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Newspaper Ownership Concentration
and Freedom of the Press under the
Charter of Rights and Freedoms

by

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A thesis submitted in conformity with the requirements
for the degree of Master of Laws
Graduate Department of the Faculty of Law
University of Toronto

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INK and LIBERTY:
Newspaper Ownership Concentration and Freedom of the Press under the
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Master of Laws, Department of Graduate Studies, Faculty of Law,
University of Toronto, 1998.

**ABSTRACT**

The *Charter of Rights and Freedoms* guarantees "everyone" the right to freedom of the press. The Canadian daily newspaper industry, however, is controlled by a small group of extremely powerful owners, whose control is concentrated to unprecedented levels. For much of the last half of this century, concerned voices have been asserting that this concentration threatens to diminish the vibrancy and diversity of the press, endangering the legitimacy of our democratic systems. This thesis asks whether legislated limits on the concentration of newspaper ownership would be consistent with the *Charter's* guarantee of freedom of the press, and concludes that it would. Emphasizing the intrinsic link between democracy and the functions of a free press, they proposes a scheme of legislation which protects and promotes a full, open, and accurate community of information and opinion, while checking the potential abuses flowing from excessive concentration of ownership
Acknowledgements

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To the memories of MURRAY DEVLIN and MURRAY FRASER, my father and my mentor.
The story of newspapers is the story of man's struggle for freedom and democracy. From the moment the first pamphleteers laid press to paper, newspapers have been the lifeblood of popular sovereignty, circulating through the body-politic the facts, figures, ideas and opinions which allow citizens to participate meaningfully in a self-governing society. But newspapers, like the men and women who turn to their pages for a view of the world around them, have not always been free. Keenly aware of the mass media's potential to empower popular sovereignty, Church and state authorities attempted to quell the nascent movement for religious and political pluralism by silencing the politically threatening voice of the press in its infancy. Not surprisingly, the early shackling of the printed word spawned agitation for freedom of the press, as people began to call for the liberty to speak freely and determine their own political destinies.

The idea of freedom of the press is an old and elusive concept, predating both democracy and substantive freedom of expression, escaping any agreed definition. It is certain, however, that the intimate connection of the press with the cause of liberty gives newspapers a special place in our constitutional order. Along with their younger electronic cousins, radio and television, they

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2 As Dickson J. noted in Gay Alliance Towards Equality v. Vancouver Sun, [1979] 2 S.C.R. 435 at 463 [hereinafter "Gay Alliance"], freedom of the press comprises may issues which have not been settled in any common law jurisdiction.
comprise "The Press" – the only private institution charged with performing a constitutionally ordained and protected function within our system of government. Indeed, the modern institutional media is often spoken of as the "Fourth Estate". Yet, despite the universal acknowledgement of the extremely important role played by the information media in our daily lives, a myriad of questions remain: what does freedom of the press really mean; to whom does it belong; and how does it mediate the complex of conflicting claims for its protection? This thesis seeks to make a modest contribution our understanding of this fundamental and multifaceted right by examining the current controversy over ownership of Canadian newspapers, and suggesting a conceptual framework for approaching this and other freedom of the press problems.

The contemporary newspaper industry offers an ideal crucible for theoretical experimentation. The battle for freedom from the heavy hand of state censorship has largely been won in the west, culminating in Canada with the entrenchment of freedom of the press as a constitutional right of all citizens in the Charter of Rights and Freedoms. Yet, despite the historically unprecedented freedom enjoyed by journalists and the media in contemporary western society, a persistent concern over the performance of the press, and in particular its service of the public interest,

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3 The term “Fourth Estate” originate in the era of the French Revolution to connote any body within society, other than the traditional establishment, which wielded political power. Its application to the press in contemporary parlance reflects the media’s stature as a major player in the political realm.

4 The Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act (U.K.), 1982, c. 11 [hereinafter “Charter”]. Section 2 provides that:

2 Everyone has the following fundamental freedoms:

(b) freedom of though, belief, opinion and expression, including freedom of the press and other media of communication;
In recent years, the once romanticized image of newspapermen as Lou Grantesque men in tattered trench coats and fedoras, nobly battling corrupt politicians and public officials, has given way to a cynical view of the media as peddlers of corporate propaganda and tabloid trash. Many are coming to question how well the owners of the press are serving the public as they pursue their commercial objectives and grow ever larger. Specifically, the trend towards ever increasing concentration of media ownership is seen as a cause for alarm. How, it is asked, can the Charter's idealistic guarantee of freedom of the press to "everyone" be fulfilled, when control of the Canadian press is concentrated in the hands of a few extraordinarily wealthy men? Nowhere is this concentration more acute than in the daily newspaper industry. A single man, Conrad Black, now owns 60 of 105 daily newspapers, comprising 43% of daily circulation. Through recent acquisitions, he now owns every daily newspaper in Newfoundland, Prince Edward Island, and Saskatchewan, and all but three in British Columbia. Black and his two largest rivals control fully three-quarters of all Canadian circulation. In New Brunswick, the powerful Irving family own all of the province's major dailies. Many Canadians believe that this


As of the same date, Hollinger Inc. owned: The [Summerside] Journal-Pioneer, [Chicoutimi] Le Quotidien,
level of concentration is not conducive to a vibrant and diverse press. They believe such high levels of concentration stifle debate, silence alternative viewpoints, and degrade both the quantity and quality of expression available to Canadians. As the Royal Commission on Newspapers stated in its final report:

In a country that has allowed so many of its newspapers to be owned by a few conglomerates, freedom of the press means, in itself, only that enormous influence without responsibility has been conferred on a handful of people.  

In the summer of 1996 the clash of viewpoints over the state of the print press came to a head when Council of Canadians, a public interest group concerned with the well-being of Canada's social and cultural milieu, sought judicial intervention to stem the tide of newspaper amalgamation, asking the Federal Court of Canada to overturn the sale of the Southam Newspaper chain to Conrad Black's parent company, Hollinger Incorporated. The Director of Investigation and Research of the Competition Bureau had sanctioned the transaction after a purely economic analysis of its impacts. The Council of Canadians took issue with this approach, arguing that the guarantee of freedom of the press under the Charter mandates protection of


8 Canada, Report of the Royal Commission on Newspapers (Ottawa: Minister of Supply and Services, 1981) at 217 [hereinafter "Royal Commission on Newspapers"].

9 Council of Canadians et al., v. Director of Investigation and Research, Competition Act et al. (1996), 124 F.T.R. 269 (F.C.T.D.), aff'd (1997), 127 F.T.R. 238 (F.C.A.). The transaction added the 20 Southam newspapers to Hollinger's existing stable of publications, bringing its total at the time to 60, representing 43% of national circulation. The court never ruled on the merits of the case as the Council had missed the statutory limitation period within which to seek review, and was unable to persuade the court to exempt it from the limitation.
editorial freedom and diversity, and the regulation of concentration which may compromise these values. According to the Council’s submissions, the Southam-Hollinger transaction, “threaten[ed] to undermine the basic right of the Canadian people both to speak and be heard and that this diminishing of freedom of expression in Canada directly undermines the effectiveness of democracy itself.”  

Counsel for Hollinger trenchantly rejected the notion that our constitutional protection of freedom of the press could countenance state interference in the sale of a private newspaper. They countered that any government interference in the ownership of newspapers would constitute, “an unprecedented and monstrous interference by the state in the freedom of the press and in the ability of citizens to be involved in newspaper publishing.” Overstated as these arguments are, they constructively highlight the tension in our understanding of freedom of the press. Two sides in a litigious dispute both claimed the support of freedom of the press for diametrically opposed positions.

While it may appear incongruous that a right of such long-standing could spark so heated a debate over its meaning, this conflict is a function of the continually evolving relationship between the government, the press and the people. The Charter of Rights and Freedoms has come into the lives of Canadians at a time when traditional concepts of the media, information, and communication are giving way to a new technologically driven reality. Competing newspapers

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10 The Council of Canadians et al. v. Director of Investigation and Research (Competition Act) and Hollinger Inc., Federal Court File No. T-2096-96, Affidavit of Maude Barlow, at 6.


12 In Scrambling for Protection: The New Media and the First Amendment (Pittsburgh: University of Pittsburgh Press, 1994), Patrick Garry argues that as modes and means of communication proliferate and diversify, a broader understanding of freedom of the press, and of “the press” itself, will be required to create a coherent regulatory framework and further the underlying values of free speech and press. See also I. de Sola Pool, Technologies of Freedom: On Free speech in an Electronic Age (Cambridge: Belknap Press, 1983).
no longer abound. Television signals are no longer scarce or novel. The Internet and other digital computer networks, all but unheard of a few years ago, have emerged as a significant mode of business and personal communication. Modern technologies of communication allow the trafficking of information and ideas across geographic and political boundaries with virtual impunity. In this climate of information abundance, freedom of the press is no longer a simple cry for liberty from state interference. In the era when anyone "with a press and a shirt-tail full of type" could put out a newspaper or pamphlet and be heard by his political community, a simple libertarian account of press freedom was adequate. Today, however, all the world is our village, yet the means of mass communication are available only to those with millions of dollars. Therefore, if freedom of the press means nothing more than the right of those with a press to print what they wish, it has become a hollow right for the vast majority of citizens.

Mindful of the reality, many contemporary conceptions of press freedom embrace the premise that government is not always the enemy of expression, as the state can act as the guarantor of expressive diversity against homogenizing or monopolistic tendencies of a laisser-faire system.  

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13 In 1900, there were a total of 121 daily newspapers, of which 66 faced direct daily competition. As of January 1998, there are 105 daily newspapers, of which only 9 are in truly competitive markets (ie: not including cities in which the same owners operate more than 1 newspaper). W. Kesterton, A History of Journalism in Canada (Toronto: McClelland & Stewart, 1967) at 73.


In the heavily regulated realm of broadcasting, this notion is far from radical. In fact, most nations have statutory agencies charged with ensuring that minority opinions and unpopular or unusual views are not drowned out by prevailing current of commercial forces. Newspapers are a different story. Despite periodic expressions of public concern over the effects of concentration and calls for legislative intervention, newspapers in both Canada and the United States have escaped any form of content or ownership regulation. The traditional libertarian approach to freedom of speech and the press has held sway in relation to newspapers, maintaining that a completely free and self-regulating market, driven by consumer choice, is an ideal model, providing an internal cure for any ills of an inadequate press. This view has, however, been largely discredited in the current environment, given the practical impossibility of existing as an informed citizen without reference to the mass media. As early as 1947, the U.S. Commission on a Free and Responsible Press noted that:

\[\text{since the consumer is no longer free not to consume, and can get what he requires only through existing press organs, protection of the freedom of the issuer is no longer sufficient to protect automatically either the consumer or the community. The general policy of laissez faire in this field must be reconsidered.}\]

Thus, the language of libertarian laissez-faire is being dispatched from contemporary media discourse, most eloquently by Jerome Barron, who has written that, "[o]ur constitutional theory is in the grip of a romantic conception of free expression, a belief that the 'marketplace of ideas'
is freely accessible. But if there were ever a self-operating marketplace of ideas, it has long ceased to exist."  

As a result, the recently wave of acquisitions which has taken levels of concentration in the Canadian newspapers industry to globally unprecedented levels is both a source of significant concern for the health of our democratic institutions, and an invitation to re-examine our understanding of press freedom and the role of government in mediating the marketplace of ideas.

The purpose of this thesis is to inquire whether legislated limits on the concentration of newspaper ownership would be consistent with the guarantee of freedom of the press enshrined in the Charter of Rights and Freedoms. The essential form of ownership controls would be the creation of a Press Ownership Review Tribunal charged with monitoring transactions which increase corporate concentration, and empowered to prevent any transactions which it deems contrary to the public interest. The basic rules of the ownership regulation scheme would establish a threshold limit on regional and national concentration, in terms of percentage of circulation and percentage of publication, beyond which any expansion by a publishing interest would be subject to review by the Press Ownership Review Tribunal. There would be no prohibitions whatsoever on the start-up of new publications, although existing competition laws in regards to predatory and anti-competitive practices would be very strictly enforced.

The prime directive of the the Tribunal would be to examine whether the transfer may be expected to operate against the public interest, by reducing the quality, breath, and diversity of

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expression published. The focus of the review process would not be to restrict ownership concentration according to purely numerical quotas, but to consider the implications of any concentration increase on the quality of the news product reaching Canadian readers. As will be discussed in the following chapters, simple arbitrary limits on ownership are a crude instrument, unsuited for use in the complex task of promoting quality and diversity in the community of information and opinion which citizens depend upon. Concentration per se is not the greatest threat to the values of press freedom, publishers who places profit or politics before editorial excellence are. Although examination of quality is necessarily less content-neutral than a quota system, it will be argued that concerns arising from ownership concentration can only truly be addressed through a scheme which specifically evaluates the content and editorial behaviour of the publishers who seek to hold dominant position in the Canadian newspaper industry.

In evaluating the past performance of potential purchasers, the Tribunal would be directed to consider their record of expenditures on newsroom expenses, investment in editorial content in comparison to return-on-investment, the proportion of self-generated coverage versus wire copy, the absolute and relative (to size) amount of editorial content, the balance of editorial opinion expressed by the newspaper, and the depth, balance, and accuracy of news stories. The Tribunal would be authorized to grant exemptions in the case of financially troubled newspapers which might fold in the absence of a bail-out, when no other suitable purchaser had come forward.

It is imperative, however, that any scheme of regulation not only allows, but indeed encourages,

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any development which promises to augment the quality or diversity of the press. In short, the terms of the Tribunal’s operations must be sufficiently sensitive and nuanced to encompass the subtleties of the newspaper industry and yield results which reflects the goals of quality, diversity and vibrancy of the press. At the same time, any legislation to regulate ownership and control must be drawn so as not to interfere with the content of the press, or with the liberty of individuals to publish their views. For the sake of this discussion, and mindful that the Supreme Court has cautioned against undertaking rights-analysis in a factual vacuum, the following draft legislation is offered as a model upon which a hypothetical Charter analysis may be conducted. It draws upon numerous existing or proposed models of legislation, which are discussed in more detail in the course of the analysis, and attempts to reconcile concerns over the continued freedom of the press from political interference with the emerging imperative of preventing private interests from buying their way into a position of control from which they could subvert the freedom they so loudly assert.

After a brief consideration of the Parliament’s constitutional competence, under the federal division of powers, to enact legislation of this sort, the balance of this thesis will be devoted to examining how such legislation would fare in the crucible of Charter scrutiny. Chapter 1 develops the framework of the analysis. Using the model of the Supreme Court’s decision in R. v. Keegstra, it details the Supreme Court’s approach to both section 2(b) and section 1 in the context of controversial and political sensitive expression, and provides the blue-print for the

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substantive examination of the proposed restriction on the freedom of newspaper publishers to expand their influence in the Canadian marketplace of ideas. As the idea of freedom of the press is inextricably linked to the birth and development of democracy, and this has been recognized by Canadian courts since well before the entrenchment of the Charter, Chapter 2 provides an historical account of freedom of the press, its origins, functions, and abiding role in democratic society. Chapter 3 moves the analysis into the context of the Charter, and asks if, and how, legislation such as the Canadian Newspaper Ownership Act would infringe section 2(b)'s guarantee of freedom of expression and the press. Since it is clear that ownership regulation would be found to infringe the rights of publishers and the public alike, Chapter 4 undertakes the task of examining whether this infringement could be justified, with each of its sections detailing one step in the section 1 analysis.
An Act Respecting the Ownership of Newspapers in Canada

Short title

1. This act may be cited as the Canadian Newspaper Ownership Act.

INTERPRETATION

2. In this Act,

“average daily circulation” means the total number of copies published by a newspaper in a one month period, divided by the number of publication days.

“newspaper” means any publication containing both public news, or any comment thereon, and commercial advertising, published periodically at intervals not exceeding seven days;

“newspaper proprietor” includes (in addition to an actual proprietor of a newspaper) any person having a controlling interest in a body corporate which is a newspaper proprietor, and any body corporate in which a newspaper proprietor has a controlling interest.

“press transaction” includes any purchase, sale or exchange of securities, merger, amalgamation, or other arrangement of corporate affairs which affects the ownership or control of one or more newspapers;

“subject newspapers” means those newspapers over which control is to change hands by virtue of press transaction;

“Tribunal” means the Press Ownership Review Tribunal established by section 3;

“working journalist” means an individual who is directly engaged in the production of a newspaper’s editorial content.

PRESS OWNERSHIP REVIEW TRIBUNAL

3. There is hereby established a Tribunal to be known as the Press Ownership Review Tribunal, which is charged with the administration of this Act.

4. The Tribunal shall consists of three Members appointed by the Governor in Council.

5. (1) The Governor in Council must be satisfied that at least one of the three Members is qualified for appointment by virtue of his or her knowledge of newspaper publishing.

    (2) No person who has,

        (a) held elected political office, or been a candidate for elected political office;

        (b) held an elected or appointed position, or been a candidate for an elected or appointed position, within a provincially or federally registered political party:

        (c) held paid employment with a provincially or federally registered political party; or

        (d) held paid employment with any newspaper proprietor, other than as a working journalist, within the preceding two years shall be eligible for appointment to the Tribunal.

6. No member of the Tribunal who has participated in a decision on an application for authorization pursuant to section 11 may do any of the things listed in section 5(2)(a-d) within the two years immediately following his or her ceasing to be member.

7. Members may hold other appointments or paid employment, except for those positions and activities enumerated in section 5(2)(a-d).

8. (1) Members shall be appointed for a period of no less than three and no more than seven years.

    (2) Members’ remuneration shall be fixed at the time of their appointment, and not subject to change during their term.

    (3) Members may only be removed by order of a Justice of the Federal Court, and only for

        (a) breaches of this Act, or

        (b) conduct, including statements, which calls into question the political neutrality of the Tribunal.
PROHIBITION

9. (1) No newspaper proprietor shall enter into a press transaction if the proposed purchaser already owns or controls:

(a) 25% of daily circulation nationally, or
(b) 40% of daily circulation in the province where one or more of the subject newspapers are located; and

has not received an authorization from the Press Ownership Review Tribunal.

10. Press transactions occurring without authorization from the Press Ownership Review Tribunal pursuant to section 11 are void.

AUTHORIZATION

11. (1) The Press Ownership Review Tribunal may, upon application from a person who wishes to engage in a press transaction prohibited by section 9, authorize that transaction if it deems the transaction to be in the public interest.

GUIDING PRINCIPLES

12. In determining the public interest, the Press Ownership Review Tribunal shall be guided by the principle that:

(1) freedom of the press and the public interest are best served by a free, open, diverse and comprehensive community of information and opinion, and that

(2) the concentration of newspaper ownership is prima facie against the public interest.

13. (1) In determining the public interest, the Press Ownership Review Tribunal shall have regard to,

(a) whether any offers to purchase, other than that of the applicant, have been made to acquire control of the subject newspaper(s):

(b) the likely effect on the circulation and commercial viability of the subject newspaper(s) if the proposed transaction is refused authorization;

(c) the likely impact on the editorial quality of the subject newspaper(s), in terms of the applicant’s likely conduct in relation to,

(i) expenditure on editorial expenses,

(ii) commitment to journalistic freedom,

(iii) coverage of local issues,

(iv) the diversity of political viewpoints expressed in editorial content,

(v) the diversity of sources represented in news stories,

(vi) the extent of the applicant’s existing newspaper holdings,

(vii) the applicant’s other commercial interests.

14. In determining whether a proposed press transaction is in the public interest, the Press Ownership Review Tribunal shall not have regard to the specific political or policy viewpoints espoused by the newspaper, its present proprietors, or the applicant.

15. Where the Tribunal has reason to believe that a person is capable of furnishing information, producing documents or giving evidence relating to a matter that is relevant to the exercise of the Tribunal’s discretion under section 11, the Tribunal may, by notice in writing served on that person, require that person

(1) to furnish to the Tribunal, by writing signed by that person, or in the case of a body corporate by a competent officer of that body corporate, within the time and in the manner specific in the notice, any such information:

(2) to produce any such document; or

(3) to appear before the Tribunal to give evidence and produce documents under oath or affirmation.

16. Any person may make an oral or written submission to the Tribunal relevant to the Tribunal’s inquiry regarding an application for an authorization.

17. Tribunal hearings shall be held in public.
Federal Competence to Legislate in the Area of Newspaper Ownership

The consensus has always been that Parliament has the power to legislate ownership controls over the newspaper ownership. Neither the Kent Royal Commission nor the Davey Committee entertained any doubts about the ability of Parliament to enact legislation to safeguard freedom of the press and public discussion from the threats posed by excessive concentration, and the authorities support this conclusion. In the *Alberta Press Reference*, the Supreme Court clearly stated that, "the Parliament of Canada possesses the authority to legislate for the protection of this right," namely freedom of the press. Although the precise source of federal jurisdiction over newspaper ownership is the subject of some debate, it is to be found in one of three heads of federal jurisdiction: the general trade and commerce power, the criminal law power, or the residual Peace, Order and Good Government power ["P.O.G.G."].

Regulation specific to newspapers would likely not be sustainable as an exercise of Parliament’s general trade and commerce power. Mindful of the risk of excessive encroachment into provincial jurisdiction over property and civil rights, the Supreme Court has circumscribed federal exercise of this power by stipulating that, in order to be valid, enactments under this head of

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24 *Constitution Act, 1867* (U.K.). 30 & 31 Vict., c.3, ss. 91(2), 91(27) & 91, respectively.
authority must be concerned with "trade as a whole rather than with a particular industry". It would be difficult to defend the addition of the examination of any transaction's impact on editorial diversity and free expression to the mandate of the Competition Tribunal as anything other than an a colourable attempt to regulate the newspaper industry.

While the protection of the integrity and independence of our democratic institutions has always been a fundamental concern of the criminal law, the degree of discretion which must be granted to a review Tribunal to optimally protect the public interest in newspapers would render any legislation in this area primarily regulatory in nature, and thus ultra vires the criminal law. As the Davey Report noted, a complex regulatory framework, vesting substantial discretion in an administrative tribunal, pushes the bounds to what is normally accepted as a valid criminal law enactment. Notwithstanding the bounds the which the reach criminal law power has been stretched by recent decisions, it is unlikely that the sort of review process contemplated by this analysis could be sustained as a proper exercise of the criminal law power.

The most coherent and convincing view is that federal competence to enact newspaper ownership controls would arise from the P.O.G.G. power. As most recently formulated by the Supreme


26 Examples of Criminal Code offences directly aimed at protecting the institutions of democracy include the prohibitions against damaging election documents (section 377.1(c) & (d), intimidating Parliament or a Legislature (Section 51), the general contempt power to maintain Order in Court (section 484), and the seditious promotion of revolutionary violence (section 61).

27 Report of the Senate Special Committee on Mass Media, supra note 22, at 74-75.

Court, P.O.G.G. affords Parliament jurisdiction over any matter of national dimension, which possess a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern, and is beyond the ability of individual provinces to effectively control.29 Newspapers are truly a matter of national concern. They form an integral part of the nation’s information matrix, and remain a key forum of communication through which citizens obtain and exchange the information, opinions and ideas which we require. The quality of any given newspaper impacts not only its local readership, but citizens across the country. The image a newspaper portrays of its community, what Davey terms the “Uncertain Mirror,” is often the only reflection seen by Canadians elsewhere.30 Similarly, if a dominant newspaper chain were to print the same opinions by the same writers and the same columnists in each of their publications, the ensuing wave of homogeneity would touch virtually every province and territory. When the impact of newspapers on the national consciousness, public opinion, and the political agenda are factored in, one can readily see that individual newspapers are not so much isolated instruments of information and opinion but rather integral components of complexly inter-related media infrastructure - one that is functionally distinct and indivisible.31 Moreover, modern communication transcends traditional legal boundaries. As Brossard J.A. of the Quebec Court of Appeal recognized in R.J.R.- MacDonald, “the fact is that communications, whether radio or television broadcasting, or even newspaper publishing, do not recognize frontiers, still less


30 Newspapers rely heavily on wire-service coverage for material on news events in other regions of the country. Since the C.P. (Canadian Press) wire service is a member co-operative, it in turn relies upon local newspapers to file their stories and photographs. Therefore, the tone and quality of local coverage, especially in smaller centres, has the potential to colour the entire nation’s perceptions of the region; Royal Commission on Newspapers, supra note 8 at 119ff.

provincial borders." The effects of media concentration wrought by the multi-national conglomerates which dominate the news industry are well beyond the ability of the individual provinces to control. If the vital role of newspapers in informing the Canadian people, and in providing the principal forum for the exchange of opinions and ideas, is accepted, then the national importance of protecting their integrity and independence is obvious, and the case for federal legislative competence is clearly made out.\textsuperscript{33}

The chequered legacy of suppression which the print press has endured, combined with the deeply engrained traditions of editorial autonomy and entrepreneurial verve in the newspaper industry, would make any government foray into the realm of newspaper regulation a politically loaded venture, certain to meet with heated words and hearty opposition. Addressing the Kent Commission, an indignant Arthur Irving expressed the passion which many owners feel for their newspapers: "We like the Saint John paper...I own 40 per cent and I intend to keep it forever...it is our privilege to own it, and nobody in this God-given room is going to take it away from us."\textsuperscript{34}

However, if the government ever moved to divest or limit the publishing empires of powerful newspaper owners, it is not from the Almighty, but rather from section 2(b) of the Charter that the press barons would seek intercession.


\textsuperscript{33} See also A. Singer, "Regulation of Newspaper Ownership: Nothing to Lose But Our Chains" (1986) 24 U.W.O.L. Rev. 103, where the author concludes that Canadian Daily Newspaper Act would have been valid under either the criminal law or the P.O.G.G. power.

\textsuperscript{34} Royal Commission on Newspapers, supra note 8 at 95.
CHAPTER 1

Defining the Framework of Analysis

The Charter is a young document, still in the infancy of its interpretation compared to the venerable American Bill of Rights. As such, the Supreme Court has not yet had the opportunity of developing a large body of case law on freedom of the press, so no precise precedent for the adjudication of this case is available. Nonetheless, the court’s analysis of Canada’s hate-propaganda laws in R. v. Keegstra provides a particularly useful framework for predicting the fate of legislation such as the Canadian Newspaper Ownership Act under Charter scrutiny. This chapter will trace the path of reasoning followed by the court in that case, both for a synopsis of the current state of freedom of expression jurisprudence, and for the step-by-step model of analysis which it affords. Although hate propaganda and newspaper publishing are vastly dissimilar forms of expression, this case provides an ideal illustration of the approach employed by the Supreme Court in adjudicating difficult freedom of expression cases, where fundamental values come into conflict. Moreover, both instances concern exercises of expression rights which are thought to specifically undermine the values of freedom of expression and the press itself, and consequently threaten the core workings of a democratic society. They both involve the consideration of an extensively documented public study, both in Canada and abroad, into the deleterious effects of the expression, and both prompted significantly conflicting responses from judges and lay-persons alike; as between fair-minded observers, the criminalization of hate-propaganda and the curbing of concentration in newspaper ownership can either be seen as essential to the proper functioning of a free and democratic society, or anathematic to it. Therefore, the decision in Keegstra is of particular interest for the insights it affords into freedom
of expression analysis under the Charter, the relationship between section 2(b) and section 1 justification, and the resolution of socially and historically contentious social debates over the proper protection of expression and freedom.

The Keegstra decision

James Keegstra made an ignoble career of teaching anti-Semitic doctrines to his rural grade-school students. He was charged and convicted of wilfully promoting hatred of a group identifiable by race, colour, ethnic origin or religion, contrary to section 319(2) of the Criminal Code. He challenged the constitutionality of the provision, and successfully convinced the Alberta Court of Appeal that the criminalization of hate-speech violated freedom of expression. On further appeal the Supreme Court agreed that the law infringed section 2(b), but held - by a four to three majority - that the infringement was justifiable under section 1. Although Chief Justice Lamer and Justice McLachlan reached diametrically opposite conclusions in Keegstra, they followed much the same tack in their examination of the issues. The first question faced by the court in any such case is whether the expression of intentionally hatred-promoting thoughts and ideas is protected under section 2(b), and both justices commenced their judgements with a discussion of the scope and meaning of freedom of the press under the Charter. Justice McLachlan in particular chose to begin her dissenting analysis with an extensive review of the philosophical and historical underpinnings of freedom of expression.35 Indeed, as will be discussed at greater length below, few rights have a longer and more colourful history than

freedom of expression and the press, and an understanding of that history is indispensable to the proper interpretation of section 2(b) in the contemporary context. As the Supreme Court noted in its first case involving freedom of expression under the Charter, *R.W.D.S.U. v. Dolphin Delivery Ltd.*, freedom of expression is not “a creature of the Charter,” but rather “one of the fundamental concepts that has formed the basis of the historical development of the political, social, and educational institutions of western society.”36 From this basis in history, the court has expanded the notional breadth of freedom of expression well beyond the narrow and technical protection they could afford it under the common law through the mechanisms of federalism and the implied bill of rights.37

*The scope of section 2(b)*

One of the court’s key tasks in *Keegstra* was to determine whether the scope of freedom of expression under the Charter extended to hate speech. The starting point of that analysis, as with almost all section 2(b) cases to date, was with *Irwin Toy v. Quebec (Attorney-General)*,38 which has become the interpretative cornerstone for Charter expression claims. We must, therefore, detour to an examination of the tests established in *Irwin Toy* to understand the way in which speech or conduct come to be protected by the Charter, and to assess what is required of a rights-claimant to make-out a *prima facie* infringement of his or her section 2(b) rights.

Whereas courts previously attempted the piecemeal protection of civil liberties, the advent of the

36 *Dolphin Delivery*, ibid. at 183.


Charter introduced a comprehensive system of freedom of expression to Canada which protects the entire expressive process, from the inception of an idea, through to its publication to the world at large. In the words of Chief Justice Dickson, the introduction of section 2(b) into the Charter brought "not only increased [freedom of expression's] importance, but also a more careful and generous study of the values informing the freedom." Early in its efforts at interpreting section 2(b) of the Charter, perhaps too early in the view of some critics, the Supreme Court attempted to articulate a comprehensive approach to freedom of expression claims. Coming in the unlikely guise of a large corporation's challenge to Quebec's consumer protection legislation banning advertising aimed at persons under the age of thirteen, Irwin Toy v. Quebec (Attorney-General) has since become synonymous with freedom of expression adjudication under the Charter. The initial task of the court in Irwin Toy was to define the scope of section 2(b), to determine what manner of human conduct would attract the protection of the Charter. In answering this question, the court chose to forge a different path from that trod by the American Supreme Court. Our southern neighbours being blessed, or perhaps burdened, with a constitutional guarantee of freedom of speech which admits of no exceptions, have developed a jurisprudence which, on its face, allows for socially necessary infringements of free expression by categorically excluding certain forms and means of expression from the scope of the word

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39 Keegstra, supra note 21 at 727.

