideas therein, its editorial comment and the editing of news; and he held that although as a physical object a newspaper was caught by the combines legislation as being an article of trade or commerce the legislation would not cover the contents as such. . . .
>
> At first blush it seems incongruous that a prohibited merger or monopoly should not include newspapers in respect of their editorial direction but, as I have said, I leave the point open.[66]

(b) *Defences: relevant market and effect*

In the investigations under the Restrictive Trade Practices Commission and in the *Irving* case, the concept of relevant market was signal in determining the question of detriment. In the *B.C. Sugar Refining* case, the relevant market was defined in such a manner that the acquisition was found to have had no effect upon competition within that market. In *B.C. Sugar*, one monopoly operating in one segment of Canada merged with another operating in a different part of Canada. The market of the individual monopoly before acquisition was the relevant market and, therefore, there was, within that market, no change in the competitive situation after the merger. There had been no competition before the event and there was none after. In newspaper proceedings, the result was similar.

The investigation into the Thomson acquisition of the Fort William *Times-Journal* resulted from Thomson Newspapers, which owned the Port Arthur paper, acquiring the Fort William paper. The relevant market for each paper was the city in which it published as neither had had significant circulation in the community of the other. On this basis, the Commission decided that there had been no reduction in competition as there had been no competition before the merger.

In the *Irving* case, the Court of Appeal made a similar finding with respect to New Brunswick. Each paper acquired, with one exception, operated in its own community and had control of the business in that community. As none of the papers competed with each other in the communities in which they operated, there had been no change in the level of competition as a result of the final acquisition of the Fredericton paper.

Mr. Justice Limerick said:

> The statement of the Crown that there is a lessening of competition is not supported by the evidence. There never was nor is there now any competition for markets between the three afternoon newspa-

> pers, the "Daily Gleaner", the "Transcript" and the "Times Globe"; each of these papers has historically served its own limited area of distribution without any material overlap. There is not nor has there ever been any competition between the "Times Globe" and the "Daily Gleaner" on the one hand or the "Moncton Times" on the other. The "Telegraph Journal" served and supplied a different market than the "Daily Gleaner", "Times Globe" and the "Transcript", many people buying both the "Telegraph Journal" and one other paper. No lessening of competition has been established nor any evidence pointed out to this Court or the trial Judge to indicate any such lessening of competition.[67]

It is to be noted that the appeal court was here making the assumption that subsidiaries of a single company compete.

Where competition exists, the defence of "no effect" was also successfully used by the respondents in the investigation by the RTPC into the launching of the Sudbury *Scene*. In its conclusion, the Commission stated that, whether or not the Sudbury *Scene* had been launched, the Sudbury *Sun*, the fledgling weekly, would have been unlikely to survive.[68] Thus, the competition from the Sudbury *Scene* had no effect upon the actual outcome.

(c) *Collateral benefit*

The defence that some benefit not related to competition has been derived from the acquisition or control of a business has been used in two hearings involving newspapers. In the investigation of the acquisition by Thomson of the Fort William *Times-Journal*, the Commission took into account, in considering detriment, the proposition that advantages would be gained by the acquired newspaper. In its conclusion, the Commission remarked:

> The Combines Investigation Act requires that the monopoly power of a single daily in a city like Fort William, whether in the hands of independent ownership or that of a newspaper chain, not be employed to the detriment of the public. A daily which is a member of a chain may derive many technical advantages from its association with professional management supervision, financial stability and news-gathering facilities often not available to a single small newspaper. In the present case the substantial Thomson investment to rebuild the press plant of the *News-Chronicle* resulted in an improvement of the daily.[69]

A like defence was raised in the *Irving* case and found sympathy with the appeal court where Mr. Justice Limerick noted that the Moncton *Times* had greatly increased its circulation due, in part, to the infusion of new capital by the new owners.[70]

Chief Justice Laskin, in the Supreme Court of Canada, referred to these observations made by Mr. Justice Robichaud with respect to the defence of public benefit:

> (1) There has been an increase in circulation of all five daily newspapers;
>
> (2) There has been a continuation in the publication of the two morning papers despite that both are in a loss position;
>
> (3) There has been a continuation of the publication of the monthly *Atlantic Advocate* and also the printing plant in Fred-

ericton despite the fact these two operations have been in a loss position for many years;

(4) There has been a substantial improvement in the facilities and plant of the publishing companies and all have achieved financial stability;

(5) The provincial economy and industry have benefitted since all profits have been re-invested in New Brunswick enterprises.