40 See M.D. Lepofsky, "The Supreme Court's Approach to Freedom of Expression - Irwin Toy and the Illusion of Section 2(b) Liberalism" (1993), 3 N.J.C.L. 37.

41 Irwin Toy, supra note 38.

42 The First Amendment, U.S. Const. amend 1, states that: "Congress shall make no law...abridging the freedoms, or of the press..."
“speech”. 43

In light of the internal limitation on rights contemplated by section 1 of the Charter, the Canadian Supreme Court had no need to resort to such interpretive maneuvering, and was free to cast the net of section 2(b) as widely as it desired. Consequently, in Irwin Toy section 2(b)'s protection was deemed to encompass any activity “which conveys or attempts to convey meaning,” 44 thus applying to a range of behaviour almost as vastly diverse as human existence and interaction itself. To date, only physical violence has been excluded from section 2(b)'s scope. Any other expressive conduct including even the spreading of deliberate falsehoods, 45 qualifies for prima facie protection under the Charter.

In line with this expansive understanding of expression, the protection of section 2(b) inures to all phases of expression, including its reproduction and distribution. 46 It has been found to apply to actions as disparate as advertising a cobbler's shop, painting a house, or sitting quietly observing a court in session. 47 It includes the right to gather information and opinions on matters of interest for yourself and on behalf of others, and the right to transmit and receive that material

44 Irwin Toy, supra note 38 at 969.
uncensored; the substantive right to say whatever one wishes in response, and the right to publish one’s expression in the marketplace of ideas through the technologies of communication. It also includes the right to chose one’s form and forum of expression, and ultimately, the right to say nothing at all.

The broad scope of this right is supported by an equally broad statement of principle outlining the values which the rights of s. 2(b) are intended to protect. Adopting the theoretical framework for freedom of expression articulated by preeminent American First Amendment scholar Thomas Emerson, the Supreme Court has held that the Charter’s commitment to freedom of expression stems from the belief that, “seeking and attaining the truth is an inherently good activity; participation in social and political decision making is to be fostered and encouraged; and [that] the diversity in the forms of individual self-fulfilment and flourishing ought to be cultivated...” These three central values define the core of freedom of expression. As Chief Justice Dickson emphasized in Keegstra, however, the court has not deviated from “stressing as primary the

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53 Irwin Toy, supra note 38 at 976. For the seminal discussion of free expression’s functions and justifications within society, see T. Emerson, Towards a General Theory of the First Amendment (New York: Random House, 1966), especially at 3-7.
The test for section 2(b) infringement

Under the two-step analysis developed in Irwin Toy to determine whether freedom of expression has been infringed, the rights-claimant must first demonstrate that the activity which the government is interfering with attempts to convey meaning. If the activity in question falls within the protected sphere, he or she must then persuade the court that either “the purpose or the effect of the government action in issue was to restrict freedom of expression.” If it does, then section 2(b) has been breached. If, on the other hand, the measure in question merely intends to control the harmful consequences of expression and does not seek to suppress either the content or the influence of the meaning being conveyed, the rights-claimant may still attract section 2(b)’s protection by demonstrating that the meaning he or she is seeking to convey, “relates to the pursuit of truth, participation in the community, or individual self-fulfilment and human flourishing.”

In the case of hate-speech, the first criterion was easily satisfied, as hate-mongers undeniably seek to convey messages and meanings disparaging the objects of their enmity. There was equally little doubt that the government sought to prevent those thoughts and ideas from being expressed, by means of the criminal prohibitions imposed by section 319(2). The proponents of restrictions

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54 Keegstra, supra note 21 at 727.

55 Irwin Toy, supra note 38 at 978.

56 Irwin Toy, ibid. at 979. This bifurcation of section 2(b) analysis is effectively criticised by David Lepofsky as illogical unproductive, “The Supreme Court’s Approach to Freedom of Expression - Irwin Toy and the Illusion of Section 2(b) Liberalism,” supra note 40.
on hate-speech nevertheless argued vigorously that this virulent form of expression furthered neither section 2(b)’s democratic commitment, nor any other of the Charter’s values, and consequently had no claim to any protection under the auspices of freedom of expression. Although the majority accepted the premises of this proposition, the court was united in rejecting the introduction of any internal limitations on the scope of freedom of expression at the initial stage of section 2(b) analysis. Further entrenching a bifurcated approach to the determination of expression cases, the court stated that:

[the] questions of whether a particular form or act of expression is within the ambit of the interests protected by the values of freedom of expression and the question whether that form or act of expression, in the final analysis, deserves protection from interference under the structure of the Canadian Charter of Rights and Freedoms...are two distinct questions and call for two distinct analytical processes.57

The court’s unequivocal message was that all factors mitigating in favour of, or against, the ultimate protection of a certain form of expression will only be considered as a part of the section 1 analysis. This staunch refusal to create categorical exclusions from the realm of protected expression, which has been a technique resorted to by the U.S. Supreme Court, was re-affirmed shortly after the Keegstra decision, when the Supreme Court held that even the most violent and degrading forms of pornography were entitled to at least nominal protection.58 Irrespective of the merits or doctrinal defensibility of section 2(b)’s near-boundless breadth,59 what emerges as

57 Keegstra, supra note 21 at 727, citing Ford v. Quebec (Attorney-General), supra note 47 at 765-66.

58 Butler, supra note 49.

59 Some critics have even noted that the court’s arbitrary and obiter exclusion of violence from the prima facie reach of section 2(b) is inconsistent with the substance of the court’s approach, and is either emblematic of the court’s visceral recognition of their error in expanding the definition of expression so far, or the meaninglessness of section 2(b) as it is presently interpreted. See Lepofsky, supra note 40, and R. Moon, “The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication” (1995) 45 U. T.L.J. 419 at 421.
undisputably clear is the Supreme Court's commitment to carefully review any and all state-imposed restrictions on the substance of the thoughts and ideas which individuals seek to convey to one another.

With the idea of any premature attenuation of freedom of expression firmly repudiated, a heightened importance falls upon on the second stage of Charter analysis, the justification process. Under the Charter of Rights and Freedoms, the balancing of competing social values and interests takes place under the auspices of section 1, which prescribes that rights may only be abrogated by laws which are "demonstrably justifiable in a free and democratic society." To meet this test, the government must establish, on balance of probabilities, that the objective of the law under review is of sufficient importance to override a Charter right, and that the degree to which rights are infringed is proportional to the good achieved. To show proportionality, the government must demonstrate, in sequence, that the legislation is rationally connected to the identified purpose, that it infringes Charter rights as little as is reasonably possible, and that its overall salutary effects outweigh its detriments.

The Supreme Court's vision of section 1

In Keegstra, Chief Justice Dickson began this process with a series of general observations on the nature of section 1, culminating with the assertion that "in the words of section 1 are brought

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60 Charter section 1, supra note 4.

61 R.J.R.-MacDonald, supra note 28 at 353.

together the fundamental values and aspirations of Canadian society." By this he was referring to section 1's dual nature - both deeding us the realm of freedom described in the Charter, and simultaneously circumscribing the run of liberty by staking the limits beyond which it will not be allowed to trespass upon the well-being of others or of ordered society. Interpreting the words of section 1, Chief Justice Dickson re-iterated his original definition of Canadian values articulated in R. v. Oakes.

The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and in social and political institutions which enhance the participation of individuals and groups in society.

This characterization of the Charter's social vision shapes and informs the entire body of Charter jurisprudence, and its strong emphasis on equality, accommodation, and group identity firmly steers interpretation towards concern for the broader societal impacts and goals of impugned legislation, and away from claims predicated on a strongly individualistic conception of rights. Indeed, the spirit of the Charter is well-summed by Irvin Cotler in his description of it as a "manifesto for minority rights." The pluralistic and communitarian tone of the Chief Justice's words mark a resolute divorce from the individualistic ethic and innate skepticism of government which are embodied in the American First Amendment, and an embrace of the possibility that

63 Keegstra, supra note 21 at 735-736.

64 R. v. Oakes, supra note 62 at 136, per Dickson C.J.C.

society may be bettered by a careful management of the marketplace of ideas. His hesitancy to wholeheartedly endorse the classic liberal conception of ideas engaging in free and open combat is made explicit when he states: "Indeed expression can be used to the detriment of our search for truth; the state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas."66

This invitation for a governmental role in regulation of the marketplace of expression stands in marked contrast to the comparatively libertarian conception of expression-rights articulate by Justice McLachlan. Drawing heavily from the work of Fred Schauer,67 she writes that "one need only look to societies where free expression has been curtailed to see the adverse effects both on truth and on human creativity."68 Placing tremendous importance on the importance of the unfettered exchange of ideas, even in fervent and heated clashes, she expresses greater reservations as to the wisdom of empowering government to tamper with freedom of expression. "That is not to say, " she writes, "that it is always illegitimate for government to curtail expression, but government attempts to do so must prima facie be viewed with suspicion."69 It is with the backdrop of this divide over the role of government in the regulation of expression that the Supreme Court in *Keegstra* undertook the section 1 analysis.

**Pressing and substantial purpose**

66 *Keegstra, supra* note 21 at Alta. L.R. 763.


68 *Keegstra, supra* note 21 at 803.

The first step in section 1 analysis is the task of identifying the purpose of the impugned legislation and assessing whether it presents a sufficiently pressing and substantial to warrant overriding a *Charter* right. Inherent in the idea of constitutionally entrenching civil liberties is the notion that certain rights and freedoms are of superordinate importance to the workings of a free, just, and democratic society. No government can, by means of simple legislation, re-order the priorities laid down by the *Charter*. It must at times, however, mediate the inevitable conflicts and tensions which arise between rights as they are exercised by individual citizens. Section 1 of the *Charter* expressly permits the courts to facilitate this balancing of rights and interests, but properly mandates that government only be permitted to infringe rights when it has a sufficiently important objective to do so.

To date, however, only one law has ever failed to meet this first criterion of section 1 scrutiny before the Supreme Court. In *R. v. Big M Drug Mart*, mandatory observance of the Christian sabbath was found to be antithetical to the *Charter*'s guarantee of religious freedom, and therefore incapable of justifying the abrogation of that right. In all other cases, and most importantly all cases concerning freedom of expression, the Supreme Court has sanctioned the objective of the infringing legislation. The pressing and substantial purpose test has become a theoretical tiger without any teeth. The bite, so to speak, of the first stage of analysis is felt later, when the proportionality of the infringement is assessed. If the objective of the law is cast in very specific terms, and approved, then there will be little work left to do in the later stages of analysis.

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70 The point is made by Lorraine Weinrib, in "The Supreme Court of Canada and Section 1 of the Charter" (1988) 10 Supreme Court L.R. 469.

On the other hand, the courts could, in theory, almost always locate a least intrusive means of achieving a very broadly stated objective.72 Therefore, to avoid pre-empting the latter stages of proportionality analysis, the court's "primary focus," at the initial level of section 1, "must remain upon the characterization which most directly relates to the reasons for violating the right."73

In Keegstra, Chief Justice Dickson drew upon three sources of social-scientific intelligence in evaluating the substantiality of the legislation's purpose: studies commissioned by Canadian government agencies, international instruments and approaches to the hate speech, and the other provisions of the Charter itself. On the home front, he took note of the long-standing concern over hate-speech, and the repeated opinions voiced by sequential Committees of inquiry as to the harms of hate-speech against both its specific victims and the nation's social fibre generally.74 He bolstered this evidence with extensive reference to international human rights instruments, multi-lateral agreements aimed at curbing racial discrimination and legislation paralleling the impugned provisions which has been successfully implemented in other western democracies.

This concerned perusal of international standards is characteristic of the Supreme Court's freedom of expression jurisprudence, throughout which it has expressed a tacit concern that rights-infringing statutes adopted by Canadian legislatures "not be out of proportion to measures

72 P W. Hogg, Constitutional Law of Canada, 3d. ed. (Toronto: Carswell, 1997) at §35.9. In practice, the court has doged this result by developing its doctrine of deference.


74 Keegstra, supra note 21 at 745-749.
taken in other jurisdictions." In addition to Chief Justice Dickson's extensive discussion of international practice in the area of hate-propaganda in *Keegstra*, numerous other manifestations of this concern can be found. For instance, Justice Gonthier, concurring in the court's validation of the *Criminal Code*’s anti-obscenity provisions in *R. v. Butler*, found support for his position in its symmetry with the jurisprudence of the European Court of Human Rights. In the context of press freedom, the court in *Hill v. Scientology* seemed to derive considerable comfort from the fact that numerous other common law jurisdictions had reached identical conclusions as to the wisdom of introducing the "actual malice rule" into the law of defamation. Similarly, Justice Cory quoted extensively from the decision of the European Court's *Sunday Times Case* in striking down Alberta's statutory ban on publication of information in domestic proceedings. Stating that the European Court's words were "apposite" and dispositive, he went on to say that "it is not without significance that the ban...is unique to [one] province. No other jurisdiction in Canada has found it necessary to impose such a restriction." This reasoning makes it clear that the Supreme Court seeks not only to establish a harmonious consensus on rights within Canada, but also to ensure that the level of rights-protection enjoyed by Canadians under the *Charter* is at least comparable to that in force in other major western democracies.

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75 *Irwin Toy, supra* note 38 at 999.

76 *Keegstra, supra* note 21 at 749-755.

77 *Butler, supra* note 49 at 522.


Most significantly, perhaps, Chief Justice Dickson gleaned substantial support for the objectives of s.319(2) from other provisions of the *Charter* itself. Racial equality is not merely a platitudinous by-product of the words “free and democratic society,” but is actively demanded by sections 15 and 27 of the *Charter* which, respectively, entrench substantial equality before and under the law and the multicultural make-up of Canadian society as fundamental tenets of our constitutional law. On the same theme, though more obliquely, the majority noted that subjection to hate-propaganda is likely to diminish its victims’ sense of self worth and acceptance, making them less likely to participate broadly in society outside their own communities. By logical consequence, this invidious effect of hate-speech makes minorities less likely to exercise their right to participate in social and political discourse and decision-making, chilling their own exercise of freedom of expression and depriving others of the opportunity to absorb the insights they would otherwise have shared. This impoverishment of the marketplace of ideas directly assaults one of the very core values of freedom of expression itself, making it substantially easier to find that restrictions on such expression are consistent with the *Charter*.

*Contextualizing the analysis*

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81 Section 15(1) states that:

15. (1) Every individual is equal before and under the law and as the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 27 states:

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

82 *Keegstra*, supra note 21 at 746-747.

It is at the next step of analysis, the inquiry into proportionality, that the context of the expression under consideration is brought into play. While the court steadfastly refuses to consider the content, circumstances or 'value' of expression under the section 2(b) stage of the inquiry, the test for proportionality is largely conditioned by the specific context of each case. Recognizing that not all protected expression and expressive conduct is equally worthy of protection, the court will tailor the intensity of its scrutiny, and level of deference to Parliament's chosen means, to suit the nature and importance of the expressive conduct which is being suppressed. Following the contextual approach, the court has defined the topography of free expression in terms of a central core of values surrounded by an expansive realm of expressive behaviour, diminishing in importance as it departs further from the centre. These values, as mentioned before, are the search for truth, political and social participation, and individual self-fulfilment. Not surprisingly, the characterization of expression as either central to the values of freedom of expression, or peripheral to it, has often proven determinative of the section 1 analysis. In Keegstra, it is in the process of contextualization, where the value of the expression at hand -- in the eyes of the Charter -- that the essence of the disagreement between the majority and the dissent come clearly into focus.

For Chief Justice Dickson, hate-speech was linked only tenuously to the rationale underlying

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85 This manifestation of the contextual approach to freedom of expression originated with the decision of Wilson J. in Edmonton Journal, supra, note 80, and was subsequently adopted by the court in Rocket, ibid. at 246-247, and R.J.R.-MacDonald, supra note 28.
section 2(b). It is almost certainly false, and thus does nothing to advance the search for truth. Although deeply-held and often profoundly political, hatred-promoting beliefs have, when published widely, the effect of undermining minorities' participation in social and political life (as discussed above), undermining the second and most significant value of freedom of expression. Struck by the malignance of this form of expression, Chief Justice Dickson pointedly warned that freedom of expression, if left wholly unchecked, can actively "work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values." Although those individuals moved to disseminate hatred and scorn against other members of society undeniably gain some perverse sense of self-fulfilment from doing so, this connection to the values at the heart of section 2(b) was deemed so flimsy as to entitle this expression to only slightly more than marginal protection. This finding largely prefigured the outcome of the case, as the history of freedom of expression adjudication has shown that 'devalued' expression has not fared well against legislative limits under section 1 in any context.

In stark contrast to the majority, Justice McLachlan and her fellow dissenters held that s.319(2) was capable of having a chilling effect on legitimate activities important to our society," such that "even political debate on crucial issues such as immigration, educational language rights, foreign ownership and trade may be tempered." These issues," the minority emphasized, "go to the heart of the traditional justifications for protecting freedom of expression." Consequent to this

86 Keegstra, supra note 21 at 762.
87 Ibid. at 764.
88 Ibid. at 766.
89 Ibid. at 860.
holding, their conclusion too became predictable. The judgements in Keegstra illustrate, more
clearly than any other decided case in the area of the freedom of expression and the press, that
the way in which the context of a limit on expression is portrayed, and the terms in which the
expressive conduct’s links to the values of truth-seeking and social participation are described,
determine the outcome of the rights-inquiry.

Rational connection

The first stage of the proportionality component of section 1, the rational connection test, is an
“assessment of how well the legislative garment has been tailored to suit its purpose.” It asks
whether the means chosen by Parliament are causally connected to their stated aims, although it
stops well short of demanding scientifically precise proof of causality. It does, however, require
that the law in question be “carefully designed to meet the objectives in question,” and not be
“arbitrary, unfair, or based on irrational considerations”. In practice, the Supreme Court has
even been willing to accept a “common sense” connection between the means and ends, even in
the face of expert and statistical evidence to the contrary. In the context of section 2(b), the
Supreme Court has been willing almost to presume that exposure to expression is causally linked
to changes in attitude and behaviour. In R. v. Butler and R.J.R. MacDonald, respectively, the
court was satisfied with the government’s claim that pornography and advertising influence

91 See in particular R.J.R.-MacDonald, supra note 28.
92 Oakes, supra note 62 at 139.
93 For example, R.J.R.-MacDonald, ibid., Butler, supra note 49, and Ross v. New Brunswick School District
No. 15, [1996] 1 S.C.R. 825. Professor Hogg is rightly critical of the almost cavalier way in which the Supreme
Court has substituted its own judgement on rational connection for contrary findings by trial judges, based on
substantial bodies of evidence, supra note 72 at §35.11(b).
viewer behaviour in certain ways, even though the social-scientific evidence supporting this claim was scant or highly controversial. As a result of this approach, the rational connection test has had little work to do in decided Charter cases, and has never been determinative of a section 2(b) claim.

The rational connection test functions at a fairly high level of generality, examining whether the thrust of the legislative scheme before the court is relevant to the advancement of its identified objectives. The courts do not parse individual sections of a law to determine if each and every one adds to the accomplishment of the stated purpose, and only consider whether the overall effect of the legislation is connected to the stated purpose. It is an examination of whether the kind of infringement involved is rational, not whether its degree of infringement is necessary. Any provisions which are deemed superfluous to an otherwise satisfactory scheme are severed under the minimal impairment test, through the doctrine of overbreadth.

In Keegstra, it became evident that the question of rational connection could be asked at two separate levels: the conceptual and the practical. Rarely will any legislated measure be evidently unconnected to its stated purpose on its face. If this stage of section 1 analysis sought to do nothing more than screen out the most egregious cases of legislative duplicity, where Parliament has passed rights-infringing legislation on flimsy pretenses, then it would be a largely meaningless and perfunctory procedure. Therefore, rational connection must be understood as aiming to ensure that “the means chosen to further this purpose are rational in both theory and operation.”

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94 Keegstra, supra at 771 [emphasis added].
As Keegstra illustrated, the inquiry into the practical effects of the measures in question is especially important in cases concerning freedom of expression, as the effects of censorship are often thought to distort the truth-seeking and social participation in serious and sometimes unpredictable ways. The prominence of freedom of expression in the Charter, and the demand that any abridgement of it be demonstrably justified, underscore our societal belief that the ill side-effects of censorship often render government interference with expression undesirable, even if it seems like a good idea in the abstract.

As Justice McLachlan articulated, the human experience with state-ordained truth is one of misery, oppression and unjust persecution. Largely as a function of this history, the spectacle of the state prosecuting individuals for what they have said, even in the case of speech as offensive as that promulgate by hate-mongers, can take on the appearance of persecution, securing publicity and credibility for the impugned expression. As she astutely observes, “listeners might be just as likely to believe that there must be some truth in the...expression because the government is trying to suppress it.”

This phenomenon is exacerbated by the fact that, even if they can be forcibly silenced, people cannot be kept from thinking thoughts and believing beliefs which are central to their belief-system and self-identity. The speakers become martyrs for their causes and remain, almost invariably, unchastened by their encounter with the law. For the majority of the court in Keegstra, however, the conceptual benefits outweighed the feared shortcomings, establishing again in clear terms that the court itself has a strong belief in the role of government as a mediator

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95 Ibid. at 316.

96 These problems are discussed extensively in Keegstra, ibid, by Chief Justice Dickson at 250-253, and by Justice McLachlan at 314-316.
of expression, and in the faith of the Canadian people in the government’s good will and capacity to regulate speech without ulterior motives or manipulative practices. Consequently, the majority deemed s.319(2) to be rationally connected, notwithstanding considerable doubts about its effects in operation.

**Minimal impairment**

The second and most important step in the proportionality analysis is the so-called minimal impairment test. It asks whether, on the face of the legislation, the limit is within the range of reasonable alternatives which Parliament had to chose from in addressing the social issue at hand.

In original formulation, the minimal impairment test was interpreted as requiring that Parliament’s chosen means intrude upon Charter rights “as little as possible.” This standard posed an almost insurmountable obstacle for the government, as the court or the aggrieved party can imagine some slightly less intrusive measure in almost any situation. As a result, the courts re-stated the minimal impairment test in *R. v. Edwards Books* as requiring that the government show that its chosen legislative scheme impaired the right in question “as little as reasonably possible.” This formulation of the test leaves a healthier margin of appreciation to buffer the legislature’s detailed policy choices, and avoids putting the court in the position of having to “substitute judicial opinion for legislative ones as to the place at which to draw a precise line” between competing social interests.

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97 *R. v. Oakes*, supra note 62 at 139.


The degree of deference which the courts should afford to good-faith legislative attempts at ameliorating difficult social problems has been the subject of much debate. The Supreme Court has been particularly deferential in cases where the legislature is seeking to achieve social justice by “mediating between the claims of competing groups,” in the context of sociologically complex problems, leading to criticisms that the court had eviscerated section 1. In R.J.R. MacDonald, Justice McLachlan attempted to tow the minimal impairment analysis away from the shoals of extreme deference, concluding that:

To carry judicial deference to the point of accepting Parliament’s view simply on the basis that the problem is serious and the solution difficult, would be to... weaken the structure of rights upon which our constitution and nation is founded.

Most recently, however, in Libman v. Quebec (Attorney-General), the Supreme Court struck down Quebec’s electoral spending laws as too restrictive of political speech, but relapsed into a deferential posture on the question of minimal impairment, stating that, “a failure to satisfy minimal impairment will be found only if there are measures “clearly superior to the measures currently in use.” It is profoundly difficult to reconcile this formulation of the test with the underlying principle of the Charter that the onus is on the government to establish that measures

100 Irwin Toy supra note 38 at 993-994.

101 Many observers feel that the Supreme Court has displayed a growing trend towards deference, especially in areas of social policy. The test for rational connection and minimal impairment in cases involving marginal expression, such as tobacco advertising, has been dramatically eroded. This trend is particularly in particular by the judgement of Justice LaForest in R.J.R.-MacDonald, supra note 28. See also C. Dassios and C. Prophet, “Charter Section 1: The Decline of Grand Unified Theory and the Trend Towards Deference in the Supreme Court of Canada” (1993) 15 Advocates’ Q. 289, “The Rise and Fall of Doctrine under Section 1 of the Charter” (1992) 24:1 Ottawa L.R. 163, J. Cameron, “Abstract Principle v. Contextual Conceptions of Harm: A Comment on R. v. Butler, (1992) 37 McGill L.J. 1135.


which infringe protected rights and freedoms are “demonstrably justified.” Suffice it to say that the stringency of the minimal impairment standard remains one of the most open and active debates in Charter jurisprudence.

In Keegstra, the court’s approach to minimal impairment showed that three factors will usually form the heart of the minimal impairment test. The first of these is the language of the offending statute itself. What threshold of interference does it establish? Just how broadly does it assault the right in question? What internal limitations does it create? In the case of s.319(2), this entailed an examination of the language of the section and the way in which it qualified and circumscribed the limitation on expressive freedom. The majority honed in on the fact that the hate-propaganda provisions of the Criminal Code only criminalized the expression tending to evoke the most virulent of negative emotions, that being hatred, while leaving unmolested any expression which might nonetheless provoke lesser forms of disaffection or unrest. Considerable emphasis was placed on the severity of incitement required to engage the restriction and the generous breathing-room this afforded less intemperate, but nonetheless heated and passionate, speech. Moreover, the majority stressed that, as a criminal statute, s.319(2) prohibited only the willful, as opposed to incidental or inadvertent, promotion of animosity, thus punishing only individuals whose expression was motivated by malevolent intentions.

The second factor considered by the court was what, if any, explicit defences are provided internal to the offending legislation? In the case of hate-speech, s.319(2) provided defences for statements which were true, reasonably believed to be true and made on matters of public interest for the public benefit, made in good faith on matters of religious opinion or made for the bona
Therefore, the legislation itself provided exemptions for the vast majority of politically or religiously motivated speech which it might otherwise have captured, dramatically narrowing its impact, and singling out the most virulent rhetoric for punishment. Other examples of internal defences which protect expression include the exclusion of bona fide artistic works from the reach of anti-obscenity provisions, and the common law defences of truth, fair-comment and qualified privilege in the law of defamation. Each of these defences has in common a close link to the values underlying the guarantee of freedom of expression, and serve to exempt the most valuable instances of expression from the scope of otherwise justifiable limitations of expressive freedom. Therefore, the court's approach in Keegstra alerts us to the fact that legislation will often be judged based on which expression it exempts from restrictions.

The third and final factor which the courts will almost invariably consider is the availability of less-impairing alternatives to the scheme enacted. It is at this stage where perhaps the most deference towards legislative judgement is shown. The Supreme Court has expressed an almost complete unwillingness to second-guess good-faith legislative policy choices. When there has been extensive study, and the government picks a reasonable mode, then the existence of somewhat less intrusive alternatives is relatively quickly discarded. In this vein, the court has demonstrated a tendency to discount the proposition that the best way to 'fight speech' is with more speech. Often times the defenders of freedom of expression will argue that, for instance,

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104 Ss.319(3)(a-d).
105 Butler, supra note 49.
106 Hill v. Scientology, supra note 78.
"discriminatory ideas can best be met with information and education programs extolling the merits of tolerance and cooperation between racial and religious groups."\textsuperscript{107} This argument failed to persuade the majority in \textit{Keegstra}. Showing little faith in the idea that expression-related harms are best undone by further expression, Chief Justice Dickson wrote:

In assessing the proportionality of a legislative enactment to a valid governmental objective, section 1 should not operate in every instance so as to force the government to rely only upon the mode of intervention least intrusive of a \textit{Charter} right or freedom....In such circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of a larger program of action.....[provided that the entirety of the approach remains proportionate to the valid aim].\textsuperscript{108}

The most notable exception to this precept of \textit{Charter} interpretation arises in relation to absolute bans on expressive behaviour. On four occasions the Supreme Court has commented that selective impairments of expression are far more likely to be justified that outright prohibitions.\textsuperscript{109} Of greatest relevance is the comment of Justice Iacobucci in \textit{Ramsden v. Peterborough (City)}, which considered the municipality's complete ban on postering on public property. Expressing the court's unanimous opinion that the prohibition was unsustainably broad, he stated that it will "be more difficult to justify a complete ban on a form of expression than time, place or manner restrictions."\textsuperscript{110} The court has also demonstrated its willingness to adopt a far more harsh and unforgiving stance towards the existence of alternative means if the evidence suggests that the government has not acted in good-faith when selecting or defending its chosen means of

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\bibitem{107} \textit{Keegstra}, supra note 21 at 784.

\bibitem{108} \textit{Ibid.} at 784-784.


\bibitem{110} \textit{Ramsden v. Peterborough}, \textit{ibid.} at 1106.

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restriction. In *R.J.R.-MacDonald* the government sought to defend a complete ban on all tobacco related advertising, arguing that anything less would be inadequate to achieve its sanctioned purpose. Not only did the government adduce no evidence to support this contention, but went so far as to invoke crown privilege, pursuant to the *Canada Evidence Act*, to avoid disclosing the results of a study which it had carried out on precisely this question.111 Clearly non-plussed by the government’s disingenuous behaviour, the majority refused to find the ban proportional. “Even on difficult social issues where the stakes are high,” Justice McLachlan wrote, “Parliament does not have the right to determine unilaterally the limits of its intrusions on the rights and freedoms guaranteed by the *Charter*.”112

*Final considerations*

The third and final stage of the proportionality analysis calls upon the court to make a final overall assessment of whether the benefits obtained by the infringement of protected rights outweighs the harm in perpetrates. For the first decade of *Charter* adjudication this test lay dormant, largely because, as Professor Hogg points out, “it is redundant. It is really a refinement of the first step, the requirement that a limiting law pursue an objective that is sufficiently important to justify overriding a *Charter* right.”113 In *Keegstra*, Chief Justice Dickson gave this final step only the most cursory treatment, dispensing with any final concerns in three short paragraphs which simply re-iterate his previous conclusions on the importance of the purpose at hand and the diminutive

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111 *R.J.R.-MacDonald, supra* note 28 at 345.


113 Hogg, *supra* note 72 at §35.12
nature of the rights-infringement involved.\footnote{Keegstra, supra note 21 at 786-787.}

More recently, however, in Canadian Broadcasting Corporation v. Dagenais, Chief Justice Lamer repried the final step of proportionality, and restated it as asking the court to “measure the actual salutary effects of impugned legislation against its deleterious effects.”\footnote{Dagenais v. Canadian Broadcasting Corporation, [1994] 3 S.C.R. 835 at 887 [hereinafter “Dagenais”].} The admittedly nebulous nature of this test has led one critic to assert that he was unconvinced that these words have any meaning.\footnote{R. Martin, “Judicial Proceedings: Media Nans: C.B.C. v. Dagenais” [1995] 74 Can. Bar. Rev 500 at 504. Professor Martin goes on to say that “[t]he Chief Justice was operating at such a level of abstraction that I fail to see how anyone could actually apply his analysis to concrete facts.”} Nevertheless, the court has shown a renewed interest, at least procedurally, in this final balance of proportionality,\footnote{R. v. Laba, [1994] 3 S.C.R. 965.} and it may well serve to check the haste with which the court has found legislative purposes to meet the first step of section 1 analysis. It may also be useful in cases the infringement of a right has extensive and unexpected collateral effects, such as the “chilling” effect on expression which is often attributed to laws punishing speech, such as defamation, or impairing the news-gathering process, for instance by compelling journalists to reveal sources.\footnote{The “chilling” of expression is the phenomenon whereby individuals self-censor legitimate expression in order to avoid the possibility of conflict with the law, thus depriving the marketplace of ideas of valid and valuable expression. Justice McLachlan discusses the tendency of criminal speech prohibitions to erode into the zone of permissible speech as individuals leave a wide margin of safety around the bounds of the prohibition, Keegstra, supra note 21. David Lepofsky rejects the notion that any libel chill exists in the context of the law of defamation, “Making Sense of the Libel Chill Debate: Do Libel Laws “Chill” the Exercise of Freedom of Expression?” (1993) 4 N.J.C.L. 169. The Supreme Court has been more inclined to adopt this view, as in Hill v. Scientology, supra note 78, notwithstanding the fact that most everyone associated with the journalism profession, or the representation of media clients vouch for its existence.} It is conceivable that once a law has been in operation for some time, it can be shown from experience that its deleterious effects reach well beyond the immediate
parties affected by the law, consequently rendering the negative impact of the rights infringement disproportionate to its beneficial effects.

Two key lessons can be learned from the Keegstra example. In addition to providing a framework for the constitutional analysis of controversial expression claims, it demonstrated the importance of the social and historical context of the expression under attack, and the right being asserted in defence of it. The conflicting judgements produced in Keegstra also illustrate the deep and abiding difference in opinion on the role and risks of state involvement in the marketplace of ideas. For the majority it Keegstra the Charter not only permitted, but actively encouraged, government intervention on behalf of minority groups who stood to be marginalized by the unfettered expression of radical racist views. For the minority, the gravity of these harms nevertheless failed to outweigh the dangers of criminalizing controversial expression, and the attendant risk of 'chilling' legitimate and valuable political discourse. The same tension between stands to be played out in the context of newspaper ownership regulation. Proponents of such measures would make the case that the commercial monopolization of the mainstream media by a few powerful interests threatens the pluralistic nature of society and diminishes the democratic debate, while its opponents will point to the legacy of censorship which we have only recently escaped, and decry and return to a state-controlled press. As this chapter has shown, this tension will only be resolved with a careful consideration of the history and philosophy underlying the freedom of the press, and a clear identification of the values this right seeks to protect and advance. With this background, we are now ready to assess the constitutionality of legislated controls on newspaper ownership concentration, as formulate in the proposed Canadian Newspaper Ownership Act.
The question of whether newspaper ownership may be managed by the state for the benefit of all citizens consistently with the Charter of Rights and Freedoms poses fundamental questions about the nature of the relationship between the state, the press and the people. Therefore, it is useful to preface the Charter analysis with a historical and philosophical roots of freedom of the press.

Origins of the idea of freedom of the press

In the beginning, there was the state. For the first two centuries after Johannes Gutenberg’s inventive curiosity gave birth to the first technology of mass communication, freedom of the press meant nothing more than the right of church and state to regulate the practice of printing however they saw fit, and those who claimed greater liberty were dispatched as traitors and revolutionaries. Truth and opinion were the property of sovereign authority. Books or other tracts printed without imprimatur, or deemed seditious by a servient judiciary, were burned, and the authors and printers fined, jailed, tortured and even executed.\(^{119}\) The idea of a popular liberty to communicate through the printed words was as unthinkable as the idea of political or religious dissent.\(^{120}\)

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\(^{119}\) For instance, the unfortunate Dr. Alexander Leighton was convicted of Libel for publishing attacks on the British Church and Crown in 1630, and sentenced to a £10,000 fine and life imprisonment. In addition, he was sentenced to being whipped, pilloried, having his ears cut-off, his nostrils slit, and the letters “SS”, signifying Stirrer up of Sedition, branded on his neck. Trial of Dr. Alexander Leighton (1630), 3 Howell’s State Trials 383.

\(^{120}\) Wm. M. Clyde, The Struggle for Freedom of the Press from Caxton to Cromwell (London: Oxford University, 1934) at 9; see also Siebert, supra note 1, and Hanson, supra note 1.
It is no coincidence that the idea of press freedom first took shape in the turbulent flurry of freedom surrounding the English Revolution.121 As the demand to be religiously and politically self-determining grew in England, abetted by the rise of populist Puritanism, people began to assert their right to hold and express opinions without license of the state. They quickly learned that freedom of the press is both a cause and effect of political liberty. By 1641, Samuel Hartlib, prophesied that "the art of printing will so spread the knowledge that the common people, knowing their rights and liberties will not be governed by way of oppression."122 As this chapter will show, the history of freedom of the press is the history of people repudiating authoritarian rule and redefining the relationship between the citizen and the state.

Two sources of thought from the seventeenth century epitomize the original vision of press freedom as the indispensable instrument for the establishment a community of opinion and belief separate and apart from the state. The first and most famous of these was Thomas Milton's Areopagitica, which is ritualistically cited as the rhetorical well-spring of press freedom.123 The other, more obscure source, was the Leveller movement, led by John Lilburne and Richard

121 See K. Lindley, "London and popular freedom in the 1640s," in R.C. Richardson and G.M. Ridden eds., Freedom and the English Revolution (Manchester: Manchester University Press, 1986) at 111ff. Given the harsh and bloody punishment of errant expression in the early days of the press, it is hardly surprising that the first open stirrings for freedom of the press in England came from devout Puritans, whose religious zeal blunted their fear of persecution and martyrdom. Although renegade Puritan authors and printers fought a cat and mouse battle with ecclesiastical authorities throughout the late Tudor years, none ever articulated a claim for freedom of the press or a coherent theory of what such a right would entail; see Clyde, ibid. at 95 - 100.

122 S. Hartlib, A Description of the Famous Kingdom of Macaria (London: 1641), quoted in Siebert, supra note 1 at 192.

Overton, which "represented the first great outburst of democratic thought in history".124

Milton based his argument against prior restraint of printed communication on the premise that censorship violated the inherent dignity of men by denying their rationality, and ran retrograde to the search for social and religious truth. His classic entreatment, "give me the liberty to know, to utter, and to argue freely according to conscience above all liberties," epitomizes the Enlightenment demand for freedom of the human mind from the bonds of authoritarian government.125 For him, truth was best attained through the open and vigorous exchange of ideas, and censorship was but a futile and self-defeating exercise of authoritarian regimes. Milton’s gift in the art of language imbued his arguments for liberty with matchless force and eloquence. In the *Areopagitica* he also anticipated the “marketplace of ideas” metaphor,126 which was to become a defining component of the liberal democratic paradigm.127 Notwithstanding Milton’s religious intolerance128 and inconsistent conduct in respect of press

124 M. Judson, *The Crisis of the Revolution* (Rutgers: Rutgers University Press, 1949) at 381. The title "Levellers" was given to a radical reform element in the English Revolution who lobbied for democratic reforms, but were eventually persecuted out of existence by Cromwell’s political forces.

125 *Areopagitica, supra* note 123 at 35.

126 "And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter." *Ibid.*


freedom, his words provided the earliest rhetorical rhetorical support for allowing uncensored access to technology of printing and the benefits of a society informed by vigorous open discourse.

In contrast to Milton, whose account of press freedom failed to connect the right to communicate with any radical political re-ordering, the Levellers took debate over the relationship between press and government to the next level by explicitly linking freedom of the press and democracy. At the heart of the Levellers' programme of democratic and egalitarian reform lay their so-called "Agreement of the People," essentially a written constitution establishing popular democracy premised on the natural rights of man. While the Levellers premised their natural rights theory on theological grounds, this in no way undermines the significance of their radically democratic programme. It is interesting to note that our own Charter of Rights and Freedoms begins with the words, "Whereas Canada is founded upon principles which recognize the supremacy of God and the rule of law". These two notions, God as the source of natural rights, and the consequent impermissibility of arbitrary power, formed the heart of the Leveller ideology. Their programme of reform called for freedom of the press, for as Richard Overton wrote, it is "essential unto freedom...for what may not be done to that people who may not speak or

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129 Indeed, he not only denied non-Protestants the freedom of press and expression he claimed for himself, but even served as one of Cromwell's licensers, supervising, and at times suppressing, publication of the proliferating news-books; Emergence of a Free Press, supra note 1 at 207-212. See Clyde, supra note 120 at 79-80, for a more charitable account of Milton as censor.


131 Charter, supra note 4.
Like Milton, the Levellers saw the fundamental need to separate the authority of the state from the opinion of individual citizens. However, their conception of liberty took the further step of asserting that citizens had both the right to participate in the political community, and the right to freedom of the press to protect and preserve their political standing. In *England's New Chains Discovered*, John Lilburne succinctly encapsulated the Leveller philosophy of press freedom when he petitioned the Rump Parliament to,

> open the press, whereby all tyrannical designs may be the easier discovered, and so prevented, which is a liberty of greatest concernment to the Commonwealth, and which only such as intend a tyrannie are engaged to prohibit.  

While this demand may seem commonplace today, its embrace of the idea that the people have a right to monitor and critique the performance of their governors was radical for its time. Even sixty years later this fundamental principle of democracy was savaged by the Whig printer Daniel Defoe, who wrote in his *Review* that, “governments will not be jested with, nor reflected upon, nor is it fit that they should always lye at the mercy of every pen.” The Levellers were pioneers in the concept of democracy, rejecting the notion that Parliament was the sole appropriate forum for the open, frank, and even ferocious discussion of public affairs and policy. Better than any other seventeenth century thinkers, their concept of press freedom demonstrated the interdependency of the struggle for popular sovereignty and freedom of the press.

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134 This sentiment was echoed by his rival, Charles Leslie, who wrote that, “private men are not the judges of their superiors.” Hanson, *supra* note 1, at 1.
2.1 Libel, Juries and Freedom of the Press as Democratic Reform

After the licensing acts expired in 1694, the state’s zeal for censorship had not abated but rather found new life in the form of prosecutions under the common law of libel. Freedom of the press continued to play a substantial role in the struggle for democracy as the battlefield moved from the street corners of the pamphleteer, into the courtrooms of Britain and Colonial America. Prosecutions against the authors, printers and booksellers for the production and distribution of publications in any way shape or form critical of the Crown, Parliament or the Church, were prevalent, notwithstanding Locke’s radiant description of Englishmen’s “love of their just and natural rights, with their resolution to preserve them.” The victory of freedom and democracy was largely pyrrhic, as Blackstone’s classic Commentaries make clear.

The Liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure from criminal matter when published. Every free-man has an undoubted right to lay what sentiments he

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135 The eminent liberal philosopher John Locke was instrumental in persuading Parliament to abandon the licensing system. Ironically, though tellingly, the reasons he advanced were purely economic, and made no mention of freedom of the press; Siebert, supra note 1 at 261.

136 At common law, there existed four species of libel: blasphemous libel - which comprised libels against the Church and any form of heresy; obscene libel - which dealt with prurient materials deemed offensive to public morals; private libel - which prohibited the defamation of individuals; and seditious libel - which criminalized any criticism of the state which, “tends to scandalize the government by reflecting on those who are entrusted with the administration of public affairs...” (W. Hawkins, A Treatise of the Pleas of the Crown (London: 1716).

137 After the Restoration, Parliament claimed exclusive jurisdiction over the licensing of the press, putting an end to the Royal prerogative and the Court of Star Chamber (disbanded by the Long Parliament in 1641), but not to censorship. After the restoration, Parliament passed the Act for preventing abuses in printing seditious, treasonable and unlicensed books and pamphlets and for regulating of printing and printing presses, 1662 (U.K.), 14 Car. II, c.3, which established an extensive system of prior restraints on expression.

138 From the introduction to “Of Civil Government”, in J. Locke, Two Treatises of Government (1690).

139 As the eminent American First Amendment historian Leonard Levy has noted, most, if not all of the principal intellectual advocates of free expression espoused “an unbridled passion for a briddled liberty of speech.” See “English Theory from Milton to ‘Cato,’” in Emergence of a Free Press, supra note 1 at 100.
A "free" press whose editors and publishers languished in prison on charges of seditious libel was a sorry imposter, yet the law of the time was both clear and objectionable: the seditious nature of a document was a matter of law for the trial judge to decide, leaving the jury to decide only whether publication had been proven.\textsuperscript{141} In practice, however, a sharp divergence was developing between the letter of the law and its application. By the mid eighteenth-century, recalcitrant juries, which Joseph Howe later called "the steady friends and protectors of the press,"\textsuperscript{142} routinely returned verdicts of "not guilty" in cases involving popular printers.\textsuperscript{143} As Siebert puts it, "[t]he technical rules of seditious libel were out of tune with the developing concept of the

\textsuperscript{140}\textit{Blackstone's Commentaries} (1769) Vol. 4, at 151-152. Lord Mansfield C.J. articulated precisely this conception of freedom of the press in \textit{Woodfalls's Case} (1770), 20 Howell's State Trials 895 at 903.

\textsuperscript{141} A particularly clear statement of the law as it stood is found in \textit{R. v. Franklin}, 17 Howell's State Trials 626, at 671-72.

\textsuperscript{142} \textit{The Speeches and Public Letters of Joseph Howe}, ante note 160 at 85.

\textsuperscript{143} See \textit{Power Without Responsibility: The Press and Broadcasting in Britain}, supra note 15 at 11, and \textit{Emergence of a Free Press}, supra, note 1 at 128. In response, the British Government imposed stamp taxes, both in Britain and the colonies, in an attempt to drive the critical press out of business.
constitutional relationship between the government (and its officers) and its subjects.”\textsuperscript{144} In other words, juries were enforcing the separation of state and individual opinion which the law would fail to recognize for a further century.\textsuperscript{145}

The most sensational revolt against the law of seditious libel occurred in the celebrated case of John Peter Zenger, the radical immigrant printer who published the first news sheets to attack the colonial government of New York.\textsuperscript{146} At trial, his Attorney Alexander Hamilton, argued that the jury had the jurisdiction to decide on the totality of the matter, namely whether the publication was libellous by virtue of being false and unjustified. Despite a direction from the trial judge to ignore Hamilton’s distortion of the law and return a verdict of “guilty” against Zenger, the jury followed popular sentiment and acquitted him. This insolent result is rendered somewhat less surprising in light of the fact that Zenger had already prefigured much of his defense by publishing

\textsuperscript{144} Siebert, supra note 1, at 383-84. This apparent contradiction is at the heart of Leonard Levy’s controversial position that the First Amendment was not understood by its framers to guarantee the sort of substantive freedom of the press which it has subsequently been interpreted to protect. With the publication of Legacy of Suppression: Freedom of Speech and Press in Early American History (Cambridge: Harvard University Press, 1960), Levy argued that the mere that fierce and open political controversies raged in the popular press, and were either tolerated by the state or secured by recalcitrant juries, did not confirm that the First Amendment was meant to obsolete the crime of seditious libel. As far as Levy was concerned, the criminalization of seditious libel is antithetical to true freedom of the press, and that since this crime co-existed, at least in theory, with the First Amendment for many years, the First Amendment was not in fact the bulwark of freedom of expression and the press which it was commonly thought to have been from its inception. While Levy considerably softened his views in Emergence of a Free Press, he continues to point to the divergence in practice and principle over seditious libel in America an indicating that early Americans did not generally share the more radically libertarian ideal of freedom of the press which has subsequently come to the fore in American constitutional interpretation.

\textsuperscript{145} Proof of publication was the only necessary element of the offence, as truth did not become a defence until the passage of Lord Campbell’s Act in 1843. An Act to amend the Law respecting defamatory Words and Libels, 1843 (U.K.), 6&7 Vict., c. 96.

substantial selections from contemporary libertarian writings, including "Cato's Letter's," a series of celebrated polemics in favour of freedom of expression and the press, which enjoyed wide circulation in both England and America.\textsuperscript{147} In language fashionable for the time, Cato argued that it was in the interest, "of all honest Magistrates, to have their Deeds openly examined and publicly scanned," for, "Freedom of Speech is ever the Symptom as well as the Effect of good Government."\textsuperscript{148}

In England, the conflict between the rising tide of reformist sentiment and the legal establishment's trenchant defense of the repressive \textit{status quo} came to a head when the legendary advocate Thomas Erskine defended the Dean of St. Astaph on a charge of sedition before Lord Chief Justice Mansfield.\textsuperscript{149} After securing a verdict of "guilty of publishing only" from the trial jury, Erskine argued passionately and convincingly that the trial judge could not find his client guilty of libel. "Publishing and printing that which is legal contains in it no crime," he told a politely disinterested court of King's Bench.\textsuperscript{150} Allowing judges, "who may be the supporters of the very Administration whose measures are questioned by the defendant," to determine the sole criminal element of the charge was, Erskine argued, contrary to the English principles of

\textsuperscript{147} "Cato" was the \textit{nom de plume} of John Trenchard and Thomas Gordon, who wrote a series of essays on liberty from 1722-1755. See D. Jacobsen ed., \textit{The English Libertarian Heritage} (Indianapolis: Bobbs-Merrill, 1965); see also "Early English Theory: From Milton to Cato," in \textit{Emergence of a Free Press}, supra note 1.


\textsuperscript{149} \textit{The Dean of St. Astaph's Case} (1783), 21 \textit{Howell's State Trials} 846.

\textsuperscript{150} "Mr. Erskine's Argument in the King's Bench in Support of the Rights of Juries," in J. L. High ed., \textit{The Speeches of Lord Erskine, while at the bar} Vol. I. (Chicago: Callaghan & Company, 1876) 281 at 341.
fundamental justice.¹⁵¹ This was not a simple argument for procedural fairness, but a blunt attack on the conflict of interest inherent in any state regulation of political discourse, and a demand that the courts recognize the incompatibility of government suppression of the press with the liberty of democratic citizens. While an intransigent bench rejected Erskine’s argument, his position ultimately prevailed when the shock waves of the controversy forced Parliament to pass Fox’s Libel Act of 1792, which codified the right of juries to decide upon the substantive question of whether writings constituted a criminal libel.¹⁵²

In the same year, Erskine unleashed his most forceful argument in support of freedom of the press as a fundamental right of a self-governing people. Defending Thomas Paine for publishing *The Rights of Man*, Erskine articulated the quintessence of press freedom:

> I have insisted at great length on the origin of government...because I consider it to be not only an essential support, but the very foundation of liberty of the press....if the people have, without possible recall, delegated all their authorities, they have no jurisdiction to act, and none to think or write upon such subjects....But on the other hand, as it is a settled rule in the law of England, that the subject may always address a competent jurisdiction; no legal argument can shake the freedom of the press in my sense of it, if I am supported in my doctrines concerning the great unalienable right of the people, to reform or to change their government.¹⁵³

His words demonstrate that the significance of allowing juries to decide sedition charges on their merits goes well beyond the mere tactical consideration that ordinary citizens are reluctant to

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¹⁵¹ *Emergence of a Free Press*, supra note 1 at 282.

¹⁵² *An Act to remove doubts as respecting the function of juries in cases of Libel*, 1792 (U.K.), 32 Geo. III, c. 60.

¹⁵³ *R. v. Paine* (1792), 22 Howell’s State Trials 357 at 437.
convict well-meaning printers of producing tracts discovering and decrying government abuses. If a jury of citizens, which Lord Devlin so aptly described as "a little parliament,"\textsuperscript{154} is empowered to determine whether speech criminally assailed the interests of an ordered society, then the balance of deciding the proper conduct of the affairs of state has shifted radically to the people. While Erskine argued for the right of juries to render general verdicts from a legal standpoint, the political implications are far greater. One simply cannot reconcile the right of twelve empanelled citizens to pass implicit judgement on their government without embracing the principle of popular sovereignty and democracy. Therefore, the law was drawn inexorably, if reluctantly, to the conclusion that the people, and not the state, where the ultimate arbiters of political truth.

Despite the hobbles placed on the press by the law of seditious libel, two important principles may be derived from the early movement towards freedom of the press. The first of these is the uneasy relationship between freedom of the press and property and the concept of property. At a basic level, the idea of press freedom necessarily comprises an aspect of property rights in demanding that essentially anyone be allowed to own or use a press. Freedom of the press recognizes the right of the individual citizen to acquire and peacefully enjoy the tangible mechanisms of the technology, and to the protection of this private property from arbitrary state interference. Given the history of suppression, it could scarcely be otherwise. As despots everywhere have recognized, there can be no hostile printing if there are no presses, or if presses reside only in friendly hands. The corollary, of course, is that freedom cannot flourish in any system where the presses themselves exist, and are owned, by the pleasure of the State alone.

At a broader level, however, the idea of freedom of the press finds itself at odds with the concept of intellectual property. While this term is a relatively recent one, it signifies a very ancient idea, namely that certain individuals may possess a legally enforceable monopoly on the expression and dissemination of certain ideas, information, and even opinions. Within authoritarian systems, the sovereign possess the sole right and prerogative to ordain truth and opinion. It was the genius of Tudor statecraft which led the Crown to grant patents to designated printers, thereby creating an effective system of political control, cloaked in the guise of simple respect for property. The revolt against licensing and patents was, in effect, a demand for the deproprietization of thought and opinion. It was about stopping the state from enforcing a monopoly on the discussion of public affairs, and from supporting private monopolies on matters of public concern, such as politics and religion. Therefore, the early history of the struggle for freedom of the press clearly demonstrated a limited negative liberty to possess the instruments of communication, but clearly favoured the public’s general right to freedom of information over individual claims to property rights in news, opinion or the status of constituting the legitimate “press” itself.

More importantly, however, this period also clearly illustrates the intrinsic connection between freedom of the press and the struggle for freedom from arbitrary and tyrannical rule. The advocates of press freedom saw, as did de Tocqueville, that a free press is the “chief democratic

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instrument of freedom."\textsuperscript{157} By raising the right of the people to police their governments and state institutions, thereby ensuring the state's adherence to its constitutional obligations, the free press advocates of the 17th and 18th centuries fashioned a special institutional function for communications technology within the democratic polity. They understood that, just as the early English struggles for freedom focused on the separation of Parliament from the Crown, the next step in the democratic struggle, namely the popularization of politics, required a separation of Parliament from the people in the realm of speech and opinion. Earlier than any other western thinkers, they expounded a philosophy of freedom which recognized that, to form a viable political community, citizens required the ability to communicate freely amongst themselves absent the controlling hand of government censors. And so was born the democratic vision of freedom of the press.

2.2 \textbf{Early Freedom of the Press in Canada}

The same themes of popular sovereignty, self-government through open political discourse, and critical scrutiny of state authority are echoed in the early Canadian experience of freedom of the press. Although Blackstone's formulation of freedom of the press as a "legal liberty," and not a "licentious liberty,"\textsuperscript{158} came to Canada with its first English colonial governments and, held currency in legal spheres well into this century,\textsuperscript{159} there existed the same tension between the

\textsuperscript{157} Cited by Dickson J. (in dissent) in \textit{Gay Alliance v. Vancouver Sun}, \textit{supra} note 2 at 468.

\textsuperscript{158} This distinction was articulated by Attorney-General Sir Philip Yorke in the \textit{Trial of Richard Franklin} (1735), 17 Howell's State Trials 626 at 675.

\textsuperscript{159} As late as 1953, it was parroted by Cartwright J. as, "an accurate description of what is commonly understood by the expression "liberty of the press," as heretofore enjoyed by the inhabitants of Canada." \textit{Samur v. City of Quebec et al.}, [1953] 2 S.C.R. 299 at 385 (in dissent).
limited formal notion of freedom of the press articulated in legal precedent and the popular conception of press freedom as was witnessed in Britain. That tension manifested itself in the trial of Joseph Howe, which can be regarded as the rhetorical birthplace of freedom of the press in Canada. Howe, who would go on to become Premier of Nova Scotia, and a father of Confederation, began his career as a newspaper publisher in Halifax. His *Nova Scotian* frequently savaged the corrupt local magistracy and, in early 1835, Howe overstepped the bounds of their toleration by printing an article which complained of corruption and misappropriation of funds as well as the, “slovenly, extravagant, and unpopular” manner in which public affairs were being conducted.\(^{160}\)

Charged with seditious libel, Howe defended himself before a jury of twelve local men. In an address to the court which lasted nearly six hours and was frequently interrupted by expressions of popular support from the gallery, Howe admitted publication of the impugned letter and ostensibly recognized that he could not plead the truth of the alleged libels, but nevertheless argued that he could present evidence to rebut the presumption that his publication was intended to incite unrest and invocation to breach the peace.\(^{161}\) By reciting the litany of corruption which had moved him to criticize the magistrates, Howe argued that his obvious intention was to restore and preserve the peace and good government of his community.\(^{162}\) While the presiding judge


\(^{161}\) Ibid. at 22.

\(^{162}\) Howe’s defence was not at all novel, mirroring the tactic of Thomas Erskine in the *Dean of St. Astaph’s* case, *supra* note 55, and the line of defence employed by Andrew Hamilton resulted in the acquittal on a charge of libel of John Peter Zenger in New York precisely a century earlier.
instructed the jury that Howe was unquestionably guilty, the jury took only ten minutes to return a unanimous acquittal. Howe was carried triumphantly from the courtroom by his supporters, and proclaimed the establishment of freedom of the press in Nova Scotia.

Notwithstanding the fact that his acquittal amounted to little more than "jury nullification,"163 Howe's defence is of great value in defining the historical roots of Canadian press freedom, for as he strove to demonstrate to the jury how his expression accorded with English ideals of freedom and order, Howe articulated a relatively comprehensive theory of freedom of the press - one which obviously carried favour with the contemporary citizenry. Howe cast his theory of press freedom in quintessentially conservative terms, insisting that he sought neither the "impunity which the American press enjoys,"164 nor to set the press above the law.165 Instead, he professed to rely solely upon the existing principles of English law in defence of his freedom to print.166 In his eloquent closing, he entreated the jury: "I conjure you to judge me by the principle of English law, and to leave an unshackled press as a legacy to your children."167

Whether Howe truly believed that freedom of the press could be adequately protected in the

163 The process in which a jury is persuaded to ignore a clear but (in their perception) unjust law, and returns a verdict of not-guilty, despite the obvious guilt of the accused under the law as it stands. See D. Farnham, "Jury Nullification: History Proves It's Not a New Idea" (1997) 11:4 Criminal Justice 4. Recent Canadian examples include the repeated acquittal of Dr. Henry Morgentaler by juries to whom he essentially confessed performing illegal abortions. see Pro-Choice vs. Pro-Life, supra note 56.

164 Howe's Defense, supra note 59 at 71.

165 Ibid. at 64.

166 Ibid. at 64, 70 and 71.

167 Ibid. at 70.
absence of a recognized natural or constitutional right to freedom of the press, or simply made a tactical choice to frame his defence in less ardent terms, he nevertheless introduced a number of unique concepts. Howe sought not only vindication of his right of free expression as a citizen, but recognition of the instrumental social function of a free press. He spoke of journalism as both a profession and a public duty, and acknowledged the difficult yet crucial role of the press as a watchdog over governmental conduct:

[1]o inform the public on the conduct of those who administer public affairs, requires courage and constant scrutiny. It is always an invidious and obnoxious office, but it is often the most necessary of all public duties.  

In contrast to earlier figures such as Milton, who’s impassioned plea for an unlicensed press in England, the Areopagitica, focussed principally on the indignity of denying a man the right to express his own opinions thoughts, Howe was defending the right to observe and report factually on the doings of government to the citizenry at large. Thus, the press is both professionalized and institutionalized, and the notion of freedom of the press is obtains a life of its own beyond the simple propagation of individual expression through the technologies of mass communication. Also, by adopting Milton’s self-righting principle, which had by this time found its way into British legal doctrine, Howe tacitly endorses the idea that the public interest is best

\[168 \text{ Ibid. at 66.}\]

\[169 \text{ “He who is not trusted with his own actions, his drift not being known to be evil and standing to the hazard of law and penalty, has no great argument to think himself reputed in the Commonwealth wherein he was born for them than a fool or a foreigner.” Areopagitica, supra note 123 at 21.}\]

\[170 \text{ Howe’s Defense, supra note 59, at 64, quoting Thomas Starkie, The Law of Slander, Libel, Scandalum Magnatum, and False Rumors (London: 1813):}\]

\[\text{“errors are not likely to prevail against the better sense and judgement of mankind to a very serious and prejudicial intent; and the continual and casual publication of erroneous opinions cannot be}\]
served by the publication of the greatest possible diversity of opinions on matters of popular concern. The legacy of press freedom he envisioned and achieved was one of vigorous civic involvement and responsibility. Part watchdog, part demagogue, Canada's first free press was not an instrument of profit, but an institution of obligation, information, and advocacy.¹⁷¹

Just as early Nova Scotians found in their traditions of government the right to heed Joseph Howe's call for press freedom, a century later the Supreme Court found in the Canadian constitution¹⁷² the right of citizens to free and open discussion of political affairs. When Alberta's doctrinaire Social Credit regime, led by William Aberhart attempted to implement it's "new economic order," the Court was called upon to adjudicate the constitutionality of the most serious legislative attack on freedom of the press in the post-Confederation era. The front assault came in the form of the Orwellian-titled Accurate News and Information Act.¹⁷³ Under the Press Bill

placed in competition with the splendid advantages which flow from permitting full and fair discussion on every subject of interest to mankind, as connected with religion, politics, philosophy and morals."

This self-righting principles amongst Milton's greatest contributions to theory of enlightenment liberty, and is epitomized by the following famous passage:

"And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter?" Areopagitica, supra note 123 at 35.