All the above facts have been substantiated, beyond all reasonable doubt, by the evidence before me at the hearing.[71]

He commented further:

> It is, in my view, impossible to contend in the face of the reasons for judgment at trial and on appeal that there was any proof of detriment in fact. Both sets of reasons are to the contrary. The trial judge noted that the only allegation of actual detriment concerned the French-language daily *L'Evangéline*, and this allegation, as I have already noted, was not substantiated.[72]

(d) *Evidence*

In the *Irving* case, the Crown attempted to prove that there was a likelihood that the operation of all English-language daily newspapers in New Brunswick by one owner would result in detriment to the public. In the presentation of its case, the Crown called upon several expert witnesses to give opinions as to the possible consequences of the single ownership of all of New Brunswick's daily newspapers. In doing so, it fell upon the very problem discussed in this study under the heading "Proving Detriment". All of the Crown's evidence was theoretical; no provable detriment having yet resulted. The witnesses could only extrapolate from other experience and, notwithstanding the eminence of some of these witnesses in the newspaper field, both the appeal court and the Supreme Court of Canada commented adversely on such evidence and, because of its theoretical nature, awarded to it a lesser weight.

10

Adequacy of the Combines Investigation Act

The prior discussion illustrates that the treatment of the newspaper industry under the monopoly and merger provisions of the Combines Investigation Act has not differed from the treatment under the Act of other, less controversial objects of trade or commerce such as scrap (Weidman v. Shragge), matches (Eddy Match Company Limited), paper (Howard Smith Paper Mills) or lamps (Canadian General Electric Company Ltd.). The interest to be protected remains the interest in maintaining competition. As said earlier, a major reason for maintaining competition is to ensure that products reach the public at a reasonable price. Although the same standards have been applied to the newspaper industry as to other objects of trade or commerce under the Act, the principal reason for maintaining competition in the case of newspapers is to offer a diversity of information to the reading public. The difference between these two interests is sufficiently significant to render the Act inadequate to deal with the newspaper industry.

The inadequacy in the monopoly and merger provisions of the Combines Investigation Act applies not only to the newspaper industry. The Canadian courts have not taken a very aggressive attitude toward the prevention of monopoly control and Sections 2 and 33 of the Act have been emasculated by judicial interpretation so that they are now essentially useless in dealing with any industry. Certainly concentration of ownership could not be prevented in an incipient stage and it is doubtful whether complete monopolization of an industry could be prevented.

The monopoly and merger provisions of the Act have been rendered nugatory for all commerce but, given the unique function of the newspaper in our society, the result, in this instance, may be particularly grave. Newspaper publishing is an information business and as such has an extremely important function in society. The newspaper is a window on the world and those who control the perception through that window may control the formation of public opinion. While maintaining competition may be of assistance in protecting the dissemination of information, the Combines Investigation Act is not designed to deal with the problem of a diversified press; as is evident from the judicial decisions, it is really designed to protect the financial interest of the public.

The financial interest of the public is of relatively minor concern in the discussion of ownership concentration in the newspaper industry. Although the newspaper has been held in American jurisprudence to be a class of business with unique characteristics (and this contention was not disputed in the *Irving* case) its cost to advertisers and consumers is kept in line by competition with other media. The price of a

newspaper to the consumer has not been found to be exorbitant in any of the proceedings involving newspapers and advertising rates have not been shown to be unduly high in any case.