¹⁷¹ Howe's popular and progressive conception of press freedom notwithstanding, the early half of the eighteenth century was marked by vigorous political repression, the frequent prosecution and jailing of irksome editors, and numerous instances of sectarian violence against newspapermen, A History of Journalism in Canada, supra note 6 at 19 - 23. While abuses of the press abated considerably as the ripples of reform in English law washed ashore in colonies, freedom of the press per se was never mentioned in Confederation debates, nor the resulting constitution itself.

¹⁷² British North America Act, 1867 (U.K.), 30 & 31 Vict., c.3.

¹⁷³ Bill No. 9, An Act to Ensure the Publication of Accurate News and Information Act, 3rd sess., 8th Leg., Alberta, 1937, [the "Press Bill"].
newspapers were required to publish government statements furnished by the Social Credit Board, an ideological appendage of the government, and furnish the names and occupations of any source of statements or information appearing in a newspaper when so required.\textsuperscript{174} As penalties for contravention, the \textit{Press Bill} gave the provincial Cabinet the power to indefinitely prohibit the publication of any newspaper, any specified individual’s writing, or any information emanating from designated sources.\textsuperscript{175} The Lieutenant Governor reserved the entire \textit{Social Credit Act}, and Parliament referred it to the Supreme Court.\textsuperscript{176} Their judgement remains the most significant specific pronouncement on constitutional status of freedom of the press in Canada.\textsuperscript{177} While the scope of rights recognized by \textit{Alberta Press Reference} is extremely limited, the case nonetheless marks a definitive turn in the citizen-state relationship. At long last, the democratic rights of the citizen are recognized as supreme, and the intrusive acts of government as exceptions in need of justification.

The principle \textit{ratio} of the \textit{Alberta Press Reference} case is that any attempt to limit freedom of discussion in the press is \textit{ultra vires} the provincial legislatures. The court, however, went well beyond the simple division of powers issue, and held that freedom of the press is a fundamental tenet of Canadian constitutional democracy. In the judgement’s most oft-cited passage, Duff C.J.C. wrote:

\begin{quote}
174 \textit{Ibid.} ss. 3 & 4.

175 \textit{Ibid.} s. 6(a-c).

176 For a complete account of the battle over the \textit{Press Bill}, see H. D. Fischer, \textit{Struggle for Press Freedom in Canada} (Bochum: Universitätsverlag Dr. N. Brockmeyer, 1992); see also \textit{A History of Journalism}, \textit{supra} note 6 at 226-233.

177 \textit{Alberta Press Reference, supra} note 23.
\end{quote}
The [British North America Act] contemplates a parliament working under the influence of public opinion and discussion. There can be no controversy that such institutions derive their efficacy from free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defense and counter-attack; from the freest and fullest analysis and examination from every point of view of the political proposals....

...it is axiomatic that the practice of the right of free public discussion of public affairs, notwithstanding its incidental mischief, is the breath of life for parliamentary institutions. 178

While Duff C.J.C. spoke for the majority, Cannon J. echoed this sentiment in his concurring reasons:

Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government. Freedom of discussion...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 parties contending for ascendancy. 179

While both justices spoke of freedom of press and public discussion as "freedom governed by law," 180 and were careful to reserve Parliament's jurisdiction to limit these rights, their language, comprising phrases such as, "[the citizen's] fundamental right to express freely his untrammelled opinions about government policies," 181 and the "rights of the Crown and the people as a

178 Ibid. at 133.

179 Ibid. 145-46.

180 per Lord Wright in James v. Commonwealth, op. cit. 133.

181 Ibid. 146.
whole," arguably established freedom of the press as a natural right of all democratic citizens, and delineated a limited sphere of constitutionally protected discourse which even Parliament may not abrogate. In the *Alberta Press Reference*, for the first time in Anglo-Canadian law, a court read the words of democracy and recognized in them the inseparable strand of freedom of the press. The court's bold assertion that an "implied Bill of Rights" existed between the austere Victorian lines of the *British North America Act* subsequently allowed them to invalidate much of Quebec Premier Maurice Duplessis's authoritarian assault on religious and expressive freedom. Their line of reasoning remains a most persuasive statement of the institutional role played by press functions in a democracy. Recently, this line of cases was instrumental in allowing the High Court of Australia, a nation without any constitutionalized rights document whatsoever, to derive an implied "right of communication" from Australia's democratic system of government. Unaided, and unburdened, by a constitutional text, the court held that citizens in a self-proclaimed democracy are entitled to hold their governments accountable, which in turn requires a mechanism of free and open communication to be meaningful. Not surprisingly, the court drew heavily upon the Canadian pre-*Charter* rights cases in creating this limited freedom of expression, which, while restricted to political discourse, nonetheless establishes a basic and

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185 *Ibid.* at 594, per Mason C.J.

186 It is interesting to note that the eminent American First Amendment scholar Alexander Meiklejohn believes that a proper interpretation of the First Amendment limits its absolute protection of speech to political subject matter. A. Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Harper, 1948).
inalienable right to freedom of the press.187

After the trilogy of Quebec civil rights cases, the courts continued to remark on the importance of a free press, and integrated the recognition of the media special role in facilitating a milieu of general intellectual freedom into their decisions, though the opportunity to do so arose less frequently.188 In this way, the principle of press freedom continued to play a fundamental role in guiding the courts' hand in shaping boundaries of privacy and freedom from state intrusion. Foreshadowing the constitutionalization of the press,189 the Royal Commission on Publications in 1961 wrote that, "[s]o sacred indeed is the freedom of expression -- or freedom of the press, which is but a function of all freedoms -- so essential is it to our way of life that its protection benefits from every doubt of State measures which concern it."190

Thus, long before any wide-reaching freedom of expression took hold in the law, freedom of the press secured and defined the essential framework of democracy and the relationship between governors and the governed. Indeed, neither freedom of the press nor liberal democracy makes

187 Leaving only New Zealand, amongst democratic common law countries, without any explicit or judicially implied protection for freedom of the press.

188 In *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455 at 467, the Supreme Court held that the government could reasonably restrict the freedom of expression of certain civil servants on blatantly political matters, but echoed the words of *Alberta Press Reference*, noting that, "our democratic system is deeply rooted in, and thrives on, free and robust public discussion in public issues. As a general rule, all members of society should be permitted, indeed encouraged, to participate in that discussion."

189 The idea of legislatively entrenching freedom of the press was raised in Parliament during the mid nineteen-fifties (Debates of the House of Commons, (7 February 1955) Vol. I, at 895, and (30 January 1956) at 690), and first came to fruition with the enactment of the *Canadian Bill of Rights* in 1960, S.C. 1960, c. 44, s. 2(1). However, the Bill suffered an ignoble fate, interpreted into irrelevance by a conservative judiciary. See W. Tarnopolsky, *The Canada Bill of Rights* (Toronto: Carswell, 1966).

sense without the other. Liberal democracy is premised on the existence of a popular will amongst an adequately informed citizenry, neither of which can exist without a sustained flow of accurate information and access to an open forum of opinion on matters of public importance.\(^{191}\) This is precisely the point expressed by Tunis Wortman, a Jeffersonian republican and libertarian press theorist of the early nineteenth century, who wrote that:

\[ \text{[t]he government of the United States is the genuine offspring of a pre-existing determination of public volition...With respect to government, therefore, everything is dependent upon the public will...it should therefore be established as an essential principle, that freedom of investigation is one of the most important rights of a people.}^{192} \]

Moreover, the press is the sole effective means by which the popular will (and popular arms if necessary), may be turned against a government which is behaving undemocratically. Therefore a free press, unfettered by special indulgences and unmolested by the government’s henchmen, is absolutely essential to the preservation of democracy. Conversely, in the absence of liberal democracy, freedom of the press makes no sense. Our conception of press freedom is inimical to every contemporary form of authoritarian rule, regardless of its stripe, just as it once stood in defiance of the divine right of kings.\(^{193}\) Freedom of the press, in our understanding of the term, would be an anathema to any system of sovereignty premised on a principle other than the free and informed consent of the governed. As Oliver Wendell Holmes so sagely observed in his famous dissent in Abrams v. United States, “persecution for the expression of opinions


\[^{193}\text{See Four Theories of the Press, supra note 15.}\]
seems... perfectly logical,” if one does not subscribe to the fundamental democratic tenet that, “the ultimate good desired is better reached by free trade in ideas.”\textsuperscript{194}

Viewed through the lens of political history, the declaration that “everyone” has a right to freedom of the press may be seen as a statement about the kind of society we desire as it is about the press itself. This conception is consistent with a form of positive rights theory which maintains that freedom of the press is an indelible part of the answer to the constitutional question of who governs a society,\textsuperscript{195} and accounts for the inclusion of freedom of the press as a “fundamental freedom” in the \textit{Charter of Rights and Freedoms}, and as the “firstness” of the First Amendment in the United States Constitution.\textsuperscript{196} It is also consistent with the “watchdog function” commonly ascribed to the press, and the recognition that an independent press is not only a hallmark of democratic government, but is in fact the only reliable protector of it.

The principles of freedom of the press are simple: the people as a whole, and not those in power, must be the final arbiters of political truth and virtue; corruption, ineptitude, or other breaches of the public trust by government officials must never find shelter behind the screen of censorship;

\textsuperscript{194} 250 U.S. 616 (1919) at 630.

\textsuperscript{195} In true Kantian form, Isaiah Berlin argued that there is a significant difference in kind between questions of fundamental authority in the state and the extent to which the state may interfere in individual liberty. \textit{Four Essays on Liberty} (New York: Oxford University Press, 1969) at 130. Berlin’s position thus supports an interpretation of press freedom which sees the right as a necessary entitlement of citizens in order to facilitate their self-government. The applicability of Berlin’s distinction between “freedom to” and “freedom from” to the media concentration question was also noted by Professor Michael Keren in, “Media Conglomerates: Just How Worried Should we Be?” in M. Keren ed., \textit{The Concentration of Media Ownership and Freedom of the Press} (Tel Aviv: Romot Publishing, 1996) at 45.

the people must have reasonable access to the physical implements of communication; and ideas, information, and opinion on matters of public importance must never be confiscated from the forum of open discussion through perversions of the law of property.
CHAPTER 3

Do Newspaper Ownership Controls Infringe Section 2(b)?

Freedom of Expression

The process of analyzing the section 2(b) claim of newspaper publishers in the framework provided by the Irwin Toy test yields a predictable result: control over newspaper ownership violates freedom of expression and the press. There is no question that publishing newspapers constitutes expressive conduct. Newspapers are the ultimate soap-box and, as the Indian Supreme Court has observed, “newsprint constitutes the body, if expression happens to be the soul.”197 As the United States Supreme Court has noted, “ownership carries with it the power to select, to edit, and to choose the methods and manner of presentation.”198 Owners are also in a position to shape the tone and character of their newspaper’s coverage through their choice of publishers and editors, the establishment of editorial policy and, less frequently, through direct intervention in the day-to-day content of their publications. Although the prevalence of corporate control in the newsroom has been the subject of extensive debate, there is no question as to the potential for influence from on-high.199 It is also uncontroversial that the owner’s personal political perspective is often instrumental in setting down the essential elements of the editorial stance.200 Andrew Neil, former editor of the Sunday Times described the influence of his

197 Indian Express Newspapers (Bombay) P. Ltd. v. Union of India AIR 1986 SC 515 at 540.


199 Winter, supra note 6 at 98-99.

newspaper's owner, billionaire communications-tycoon Rupert Murdoch, in the following terms:

For a start he picks as his editors people like me, who are mostly on the same wavelength as he is...[he] expects his papers to stand broadly for what he believes in: right-wing Republicanism from America mixed with undiluted Thatcherism from Britain and stirred with some anti-British Establishment sentiments, as befits his heritage.\(^{201}\)

Leaving aside any normative evaluation of ownership influence over editorial content, it is safe to conclude that the shaping of a newspaper's content, both by the direct contribution of articles and the indirect exercise of influence, is a form of expression. Thus, there is no question that publishers would pass the initial threshold of showing that ownership controls impact upon their protected freedom of expression. This protection is undiminished, at least at this initial stage, by the fact that publishers can be shown to be motivated in their expressive pursuits primarily by the quest for corporate profit. In *Irwin Toy* the Supreme Court re-iterated its position, first articulated in *Ford v. Quebec (Attorney-General)*,\(^{202}\) that "there is no sound basis on which commercial expression can be excluded from the protection of section 2(b) of the *Charter.*"\(^{203}\)

In the case of newspapers, however, publishers would have little trouble showing that at least a portion of the editorial expression in their newspapers constitutes their own personal and sincerely held views, and that much of the pleasure of owning newspapers derives from the ability to make one's views heard in a broad and influential manner.


\(^{202}\) *Ford, supra* note 47 at 766-767.

\(^{203}\) *Irwin Toy, supra* note 38 at 971.
Having passed the admittedly low threshold for section 2(b) protection set out in *Irwin Toy*, by showing that their activities are aimed at directly and indirectly conveying a specific messages and meanings to their readership, newspaper publishers would still have to demonstrate that the impugned legislation either expressly intends to restrict expression, or that its collateral effects restrict expression which advances the values underlying section 2(b). There is no question that the government’s purpose in enacting newspaper ownership controls would be to turn down the volume, so to speak, on the expressive influence wielded by certain individuals. That conclusion, however, is not necessarily determinative of the section 2(b) infringement. While the claim that ownership controls violate freedom of expression is most often painted in broad-brush strokes asserting the abrogation of constitutional principle at a fundamental level, the actual extent of the infringement of the owners’ personal rights, if any, is much narrower.

On its face, a restriction preventing the purchase of one or more newspapers by an individual already controlling a substantial segment of the print-press in Canada limits neither the content of his or her message, nor his or her ability to communicate it to the desired audience. No message would be censored, and affected individuals would be free to publish handbills, leaflets, or letters and distribute them to the community at large, to air their views in space in purchased from other proprietors’ newspapers, or even to establish a new competing newspaper. They would only be prevented from taking over publication of existing newspapers. Whatever challenge Conrad Black and the handful of other press barons potentially impacted by ownership controls might advance against ownership control, they cannot deny that the basic spirit of the

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204 See Memorandum of Fact and Law of Hollinger Inc. in *Council of Canadians*, supra note 7, at 15.
Charter's free speech guarantee, "to ensure that everyone can manifest their thoughts, opinions, [and] beliefs,"\textsuperscript{205} has been largely respected in their case. If owning a newspaper is a form of speech, Conrad Black is one of the most heard voices in Canada. This is not a simple case of an individual being silenced by the state.

While ownership controls do not seek in any way to reduce the public's access to messages conveyed by the media, or diminish any particular perspective, they do aim to create a balance in the material being presented, and consequently obstruct the ability of individual publishers to disseminate their as widely as they might wish. This attempt to influence the allocation of the expressive opportunities afforded by newspaper ownership would make it harder for certain individuals to reach audiences which they do not already serve. For instance, Conrad Black presently owns more than half of the daily newspapers in Canada, but none in Toronto. Under the terms of the Canadian Newspaper Ownership Act, it would be most unlikely that Black would be permitted to acquire any of the three existing Toronto daily newspapers, considering that the addition of these large and influential newspapers would give him a virtual strangle-hold on the Canadian newspaper industry. While he, and the individuals affected by ownership concentration controls, would still be free to start new publications, the dictates of economic reality largely forestall them from doing so.\textsuperscript{206} Consequently, neither he, nor any of the columnists or other

\textsuperscript{205} Irwin, supra note 38 at 968.

\textsuperscript{206} The contradiction between the imperatives of the economic market and the marketplace of ideas is one of the most striking features of the modern media environment. Those newspapers which produce a higher return on investment, at the expense of editorial quality and content, will be more economically successful than their "high-quality" competitors. Similarly, advertisers often prefer that a market be served by a single newspaper, rather than by two or more competing publications, as the existence of a daily newspaper monopoly does not raise lineage rates dramatically, but avoids the need to advertise in more than one publication. These trends are more fully discussed in R. Entman, Democracy without Citizens: Media and the Decay of American Politics (New York: Oxford University Press, 1989) at 91ff. See also the Georgetown Law Journal, Media and the
writers under exclusive contract to his newspapers, would not be able to reach readily the nation's largest and most economically influential urban market. The *Canadian Newspaper Ownership Act* would make the publication of additional newspapers more costly to certain publishers. It would impose a financial burden on expressive content, based on prior content, with the intention of reducing the influence of certain voices in the marketplace of ideas. In short, it would make it harder for certain individuals to use their chosen forum, namely newspapers, to reach the Canadian public.

The Canadian jurisprudence on choice of forum is limited, but has unambiguously rejected any suggestion that denial of a claimant’s chosen forum for expression automatically constitutes a breach of section 2(b). Although the Canada courts have never address the question of an individual’s entitlement to his or her chosen “forum” of expression in the abstract sense connoted by newspapers, the Supreme Court’s reasoning in the leading decision on point, *Committe for the Commonwealth of Canadian v. Canada*,207 may be applied by analogy. Of the three alternative, but generally similar, approaches to choice-of-forum challenges articulated in *Commonwealth*, Justice McLachlin’s test best applies to the context of newspapers. This approach requires the court to consider how the claimant’s choice of forum relates to the values underlying the guarantee of freedom of expression.

In this case, the jurisprudence laid down in *Irwin Toy* requires that the claimant establish that the expression in question (including its time, place, and manner) promote one of the purposes underlying the

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207 The facts of the case are discussed below at page 7.
guarantee of free expression," [as t]hese were defined in *Irwin Toy*. Only if the claimant can establish a link between the use of the forum in question for public expression and at least one of these purposes is the claimant entitled to the protection of s. 2(b) of the Charter.\(^{208}\)

Newspaper publishers would be in a strong position to show that the effects of the legislation touched upon their pursuit of the values underlying section 2(b). Speaking from the platform of a newspaper's editorial pages, and influencing the story and source selection in its news section offers an obvious enhancement of one's participation in social and political discourse. Indeed, freedom of the press was first sought as a means of allowing citizens to informing each about current affairs and influencing popular opinion. Thus, publication of a newspaper is not merely linked to social and political participation, it is the epitome of these democratic values. It is indeed difficult to imagine any activity more clearly linked with the one's participation in the social and political life of a community than the publication of a newspaper. As such, ownership controls infringes the expansive interpretation of freedom of expression which we have seen, in chapter 1, prevails in Canada.

The foregoing analysis is based on the traditional test for violations of freedom of expression. The *Canadian Newspaper Ownership Act* can also be seen to violate section 2(b) purely from the point of freedom of the press. Although the court has never articulated a discrete test for freedom of the press equivalent to its expression-rights test under *Irwin Toy*, there is now sufficient body of case law which, combined with the historical experience of freedom of the press, can be used to formulate an analysis of legislative restrictions on press functions.

\(^{208}\) *Commonwealth, supra* note 51 at 238-239.
Freedom of the Press

Publishers are not the only parties who would be affected by the Canadian Newspaper Ownership Act, although they would most certainly be the ones bringing a challenge to it. The entrenchment of the Charter of Rights and Freedoms as part of the Canadian Constitution in 1982 finally brought formal recognition to freedom of the press as a foundational principle of Canadian society, and as a right guarantee to everyone in Canada. In the first Charter case concerning freedom of the press to reach the Supreme Court, Justice Lamer J. (as he then was) wrote that:

freedom of the press is indeed an important and essential attribute of a free and democratic society, and measure which prohibit the media from publishing information deemed of interest obviously restricts that freedom.\textsuperscript{209}

In its simplest and most literal form, freedom of the press gives substance to freedom of expression by guaranteeing individuals the right employ the technologies of mass communication to disseminate otherwise lawful expression. But it must also mean something more. When viewed in concert with the historical roots of press freedom, the Supreme Court's reading of freedom of the press under section 2(b) is best understood as guaranteeing all citizens the right to access a community of information and opinion, which is factually accurate and comprehensive, and offers a representative diversity of viewpoints. As such, freedom of the press under the Charter is the right to enjoy a condition of informational freedom and abundance. This

\textsuperscript{209} Canadian Newspapers v. Canada (Attorney-General), [1988] 2 S.C.R. 122 at 129. The media organizations involved in this case challenged the validity of section 442(3) of the Criminal Code, which provides for a mandatory publication ban on the identity of a sexual assault victim, when she or he requests it. The court held that this provision was a justifiable limit on freedom of the press, as it was necessary for the encouragement of victims to come forward, and in no way interfered with the media's right to fully and substantively cover the proceedings. The court also held that the mandatory ban did not violate the accused's right to a fair and public hearing, as guaranteed by section 11(d) of the Charter.
understanding of freedom of the press is buttressed by the language of section 2(b), which guarantees press freedom to "everyone". American First Amendment scholar Jerome Barron rightly points out that the use of the word "everyone" gives the Charter's guarantee of press freedom a much more inclusive, and less individualistic, flavour than the First Amendment. "The point," Barron writes, "is that everyone has certain fundamental freedoms in the area of communication and free expression."^{210}

Under the Charter, the right of the potential audience to hear what a speaker has to say ranks in importance with the speaker's right to say it. The Charter's commitment to protect the individuals on both ends of any expressive transaction is well established in the section 2(b) jurisprudence. In Edmonton Journal v. Alberta (Attorney-General) the Supreme Court placed freedom of the press above privacy values in striking down the provisions of the Alberta Judicature Act which prohibited the publication of any details pertaining to matrimonial proceedings. Re-iterating its previous observation that, "freedom of expression protects listeners as well as speakers,"^{211} the court emphasized the special public interest of all citizens in having access to a free, fair, and fully informative press.

[A]s listeners and readers, members of the public have a right to information pertaining to public institutions and, particularly the courts.....Those who cannot [personally] rely in large measure on the press to inform them about court proceedings.....It is only through the press that most individuals can learn what is transpiring in the courts.


^{211} Edmonton Journal, supra note 80 at 1339.
They as "listeners" or readers have a right to receive this information.\textsuperscript{212}

In the case of the media, the interest of the listening, or reading, audience is clearly heightened. In the bustling vastness of modern society, the media are the eyes and ears of the general public. The Supreme Court has explicitly recognized that expression in the media is of seminal importance to the public. In \textit{Canadian Broadcasting Corporation v. New Brunswick}, the court commented on constitutional dimensions of public's interest in a free press, stating that:

\begin{quote}
[t]he media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enables members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being.\textsuperscript{213}
\end{quote}

The fundamental connection between adequate information and personal dignity of the individual citizen has been eloquently summarized by Professor Burt Neuborne.

When society provides its members with lawful choices, respect for individual dignity compels that the choices be the autonomous expression of individual preference. It is impossible to respect individual autonomy with the left hand while selectively controlling the information available to the individual with the right hand. A purportedly free individual choice premised on a government controlled information flow is a basic affront to human dignity.\textsuperscript{214}

Indeed, the concept of the citizen's right to information permeates the \textit{Charter}. For instance, in guaranteeing the right of all citizens to vote, section 3 creates a substantive right of meaningful

\textsuperscript{212} \textit{Ibid.} at 1339-1340.


\textsuperscript{214} The First Amendment and Government Regulation of Capital Markets, [1989] 44 Brooklyn L. Rev. 5 at 37.
democratic participation, which has been universally interpreted to comprise "the right to access sufficient information to make an informed vote." This necessarily has implications for the government's attempts to regulate the press. For instance, in *Thomson Newspapers Co. v. Canada (Attorney-General)*, the Ontario High Court held that a complete prohibition on the publication of polling information would infringe the right of electors to make strategic voting decisions. From these decisions, freedom of the press may be extrapolated to protect the gathering and dissemination of any and all information and opinion which citizens may reasonably require to participate meaningfully in the democratic process.

Between elections, citizens are also entitled to information about the conduct of their governments, and have a right to receive reports on Parliamentary debates and discussions. As the Supreme Court first held in the *Alberta Press Reference*, democracy itself demands that the citizen be able to see the state apparatus at work, and to judge its performance for himself or herself. It is only through the press that most individuals can really learn of what is transpiring in Parliament, the courts, and other organs of the state. Without the press, the public would be blind to the world around them and the doings of their governments and political institutions.

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216 (1995), 24 O.R. (3d) 109 at 138. While this point is uncontroversial, the decision of the trial judge, and the Court of Appeal in particular, present a disturbingly paternalistic view of Canadian voters, and attenuate protection for the expression of political information in a dangerous and unacceptable manner. The Supreme Court granted leave to appeal, and their decision is under reserve at this time. For a critical comment on the lower courts decisions, see N. Devlin, "Opinion Polls and the Protection of Political Speech - A Comment on Thomson Newspapers Co. v. Canada (Attorney-General)," (1997) 28:2 Ottawa L.R. 411.

217 *Edmonton Journal*, supra note 80 at 1339-40, re-iterated with emphasis in *Carson*, supra note 47 at 496.
In *New Brunswick Broadcasting Corporation v. Nova Scotia (Speaker of the House of Assembly)*,\(^1\) the Supreme Court considered a challenge to the restrictions placed on private television cameras within the provincial legislature, and concluded that, so long as they are not overly intrusive, there "can be no good reason" to exclude television cameras from the galleries.\(^2\)

In particular, the court emphasized that the use of devices which facilitate greater accuracy in the recording and reporting of events, such as television cameras, are to be favoured, not discouraged.\(^3\)

Similar reasoning applies to the coverage of court proceedings, which has yielded the two most significant *Charter* decision on freedom of the press. In *Lessard v. Canadian Broadcasting Corporation*\(^4\) the media sought to quash a series of search warrants which had been issued to police allowing the authorities to search the editorial premises of the C.B.C. and seize news materials as part of criminal investigations into potentially illegal activities which the C.B.C.'s journalists had witnessed, recorded, and partially broadcast. The C.B.C. objected to these warrants on the basis that they effectively rendered the media investigative agents of the state, interfered with the production and dissemination of the news during the period of the search, jeopardized access to confidential sources of information essential to adequate coverage of many significant stories and events, deterred reporters from making or preserving notes, and "chilled"

\(^{218}\) The court again adopted Cory J.'s words from *Edmonton Journal*, *supra* note 80 (*ibid.*), in upholding a *prima facie* right of the media to observe and report upon the functioning of legislative assemblies; *New Brunswick Broadcasting Corporation v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 406-7.


\(^{221}\) Decided with its companion appeal *Canadian Broadcasting Corporation v. New Brunswick (Attorney-General)*, *supra* notes 48 and 213.
the production of news by allowing the state to peer inside the editorial deliberations. The totality of these effects, they argued, contravened freedom of the press.222

Despite the plethora of opinions produced by the court, with the seven Justices sitting on the appeal writing four separate judgements, a rather cohesive approach to freedom of the press emerges. With the sole exception of Justice L’Heureux-Dubé, the court agreed on two fundamental principles: that the media’s special role in society demands an elevated level of judicial vigilance over potential state interference with the free functioning of the press, and that such interference must be proven both necessary and proportionate. The key differences amongst the members of the court centred on whether the facts of the case engaged the values of section 2(b), necessitating a section 1 justification of the warrants, or whether protection of the press was adequately subsumed within the criteria for assessing the reasonableness of searches at common law, the precise point at which press freedom is truly threatened by state action such as this.

The majority of the Court (6-1) rejected the argument that the issuance and execution of search warrants against media premises violated freedom of the press under section 2(b), and the entire court united in its conclusion that the press enjoys no blanket immunity from search warrants. Justice Cory, writing for himself and Justices Sopinka, Gonthier and Stevenson, held that while “the media are entitled...to special consideration because of the importance of their role in a democratic society,”223 the “constitutional protection of freedom of the press...does not....import

222 Lessard, supra note 48 at 452.

223 Ibid. at 444.
any new or additional requirements for the issuance of search warrants."^{224} Interestingly, however, the majority adopted the pre-Charter principle that search warrants issued against the media which unreasonably or unnecessarily impeded the operation of the press are not reasonable, and are therefore invalid. In *Re Pacific Press and The Queen,*^{225} Chief Justice Nemetz of the British Columbia Supreme Court had held that the press occupy a "special position,"^{226} requiring the courts to exercise singular vigilance over state police action directed towards it. The Supreme Court of Canada subsequently adopted this position in *Descôteaux v. Mierzwinski,*^{227} where Justice Lamer (as he then was) on the eve of repatriation of the constitution, concluded that the courts had both the power and the obligation to quash government searches of press premises which "would [unduly] interfere with rights as fundamental as freedom of the press."^{228}

This early and enduring concern over press freedom, as discussed in the previous chapter, fundamentally informs the meaning of freedom of the press under *Charter,* and dictates that the courts will be quicker to intercede against government on behalf of the press, at least by way of monitoring the *bona fides* of any state action which affects the ability of individuals or organizations to perform press functions. The relevance of these decisions is that they set the media, and other performing press functions, on a higher plane of protection from government interference than other ordinary citizens. Search warrants by their very nature obviously disrupt

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224 *Canadian Broadcasting Corporation v. New Brunswick (Attorney-General),* supra note 213 at 475.


228 Quoted in *Canadian Broadcasting Corporation v. New Brunswick (Attorney-General),* supra note 213 at 473.
those upon whom they are served. The jurisprudence concerning warrants against the media, both before and after the advent of the Charter, demonstrates that there is something intrinsically dangerous to our precious principles of press freedom in any form of state-sanctioned hindrance of media organizations. These cases buttress the conclusion that government scrutiny of media conduct raises prima facie concerns about press freedom, and must be carefully monitored by the courts to avert abuses.

In Lessard and Canadian Broadcasting Corporation v. New Brunswick (Attorney-General), the majority expounded a list of criteria to be used in assessing the reasonableness of media-warrants which bears a striking resemblance to the principles of necessity and proportionality embodied in section 1. For instance, the Supreme Court directed magistrates issuing warrants to:

ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes, and the right of privacy of the media in the course of their news gathering and news dissemination....[bearing] in mind that the media play a vital role in the functioning of democracy.229

The court also suggested that the affidavit filed in support of the warrant must disclose the existence of potential alternative sources of the information sought, and the extent of the investigators' attempts to secure that material through those avenues. Further, it insisted that the terms of any warrant impede the operation of the press as little as possible.230 These steps mirror almost exactly the considerations of necessity and proportionality which characterize the process

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229 Lessard, supra note 48 at 445.

230 Ibid.
of analysis under section 1 of the *Charter* as discussed in chapter 1.

This similarity in approach to *Charter* analysis led Justice La Forest to shrewdly observe that it was "not, in any event, certain that the question of whether a search constitutes a reasonable limit under section 1 is really different from the question whether a search is reasonable under section 8 [of the *Charter*]." In substance, Justice LaForest's decision parallels that of the majority, and concurs in the result on the facts, but places a higher premium on protection of press freedom than was indicated by the majority. He cautioned that "reliance on [these aforementioned] factors in other situations could...lead to serious infringements of freedom of the press." This conclusion is significant since the court's compulsion to undertake a *de facto* justification of the way in which examinations of media premises and news materials may impact the press implies that underlying values of freedom of the press has already been breeched, or at least is threatened. Justice La Forest's caution as to the potential severity of the negative consequences to press freedom if warrants are insufficiently examined bespeaks an even firmer conviction that the exercise of state power against, or in relation to, the press is fraught with peril and requires careful judicial oversight to protect the integrity of the media's autonomy from government.

The court's most acute account of press freedom is found in Justice McLachlin's spirited dissent. Disagreeing with her colleagues on the implications of section 2(b) for the issuance of warrants, she wrote at some length on the necessity of special protection for media organization, on the

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231 Lessard, *supra* note 48 at 433.

fundamental assumption that “the history of freedom of the press in Canada belies the notion the press can be treated like other citizens or legal entities when its activities come into conflict with the state.” Integrating the traditional role of press in democratic society with the triumvirate of values underlying the Charter, the pursuit of truth, social and political participation and individual self-fulfillment, she stated:

The press furthers [the] pursuit [of truth] by reporting on facts and opinions and offering its comment on events and ideas - activities [which are]...premised on the free reporting and interchange of ideas. The press acts as agents of the public in monitoring and reporting on government, legal, and social institutions. Freedom of the press is also important to participation in the community and individual self-fulfillment. One need only think of the role of a community newspaper in facilitating community participation, or the role of arts, sports and policy publications to see the importance of freedom of the press to these goals....[I]t may be ventured that an effective press is dependent on its ability to gather, analyze and disseminate information independent from any state imposed restrictions on content, form or perspective except those justified under s. 1 of the Charter.

This approach led Justice McLachlan to conclude that any state action which interfered, or threatened to interfere, with the performance of press functions infringes freedom of the press, and requires justification under section 1. Even Justice McLachlan, however, held that the issuance and execution of search warrants is a reasonable limit, provided that certain safeguards, functionally identical to those enumerated by Justice Cory, were respected. The pressing and substantial purpose interest of all members of the community “in seeing that crimes are

233 Ibid. at 450.

234 Ibid. at 451-452.

235 Ibid. at 454-455, 433 & 444-446.
investigated and prosecuted,"\textsuperscript{236} was unhesitatingly endorsed as a sufficiently important to underwrite the infringement of freedom of the press.

Only Justice L’Heureux-Dubé concluded that the press neither had nor could claim any special status.\textsuperscript{237} In this conclusion she is badly out of step with both the law’s relationship with the press, as its protector from political manipulation, but also with her court’s commitment to a large and liberal interpretation of Charter rights.\textsuperscript{238} Protection of press functions is not so much a matter of indulging the needs and conveniences of commercial media outlets, but of safeguarding the public’s right to receive news it both needs, and to that which it is is constitutionally entitled.

In Lessard, the court was not pressed to strike a difficult balance between the public interest in the administration of justice and its interest in press freedom, as the two values were found to be fully reconcilable. These cases are useful, however, in establishing the principle that press functions enjoy a privileged level of protection from state interference, despite the fact that a majority of the court chose to operationalize that protection through the mechanism of the common law’s treatment of reasonable search and seizure. This jurisprudence demonstrates that the court is principally concerned with the necessity and proportionality of state interference with press functions, and will employ whatever mechanisms most conveniently permit it to perform this analysis. Their insistence in undertaking this analysis, and corollary disinterest in focussing on the language of section 2(b) and the establishment of an infringement, suggests that almost any

\textsuperscript{236} Ibid. at 446.

\textsuperscript{237} Ibid. at 436.

\textsuperscript{238} See Big M, supra note 71, 196.
governmental meddling with the press, such as that proposed by the *Canadian Newspaper Ownership Act, prima facie* necessitates an analysis following the general principles of section 1, irrespective of the guise under which it takes place. As the historical record clearly shows, the separation of the press, and the community of information and opinion which it facilitates, from state control or influence is the essence of freedom of the press, and an indispensable element of democratic society. Whenever that separation is threatened, the courts have a superordinate obligation to protect it. In the search warrant cases the magnitude of this obligation is underscored by the importance of the countervailing value which the courts are prepared to compromise in order to protect press freedom, namely the ability of the state to investigate and successfully prosecute crimes. It is also significant to note that, instead of focussing myopically on the effects of any specific search, the Court instead trained its attention on the broader implications of allowing police access to newsrooms and news materials on the culture and practice of news gathering. Therefore, the correct approach is for the courts is to examine the potential systemic impact of press regulations, rather than emphasizing single instances of state action. In the case of ownership regulation, taking this longer view raises serious concerns about the way in which publishers might seek to conform to perceived state wishes in order to protect their future economic interests, perhaps at the expense of editorial vitality. This heightens the need for detailed examination of the proposed measures, such as can only be provided by section 1, thus strengthening the impetus to find a *prima facie* infringement of section 2(b).

While *Lessard* provided an important foundation for the protection of press freedom under the *Charter*, the Court’s decision in *Carson* is its clearest application to date of the philosophy of press protection which it has espoused. In *Carson* the Supreme Court considered the
constitutionality of excluding the public and the media from a sentencing hearing during the portion of the proceedings where the specific details of the acts committed by the accused, a prominent citizen of the city of Moncton, were being discussed. Speaking finally with a united voice, the court held that although the section of the Criminal Code affording courts the latitude to make such orders was a reasonable limit to freedom of expression and the press, the trial judge had improperly exercised his discretion in ordering exclusion on the facts of the case. In short, they found that the record simply did not reveal any sufficient or compelling reason to infringe the public’s rights so grievously.

More importantly, however, the court finally articulated in unambiguous terms the two key press functions: facilitating informed democratic choice and debate, and the discrete but related task of monitoring the performance of governmental institutions. In regards to the media’s watchdog function as the overseer of institutional propriety by the government, courts, and other state agencies, the Court noted that:

the liberty to criticize and express dissentient views has long been thought to be a safeguard against tyranny and corruption. James Mill put it this way:

So true it is, however, that the discontent of the people is the only means of removing the defects of vicious governments, that the freedom of the press, the main instrument of creating discontent is, in all civilized countries, among all but the advocates of misgovernment, regarded as an indispensable security, and the greatest safeguard of the interests of mankind.\textsuperscript{239}

\textsuperscript{239} Carson, supra note 47 at 494.
The emphasis on the “interests of mankind,” referring to the right of everyone in society, is crucial to our understanding of the inter-relationship of private and public rights under the rubric of freedom of the press. It is, as Mill contemplates, only though the mechanisms of the press that politically effective popular dissent can be mobilized against a corrupt or invidious regime. Since all citizens share a common interest in the quality of their government and institutions, it is for the benefit of all that the press is protected from government interference. It also follows, however, that for this right to be truly effective everyone must have the opportunity to access the mediums of mass communication. For if the state is acting unjustly towards only a narrow segment of the population, but these same individuals are disabled from publicizing their grievances, then the liberty and freedom of the entire nation is undermined.

Addressing the importance of the embargoed information in relation to the general democratic demand for open social discourse, the Court stated:

That the right of the public to information relating to court proceedings, and the corollary right to put forward opinion pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom. The full and fair discussion of public institutions, which is vital to any democracy, is the raison d'être of the section 2(b) guarantees. Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press.240

This case attests to the active presence of a separate and distinct meaning to freedom of the press in section 2(b), beyond its role as the technical facilitator of expression. The right to attend and report upon court proceedings cannot be derived simply from the right to speak about the judicial

240 Carson, supra note 47 at 496-497 [emphasis added].
process as a general matter of freedom of expression. People could be entirely free to speak about the courts without being entitled to observe them in action. The additional element of access to information demonstrates that citizens have a right not only to speak about the courts, and other public institutions, but to speak and listen about them in an informed and accurate manner. The crucial point is that freedom of the press is protected not for the sake of expression per se in whatever form it may come – talk for talk's sake – but to facilitate substantive and informed discussions which possess at least the promise of providing intelligent resolution of important social issues. This requires information and expert opinions which only the press is in a position to provide, leading to the conclusion that freedom to disseminate information would be of little value if it did not also encompass the right of individuals to perform the functions of a free press, namely the gathering and dissemination of news and other information, without undue government influence.

Just as Joseph Howe convinced an early jury that it would be absurd and unjust, in a society that professed to enjoy freedom of the press, to punish a newspaperman who had published true and socially useful statements, the argument that freedom of the press must be adjudged by media's performance of its key functions still holds currency today. Therefore, since ownership controls, on their face, bear the risk of preventing publishers from disseminating information as widely as they wish, much of which may be accurate and valuable to readers, such a scheme by definition impairs legitimate press functions. Without a detailed rationalization of its provisions, one cannot be certain that regulation such as the Canadian Newspaper Ownership Act abides by the basic principle that the circulation of fair and responsible facts and opinions never be unjustifiably suppressed.
Significance also attached to the court’s use of the words “full and fair” to describe the desired condition of press coverage of important matters. Implicit in this phrase is the notion of political plurality, and the equitable, if not necessarily equal, representation of opposing and even marginal views. Discussion is not hear full until all a representative sampling of all voices has been heard, nor is it fair if any perspective is overplayed or gains disproportionate attention. It is on this basis that the Supreme Court has suggested that legislated limits on third-party spending in elections may be justified. In *Libman v. Quebec (Attorney-General)*, the court soundly repudiated the previous judgement of the Alberta Court of Appeal in *Sommerville v. Canada (Attorney-General)*, wherein the Alberta court rejected, in near-absolute terms, the possibility of justifying third-party spending limits under section 1. Refuting the alleged impropriety of government measures aimed at taming the influence of the wealthy, the Supreme Court stated that, “fairness is promoted in order to ensure that to the greatest extent possible various sides... have a reasonable opportunity to present their case to voters... and the voters themselves will have a reasonable opportunity to hear the various views put forward.”241 This principle appears to collide directly with the interpretation of freedom of the press found in three cases concerning the right of non-mainstream political parties to put forward their views on public television, the most comprehensive of which is *Trieger v. Canadian Broadcasting Corp.*242 This case involved the first claim brought under the *Charter* for a positive right to access the mass media.243 Seymour Trieger, the leader of the Green Party, sought an injunction compelling the C.B.C. to include him in a televised debate between party-leaders held during the 1988 federal general election. In

241 *Libman*, supra note 103 at para 40.


rejecting his application, the Court expressed grave doubts as to whether the C.B.C., in its role as an independent broadcaster, was subject to the Charter, but proceeded to discuss the case on its merits nonetheless. Justice Campbell made it very clear that he was not impressed with the submission that freedom of expression and the press afforded the applicant the right, or the courts the power, to interfere in the editorial discretion of the press.

It is not the function of the government or indeed the courts to dictate to the news media what they should report. The broadcasters are exercising a function that is very central to the democratic process. But it is a function that they perform quite independent of government. What the applicants are really asking this court to do is to dictate the content and the agenda [of the C.B.C.'s programming].

The application of this reasoning to the case of newspaper regulation quickly breaks down. To begin with, ownership review dictates nothing, but simply rewards and encourages diverse coverage by affording publishers with a demonstrated commitment to editorial excellence the chance of purchasing further newspapers above and beyond the basic limits on concentration. The basic right of editors and publishers to print whatever they wish in the first instance is untouched. Applied by analogy to facts of the Trieger case, the terms of the Canadian Newspaper Ownership Act would allow any broadcast outlet to hold campaign debates featuring which ever political leaders it wished. However, if any one broadcaster attempted to secure the exclusive right to publish leadership debates, it would only be allowed to do so if it had a demonstrated track-record of fairness and equity in allocating time to the full spectrum of candidates. As one media outlet’s control over the news and information agenda increases, so

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244 Trieger, supra note 242148.

245 Ibid. at 148-149.
too does the public’s interest in ensuring that this agency is carrying out its journalistic role responsibly and in accordance with the Charter democratic values of pluralism and political diversity.

For example, the promotion, and indeed warranting, of diversity in political expression through the broadcast media has already been found compatible with the guarantee of political and expressive freedoms in the Charter. In Reform Party of Canada v. Canada (Attorney-General), a five-member panel of the Alberta Court of Appeal unanimously held that the provisions of the Canada Elections Act246 compelling broadcasters to provide free and paid-for air time to all bona fide political parties was a reasonable limit of the media’s freedom.247 Therefore, the courts must bear in mind that although the private commercial nature of the press is essential to its independence from government and its financial viability, the freedom to engage in the business of media is ancillary to the paramount interest of ensuring that the press fulfills its constitutionally ordained function.

Early in its freedom of the press jurisprudence, the Supreme Court adopted the European Court of Human Rights’ holding in the Sunday Times Case that the notion of press freedom “guarantees not only the freedom of the press to inform the public but also the right of the public to be


247 Reform Party of Canada v. Canada (Attorney-General), [1993] 3 W.W.R. 139 (Alta. Q.B.), rev’d [1994] 4 W.W.R. 609 (Alta. C.A.). The Alberta Court of Appeal’s decision in this case is particularly noteworthy, because the court unanimously held that the basic principle of forcing broadcasters to set aside both free and paid time for political advertising was constitutional. All the justices also agreed that the limits on sale of surplus advertising time were impermissible, the majority held that the basic division of free time favouring existing and established parties was justified, but only when tempered by the possibility of discretionary adjustment to remedy inequality. The minority would have held the entire scheme invalid by virtue of its political discrimination.
properly informed." The language of the Court, referring to the freedom of the press, and the right of the public, suggests that the principle underlying the protection of press functions has everything to do with the public interest, and comparatively little to do with the institutional media's commercial interests. By speaking in terms of the media having "the task of imparting such information and ideas [as are of public interest]," and the public having "a right to receive them," the court down-plays the media's commercial interest in publication, and focuses rather on the public need for knowledge as the essence of freedom of the press. The public's need for insight and information is clearly the dominant purpose and rationale underwriting freedom of the press in Canadian jurisprudence. While a generous measure of private freedom to deal with the media, both as expression and as commerce, is essential to the discharge of press's public function, it is clear that individual rights to participate in social discourse through the instrument of the press, that freedom will always remain predicated upon, and subservient to, the dominant public interest in a free and fairly representative press.

This approach is consistent with European Court of Human Rights' position that the freedom of expression provisions of the European Convention on Human Rights impose a negative obligation to allow private citizens to ownership and operate the press, as balanced against the positive obligation on contracting states to take measures ensuring pluralism in their internal media.

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249 *Sunday Times Case*, ibid. at 40
marketplaces. In the Lentia Case, the European Court confronted Austria’s state monopoly on private radio broadcast, and found it to be an unjustified restriction on the right of individuals to express themselves through ownership and utilization of the press. Striking down the monopoly as a infringement of Article 10 of the Convention, the court stated that,

contrary [to Austria’s contention that private ownership of the press would comprise pluralism and accessibility], true progress towards attaining diversity of opinion and objectivity was to be achieved only by providing a variety of stations and programmes.......a public monopoly is the [mode of regulation] which imposes the greatest restriction on freedom of expression.

Having recognized the need for a private role in the press, the court emphasized, however, that the press would be incapable of fulfilling its essential purposes of informing the public, “unless it is grounded in the principle of pluralism, of which the state is the ultimate guarantor.”

Also in a similar vein, the German Constitutional Court has held that Article 5 of the national constitution mandates that the press be, “neither at the mercy of the state nor of any single social group.” In so doing, the court has assigned to the press the task of educating and informing the public, functioning as a forum for the development of public opinion, and serving as both a


251 The Lentia Case, supra note 15 at 16.

252 Ibid. [emphasis added].

check on the government, and an intermediary between it and the public.\textsuperscript{254}

Ultimately, the positive demand for citizens to have the benefit of a certain kind of press, translates into the traditional negative demand on the government not to interfere unduly with the workings of that press,\textsuperscript{255} which must be "largely unfettered" in order to fulfill its constitutionally ordained functions.\textsuperscript{256} In the American context, Patrick Garry posits what he calls a "revised marketplace" theory of the press, which holds that:

the individualistic and societal values of the First Amendment coincide with the speech and press clauses respectively, and that the societal function relates to the maintenance of an open, accessible and competitive industry. Insofar as the press discharges a societal function, it is entitled to First Amendment protection.\textsuperscript{257}

Thus, the history, theory, and case law of freedom of the press establish that the media have the vitally important, and commensurately protected, role in a democratic society of informing the public and of watching over the conduct of public authorities. The press is expected to function both as a marketplace of ideas, and in an active investigatory role, which has been variously been

\textsuperscript{254}W. Schulz and J. Hofman, "Control Functions of the Media in the Federal Republic of Germany" in \textit{The Vigilant Press} (UNESCO, 1989) at 33.

\textsuperscript{255}The American Vision of a Free Press, supra note 191 at 94-96. Garry discusses how this positive view dovetails with the First Amendment theories of such negative-right theory proponents as Alexander Meiklejohn and Robert Bork, who both see freedom of the press as an instrumental right enshrined to further "the freedom of those activities of communication by which we govern." See A. Meiklejohn, \textit{Political Freedom: The Constitutional Powers of the People} (New York: Harper, 1960), and R. Bork, "Neutral Principles and some First Amendment Problems" (1971) 47 Indiana L. J. 1.

\textsuperscript{256}Carson, supra note 47 at 497.

\textsuperscript{257}The American Vision of a Free Press, supra note 191 at 91.
term a "checking value"\textsuperscript{258} or "watchdog function."\textsuperscript{259} The need for constitutional protection of the press arises in large measure from the obvious conflict of charging the press with monitoring precisely those institutions that are empowered to censor them, namely Parliament and the courts. In the famous "Pentagon Papers Case," the \textit{New York Times} and \textit{Washington Post} successfully quashed an injunction against publication of a series of documents entitled, "History of U.S. Decision-making Process on Viet Nam Policy," which threatened to be highly embarrassing to the administration and defense establishment. Elaborating on the importance of protecting the operations of the press in providing information to the public free of government hindrance, Justice Hugo Black wrote:

\begin{quote}
[t]he Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.\textsuperscript{260}
\end{quote}

Infringements of the media's ability to fulfill its appointed purpose will come in a diversity of shapes and guises, ranging from direct bars to information such as secrecy laws and locked court rooms, to far more subtle forms of censorship or obstruction such as political threats against a publishers' economic interests or the selective application of general powers over taxation and import duties. All these forms of interference share the common vice of inhibiting the media's ability to collect and communicate ideas, thereby impoverishing the marketplace of ideas.


No matter how nobly intentioned or kindly characterized, restrictions on ownership concentration would diminish press freedom by having the express effect of attenuating the volume and influence of certain voices in the Canadian marketplace of ideas, imposing economic obstacles to ownership of newspapers, and especially, by allowing government scrutiny of editorial content.

The creation of a Press Ownership Review Tribunal presents both the risk and appearance of political interference in the freedom of the press. A cloud of suspicion and concern hangs over any scheme which allows state-ordained inquiries into editorial content and performance, and determines who may or may not publish newspapers in certain communities. The danger of allowing a governmentally appointed agency to review, and pass judgement upon, the performance of media organizations breaches the fundamental edict of freedom of the press, which demands separation of the realm of public information and opinion from the control of the political masters it must keep in check. Restrictions which are susceptible to taint by the exercise of discretion by interested parties must be strictly scrutinized for adherence to Charter values, for in order to vigorously and fairly report on the government’s doings the press must be free from fear of reprisals. The Charter’s strong commitment to the protection of unpopular or contrarian expression has been repeatedly affirmed by the Supreme Court. In R. v. Butler, addressing the issue of censoring obscenity, the court adopted Justice McLachlin’s unequivocal

261 The only Canadian case touching on this form of interference involved the claim of two journalists behind the Native barricades at the Oka standoff that the armed force’s practices in supplying food and other basic necessities to those inside the compound threatened their ability to continue filing reports, and consequently violated the freedom of the press. While their application for injunction was rejected as failing to raise a triable issue, I would argue that Joyal J. erred badly in failing to take the media’s claim seriously. Although no prima facie obligation to provide food or other supplies was established, and national security considerations might well have outweighed the media’s claim, the candid admission by the government at trial that it was angry with the continued exposure the media’s presence in the camp was giving to the Native Warrior’s cause, makes it clear that free press values were at play. Tactical use of military might to end media coverage which it finds irritating or embarrassing is perhaps the most vulgar and sadly prolific form of anti-democratic censorship. If the court was to reject the media’s claim, it ought to have done so under the ambit of section 1. MacLeod v. Canada, [1991] 1 F.C. 114 (F.C.T.D.).
statement that "the content of a statement cannot deprive it of the protection accorded by section
2(b), no matter how offensive it may be."\textsuperscript{262}

The danger of allowing political control over media over is strikingly illustrated in the recent
American experience with media cross-ownership. In a blatant example of illegitimate
interference with the press, motivated by a personal political agenda, Senator Ernest Hollings
slipped a single seemingly innocuous paragraph into a 471 page appropriations resolution.
Passing through Congress without a word of debate, this provision had the singular effect of
preventing media mogul Rupert Murdoch from gaining continuing exemptions from the Federal
Communications Commission (F.C.C.) in respect to his ownership of both newspaper and
television interests in the Boston and New York city areas.\textsuperscript{263} As a result, Murdoch was forced
to dispose of the \textit{New York Post}, and place the \textit{Boston Herald} in an arms-length publishing trust.
Not surprisingly, the measure was enacted with the cooperation of Senator Ted Kennedy of
Massachusetts who had something of an ongoing feud with Murdoch and the publishing
magnate's conservative newspaper, which often criticized him savagely in his own backyard.\textsuperscript{264}
Murdoch subsequently described the surreptitious amendment targeting him as "liberal
totalitarianism,"\textsuperscript{265} and in the ensuing court challenge, the Federal Court of Appeal agreed.
Quashing the measure as a violation of the First Amendment, Justice Williams held that it, "strikes

\begin{footnotes}
\item \textsuperscript{262} \textit{Butler, supra} note 49 at 488.
\item \textsuperscript{263} Pub.L. No. 100-202, 101 Stat., 1329 (1987) at 34.
\item \textsuperscript{264} For an account of the animosity between Kennedy and Murdoch, see J. Tuccille, \textit{Rupert Murdoch} (New York: D.I. Fine, 1989) at 3-7, and 187ff.
\item \textsuperscript{265} \textit{Ibid.} at 4.
\end{footnotes}
at Murdoch with the precision of laser beam," concluding that, "[w]hatever Congress’ motive, the “potential for abuse” of the First Amendment interests is so great," that it could not stand.\textsuperscript{266}

In addition to the litigation surrounding the Kennedy-Murdoch feud, the most notorious incident of gratuitous executive interference in freedom of the press occurred, unsurprisingly, during the Nixon Presidency. Angered by the \textit{Washington Post}'s ardent pursuit of the Watergate scandal, and other unfavourable coverage, Nixon uttered an angry and vindictive threat against his journalistic antagonist to his advisors, intimating his intent on retribution. “The main, main thing is \textit{The Post} is going to have damnable, damnable problems out of this one...They have a television station...And they’re going to have to get it renewed.”\textsuperscript{267} Referring to \textit{Post}'s need for government permission to continue owning both a television station and a newspaper in the same market area, Nixon’s remark demonstrates chillingly that when the government is afforded latitude to regulate media ownership, the risk of base political manipulation is unfortunately omnipresent.

While this contingency does not render ownership controls invalid, it demands that courts examine regulatory schemes to ensure that they provide adequately impenetrable fire-walls separating the regulatory process from executive influence. While blatant political interference of this sort has not been seen in the Canadian regulatory experience, freedom of the press

\textsuperscript{266} \textit{News America Publishing Inc. v. F.C.C.} 844 F.2d 800 at 814-815 (D.C. Cir. 1988).

demands that the court remain ever vigilant for petulant and improper exercises of influence by
the very politicians whom the media is charged with scrutinizing. Whenever the executive branch
is allowed to gain a toe-hold of influence over the media’s license to print, the spectre of political
interference and censorship rises. This risk is particular acute in the case of newspapers, which
are the only arm of the press which engages in active editorialization, and constitutes a *prima
facie* infringement of the section 2(b) guarantee of a free press.

It is interesting to note that when the Federal Court of Appeal examined the Canadian scheme of
restrictions on broadcast and newspaper cross-ownership enforced by the C.R.T.C., it was
confronted with a very similar issue. The net effect of the regulation was to force the Irving family
to divest itself of certain newspapers in New Brunswick if it wished to continue holding a
terrestrial television broadcast license in the same region. Aggrieved by this decision, the Irvings
challenged the rules, claiming *inter alia* that they violated the *Charter’s* guarantee of press
freedom. Somewhat surprisingly, the Federal Court of Appeal court curtly, and without any
reasoned analysis, refused even to find an infringement of section 2(b), stating simply that:

> the argument [that this violates freedom of the press] confuses the
> freedom guaranteed by the *Charter* with a right to the use of property
> and is not sustainable. The freedom guaranteed by the *Charter* is a
> freedom to express and communicate ideas without restraint, whether
> orally or in print or by some other means of communication. It is not a
> freedom to use someone else’s property to do so. It gives no right to
> anyone to use someone else’s land or platform to make a speech, or
> someone else’s printing press to publish his ideas....And it give no right
to anyone to use the radio frequencies which, before the enactment of
the *Charter* had been declared by Parliament to be and had become
public property and subject to the licensing and other provisions of the
This reasoning is fundamentally flawed in many ways. To begin with, it commits the fallacy of holding freedom of the press to be a purely negative right, and ignores the fact that freedom of expression and press, including under the Charter, has been interpreted as imposing upon governments a positive obligation to provide an expression-enabled environment. Worse still, it unquestioningly accepts the fallacy of private property rights lying beyond the reach of societal claims for a free and open press, the very same reasoning employed to justify suppression of dissentient printing during the tenure of the Stationers’ Guild, as discussed above.\(^{269}\)

While the court might well be right in suggesting that freedom of the press does not comprise a right to the use of other peoples’ property, it must certainly include some right to own and use the instruments of the press. Were the government to prohibit the sale or ownership of television cameras or printing presses, freedom of the press would unquestionably be infringed. Of course, it does not necessarily follow that freedom of the press entitles one to use someone else’s camera or press, at the very least not without some form of compensation. It does, however, follow that any government restriction on the trade and traffic in the implements of expression engages the values of section 2(b). The court’s unthinking retreat into the rhetoric of property rights will have to be re-thought when the appropriate occasion arises. It places the airwaves beyond the reach of the Charter on the basis that Parliament (and the courts) had ordained them private property prior to the Charter. This mode of status quo ante rights interpretation, which emasculated the

\(^{268}\) New Brunswick Broadcasting Co. Ltd. v. C.R.T.C., supra note 50 at 426.

\(^{269}\) See page 285 above.
Canadian Bill of Rights, was thoroughly rejected when the Supreme Court established laid down
the principles for interpreting of the Charter. Most significantly, however, it fails to recognize
that by discriminating against newspaper owners in the allocation of broadcast licenses, the
government clearly affects press ownership, and engages the section 2(b) rights of not only the
publishers it may directly impact, but of the Canadian public generally.

In light of the Supreme Court’s subsequent jurisprudence in the area of press freedom, any
legislative measure which presents the possibility of directly or indirectly fettering the freee
functioning of the media, through improper pressure from elected officials or otherwise, would
be found to constitute a *prima facie* infringement of section 2(b). In the case of search warrants
against media premises, the majority of the court was able to assuage its concerns over the
potential impact on press functioning through the law of reasonable search and seizure. In the
case of newspaper ownership regulation, there would be no alternative means of subjecting the
scheme to detailed policy examination, or to introduce safeguards of press freedom. Therefore,
if government interference with the ownership of media outlets is to be permitted, the Supreme
Court should properly insist that it be justified against the strictures of section 1.

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note 71, 196 at 343.
CHAPTER 4

Justification of the Infringement Under Section 1

4.1 Pressing and Substantial Purpose

Introductory Note

The task of justifying ownership controls necessarily takes place in somewhat of a precedential vacuum, as no court has ever been called upon to adjudicate this constitutional question, or one much like it. Therefore, the arguments must necessarily take shape around the outline of principle which may be derived from Canadian Supreme Court's existing, but still somewhat limited, body of jurisprudence on freedom of expression and the press, supplemented by the American and international experience where possible. Significantly, the various commissions of inquiry which have addressed the question of ownership concentration have only cursorily turned their minds towards the compatibility of such legislation with constitutionally entrenched guarantees of expressive freedom. There is a simple explanation for this: neither Britain, nor Australia, nor Canada possessed constitutionalized bills of rights at the time these reports were written. For its part, the American Commission on a Free Press wrote at a time before concentration had ascended to the point of necessitating critical intervention. Of course, none of these inquiries ignored the issue of freedom of the press for, after all, it is precisely the integrity of that right which they sought to protect. Instead of conducting any comprehensive analysis, however, they contented themselves with concluding that freedom of the press does not comprise the right to monopolize the marketplace of ideas. Significantly, these commissions are united in their reliance upon the sage words of Justice Black in Associated Press v. United States:
[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 society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.²⁷¹

With this in mind, the balance of this thesis is devoted to the task of analyzing the regulation of newspaper ownership concentration in accordance with the principles of section 1 of the Charter of Rights and Freedoms. The history of freedom of the press has left us two key precepts which, while ostensibly in conflict, condition the justification of ownership controls, and in particular the definition of the purpose underlying such legislation. The first and most important of these is that every citizen has a profound vested interest in the proper functioning of a free press and, that in consequence, their government has an obligation to ensure and promote this condition. The key concern of the citizen and government alike is that the essential press functions of gathering and disseminating information and opinion, including intelligence on the performance of the apparatus of government, be properly performed. Who actually owns any given newspaper is of little specific concern so long as it satisfactorily fulfills its editorial obligations.

Second, history has taught us that government control over the ownership and use of the press

²⁷¹ Associated Press, supra note 198 at 20.
is fraught with peril. More to the point, it has taught us that denying anyone access to the instruments of the press, as distinguished from denying them unlimited access, is to be avoided if at all possible. The better part of press freedom consists of being able to speak one’s mind frankly and honestly, without state control over the content of expression. Although the days of the Stationers’ Guild, where the press functioned at the monarch’s pleasure, are long gone, the ill effects of allowing the state to apportion press-rights to its favourites remain self-evident. It can also be observed that the imperative of freedom dictates that the use of newspapers to generally promote certain political perspectives is the prerogative of every owner. Indeed, it is the divergent and often contrary editorial voices of various newspapers which give them their flavour and provide the diversity which is the lifeblood of public debate and discourse.