It therefore requires a significant departure from the normally adduced evidence to bring into play the question of the public interest in maintaining a diversified press. But the courts are not really in a position to deal with the newspaper in a manner different from that in which they deal with other products under the Act. It is my view that the courts are reluctant to open up the question of detriment so as to include the interests which may be involved in maintaining a secondary interest flowing from competition other than a financial interest. The maintenance of a diversified press is, of course, such a secondary interest.

Mr. Justice Limerick, in the *Irving* case, made an apt comment when he questioned the applicability of the Act to the issue of editorial content. In that case, however, the appeal court of New Brunswick and the Supreme Court of Canada did find that diversity of information had been maintained. In so deciding, they accepted the argument of the accused that economic and editorial control were not necessarily related.

It is my view that the Combines Investigation Act is not designed to take into account the full ideological function of newspapers and that, by dealing with only a segment of the function of the newspaper industry, it opens the door to distortion. The newspaper, although printed on paper and not regulated by any specific legislation (thus making it amenable to the jurisdiction of the Combines Investigation Act) is part of the communications industry along with radio and television. The carrier of information, in the case of radio and television, is the air. It might be said that paper is merely the common carrier of information transmitted by the newspaper and that, by this analogy, the relationship between the newspaper and other broadcast media may be clarified.

As in all cases, the characterization of the problem largely determines its resolution and, in the case of the newspaper, it has been characterized primarily, for the purpose of legislation, as an object of trade or commerce rather than as a component in the communications industry with special interests which must be protected.

The ideological role of television and radio is recognized in the Broadcasting Act. With the knowledge that information is a potent ideological tool, government has formulated a philosophy and a policy which it has applied to these industries in that Act. It has been determined that the communications industry should be "effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social, and economic fabric of Canada" [73] and, as D.H.W. Henry (as he then was) points out, there are important sub-objectives in the Broadcasting Act:

> (a) Freedom to inform, interpret and comment and to stimulate debate: with this is the necessity of editorial independence sufficiently certain to withstand economic and political pressures.
>
> (b) Variety: because of the paramount public interest in the development of informed opinion, diversity assumes an importance in itself. The public is entitled to hear all points of view.
>
> (c) The public is entitled to a high standard of excellence of the product and that it be readily available at a reasonable price.

(d) An economically viable industry which will be, firstly, a commercial base for operations of the particular publication, and secondly, will permit the continued distribution of information, ideas and entertainment, as well as advertising, from that base.[74]

To exclude newspapers from policies which govern the rest of the communications industry is anomalous, as their function is akin to that of television or radio. They provide a variety of information on a large number of subjects on a frequent and regular basis. In effect, they broadcast on paper. To isolate this one segment of the communications industry and group it, for the purpose of legal control, with lamps, matches, and other objects of commerce, cannot help but court an unjust, if not dangerous, result.

Finally, the Combines Investigation Act has jurisdiction to govern relationships between companies or between companies and society at large, but it does not have jurisdiction to investigate the workings of a particular company. Given the interest of the public in high quality information, this may be an important restraint. Although a newspaper company may operate successfully, it may also, because of management priorities, give little attention to the quality of its content. This, in itself, may result in detriment to the interest of the public, although this detriment is beyond the reach of present legislation. The Broadcasting Act gives the Canadian Radio-Television and Telecommunications Commission (CRTC) the right to look into the policies of a particular company in order to ensure that societal objectives are being achieved. No such jurisdiction is available under the Combines Investigation Act.

It may be that not all of these problems can be remedied, even by the removal of the newspaper industry from the mantle of the Combines Investigation Act. Regulation of an industry is not always to the long-term benefit of society and, in some cases, regulation so increases the cost of operating an industry that it ceases to be viable. It must also be realized that, because of the capital investment required to carry on the operation of a newspaper, certain economies of scale must be employed. This having been said, it is still imperative that some legislation be set in place which would allow the newspaper to take its proper position under the law as part of a larger communications industry. If it is characterized as primarily an information industry, then it is more likely that proper standards will be applied when an attempt is made to determine whether or not a particular situation is 'to the detriment or against the interest of the public'.

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