From these principles public interest can be distilled down to this: maximum press quality with a minimum of governmental interference. Although quality will never be optimal, nor regulation entirely avoidable, the public interest will forever be the search for the ideal balance between these phenomena. Therefore, ownership concentration should only be regulated when it jeopardizes the quality of the community of information and opinion available to the public. This diminution of freedom can occur in two ways, either by one individual or organization gaining control over so much of the press as to impose a hegemony of opinion, or by publishers who lack a commitment to editorial excellence acquiring control over ever larger portions of the newspaper industry and driving out those who would do the job more conscientiously. Concentration of ownership is thought to compromise the public interest by homogenizing the tone and outlook of reporting and editorial opinion across the communities a conglomerate serves. The spread of editorial sameness sabotages the project of democratic pluralism and diversity of thought and
belief. Worse still, it allows for the subtle marginalization and exclusion of entire groups and political perspectives from vital social discourse. Indeed, a newspaper chain's sins of omission may pose a far greater danger to a healthy marketplace of ideas than would the active propagation of stilted views. Mature societies are, on the whole, too sophisticated to quietly ingest propaganda. On the other hand, readers may continually be denied exposure to news and opinion from certain intentionally or unintentionally overlooked sources without ever knowing their loss. Simply put, the potential for a proprietor who controls a near-majority of national circulation to exert undue political influence through his or her media instruments is a threat to the integrity of democracy, whether it has materialized or not.

The dangers of too much concentration of ownership in the newspaper field are first, that there may be insufficient channels for expression of opinion and, second, that it may become possible for a very few men to influence the outlook and opinions of large numbers of people by selecting and presenting news in such a way as to project a particular view of the world or to support a particular policy.272

The purpose of the proposed Canadian Newspaper Ownership Act would be to protect the diversity and integrity of the press in Canada from the deleterious effects of excessive ownership concentration. More specifically, regulation would be enacted to prevent ownership concentration from diminishing the accuracy, fairness, diversity and vibrancy of the press. If any of these four attributes are diminished, the ability of the press to perform its essential democratic functions is compromised. It is this consequence which the Canadian Newspaper Ownership Act seeks to avert. It would, in the words of the Royal Commission on Newspapers, be "designed

to secure for the press of Canada the freedom that is essential to a democratic society from coast to coast," to provide, "the affirmative action of law to protect society against the chains that its powerful minorities may impose on others." The grievous threat posed by excessive ownership concentration stems from the public's dependency upon the press. As James Winter and Maude Barlow put it, "[c]itizens in a democracy depend upon the media to understand and evaluate public polices and social issues - in theory, the media are democracy's oxygen." The inherently anti-democratic nature of the concentration of power per se, the reduction in diversity of available viewpoints, the risk for corporate conflicts-of-interest resulting in the distortion or cover-up of news, and the potential for political abuses of informational hegemony combine to create a substantial apprehension of harm. In Australia, Eric Beecher, former editor of the Sydney Morning Herald and the Melbourne Herald expressed the fear in these terms: "[t]he issue is power. Real, raw power that derives from owning or controlling the most effective instruments of influence within a democracy outside the parliamentary system - newspapers."

**Historical Considerations**

Before embarking on an examination of the three factors which usually inform analysis of the Parliament's purposes - domestic policy studies, international studies, and the internal implications of the *Charter*’s system of rights - it would be useful to embark on a brief review of the historical

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273 Royal Commission on Newspapers, *supra* note 8 at 237.


275 See *The Concentration of Media Ownership and Freedom of Press*, *supra* note 195 at 19 and 28, and Bagdikian, *supra* note 5.

rise of concern over private control of the press. Ownership controls would be premised on the age-old understand that government is not the only quarter from which freedom is at risk. It is of course true that, from the moment printing was introduced into England, the Crown claimed the prerogative right to control and regulate it.\textsuperscript{277} Thus, freedom of the press was born as the struggle to wrest control over the technology of mass communications away from the censoring hand of the state. However, the evolving relationship between freedom of the press and individual liberty from state tyranny has not been purely linear. Rather, it is complicated considerably by four trends which have progressed in historical unison: the geographic and magnitudinal growth of democracy, the establishment of substantive protection for freedom of expression and the press, the rising cost and complexity of press technology, and the increasing conglomeration of press ownership in large corporate hands. When the first serious stirrings for freedom of the press began in seventeenth-century England, the political community comprised a small compact of educated middle and upper class men, and while there was essentially no protection for speech outside Parliament, printing and distribution was readily available to most any member of the political class. As a popular saying went, anyone with a "press and a 'shirt-tail full of type'" could publish his views to the relevant audience.\textsuperscript{278} Professor Aharon Enker, a member of Israel's Press Council, and professor of law at Bar-Ilan University, paints a vivid historical illustration.

In Philadelphia of the late 18th century, as the Constitutional Congress met...[a]ll one had to do was go to Ben Franklin's print shop and pay him a small fee to print a leaflet containing the gist of the message. One

\textsuperscript{277} Clyde, \textit{supra} note 120 at 1-17, and Siebert, \textit{supra} note 1 at 21-40.

\textsuperscript{278} Desbarats, \textit{supra} note 14 at 5.
then stood at the corner of Market and Third Streets and distributed the leaflet to passers by. Philadelphia in those days was a relatively small and compact city. Over the course of just a few hours, quite a large component of its residents passed that corner, so that the message could be adequately broadcast.279

By the mid-nineteenth century, the democratic polity had grown considerably both in size and diversity, and the first substantive protections of expression were in place.280 The nature of the press itself had also changed dramatically, as by this time the early newspapers had evolved into established family properties, held as instruments of duty, profit, prestige and influence.281 As the press professionalized and the political communities it served grew larger and more geographically and socio-economically diverse, the press gradually became an institution unto itself, separate and apart from 'the people'. This process was accelerated by the evolving and increasingly complex and costly technologies required to produce the news product. With the advent of high-speed presses to serve thousands of daily readers, newspapers rapidly became the province of wealthy venture-capitalists.

The modern era has brought an ever escalating cost of entry into the publishing industry, paced by a even more rapidly growing and disparate body politic.282 While freedom of expression is


280 Prior restraints on printing came to an end in 1695 with the expiry of the last Licensing Acts (see supra note 137), while juries were allowed to render general verdicts in libel cases by Fox's Libel act of 1792, and truth was made a defence to libel by Lord Campbell's Act of 1843.


now a jealously guarded constitutional right, ownership or access to the mass media, has become the privilege of the monied few, and ownership of the press has devolved to a great degree into a handful of corporate media empires.\(^{283}\) The transformation which time and technology has wrought on the press was succinctly described by the U.S. Commission on a Free and Responsible Press:

Literacy, the electorate, and the population have increased to such a point that the political community to be served by the press includes all but a tiny fraction of the millions of the American people. The press has been transformed into an enormous and complicated piece of machinery. As a necessary accompaniment, it has become big business... The right of free public discussion has therefore lost its earlier reality.\(^{284}\)

Thus, in the beginning, the press and the people were one and the same, and freedom of the press concerned the separation of the state from the private realm of information and opinion. Today, while the separation of the state from that realm of private expression has been largely secured, a separation between the people and the press has arisen. The instruments of mass communication are no longer available to every citizen motivated by a desire to express himself or herself, but reside under the control of a select corporate class motivated principally by the profit imperative. As a result, in the twentieth century concern for freedom of the press shifted to the third side of the citizen-state-press triangle, namely the protection of the public interest in its underlying values from abuse by the 'free' press itself. By the time American media law scholar Jerome Barron wrote his passionate and compelling treatise calling for an enforceable

\(^{283}\) See Bagdikian, supra note 5, and Democracy’s Oxygen, supra note 6.

\(^{284}\) A Free and Responsible Press, supra note 17 at 15.
right of public to the media in 1973, the title of his book, *Freedom of the Press For Whom?* had become the operative question of the day.

Of course, the idea that private commercial interests can function as a restraint on press freedom is not a new one. The Elizabethan rulers of England understood it well when they created a scheme of private licensing and regulation run by the printers themselves. Having seized control over printing as a prerogative right, the monarchs in turn conferred the right to print upon a select company of carefully vetted craftsmen who could be certain to respect and uphold the Crown’s interests. In return for their unflagging loyalty, these printers, and their professional guild, the Stationers’ Company, were granted exclusive, and highly lucrative, patents to produce all approved works in England. *Enslaved by the economic rewards of their privileged position, the Stationers not only avoided publishing potentially offensive or provocative material, but became zealous censors and censurers of unlicensed printing. Empowered by their Charter to search for and seize contraband books and pamphlets, the Stationers’ Company formed a uniquely effective form of quasi-private expression police.* Thus, through the creation of a selective monopoly, the Crown avoided the need for a purely state-driven machinery of repression by co-opting an element of the very group they sought to control. In turn, these anointed licensees did the Crown’s bidding by suppressing renegade printing, not as agents of authoritarianism, but as legitimate artisans protecting their property and livelihood. As eminent press historian Frederick

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Siebert observes, "[t]he skilful use of the corporate organization of printers and publishers in the suppression and control of undesirable printing has long been considered a masterstroke of Elizabethan politics.\textsuperscript{288}

\textbf{Rise of Contemporary Concern over Concentration - The International Sphere}

By the early twentieth century, people were once again asking whether the freedom of the press was in danger of subversion by the purely economic interests of powerful corporate entities. Ironically, in the mid-1930s, as the \textit{Edmonton Journal} was about to score the single most decisive victory for the right to free and open discussion of government policies in Canada,\textsuperscript{289} American journalist George Seldes launched one of the earliest and most scathing attacks on the integrity of the privately owned media. In \textit{Freedom of the Press}, he documented a litany of abuses, including nakedly political suppression of important news at the behest of wealthy proprietors, perpetrated by major American newspapers and news organizations during his career. Highlighting the uneasy relationship between a private press and the public interest, Seldes wrote:

\begin{quote}
[u]nless we can assure ourselves that all the editors and publishers of our powerful newspapers are not bound to big business....we cannot be sure that their protestations of serving the reader, published daily, have any meaning.\textsuperscript{290}
\end{quote}

He was not alone in his concern. In 1947, the British government, citing increasing public concern at the growth of monopolistic tendencies in the control of the press, established the first

\textsuperscript{288} Siebert, \textit{ibid.} at 64.

\textsuperscript{289} The history of decision of the \textit{Alberta Press Reference} is see discussed above at page 63.

Royal Commission on the Press with a mandate of, “furthering the free expression of opinion through the Press and the greatest practicable accuracy in the presentation of news, [and] to inquire into the control, management and ownership of the newspaper and periodical Press...”\textsuperscript{291}

While the Commission concluded with cheerful chauvinism that, “the British Press is inferior to none in the world,” they conceded that all but a few newspapers failed to supply the electorate with adequate information and opinion for sound political judgements.\textsuperscript{292} Concurrently in America, a privately funded panel of distinguished academics came together as the Commission on Freedom of the Press to examine the health and prospects of the American media. Co-chaired by Robert Hutchins, Chancellor of the University of Chicago, and pre-eminent First Amendment scholar Zechariah Chafee of Harvard Law School, the Commission concluded that freedom of the press was indeed in danger from the inadequate performance of the press, and the decreasing proportion of the population able to directly express themselves through the prevailing channels of modern communication.\textsuperscript{293}

The Commission on Freedom of the Press produced a uniquely insightful and valuable study of the problems and dangers facing freedom of the press in the twentieth century. Opening with the question “is freedom of the press in danger?”, the Commission offered a distinct and unqualified “yes” in response.\textsuperscript{294} In support of this conclusion, it stated:

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\textsuperscript{291} U.K., Royal Commission on the Press 1947-49, supra note 281 at iii.

\textsuperscript{292} Ibid. at 149 & 154.

\textsuperscript{293} A Free and Responsible Press, supra note 17 at 1.

\textsuperscript{294} Ibid.
[w]hen an instrument of prime importance to all the people is available to a small minority of the people only, and when it is employed by that small minority in such a way as not to supply the people with the service they require, the freedom of the minority in the employment of that instrument is in danger.

The Commission was explicit in its criticism of commercial practices which were tending to an ever greater concentration of media ownership, arguing that, "[c]oncentration of power substitutes one controlling policy for many independent policies, lessens the number of major competitors, and renders less operative the claims of potential issuers who have no press." 295

While the first British Royal Commission and the American Commission on Freedom of the Press both recognized the potential for excessive ownership concentration to curtail press freedom, neither of these early reports manifested acute concern over the levels of own concentration in the post-war decade, nor did they advocate immediate regulation. 296 Rather, they limited their recommendation to urging the participation of the government as a supplementary participant in the marketplace of ideas by improving the conditions for press pluralism and enhancing the quantity and quality of public discourse. 297

By the time the second British Royal Commission on the Press convened in 1962, early concern over ownership concentration had been transformed into an urgent demand for government curbs on continuing amalgamations and dwindling competition. Convinced that, "concentration of ownership carries with it the potential danger that variety of opinion will be stifled," the second

295 Ibid. at 130.
297 A Free and Responsible Press, supra note 17 at 127-129
British Royal Commission recommended the establishment of a Press Amalgamations Court charged with reviewing all proposed acquisitions of existing newspapers in which the purchaser already controlled a significant share of circulation within Britain.298 The purpose of this Court would have been to curb the drastic increases in ownership concentration, and yet all amalgamations for their compatibility with the public interest in a free, fair and diverse press. Although the British government declined to implement the report’s recommendations, in 1965 it enacted a competition statute incorporating a number of provisions dealing exclusively with newspaper transactions.299 The basic premise of this legislation was that all transactions producing an increase in concentration are *prima facie* against the public interest. Therefore, any transaction which would give the purchaser control over newspapers with a daily circulation over 500,000 copies could not proceed without permission from the Secretary of State.300 Except in exigent circumstances,301 the Secretary of State could not grant permission before referring the transaction to the Mergers and Monopolies Commission for an inquiry.302 The Commission’s inquiries were to be wide-ranging, touching on social, economic, and journalistic concerns. In addition to reviewing the potential impact on advertising rates, local employment, and the commercial prospects of the newspaper under the proposed new management, the Commission was mandated to examine the potential effect of the transaction on the accurate presentation of

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299 *Mergers and Monopolies Act* (UK), 1965, c. 50.

300 *Fair Trading Act* (UK), 1973, c. 41, s. 58.

301 Transactions involving newspapers with a circulation under 25,000, or those which are not economically viable as a going concern are exempted; *ibid.* ss. 58(3) & 58(4).

news and free expression of opinion. This scheme of review remains in place, and although the Merger and Monopolies Commission has rejected very few transactions, their inquiries have, on a number of occasions, compelled prospective purchasers to give strong undertakings as to editorial non-interference. As will be discussed later, this body of quasi-judicial examinations of newspaper operations and editorial conduct provides an interesting insight into both the positive aspects of government intervention, as well its attendant dangers.

In 1977, the third British Royal Commission on the Press continued to emphasize the importance of preventing excessive concentration of ownership from compromising the quality and integrity of the nation’s newspapers, emphatically rejecting the proposition that “newspapers are a private enterprise owing nothing whatever to the public.” Instead, it concluded that “the press should neither be subject to state control nor left entirely to the unregulated forces of the market.” To this end, it recommended statutory measures assuring the independence of editors and the tightening of the restrictions imposed on newspaper mergers under the Fair Trading Act, urging that “consent to newspaper mergers both nationally and provincially should be withheld unless the Mergers and Monopolies Commission report that they are satisfied the merger will not

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303 Ibid. s. 59(3).
306 Ibid. at 11.
307 Ibid. The Report’s Recommendations are summarized at pages 231-237.
operate against the public interest." In addition, the Commission made extensive suggestions ranging from the creation of a draft charter on freedom of the press safeguarding editorial independence from ownership pressures, to the creation of a formal training and accreditation scheme for journalists.

In Australia, where media billionaire Rupert Murdoch has acquired control of an enormous segment of the print press, the state of Victoria launched a government taskforce to study the problem and consider potential solutions. Reporting in 1981, The Inquiry into the Ownership and Control of Newspapers in Victoria thoroughly reviewed the alleged perils of excessive concentration, exhaustively reviewed the arguments for and against ownership controls, and concluded with a urgent endorsement of legislative intervention. Emphasizing the need to respect and protect the editorial autonomy of the state's newspapers, the Report nonetheless concluded that in light of the dangers of dwindling diversity, and the potential for the exercise of undue influence in public decision-making by the few men who controlled the press, "the public interest requires that in general there should be no further concentration of ownership or control of the press in Victoria." Ten years later, Victoria's Working Party into Print Media Ownership reiterated this recommendation, and submitted draft legislation requiring any transaction involving

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308 Ibid. at 231.

309 Ibid. at 231-240.


312 Ibid. at 218.
the exchange or accumulation of substantial interests in the newspaper publishing industry be scrutinized for compatibility with the public interest. Although the Victoria government has yet to enact any measures curbing concentration, its two commissioned reports leave no doubt that newspaper ownership is a matter of great public importance, worthy of immediate and decisive government action.

**Concern over Own Concentration in Canada**

The rise of newspaper ownership concentration in Canada did not occur overnight, nor under cover of darkness. Twice since 1970, federal commissions of inquiry have surveyed with concern the accelerating trend towards conglomerate chain ownership, and twice have issued calls for action. The Senate Special Committee on Mass Media chaired by Senator Keith Davey in 1970, and the Royal Commission on Newspapers in 1981, both delved extensively into the workings of the Canadian media, and heard hundreds of witnesses expert in the field of publishing, ranging from academics, to journalists, to the press barons themselves. In the end, both studies concluded that ownership concentration was a serious problem meriting a serious legislative response from Parliament. In the words of the Royal Commission on Newspapers, “extraneous interests, operating internally, are the chains that today limit the freedom of the press.”

On both occasions the government responded with stalwart inertia. Whereas the broadcast media is zealously regulated, both as to ownership and content, newspapers remain free, unfettered and at the mercy of market forces. As a result, ownership of the daily press in Canada is now

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313 Royal Commission on Newspapers, supra note 8 at 237.

314 The 1996-97 Canadian Broadcast and Cable Regulatory Handbook runs to 850 pages, whereas there is presently not a single piece of federal or provincial legislation which applies solely to the newspaper industry.
concentrated at unprecedented levels.

Public concern over the level of ownership concentration in the Canadian newspaper industry was first officially expressed in 1970 by the Senate’s Special Committee on Mass Media, which presciently predicted that newspaper ownership would continue to concentrate in fewer and fewer hands, and called upon Ottawa to stem the tide of amalgamations. The Committee sought a healthier, freer, more vigorous and more diverse press, and strongly stressed that the trend towards concentration was on a collision course with the public interest. Canadians, the Committee wrote, “should no longer tolerate a situation where the public interest in so vital a field as information is dependent on the greed or goodwill of an extremely privileged group of businessmen.” Their concern reflected a reality well understood in the press, namely that, “the most powerful force for liberalism and democracy is information...power ultimately depends on assumptions, and assumptions are intimately tied to information.” Therefore, who controls information ipso facto wields tremendous control and influence over our democracy, and any over-concentration of that control is inherently at odds with our notion of liberal democracy, which is premised on the substantial political equality of all citizens. To this end, the Committee recommended that Parliament establish a Press Ownership Review Board to protect the public interest in respect of mergers and amalgamations in the publishing sector, with the

315 Report of the Senate Special Committee on Mass Media, supra note 14 at 4 & 6.

316 Ibid. at 67.

317 Quoted in The Big Black Book, supra note 274 at 26.

objective of ensuring that citizens remain the ultimate benefactors of freedom of the press.**319**

A decade later the issue of newspaper ownership came to the fore once again with the simultaneous demise of the *Winnipeg Tribune* and the *Ottawa Journal.* Two of the nation’s oldest and most respected newspapers, they fell victim to an economic arrangement between the Thomson and Southam newspaper chains.**320** The public outcry in the aftermath of this “rationalization” prompted the Trudeau government to initiate the *Royal Commission on Newspapers,* with a mandate to inquire generally into the newspaper industry in Canada. The Royal Commission on Newspapers Commission, as it came to be known, undertook a comprehensive study of the Canadian newspaper, examining not only the extent of and effects of concentration, but the role of the newspaper in contemporary affairs, the morale and professionalism of journalists, and the future of the print media in the face of the emerging electronic convergence. Concluding that Canadian newspapers were affected by a general malaise,**321** the Commission made a host of recommendations ranging from tax incentives for enhanced editorial expenditure to the creation of publicly-owned national newspapers, and the creation of a regulatory agency similar to the Canadian Radio-Television and Telecommunications Commission (C.R.T.C.) to broadly oversee the quality and performance of the print press.**322** The Royal Commission on Newspapers’s key recommendation, however, focused on the curtailment

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**319** *Report of the Senate Special Committee on Mass Media,* supra note 22 at 255.

**320** *Royal Commission on Newspapers,* supra note 8 at X.

**321** *Ibid. at 215ff.* Strikingly, the Commission reiterated the words of the Davey Committee describing Canadian newsroom as “bone yards of broken dreams.”

and reversal of chain domination. In its final report, the Royal Commission on Newspapers issued the strongest denunciation of newspaper ownership concentration yet heard:

The concentration of ownership in chains is, in the Commission's view, bad. It should not have been permitted.... We are still some way from [the] monopolistic extreme. But where we are is, in the Commission's opinion, entirely unacceptable for a democratic society. To much power is put in too few hands; and it is power without accountability.323

And still the government remained impassive. Today, Conrad Black who, as a youthful and brash newspaper entrepreneur, wrote to the Davey Committee that “[f]urther consolidation” towards monopolistic situations “is reprehensible,” and “monopolies are undesirable,”324 owns 60 of Canada’s 105 daily newspapers.325 It is still widely believed, however, that if Canadian newspapers are to remain healthy, vibrant agents of political discourse and social discourse, the present descent into hegemonic concentration must stop, although the issue has entirely vanished from the public agenda.

Ownership Regulation and Charter Values

The existence of a free, rich and diverse community of information and opinion is the sine qua non of democracy as we know it. As the Supreme Court wrote in Edmonton Journal v. Alberta (Attorney-General), its first major freedom of the press decision under the Charter:

323 Ibid. 215 & 220.

324 The Big Black Book, supra note 274 at 2.

325 In 1997, he was quoted as saying that, “the idea that [controlling] 42 per cent of the circulation of Canada’s daily newspapers constitutes an ability to dominate, or in any way abuse our position, is preposterous.” Ibid. at 106.
It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinion about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. 326

Harkening back to the libertarian reading of the American First Amendment, newspaper owners might argue that government interference in press activities, aimed at shaping the body of editorial content, is by, definition, an improper and prohibited purpose in a democratic society. 327 Although the government must always be wary of improper motives or censorial effects when regulating the media, there is no question that protecting the essential characteristics of a free press is a valid legislative aim. It is clear that the government can, and may even be obligated to take some measures which affect the operation and ownership of newspapers. 328 The press is not insulated from the workings of society, and has no immunity from laws of general application, even legislation pertaining to ownership concentration within the media. 329 Even in the United States, the courts have recognized that the government may have a role to play in preserving the conditions of press freedom through legislative intervention in the media's commercial conduct.

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326 Edmonton Journal, supra note 80 at 1336, per Cory J. This passage has been quoted at least twenty times since 1989, and is itself a further refinement of Cory J.'s previous musings on the question while a justice of the Ontario Court of Appeal in R. v. Kopyto (1987) 62 O.R. (2d) 449 at 462 (Ont. C.A.).

327 See Four Theories of the Press, supra note 15 at 52.

328 New Brunswick Broadcastin Corp. v. C.R.T.C., supra note 50.

329 In Lessard, supra note 23 at 453, McLachlin J. stated, "I add that it is not every state restriction on the press which infringes section 2(b). Press activities which are not related to the values fundamental to freedom of the press may not merit Charter protection."
In *Associated Press v. United States*, Justice Black dispelled the notion that optimum press freedom flourishes in a complete void of government action. "It would be strange indeed," he wrote, "if the grave concern for freedom of the press which prompted the adoption of the First Amendment should be read as command that the government was without power to protect that freedom." The *Associated Press* decision is particularly significant, as it held that the application of federal anti-trust provisions to the editorial conduct of newspapers did not violate the First Amendment. The *Associated Press* cooperative was attempting to enforce by-laws that prohibited member-newspapers from selling or furnishing their news to any non-member publications. The court held that this restraint on the sale and circulation of information violated the anti-combines provisions of the *Sherman Act*, and ordered the *Associated Press* to revise its practices. Coming at the middle of this century, between the end of active government censorship and the start of the corporate media era, this case signalled that freedom of the press did not protect the individual’s right to exploit the lucrative commercial potential of the news market at the expense of the public’s right to a free flow of information.

In Canada, a similar mandate for proactive government regulation may be derived from the Supreme Court’s decision in the *Alberta Press Reference*. The court invalidated the Alberta government’s attempt to staunch press criticism of Social Credit doctrines on the basis of the

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330 *Supra* note 198.

division of powers (the only means available to it for the protection of civil rights prior to the advent of the Charter), and said of freedom of the press that “the Parliament of Canada possesses the authority to legislate for the protection of this freedom.” In this passage we find the elements of the contemporary section 1 analysis, ingeniously gleaned from the nature of democracy itself. The court empowers the federal government to legislate for press freedom, but simultaneously circumscribes the extent of that power by implying that Parliament is incompetent to enact measures which violate it. Thus, Parliament is permitted to act in furtherance of press freedom, an assuredly compelling purpose, while being simultaneously limited to such measures which, on balance, improve the condition of that freedom. If freedom of the press “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 society,” then the government is clearly permitted to legislate for the protection of that condition from menacing private behaviour. It is, after all, not freedom of the press qua freedom that we cherish, but rather the ends that it serves.

The European approach to communicative freedom is also characterized by a prevailing concern for the rights of the citizen to receive important information and ideas through a diverse media. This focus has led the European Court to strike down state monopolies on broadcasting and broadcast reception, with an emphasis on listeners’ interest in the potential expression which such restrictions preempt. The Court’s reasoning is best summarized in the following passage from

332 Alberta Press Reference, supra note 23 at 133 [emphasis added].

333 Associated Press, supra note 198.
Informationsverein Lentia v. Austria, in which the state unsuccessfully attempted to justify its refusal to license private radio broadcasters.

The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the state is the ultimate guarantor. 334

Ownership concentration at extremely high levels creates the risk that new product will be homogenized throughout the largest chains, depriving readers of the diversity of perspectives they require and are entitled to; the higher the levels of concentration, the greater the risk. In short, the decline of editorial quality is the disease, and ownership concentration its root cause. To the extent that it manages the risks of homogenization and fosters pluralism in the print press, ownership concentration is a laudable objective. As seen previously in chapter 1, the promotion and protection of individuals' ability to participate in social and political affairs is amongst the Charter's most important mandates. 335 Moreover, in the modern age, newspapers and other media serve many uses, entertainment and commercial advertising in particular, which are well outside the original purposes of press freedom. While most of these supplementary functions have sufficient social value to fall under the broad protective umbrella of section 2(b). 336 It is also through the provision of entertainment and advertising that the print press generates the revenues

334 Informationsverein Lentia and Others v. Austria, supra note 15 at 16.

335 Keegstra, supra note 21 at 746-747.

336 The court recognized the usefulness of commercial advertising, both to consumers and to advertisers themselves, in both Irwin Toy and Ford, and sexually explicit publications, which can only be termed entertainment, are also protected, as per Little Sisters and Butler.
it requires to finance its editorial operations. It is, unfortunately however, in answering to the economic imperatives of their industry that newspaper publishers most risk compromising the core ability of the press to accurately report the news and disseminate diverse opinions. Newspapers run according to Thomson credo that "copy is the stuff you separate the ads with" are the newspapers least likely to fulfill their social mandate, and it is when publishers expounding this philosophy gain control of an increasing share of the marketplace that freedom of the press is threatened.

The Royal Commission on Newspapers, identified a clear and dangerous reality of the newspaper business: newspapers run with little regard for editorial excellence are far more lucrative, making "quality" newspapers susceptible to take-over by less committed and more avaricious owners. It reported that newspapers which generate the highest returns on investment usually display a diminished concern for their social responsibility, manifested in below average expenditure on editorial expenses. In turn, quality newspapers produce a lower rate of return, and are thus a 'bargain' for any would-be purchaser willing to strip-down editorial spending. Preventing amalgamations which are being undertaken for the sake of profit over public service is also a worthy legislative objective.

The existence of long standing and wide-spread concern over the deleterious effect of burgeoning

337 Royal Commission on Newspapers, supra note 8 at 66ff.


339 See supra note 206.

340 Ibid. at 221.
concentration leaves little question as to the *bona fides* of a legislative response to this perceived problem. Concern over the dangers of excessive concentration of media ownership is neither trivial nor the product of political fabrication. It is a deep-seated fear, widely-held by men and women of good faith and informed judgement. Not one, but two comprehensive independent reports on the health of the Canadian print media, have strongly advocated that the Canadian government harness run-away concentration. Significantly, the present levels of concentration far exceed what either the Royal Commission on Newspapers or the Senate Special Committee on Mass Media observed. In its report, the Royal Commission on Newspapers presciently stated that, "under existing law and policy, the process of concentration will continue to a bitterer end: company will take over company, agglomeration will proceed, until all Canadian newspapers are division of one or two great conglomerates."341 Today three corporations control 75 per cent of Canadian newspapers.342

Indeed, the fear of concentration effecting our democracy has become so much a part of our cultural psyche that the most recent James Bond film was premised on an evil media magnate manipulating Britain and China to the brink of nuclear war for fun and profit.343 While it is still open to debate whether this is a case of art imitating life, or pure Hollywood fantasy, the fact remains that any government enacting ownership controls can amply justify their intervention as a measured response to a pressing and substantial national concern. Responding to curb the threat posed by excessive ownership concentration, or concentration of ownership in the wrong


343 *Tomorrow never Dies* (1997).
hands, is consistent with both Canada and international concern over ownership concentration, as evidenced by numerous studies, commissions and legislative reports, as well as with the spirit of the Charter and the philosophy of human liberty and dignity it espouses.

4.2 Contextualizing the Inquiry

The history and role of freedom of the press suggests that few contexts call for greater watchfulness over the protection of rights than government meddling in press ownership. Certainly Milton, Mill, and "Cato", the progenitors of press freedom, would have recoiled at the thought of the government asserting the power to pick and choose who may print a newspaper. Indeed, a heavier hand of censorship has never been brought down upon freedom of the press than the governmental edict, “Thou shalt not print.” Newspaper publishers would undoubtably attempt to characterize themselves as individuals put-upon by a censorial state-apparatus, in an attempt to invoke the highest level of judicial scrutiny. They would insist that freedom from government interference must be taken as the default state, and any divergence from the canon of freedom must be strictly justified. There is indeed a strong argument to be made that, in light of the preeminent importance of a free and thriving press, and considering the overwhelming power of the state, the courts should err on the side of private freedom in disputes over press-rights.

In the Indian Express Newspapers case, discussed above, the Indian Supreme Court was faced with ambiguous evidence as to the deleterious effects of an otherwise neutral commodity tariff on newsprint. As a result, it was impossible to determine for certain whether the tariff truly threatened the circulation and accessibility of the press. The court nevertheless invalidated the
measure, giving freedom of the press the benefit of the doubt, stating:

[on the material now available to us, while it is not possible to come to the conclusion that the effect of the levy is indeed so burdensome as to affect the freedom of the press, we are also not able to come to the conclusion that it will not burdensome. This is a matter which touches the freedom of the press which is, as we said, the very soul of democracy.\textsuperscript{344}

This approach is very much in accordance with the spirit of what Thomas Jefferson once said, when he mused to a friend that, "were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate for a moment to prefer the latter."\textsuperscript{345} While Jefferson never advocated absolute press immunity to regulation or control, he gave voice to the belief that the risks of allowing a resurgence of censorship far outweigh the relative risk of harm to the condition of freedom ever posed by the press itself. Although the risk of a return to authoritarian rule, the likes of which Jefferson contemplated, is negligible today, there remains much wisdom in his observation. Given the admittedly special role and obligations of the press, and the necessarily adversarial relationship between press and government, it may be argued that the realm of press freedom is one in which the Supreme Court would be well advised to temper its deference to Parliament. It is not by accident that prior restraints on publication have been the exception, and freedom to print the rule, for more than 300 years. The courts are vested with a special public trust to protect freedom of the press from government-incursions. As Justice Frankfurter noted in Pennekamp v. Florida, it is only through an independent judiciary that freedom of the press may be

\textsuperscript{344} Indian Express Newspapers, supra note 197 at 552.

\textsuperscript{345} Thomas Jefferson to Edward Carrington, January 16, 1787, in The Papers of Thomas Jefferson, ed. Boyd, XII, 48-49; reproduced in Freedom of the press from Zenger to Jefferson, supra note 146 at 333.
vindicated, if the press falls under attack by the government which it is charged to watch over. 346

Writing in 1992, David Stratas made the prediction that, “it seems likely that the court will hold that the press possesses a freedom of expression which is more deserving of protection than that of other persons and institutions,” given its enhanced role in maintaining an informed and educated electorate. 347 While special protections for the media have been slow in coming under the Charter, 348 Justice McLachlin is undeniably right in her astute observation that “the history of freedom of the press in Canada belies the notion the press can be treated like other citizens or legal entities when its activities come into conflict with the state.” 349

In the few instances where government examination of media content has arisen, the Canadian courts have, even prior to the enactment of the Charter, followed the almost absolute non-interventionist line propagated by the American jurisprudence. In particular, the United States Supreme Court’s decision in Miami Herald v. Tornillo has been a defining landmark in North American free press jurisprudence. This case considered the constitutionality of a Florida statute

346 328 U.S. 331 (1946)


348 The advent of the Charter has not wrought any great transformation in the legal protection of press functions. For instance, the court has declined to decide whether there is any privilege for journalists’ sources under section 2(b) Moysa v. Alberta, [1989] 1 S.C.R. 1572, have rejected the claim that section 2(b) imposes any new requirements on the issuance of search warrants against media outlets Canadian Broadcasting Corporation v. Lessard, supra note 48, and has refused to modify the common law of defamation in the case of public officials, explicitly disavowing the approach of the United States Supreme Court in New York Times v. Sullivan 375 U.S. 254 (1964), Hill v. Church of Scientology, supra note 78.

349 Lessard, supra note 48 at 450-51, per McLachlin J. in dissent.
granting a judicially enforceable right-of-reply, free of charge, to any political candidate who’s character or record was criticised in print by any newspaper. In Tornillo, the court held that the Constitution does not mandate responsible reporting of news and opinion, and consequently, there is no way to reconcile interference in the editorial judgement of newspaper editors with the dictates of the First Amendment.\textsuperscript{350} The court unanimously struck down the statute, with Justice White giving a ringing endorsement of absolute editorial independence in his concurring reasons.

According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with new and editorial content is concerned. A newspaper or magazine is not a public utility subject to “reasonable” governmental regulation in matters affecting the exercise of journalistic judgement as to what shall be printed.\textsuperscript{351}

The reasoning in Miami Herald was applied with approval by the Canadian Supreme Court in 1978, when it decided Gay Alliance v. Vancouver Sun.\textsuperscript{352} This case arose from the Sun’s refusal to publish an advertisement reading, “Subscribe to GAY TIDE, gay lib paper. $1.00 for 6 issues.”\textsuperscript{353} The Supreme Court split over the question of whether commercial advertising space

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\textsuperscript{350} Miami Herald v. Tornillo, 418 U.S. 241 (1974) at 256 and 259. An interesting, and to many minds unjustifiable, dichotomy exists in American First Amendment jurisprudence between the treatment of the print and broadcast media. Five years prior to Miami Herald, the U.S. Supreme Court had held that a similar right-of-reply regulation enacted under the F.C.C.‘s “fairness doctrine,” did not violate radio and television stations‘ First Amendment rights, Red Lion Broadcasting Co. Inc., v. F.C.C. 395 U.S. 367 (1969). The differential treatment of the media is usually justified on the basis that broadcast frequencies are finite public property, whereas newspapers are personal, and potentially infinite in number. Of course, these assumptions simply do not accord with contemporary economic and technological reality, but have yet to be judicially re-examined. For interesting analysis of the principle of differential treatment, see Pool, supra note 12, and Bollinger, supra note 15, 442.

\textsuperscript{351} Miami Herald v. Tornillo, ibid. at 259.

\textsuperscript{352} Supra note 2.

\textsuperscript{353} Ibid at 441. A Human Rights Commission determination in favour of the Gay Alliance was overturned by the British Columbia Court of Appeal, whose decision was in turn upheld by a divided Supreme Court.

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within a newspaper can be exempted from general laws of non-discrimination on the basis of freedom of the press and the concomitant right of the owner and his editor to determine the entire contents of the newspaper.\textsuperscript{354} The issue in this case was whether freedom of the press protects the publisher's right to print whatever he wishes in his newspaper, or his right to print \textit{only} that with which he agrees. That is, does freedom of the press protect the right of newspapers to be monoliths of exclusive opinion? At a broader level, it engaged the debate over whether society has a compelling interest in constraining the actions of newspaper publishers so far as to assure that their newspapers continue to fulfill their essential democratic function and mandate, or whether society's interest in achievement of that end is best served by a policy of absolute non-interference. \textit{Gay Alliance} represents the Canadian high water mark on the side of non-interference. The majority of the court treated freedom of the press as an absolute right of refusal to publish, vested in the owner of a newspaper and his editor. In the words of Martland \textit{J}:

\begin{quote}
The law has recognized the freedom of the press to propagate 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 it espouses.\textsuperscript{355}
\end{quote}

Justice Dickson, in his dissenting opinion in \textit{Gay Alliance},\textsuperscript{356} disavowed the libertarian approach to freedom of the press espoused by his colleagues, and instead adopted the definition of press

\textsuperscript{354} \textit{Ibid.} at 455 and 469.

\textsuperscript{355} \textit{Ibid.} at 455.

\textsuperscript{356} Dickson \textit{J}. wrote the most extensive dissent, concurred in by Estey \textit{J}., examining the issues of press freedom implicated by the case. Laskin C.J.C. wrote a separate dissent based on interpretation of the \textit{Human Rights Code} and the specious distinction drawn by Martland \textit{J.} between discrimination against the individuals seeking to place the advertisement and discrimination against those individuals' viewpoint on the subject of homosexuality. He did not comment of the broader theoretical issue of freedom of the press.
freedom articulated by the third British Royal Commission on the Press.\textsuperscript{357} Much more circumspect about constitutionalized protection for the commercial aspects of newspaper publishing, this conception holds that:

freedom of the press [is] that degree of freedom from restraint which is essential to enable proprietors, editors and journalists to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible judgements.\textsuperscript{358}

This account of press freedom is far more consistent with the court’s jurisprudence, as well as with the nature and root of the liberty itself. Affording newspapers, a majority of which function as local monopolies, the power to arbitrarily exclude paid advertisements or announcements with which they disagree makes a mockery of freedom of expression, and profoundly undermines the right of the public to full information.\textsuperscript{359} Judged against the values of plurality, diversity and individual dignity which the court has enumerated as forming the Charter-ideal of a free and democratic society,\textsuperscript{360} the majority decision in \textit{Gay Alliance} seems anachronistic and badly out of step with contemporary rights-discourse. Tempered by the fact that Justices Laskin and Dickson dissented, and in view of the emotionally and politically charged subject matter of the case,\textsuperscript{361} \textit{Gay Alliance} is best viewed as an aberration in an otherwise continuous progression of

\textsuperscript{357} U.K., Royal Commission on the Press 1974-77, \textit{supra} note 19 at 8.

\textsuperscript{358} \textit{Gay Alliance}, \textit{supra} note 2 at 464 [emphasis added].

\textsuperscript{359} see Jerome Barron’s discussion of \textit{Gay Alliance}, \textit{supra} note 210 at 182.

\textsuperscript{360} \textit{Oakes}, quoted above at page 27

\textsuperscript{361} A similar criticism has been levelled at the United States Supreme Court’s landmark defamation judgement in \textit{New York Times v. Sullivan}, \textit{supra} note x, in light of the profound racial tensions underlying the case, and the fact that the plaintiffs were using a civil action to financial assail prominent individuals who had published a indictment of racist police practices in Alabama during the civil rights tumult of the 1960s, see
legal and social discourse recognizing that protection of the press is premised on the public interest at large, rather than on the interests of the press *qua* press.

Four factors mitigate the need to hold the government proposed policy to an extremely exacting standard of scrutiny in this case. To begin with, ownership controls do not commit the original sin of prior restraints, which is to deny the public the benefit of hearing and evaluating for themselves the views which are suppressed. Ownership controls only restrain publishers from saying more often, and to a wider audience, that which they are already saying quite loudly. In essence, this legislation seeks to curb individuals from monopolizing the editorial expression in the nation’s newspapers. Under the *Canadian Newspaper Ownership Act*, publishers would only face an impediment to their future expression if, in the past, they used their newspapers as monoliths of one-sided expression. No message would be censored, and effected individuals would be free to publish handbills, leaflets, or letters and distribute them to the community at large, to air their views in space in other purchased from proprietors’ newspapers, or even to establish a new competing newspaper. Whatever challenge Conrad Black and the handful of other press barons potentially impacted by ownership controls might advance against ownership control, they cannot deny that the basic spirit of the *Charter*’s free speech guarantee, “to ensure that everyone can manifest their thoughts, opinions, [and] beliefs,”\(^{362}\) has been largely respected in their case. If owning a newspaper is a form of speech, Conrad Black, is one of the most heard voices in Canada. This is not a simply case of an individual being silenced by the state.

If, for example, Conrad Black’s recent purchase of the *Halifax News* had been disallowed, he

\(^{362}\)  *Irwin*, supra note ? at 968.
would not, by any stretch of the imagination, have been disabled from expressing any message his heart may desire to the citizens of Halifax and its environs. He would have simply been denied the option of disseminating his messages through the vehicle of the an existing newspaper. Whatever Black’s message may have been, he would still have been free to publish it through the wealth of alternatives means available him. He would have been denied only his preferred ‘location’ and manner of expression. Preventing an individual from speaking with the voice of an established newspaper is a restriction only upon his or her choice of forum. In *Commonwealth of Canada v. Canada (Attorney-General)*, the leading case on the right to use of public forums, the Supreme Court confronted the issue of what protection section 2(b) provides against restrictions on the time, place and manner of expressive conduct. The appellants had been barred by airport officials from distributing their political literature at Dorval airport, pursuant to an internal policy directive banning any solicitation in airports. The court held, in four separate opinions, that freedom of expression under section 2(b) extends to protect the use of public places, but agreed that “[f]reedom of expression does not, historically, imply freedom to express oneself wherever one pleases. Freedom of expression does not automatically comport freedom of forum.” Each of the judgements strongly convey the principle that restrictions on the means or mode of expression will not be invalidated under the *Charter* if the proposed use of a forum is contrary to the purposes of that forum and the principles underlying freedom of expression. For instance, picketing in judges’ chambers or ministers’ offices, while undoubtedly an effective tactic of political expression, is fundamentally incompatible with the purpose of those locales, and

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363 *Commonwealth, supra* note 51 at 228. While McLachlin J. spoke directly only for herself and Justices LaForest and Gonthier, none of the opinions delivered in that case held that choice of forum was automatically protected under section 2(b).
in fact would function to undermine the efficacy of our democratic institutions. Similarly, it may be inferred from the court’s reasoning that volume controls on expression would be entirely justifiable if they prevented an individual from drowning out other voices by virtue of the sheer intensity of his or her expression. No one could, to conjure an extreme example, set up a gigantic sound system across the country, and then speak so loudly through it that no one else in the country could carry on a conversation over the noise. In the act’s assault on the freedom of expression of others lies the undoing of its own protection. As the court reasoned in *Keegstra*, expression which has the effect silencing others, whether by volume or by intimidation, is self-defeating and thus much less worthy of protection.

Second, there are grave risks attendant in allowing control of the press to devolve into too few hands. The risks of private abuse in fact mirror the potential for political abuse and manipulation of the press which makes government regulation such a perilous exercise. It does not matter whether the government is manipulating or censoring the news through, or if some private interest is doing the same through its economic power. In either eventuality, the result is the same: the citizen’s right to a free press is denied. Since both freedom of the press and freedom of expression are premised on, and intrinsically interlinked with, democracy, neither of these liberties extends to the point where either their exercise itself undercuts the functioning of our democratic system, or denies freedom of expression to other individuals. The Supreme Court has, on two occasions, clearly established the principle that expression conduct which assaults the fundamental values underlying freedom of expression and democratic government will not find shelter under the *Charter*. In upholding the validity of Canada’s laws against the willful promotion of hatred against identifiable groups, the Supreme Court made it clear that the measure
was permitted to supersede individual freedom of expression largely because of the violence done by hate-propaganda to the democratic rights of its victims. Directly addressing the conflict between private freedom and the public interest, Chief Justice Dickson warned that, “expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values.”\textsuperscript{364} This, he concluded, rendered hate-propaganda somewhat removed from the core values of free expression, of little net worth, and therefore easily suppressed.

More recently, in \textit{Hill v. Scientology}, the Supreme Court held that the common law of defamation did not contravene section 2(b) by allowing for the financial punishment of false and injurious words. While the words in question were undeniably intended to convey sincerely held political beliefs, their malicious falsity was seen as attacking rather than advancing the search for truth and meaningful social and political participation by perverting and distorting public discussion. The awarding of even very substantial damages for defamation was, in the court’s view, consistent with freedom of expression, since these sorts of statements are “detrimental to the advancement of these values and harmful to the interests of a free and democratic society.”\textsuperscript{365}

Closest on point to the issue of newspaper ownership controls is the Supreme Court’s recent ruling in \textit{Libman v. Quebec (Attorney-General)}, which resulted in the invalidation of Quebec’s draconian electoral expenditures provisions. This law allowed individuals and organizations

\textsuperscript{364} Keegstra, supra note 21 at 764.

\textsuperscript{365} Hill \textit{v. Church of Scientology of Toronto}, supra note 78 at 1174.
unaffiliated with registered campaign groups to spend no more than $600 during provincial referendum campaigns. Despite the outcome of the case, the unanimous court nevertheless approved the curtailment of spending to prevent the unfair skewing of the democratic process by wealthy individuals. Speaking in the context of honestly and passionately held political views - expression at the absolute core of section 2(b)'s protection, the court sanctioned the purpose of the legislation as a sufficiently pressing important and purpose to overriding freedom of expression, stating:

the object of the Act is, first, egalitarian in that it is intended to prevent the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources. What is sought is in a sense an equality of participation and influence of each option...from the voters' point of view, the system is designed to permit an informed choice to be made by ensuring that some positions are not buried by others.\(^{366}\)

The essential principle to be extracted from these cases is that the private right to freedom of the press cannot be exercised in such a way that it undermines the public right of everyone else to enjoy the fruits of a free and diverse press. Thus, when the court spoke of Parliament’s jurisdiction to “protect” freedom of the press, they can be taken to have included the power to protect this freedom for everyone, from those few individuals who’s power and privilege would permit them to abuse it. The ideological monopolization of a forum, namely newspapers, which must by definition be diverse to be effective, is clearly incompatible both with the condition of press freedom and the public interest. While newspapers are certainly not a public forum in the traditional sense, there is a merit to such an analogy. In *Marsh v. Alabama*, the U.S. Supreme

\[^{366}\text{Libman, supra note 103 at para 41.}\]
Court curbed the strict rights of a private corporation to exclude religious prosletiziers from the streets of its company-owned town, in conformity with the public nature and purpose of the location. On behalf of the court, Justice Black wrote that:

Ownership does not mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the general public, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.\(^{367}\)

The denial, to a narrow class of individuals possessed of extraordinary resources for personal expression, of the right to purchase an existing newspaper as the forum of their expression affects their ability to participate in social and political discourse to a minuscule extent. It denies them only whatever enhanced status and credibility an established newspaper may enjoy, and raises the cost of choosing publication of a newspaper as their preferred mode of expression. Therefore, contrary to the publishers' position, it is scarcely better, in this case, to err on the side of excessive private liberty. As Justice Black so succinctly put it in *Associated Press*, "freedom of the press from governmental interference...does not sanction repression of that freedom by private interests."\(^{368}\)

Justice Black's conception of freedom of the press, in contrast to the classic libertarian model, focuses on the third factor which bolsters the case for government intervention in this instance; that newspapers are first and foremost a commercial venture, bought, sold and published for a profit. Generally, individuals and corporations are motivated to enter the newspaper industry


\(^{368}\) *Associated Press*, supra note 198 at 20.
because they perceive a promising investment opportunity. While the commercial focus of their activity does not deprive newspaper publishers protection under section 2(b), it is of "constitutionally significance." In *Rocket v. Royal College of Dental Surgeons*, the Supreme Court held that a ban on professional advertising infringed dentists’ freedom of expression, notwithstanding the clearly commercial motive for the publicization of their services.

[The rights-claimants] wish to impart information to patients or potential patients. Their motive for doing so is, in most cases, primarily economic. Conversely, their loss, if prevented from doing so, is merely loss of profit, and not a loss of opportunity to participate in the political process or the “marketplace of ideas,” or to realize one’s spiritual or artistic self-fulfilment. This suggests that restrictions on expression of this kind might be easier to justify than other infringements of section 2(b).

As Ken Thomson bluntly told the Kent Commission, “[l]ook, we are running a business organization. They just happen to be newspapers.” While others may be more committed to the underlying values of the industry, newspaper ownership is in pith and substance a business concern. Even the *Globe and Mail*’s former publisher Roy Megarry is on record as having predicted that, “by 1990, publishers of mass circulation daily newspapers will finally stop kidding

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369 In 1996 the Sun Media Corporation was bought-out by a management consortium which had as one of its principal financial backers the Ontario Teachers’ Pension Fund. Many members of the provinces’ various teachers’ unions were unhappy about this, given the strongly anti-union and anti-teacher stances which the Sun newspapers regularly took. Resolutions were passed demanding that the newspaper’s editorial position be independent. See C. Mahood, "Ontario Teachers peeved over Sun bid Pushing for say in chain’s editorial stance" *The [Toronto] Globe and Mail* (24 August 1996) B3.

370 *Rocket*, supra note 84 at 241.

371 Ibid. at 247.

372 Royal Commission on Newspapers, *supra* note 8 at 92.
themselves that they are in the newspaper business and admit that they are primarily in the business of carrying advertising messages." Of course, this has never prevented owners from wrapping their newspaper transactions in the mantle of the freedom of the press. This reflexive retreat to the high-ground of principle is frequently practised by media executives whose decisions have been criticized as contrary to the public interest. As former Chief Justice David Bazelon of the United States Court of Appeals for the District of Columbia, a strong advocate of media cross-ownership regulation, has observed, "we should also expect that every business decision will be defended as an exercise of journalistic discretion protected by the First Amendment when not one gram of journalistic discretion is involved."

The fourth factor relevant to contextualization of any challenge to the constitutionality of the Canadian Newspaper Ownership Act, or any similar scheme, is the fact that there no partisan political advantage is derived from establishing a good press. Strengthening the virtues of the newspaper industry does not advance the political interests of the regime in power. To the contrary, the existence of a strong and diverse press heightens the probability that misconduct by the ruling regime will be uncovered, and that alternative policy approaches to their programme will be circulated. Encouraging newspapers to provide fair coverage of all political viewpoints, as the legislation does, can hardly be called an improper political interference. If press ownership

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374 For instance, Hollinger’s counsel characterized the Council of Canadians’ attempt to obstruct his client’s acquisition of the Southam newspapers as, "an unprecedented and monstrous interference by the State in the freedom of the press." Memorandum of Fact and Law of Hollinger Inc. in *Council of Canadians*, supra note 7 at 15.

review were informed by the political self-interest of the government, it would attempt to restrict coverage of opposition or fringe parties, not encourage it. Unlike the licensing regulations instituted in the early era of the press, ownership controls would not vet the political affiliations of publishers to ascertain whether they are friend or foe to the ruling political regime. In fact, section 14 of the proposed Canadian Newspaper Ownership Act explicitly forbids the Press Ownership Review Tribunal from considering the specific political stances taken by any newspaper when reviewing any transaction. Editors would remain free to savage their political and ideological opponents, and to focus their news coverage on a specific agenda, so long as they provided their readership with some balance and recognition of opposing viewpoints.

Thus, while the courts must be highly vigilant and critical of governmental incursions into press freedom, they must not succumb to the myth that private press freedom is sacred and inviolable. Indeed, that constitutional right ends where detriment to the public interest, wrought by the superficial or lop-sided presentation of information by a media monopolist, begins. In balancing the interests of private ownership with the public interest in accurate and diverse media, the courts must not blindly favour an absence of regulation, or hold the government to the strictest measure of minimal impairment in drafting its guidelines for concentration limits as this sort of legislation does not imperil the core condition of press freedom, whereas the potential for abuse by excessively concentrated private ownership does. Therefore, a balanced approach to section 1 is called for in this case, one which reflects the traditional spirit and diligence of rights-protection under the Charter.

4.3 Rational Connection
At a broad conceptual level, there is little question that ownership controls are rationally connected to the protection and improvement of editorial quality. To argue that the proposed measures are not rationally connected to the advancement of section 2(b)'s objectives, its opponents would have to claim that ownership concentration can never threaten the health and diversity of the press, or that proposed regulation offers no antidote to that threat. Few would make the first claim, and even fewer would accept it. In testimony before the Davey Committee, the presidents of the two largest national newspaper chains at the time, Southam and F.P. Newspapers, both acknowledged that there would be a point, far removed from the status quo, at which they would endorse government intervention to contain excessive concentration.376 Even Conrad Black continues to couch his extravagant arguments against ownership controls on the basis of a claim that current levels of concentration are light-years away from crossing the line of public interest, thereby tacitly admitting the existence of such a line.377 The Royal Commission on Newspapers concluded bluntly that “concentration of ownership has reduced the diversity of perspectives.”378 Once it is conceded that government intervention against excessive media ownership concentration would be justified at some theoretical extreme, then the debate is cast as a question of degree focused on whether the conditions for action have yet arisen. Given our longstanding policy of regulating ownership, and even program content, in the electronic media, it is simply untenable to argue that restrictions on media concentration are rationally unconnected to higher social aims.

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378 Royal Commission on Newspapers, supra note 8 at 166.
If the government is justified in principle in legislating ownership controls, the specific scheme it adopts must still be carefully tailored to the complexities of the problem. In short, the courts will insist that ownership controls actually work. That is, they must not only combat amalgamations, but must counteract the ills of excess concentration by advancing the *Charter*’s interest in freedom of expression. The subtleties of the newspaper industry and the complex interrelationship between ownership and advancement of the public interest require a nuanced approach which incorporates three key principles. To begin with, any scheme of ownership control which is to pass constitutional muster must recognize that not all publishers are created equal. There is a large body of research which has concluded that number of newspapers controlled by an owner has no necessary causal link to editorial quality.\(^{379}\) The research commissioned for the Royal Commission on Newspapers itself cited examples of independent newspapers both improving and declining in the wake of being acquired by chain-ownership.\(^{380}\) The Report of the Senate Special Committee on Mass Media reached the same conclusion, stating bluntly that, “[t]here is no such thing as a ‘good’ chain or a ‘bad’ chain - only good and bad owners. Even then the situation can be pretty ambiguous.”\(^{381}\) The Royal Commission on Newspapers did identify a correlation between independent ownership and above average expenditures on editorial expenses.\(^{382}\) Newspapers owned by chains have also been found to

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\(^{379}\) See for example, F. D. Hale, “Editorial Diversity and Concentration,” *supra* note 200 at 160.


\(^{381}\) Report of the Senate Special Committee on Mass Media, *supra* note 22 at 69.

\(^{382}\) Royal Commission on Newspapers, *supra* note 8 at 101 and 222-223.
produce homogeneous and less locally-focused coverage, similar political endorsements, and less controversial and argumentative coverage. There is, however, no hard and fast rule.

Commitment to editorial quality varies widely between both chain and independent newspapers, and, as such, the acquisition of a newspaper by an existing conglomerate is not inevitably detrimental to the ideals of good media. For instance, when the Davies family decided to sell their family newspaper, the Kingston Whig Standard, they looked not only for a lucrative offer, but for a buyer who would respect and continue the newspapers' dedication to quality. They chose the Southam group, also family-run at the time, for its obvious, and publicly recognized, commitment to editorial excellence. While this transaction increased concentration, it was certainly preferable to seeing the Thomson Corporation gain control of the Whig Standard, given Thomson's dismal record of running newspapers as editorially lean profit-generating machines.


386 D. Fetherling, *A Little Bit of Thunder: The Strange Inner Life of the Kingston Whig-Standard* (Toronto: Stoddart, 1993) at 11 and 339. A senior editor at the Whig Standard has also confirmed to the author that, in discussions with the editorial staff, Michael Davis justified his sale of the newspaper to Southam largely on the chain's record of editorial excellence.

387 The notable exception to this record is, of course, the Globe and Mail, which is considered to be Thomson's flagship newspaper in Canada, and which he has committed substantial editorial resources to.

388 Royal Commission on Newspapers, *supra* note 8 at 78 and 224.
A further guiding principle of newspaper ownership regulation is that more expression is better. With diversity standing as a paramount value, the simple presence of additional voices in the newspaper marketplace, replete with their teams of reporters and columnists, can be assumed *prima facie* to advance the values of press freedom. The preservation of a struggling publication, even in the hands of a conglomerate owner, is far preferable to the demise of a newspaper and the attendant diminution of competition. Similarly, the establishment of new newspapers, even by large publishing interests, is always desirable. With strict enforcement of the existing commercial laws respecting predatory trade practices, the entry of new voices into the marketplace of ideas can only add to the available range of information and opinion. This is particularly true given the fact that competing newspapers often advertise the differences in editorial stance between themselves and their competitors as a promotional device. Moreover, if conventional economic wisdom holds true, the introduction of new competition into a market can be expected to spur the existing publications to improve their product to preserve their readership.

A scheme of regulation such as the *Canadian Newspaper Ownership Act* has the additional benefit of linking the economic advantages of expansion with the imperative of quality publishing. Promoting quality in newspapers, since only good newspapers will be allowed to expand. It allows anyone to publish newspapers, and even to garner a large segment of the market, without any government interference. However, for those publishers who wish to expand their holdings beyond the threshold limits, its review process stands as an ever-present reminder that their conduct and editorial practices will come under scrutiny. They can be expected to ensure that their commitment to diversity and accuracy are beyond reproach, or at least substantially
defensible, before proposing mergers or acquisitions which will come under scrutiny by the Press Ownership Review Tribunal. In this way, the proposed regulations give publishers an economic incentive to perform their obligations well. The carrot of lucrative expansion is thus dangled beneath the stick of quality. Trash-mongers and ideologues are prevented from cornering the market, while editorial excellence is encouraged and rewarded.

And finally, it must be recognized that chain-ownership has its advantages. The main strength of newspaper chains is their relative financial muscle and consequent ability to maintain publication of marginally profitable newspapers by offsetting these costs with the profits of more lucrative publications. Likewise, chains are better positioned to provide the capital and expertise required to start new newspapers, especially in competitive markets. Newspaper chains also have the added benefit of being better able to resist financial pressure from advertisers of other corporate and political interests which may be displeased with their reporting or editorial stances. For instance, former Sunday Times editor Andrew Neil has recounted how Rupert Murdoch unflinchingly supported his decision to ban Harrod’s, the largest department store in England and a three-million pound-a-year advertiser, from advertising in his newspaper after its owner, Mohamed Al-Fayed, threatened to pull his advertising in protest of the paper’s editorial position. Few independent proprietors could afford to take such a principled stand against their largest advertiser.

389 Report of the Senate Special Committee on Mass Media, supra note 22 at 68ff.

390 Vanity Fair, supra note 201.
The provisions of the proposed *Canadian Newspaper Ownership Act* take account of these advantages, while precisely targeting the harms of concentration. It never jeopardizes the continued publication of any newspaper. Moreover, it follows Royal Commission on Newspapers’s clear recommendation that no obstacles or disincentives be placed on the establishment of truly new newspapers. And most importantly, the *Act* creates a review mechanism which is sensitive to the distinguishing features of individual publishers, allowing the government tribunal to intervene in only those transactions which are likely to be detrimental to the quality of the Canadian marketplace of information and opinion. Therefore, it is safe to conclude that a carefully crafted and limited scheme of ownership control, such as the *Canadian Newspaper Ownership Act* would be rationally connected to the purposes at hand.

4.4 Minimal Impairment

*The Limitations Defined by the Canadian Newspaper Ownership Act*

Following the framework of analysis developed in *Keegstra*, the first aspect of the minimal impairment test is to examine the language of the restriction itself in order to ascertain how tightly it has constrained freedom of expression. In the case of ownership controls, the initial limit of interest is the threshold for interference established by the *Act*. That is, to what level are publishers able to expand their newspaper enterprises without engaging any investigative apparatus or requiring governmental approval.

The proposed *Canadian Newspaper Ownership Act* sets the threshold for review of newspaper

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391 Royal Commission on Newspapers, *supra* note 8 at 238.
transactions at 25% of national circulation, or 40% of regional circulation. These figures are, as is the case with all such limitations, somewhat arbitrary. They are tailored to reflect the current reality of the Canadian newspaper industry, where the largest chains are near these levels of ownership, but would, as discussed below, allow newspaper organizations grow to a size where they have historical proven to be nationally competitive. By way of comparison, the Royal Commission on Newspapers recommended capping ownership at five newspapers per chain, and a daily circulation not exceeding 5% of the national total. In 1961, when the second British Royal Commission on the Press recommended the enactment of restrictions on ownership concentration, the three largest newspaper chains in England, the Daily Mirror Group, Associated Newspapers, and Beaverbrook Newspapers, controlled 24%, 23% and 20% of national daily circulation respectively. These figures had increased from 17%, 15% and 13% in 1948, when the first Royal Commission had concluded that concentration was not yet at the point of justifying governmental intervention. The second Royal Commission proposed a scheme of regulation which would review all transactions which would result in the purchasers acquiring control over a daily circulation of 3,000,000 copies or more. With a total daily national circulation of almost 25.5 million copies, that set the threshold for review at 12%. When the Fair Trading Act was actually amended to include similar provisions, the threshold for review was set at a 500,000 copies, or a scant 2% of national circulation.

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392 Ibid. at 239.


394 Ibid.

395 Ibid. at 105 and 173.

396 Fair Trading Act, supra note 300, section 58(1), and U.K., Royal Commission on the Press 1974-79, supra note 19 at 270.
When the Davey Committee recommended a similar system of review for newspaper acquisitions in Canada in 1970, the two largest English-language chains each controlled slightly less than 22% of national circulation in English Canada, making the actual percentage of national circulation much lower. By 1980, the figures had risen to 32.8% and 25.9%, prompting the Royal Commission on Newspapers to recommend that ownership for any one interest be capped at 5 daily newspapers, not exceeding 5% of daily circulation nationally, without possibility of exceptions.397

In the state of Victoria, Australia, Rupert Murdoch's New Corporation controls more than 60% of daily circulation in that region of the country. The most recent recommendations, from the Mathews Working Part into Print Media Ownership, recommended draft legislation which would have reviewed any acquisition of press assets or control of press corporations, without a minimum threshold of circulation.398 In comparative perspective, the Canadian Newspaper Ownership Act is by far the least restrictive scheme either proposed or adopted. This is partially in recognition of the fact that chain-ownership is a wide-spread and deeply entrenched phenomenon which cannot be reversed without causing massive disruption to the industry and unfairness to its present participants. On the same theme, no publisher is required to divest himself or herself of any newspapers, which would be the greatest intrusion of all.399

397 Royal Commission on Newspapers, supra note 8 at 239.

398 Working Party into Print Media Ownership, supra note 310, appendix "B" at 7.

399 The Royal Commission on Newspapers, while expressing regret that concentration had been allowed to burgeon to the levels existing in Canada in 1980, felt that legislating substantial divestments would be unfair and unreasonable (supra note 8 at 238). Therefore, it suggested such extreme action only to remedy the most egregious cases of concentration, such as the Irving hegemony in Nova Scotia. Under the Charter, forced divestment of newspaper holdings would seem as an extremely severe infringement of section 2(b), and would not be easily justified.
Striking the balance at this level of concentration also recognizes the inherent advantages of newspaper chains. It allows growth to a level where the establishment of national, regional, and even international bureaus is economical, and where chains are large enough to absorb the adverse economic impact of poor-performance by one or more of its publications, thus decreasing the likelihood of newspaper closures. In their day, the F.P., Thomson, and Southam chains were all highly successful and profitable with around 20% of the market. More importantly, the terms of the *Canadian Newspaper Ownership Act* do not impose any fixed or arbitrary cap on total ownership concentration whatsoever, or prohibit expansion through the creation of truly new newspapers. The legislation can best be characterized as establishing a newspaper meritocracy, with a very modest and defensible role for government intervention.

From a tactical standpoint, if the Supreme Court’s approach to the specific quantitative limits set by legislation continues on its present trajectory there is little chance that the threshold for review established by the *Canadian Newspaper Ownership Act* would be struck down. In the recent challenge to Quebec’s electoral spending law, which the court characterized as restricting third-party spending to such a degree that was tantamount to a complete ban, the court abdicated any responsibility for setting precise numerical limits. “It is not up to the courts to decide the amount [of spending] that should be allowed.” The legislature, it stated, “will have to set this amount...be fair while being small enough to be consistent with the objectives of the Act.” Given that the regulation of newspaper ownership is no less a technical question of social policy

400 *Libman, supra* note 103 at para 75.

than electoral spending, it is unlikely that the courts would be any more inclined to enter the business of proposing more appropriate circulation limits. If the question is one of fairness and reasonableness, then the proposed threshold should be passed easily, as it permits owners to amass a substantial publishing empire before ever having to account for their editorial conduct, while still preventing the uncontrolled proliferation of concentration to unacceptable levels.

Given the virtual impossibility of proving that it had targeted ownership controls to take effect at the precise point where ownership concentration begins to harm freedom of the press, the government need only prove that its chosen threshold for intervention falls within a reasonable range, erring perhaps on the side of greater freedom. In Irwin Toy, the Supreme Court considered whether Quebec’s consumer protection laws prohibiting advertising targeted at children was a justifiable limit on freedom of expression, and noted the that “a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck.”402 In that case, discussion arose as to when an advertisement would be deemed to target children, given the audience composition data for various television programmes. The government agency responsible for enforcement of the legislation decided to impose a complete ban on effected advertising during periods when children under the age of thirteen constituted fifteen percent or more of the viewing audience.403 Approving this practice as meeting the minimal impairment requirement, the Supreme Court stated that legislatures are not “restricted to the least common

402 Irwin Toy, supra note 38 at 993.

403 Ibid. at 997.
denominator of actions taken elsewhere," and that the court, "will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups." This lenient approach to establishing numerically precise thresholds for infringement of rights would be appropriate in the context of newspaper ownership controls. This is because the threats to freedom of the press posed by the scheme lie in the details of its administration, not the threshold for ownership review. Moreover, the market share which a publisher could amass in Canada without government interference is very generous in comparison to every other jurisdiction which has, or is considering, measures to curb concentration.

Irrespective of the government's ostensibly sound reasons for regulating newspaper ownership, and the measured and modest threshold for intervention, publishers may still attack the justifiability of the *Canadian Newspaper Ownership Act* on the basis that it treats newspapers as an insular industry, rather than as a small piece of the global media puzzle. They would point out that we live amidst the most media saturated age in history. There is an almost unimaginable abundance of television, radio stations, speciality magazine and computer web-sites available to the information consumers across the country. How then can even the current level of concentration in the newspaper industry constitute a threat to our societal well-being? More to the point, how can government justify any ownership restrictions in the name of diversity, when diversity abounds in other media?

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404 *Ibid.* at 999.
The answer to this argument is two-fold. First, newspapers are different. Notwithstanding the growing influence of the electronic media, the press is a major instrument in the workings of our social and political life. The Norris Commission in Australia put it well when it stated that:

Radio and television seek out news and publish it to a far lesser degree than newspapers; indeed they do to some extent feed upon the news which the press originally gathers.... When all is said and done, it remains true than no medium other than the press, especially the daily press, purports to present a comprehensive view of happenings, local, national and international, as they occur from day to day.\footnote{Report of the Inquiry onto the Ownership and Control of Newspapers in Victoria, supra note 311 at 79.}

Newspapers are the medium of record, and the standard for depth and detail in reporting. For those Canadians who live in smaller centres which do not have local television stations, newspapers are often the only source of detailed community coverage. Newspapers also employ a far larger number of editorial staff, and consequently find and develop far more stories than their electronic counterparts. They are also the primary source for the news which other media report. The members of our economic, intellectual and political elites are overwhelmingly likely to read at least one newspaper on a daily basis.\footnote{The Newspaper and Public Affairs, supra note 31 at 30, and Royal Commission on Newspapers, supra note 8 at 216.} Newspapers break the stories, set the agenda and in a subtle but unmistakable way shape the rest of the information landscape.\footnote{See also Report of the Inquiry onto the Ownership and Control of Newspapers in Victoria, supra note 311 at 79.} They are also the only form of mass media which regularly express editorial opinions and carry on-going debates on matters of public concern.\footnote{While the proliferation of web-sites on the Internet is providing an unparalleled opportunity for the expression of individual opinion to a large audience, the remains too ad hoc and scattered in nature to rival the opinion-disseminating power of newspapers.} Therefore, homogeneity in the newspaper industry, far from
being attenuated by the availability of other media, can be expected to create a ripple-effect impacting on our information environment generally. The printed word, and the extensive journalistic effort behind it, remains the cornerstone of social discourse, and our interest in protecting its integrity and diversity is undiminished. In ruling on the constitutionality of media cross-ownership rules in the United States, at the Supreme Court there stated that, "it was not irrational for the [F.C.C.] to disregard media sources other than newspapers and broadcast stations in setting diversity standards. Newspapers and television are the two most widely utilized media sources for local news and discussion of public affairs."\(^{409}\)

Second, the argument that present levels of concentration do not represent a crisis, and therefore does not justify legislative intervention, is based on the false premise that section 2(b) of the Charter only guarantees a minimum of press freedom. The Charter does not trade in half-measures or 'good-enoughs'. Canadians are not merely entitled to the minimum standard of editorial freedom and diversity required to maintain a functioning democracy, they are entitled to have their government take steps to achieve an optimum media environment. The fact that the press "as is" will suffice does not lead to the conclusion that any measures aimed at improving it are unjustifiable. Freedom of the press is not an a priori guarantee of a right to unfettered commercial activity or freedom from regulation. Private ownership and control of the press are not constitutionally ordained virtues. The history and philosophy of freedom of the press instruct us that the private exercise of expression rights must not be allowed to trump the broader societal interest in the dissemination of varied and accurate opinion and information. Commercial

\(^{409}\) News America Publishing Inc. v. F.C.C., supra note 266 at 815.
activities are protected only so far as they advance the condition of press freedom. Conversely, government regulation of the press violates freedom of the press only to the extent that it diminishes the independence, accuracy or diversity of the press.

As a mode of expression, newspaper ownership is a zero-sum game. The take-over of an existing newspaper inevitably results in the expression of the new regime replacing that expression which previously filled its pages. If a new voice is added, an old one is lost. If a potential purchaser cannot demonstrate a superior commitment to quality than the existing owner, his or her acquisition of that newspaper does not materially advance the public’s interest. This is most acutely so in the case of conglomerates which already control a large market share. Given that our liberal democratic vision of the search for truth and understanding is predicated on a plurality of competing voices, those individuals and entities whose perspectives are already well represented in the national media have, if anything, a lesser claim to be furthering the search for truth or social and political participation by increasing their presence in the marketplace of ideas.

It is key to remember that under the proposed rules publishers can capture up to a quarter of the market nationally or regionally without any restriction. It is only once they seek to purchase an even greater position within the media community that their conduct comes under scrutiny. Ownership controls run no risk of silencing a valuable viewpoint, they only function as volume controls on particularly vociferous individuals. The “constitutional right of the media to decide what is newsworthy”\textsuperscript{410} is not violated by preventing any one media-outlet from becoming

\textsuperscript{410} Trieger, supra note 242 at 151.
regionally or nationally dominant, at least without it having proved itself worthy of the public trust to fulfill such a weighty responsibility.

Defences

By way of a 'defence' against the restrictions on expression it imposes, the Canadian Newspaper Ownership Act offers publishers the chance to show that they run their newspapers in a manner entirely consistent with the democratic imperative of the Charter. Instead of imposing an unthinking blanket prohibition on growth or expansion beyond certain arbitrary limits, the Act calls for a process of review whereby transactions which tend to increase concentration above the threshold levels discussed previously would be scrutinized for their compatibility with the public interest. Those publishers whose past management conduct can be shown to have produced newspapers of good quality, which provide a forum for a rich diversity of views and accurately and fairly report on a comprehensive range of issues important to the public, would be relatively unrestricted in expanding their commercial press activities. Not only would this scheme achieve the aim of protecting the public interest in accuracy and diversity, but would also create an incentive for emerging and existing press magnates to conduct their of newspaper operations with an eye to quality.

Ironically, however, it is precisely the mechanism of adjudicating exceptions to concentration restrictions which come under the most intense criticism by publishers challenging the constitutionality of the Canadian Newspaper Ownership Act. The key indictment of the Canadian Newspaper Ownership Act would be that it allows government scrutiny over the content of expression and, worse still, amounts to a prior restraint on the publication of certain
viewpoints by rewarding those publishers whose newspapers conform to a state ordained model of expressive virtue. The principal imperative of freedom of expression, at least in the classic liberal paradigm, is that the state not pick favourites and impose penalties in the marketplace of ideas. Embodying Mill’s demand that we never assume the infallibility of our views or become complacent in the scrutiny of prevailing wisdom,411 section 2(b) of the Charter has been interpreted as a prima facie proscription of intentional abrogation of speech based on its content.412 Adopting Robert Sharpe’s observation that freedom of expression and the press is premised largely on the belief that “those who purport to legislate the truth invariably turn out to be tyrants,”413 the court has staked-off the content of expression as especially protected from state intrusion. Therefore, if the Canadian Newspaper Ownership Act’s scheme of review is to pass the minimal impairment test, the need for government scrutiny of newspaper content must be strictly justified.

Two approaches to ownership control are available: a “blind” scheme of regulation capping ownership concentration pre-determined levels, without exception or exemption, or an “informed” scheme which, while having a fixed threshold for review, allows a broader range of inquiry into the nature of the newspaper being sold, the prospective purchaser’s record on editorial quality, the likely implications for editorial diversity, and so forth. The principal advantage of a “blind” scheme is the absence of any investigation into the content and tone of the purchaser’s newspapers. The consequent elimination of the need for discretionary decision-

412 Irwin Toy, supra note 38 at 972-973.
making by any governmentally appointed Tribunal would make such a scheme immune to attack on allegations of political manipulation of the press, and would seem to be a far less intrusive mode of regulation. Unfortunately, a blind scheme would be a blunt instrument entirely unsuited to the nuanced task at hand, and would risk rejection by the courts as lacking a sufficient rational connection to the project of protecting and improving the quality of the press and the national marketplace of ideas. Under such a system, owners with a lengthy record of quality publishing, editorial non-interference and balanced and in-depth reporting, would be denied the opportunity to bring the benefits of their commitment to journalistic excellence to new markets, impairing their right to communicate without advancing the objective of section 2(b).

The ill-fated Canada Daily Newspaper Act is an example of a such scheme. Introduced as a private member’s bill by Jim Flemming, after his departure from the Cabinet in the wake of intense industry pressure, this legislation was a scaled-back rendition of the Royal Commission on Newspapers Commission’s recommendations. The Daily Newspaper Act, had it not died quietly on the order paper, would have forbidden unconditionally the acquisition of existing daily newspapers and the establishment of new daily newspaper by anyone whose aggregate newspaper holdings accounted for twenty percent or more of total national daily circulation. The Daily Newspaper Act’s restrictions were, at best, a crude response to the complex problems of corporate concentration and cross-ownership. The Act made no attempt to integrate the

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415 See Democracy’s Oxygen, supra note 6 at 41.

416 Bill C-226, supra note 414 sections 4 and 5.
subtleties of the newspaper industry and the complex interrelationship between ownership and advancement of the public interest. Any scheme of ownership regulation which imposes inflexible limits, prohibits new start-ups, and risks the demise of existing newspapers is an inadequate response to the phenomenon of ownership concentration. A simple quota system would have the very real potential of working at cross-purposes to the objectives it was meant to advance. As such, it would likely be struck-down by the courts as an insufficiently careful and precise measure, more apt to do harm than good. Therefore, some degree of content-scrutiny, sensitive to the distinguishing features of competing publishers, is required.

Evaluation of various newspapers' performance in relation to Charter's ideal of press freedom is the only means by which an agency charged with overseeing the purchase and sale of existing newspapers can determine whether a proposed transaction advances the public interest. This agency would obviously require a set of rational criteria on which to base its decisions to allocate expressive opportunities. This situation can be likened to that of two or more groups competing for the simultaneous use of the same venue for their expression. Such a contest is characterized by two certainties: that only one person or entity can have control over this venue at any given time, and that the expressive opportunities within that venue, and the number of such venues, are finite. If we assume, as the previous chapter has argued, that the government has a legitimate interest in overseeing (in as limited a role as possible) the allocation of these expressive opportunities, some criteria must established by which this decision is made.

It seems readily apparent that the first question to be asked in allocating an expressive opportunity is whether the competing users have already had a chance to express themselves in similar venues,
and if so, how often. If two groups both wanted to hold rallies in the same park at the same time, but one was also holding similar manifestations in several other parks at the same time, it would seem intrinsically fairer, and more in accordance with the principles of democratic pluralism, to allow the other less-heard voice the chance to express itself. This precept is analogous to the threshold-level of concentration required to trigger an inquiry into the sale of a newspaper. Once this threshold has been crossed, the chief dictate of freedom of expression and the press would be that government allocate the expressive opportunity fairly, but without regard to the message sought to be conveyed by would-be users. The only criterion which readily presents itself would be an evaluation of the quality of their past usages newspapers, as measured in regards to the values underlying section 2(b).

A distinction must also be drawn between examining newspapers’ relative contribution to the Charter’s ideal of a free press, and punishing certain newspapers for their specific political perspectives. The former practice is entirely consistent with the promotion of freedom of the press under the Charter, whereas the latter is inimical to it. Neither the Charter, nor the democratic concept of freedom of the press, are content-neutral. Our constitutionally constrained democracy is not an empty vessel waiting to be filled with ideological content. Rather, the entire text is laden with normative assumptions about the nature of a “just society,” the relationships between individuals and the state, majorities and minorities, men and women. Both the lineage of our idea of press freedom, and the Charter itself, dictate that a certain kind of press is desirable for our society and the protection and promotion of its values. As such, the tolerance, and indeed demand, for the expression of diverse and sharply conflicting views which characterizes Charter

democracy is a distinct and exclusive ideological position, which is nonetheless consistent with our system of constitutional rights.

The various sections of the Charter, such as the section 2(b) guarantees of freedom of expression and the press, must not be read in isolation but rather as complementary elements of the overall system of rights. As the court noted in Keegstra and Butler, the protection of expression under the Charter must be consistent with the themes of equality and cultural plurality which have been constitutionalized as defining virtues of Canadian society. Consequently, both pornography and messages of racial superiority and intolerance have been deemed less worthy of the Charter's protection than expression promoting gender equality and racial tolerance. By interpreting the Charter in such a way as to permit the criminalization of both sexually degrading and racially hateful material, the courts in essence are saying that the Charter has explicitly taken sides on the role and status of women and ethnic minorities in society. Similarly, the court’s holding that section 2(b) extends an attenuated degree of protection to commercial messages is a further example of content-based discrimination by the Charter.

While the section 2(b) does not dictate specific content preferences on the level of individual instances of expression, for example affording less protection to advertisements for cat food than to running shoe commercials, it does prescribe priority for certain general kinds of expression based on the relationship of that class of expression to the values underlying section 2(b). That

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419 See Keegstra, supra note 21 at 755.

is, news of political events or opinions on matters of public interest would take precedence over commercial expression if the two were to conflict. This is hardly a profound or novel conclusion, but it nonetheless illustrates that the Charter actively promotes a specific perspective as to what constitutes good or valuable expression.

Our Charter-based democracy also has its preferred conception of a free press. The definition of freedom of the press in any society is a function of the prevailing political system. For instance, in the communist U.S.S.R., the press was not only thought to be free, but constitutionally guaranteed so by Article 125 of the constitution.\textsuperscript{421} It just happens, however, that the definition of freedom within the communist paradigm entails, in the words of Lenin, freedom from, “capital, careerism, and bourgeois anarchistic individualism.”\textsuperscript{422} To the old Soviet eye, the Western press is not free, but rather enslaved to class and capital. In The Law of the Soviet State, Andrei Vyshinsky derided western newspapers as the “organ[s] of banks...with the largest railroads, with insurance companies...carry[ing] on a bloodthirsty agitation against the Communist Party.”\textsuperscript{423} The role of the press in communist society was to inform the people of state doctrines and programmes, promote behaviour deemed beneficial for the good of the state, and to speak of the toil of the working class and world revolution. For many decades it performed this function flawlessly, and any aberrant attempts to use the press in a manner contrary to these purposes were ruthlessly suppressed. In much the same way, Blackstone saw no contradiction in asserting freedom of the press without substantive protection for criticism of the state in

\textsuperscript{421} Four Theories of the Press, supra note 15 at 125.

\textsuperscript{422} Ibid. at 126.

Georgian England. Within his understanding of political structure, such a so-called freedom would have amounted to a revolutionary repudiation of law and social order.

The *Charter*-conception of a free press comprises independence from government control or interference, breadth and depth in editorial content, honesty and accuracy in information, and diversity of opinion. These are the values spelled out in sections 13(1)(i-vii) of the proposed *Canadian Newspaper Ownership Act*. The need for press autonomy from government coercion and control is self-evident if the media is entrusted with the role of reporting on and scrutinizing the actions of our political and judicial institutions. Similarly, the search for truth in both social and scientific matters can hardly be advanced without an accurate pool of common information on which citizens can draw, nor can the demand for an informed right to democratic participation ever be achieved without accurate accounts of political events and politicians’ conduct being available to the people at all times. If citizens are denied accurate information upon which to ground their personal and political choices, their fundamental dignity and autonomy is undermined. At a more basic level, the Supreme Court has twice recognized that the availability of truthful and non-misleading information in respect of basic personal necessities is essential to the dignified conduct of everyday life.424 Newspapers, as the principal marketplace of both political and commercial information, are relied upon by their readership for a wealth of information which shapes their daily life-choices. Newspaper must maintain a consistently high level of accuracy, or risk compromising their readership’s ability to function in an intelligently self-determined manner.

424 *Ford, supra* note 47, and *Rocket, supra* note 84
As a society, we also remain committed to the liberal programme of human progress through the fair contest of all ideas in an open marketplace. The words of John Stuart Mill, condemning the majority’s conceit of infallibility and asserting the enduring need to test and re-invigorate our beliefs through discourse tolerance for divergence and dissent, remain a cornerstone of in our system of social values.

If all mankind were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind...[for] ages are no more infallible than individuals; every age having held opinions which subsequent ages have deemed not only false but absurd. 425

The demand for pluralistic voices in the press is evident in the description of a free and democratic society in Oakes, as well as in the entire tone and character of the Charter. It is also reflected in a growing international consensus that individuals are positively entitled to a flow of information which represents and reflects the vastly diverse global community within which we live. In 1990, United Nations’ Commission on Human Rights boldly declared that the state, “must ensure that freedom of expression is not threatened by third parties; since the individual is entitled to pluralistic information, the state is bound to take all measures to assure the diversity of the media.” 426

In defining the values of a “free and democratic society” for the purposes of section, the Supreme Court faced the tension inherent between the notions of freedom and democracy which, at some

425 J.S. Mill, On Liberty, quoted in Dolphin Delivery, supra note 35 at 583.

initial level, seem to contradict one another, the restraints of constitutionalized freedoms trumping the will of the majority. In the case of certain rights, chiefly freedom of speech and press, this conflict is resolved by acknowledging their role as structural rights without which democracy, even in its purely majoritarian sense, could not exist.427 Others, such as Ronald Dworkin and David Dyzenhaus go further, and argue that:

we want a political system that will respect the right of each person to count equally when individual preferences enter into the calculation of what should be done....[From which it follows that] preferences which subvert a structure that seeks to ensure that each individual counts equally have to be screened out.428

The Charter functions as this filter, and to the extent that paradigmatic choices relating to the functioning of our society are concerned, it mandates a certain perspective of press freedom. The Charter's ideal of press freedom is one which embraces both independence and diversity of the press, mindful of the fact that these values sometimes conflict, requiring the government to step in when diversity is compromised by private action, and the courts to step in when independence is threatened by governmental controls. The mistake of the content-neutrality argument lies in conflating the Charter's meta-level dictate that a certain kind of press is preferable, with the subsidiary demand that that press not have its editorial perspective determined by the state. While the immediate effect of ownership review would be to stymie the growth of publishing empires controlled by men of like minds, it would not proscribe others of similar political persuasion from


becoming involved in the publishing industry, and would function identically, irrespective of the ideological creed of the publishers affected. Most importantly, however, ownership review would not consider what political viewpoint newspapers expounded, but only whether they present a reasonable range of opinion.

The United Kingdom’s experience with the reviews conducted by the Mergers and Monopoly Commission yields an excellent illustrations of the two levels of content scrutiny. In 1990 the Mergers and Monopoly Commission recommended against the potential acquisition of controlling interest in the Bristol Evening Post by David Sullivan, the publisher of the Sunday Sport and The Sport. The Commission’s concerns, and those voiced by at its hearings by a broad cross-section of the Bristol community, stemmed from the fact that Sullivan had a history of interfering with the editorial contents of his newspapers, especially in terms of encouraging more salacious and sensational coverage. Moreover, the Sport newspapers were described as, “heavily sex-oriented,” both in their editorial and advertising content, and carrying “little news in the accepted sense”. Despite Mr. Sullivan’s assurances that he had no intention of taking the Evening Post down-market, the Commission weighed his previous record of involvement in editorial decision-making with other daily newspapers, and concluded that, “Mr. Sullivan could be expected to influence editorial policy and the character and content of these papers and that this would harm

\footnote{U.K., Mergers and Monopolies Commission, \textit{Mr. David Sullivan and the Bristol Evening Post PLC: A Report on the proposed transfer of controlling interest as defined in section 57(4) of the Fair Trading Act 1973} (London: H.M.S.O., 1990).}

\footnote{\textit{Ibid.} at 42. The gist of the decision would find favour with the Charter, especially in light of the Supreme Court’s ruling on the impacts of obscenity on the equality interests of women in \textit{R. v. Butler}, supra note 49.}

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both the accurate presentation of news and the free expression of opinion."\textsuperscript{431} It is difficult to take issue with the Commission’s conclusions on the best interests of Bristol’s citizens, who had access to only one local daily newspaper. This decision is a clear example of a government agency preventing a specific individual from owning a newspaper because of the kind of newspapers he published and the overall social detriment if the performance of press-functions fell too greatly into the hands of this one man. As such, it respects the principle of specific content-neutrality, as Sullivan’s specific political viewpoint did not figure in the decision.

This decision must be contrasted to the Commission’s report on the proposed transfer of the Belfast News Letter and Sunday News to Thomson Regional Newspapers (TRN). This transaction stood to significantly increase the regional concentration of ownership, giving TRN 81% of daily circulation in Northern Ireland. The Commission paid particular attention to the editorial stance of the affected newspapers and those already controlled by their prospective owners.\textsuperscript{432} TRN, the Commission noted, had a “high reputation for the accurate presentation of news,” but nonetheless recommended that the transaction be rejected on the basis that the corporation’s typically moderate, “middle of the road,” editorial stance jeopardized the strong Unionist voice of the News Letter. Stating their concern that a “responsible outlet for strong Unionist opinion” be preserved, the Commission placed tremendous importance on maintaining balance – in the form of strong forums of countervailing opinion – in the politically charged

\textsuperscript{431} Ibid. at 1.

atmosphere of Northern Ireland. While the Commission’s motives may have been admirable, and their decision socially astute, this decision nevertheless represents a case of the government exercising control over the tone of a newspaper’s specific voice, and an unabashed example of social-engineering through ownership regulation.

The Press Ownership Review Tribunal could decide, as happened in the *Belfast News Letter* case, that the citizens of a certain community are best served by having a specific political perspective loudly articulated. Such a decision would constitute a severe interference in the contents of expression, in which the political interests of the government are strongly implicated. It is easy to imagine similar reasoning to that employed in the *News Letter* decision being applied to purchase of a strongly federalist newspaper in Quebec by a more neutral, or even separatist, publisher. As desirable as it may be to have federalist voices heard in Quebec, it would be a manifestly improper political manipulation of the press for a federal agency to authorize or veto newspaper transactions on such a partisan political pretense. Section 14 of the *Canadian Newspaper Ownership Act* expressly prohibits its tribunal from exercising this sort of political control over the voice of the press.

There is a quantum difference in kind between the openly partisan decision regarding the *News Letter*, and the holding that the citizens of Bristol are better off not having their only daily newspaper owned by someone who is objectively likely to publish news in lesser amounts and of lower quality. It is a much lesser interference with editorial autonomy for the reviewing agency

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to evaluate a newspaper solely on its quality. The government has no specific interest for or against seeing good newspaper publishers expand their holdings. One could even make the case in theory that an honest government would have less to fear from a thorough and conscientious press, whereas a less scrupulous regime might well prefer a superficial and commercially-oriented press. The difference in levels of content-scrutiny is codified in sections 12, 13 & 14 of the proposed Canadian Newspaper Ownership Act. The Act would only authorize the exercise of discretion based on editorial quality, not in relation to editorial perspective. As has been shown, this is the least possible impairment of press-independence which remains rationally connected to the aims of promoting freedom of the press, and is therefore consistent with section 1.

Alternative Methods

As a component of the examination of alternative means, concerns over the operation of the proposed scheme must be dealt with. If it is accepted that concentration controls are necessary, and that some mechanism of adjudicating individual cases is needed to ensure that the system always advances the values underlying freedom of expression, then it remains to be examined whether the method chosen will operate to the minimum detriment of the right. Even if it theoretically possible to objectively evaluate the quality of various newspapers, the creation of a Press Ownership Review Tribunal also raises the more troubling spectre of political interference. The Charter may permit the government to regulate for the quality of the press, but forbids it from coercively influencing the media’s editorial perspective. Returning to Erskine’s demand that judges who are implicated in the legitimacy of a regime not be allowed to determine the seditiousness of speech, the principle of press-government separation persists; individuals with a personal interest in promoting a certain political perspective must not be allowed to regulate the
voice of the press.

While in theory a newspaper's performance may be gauged in relation to the criteria of the editorial breadth, depth, and diversity without reference to its specific political perspective, a practical problem arises in insulating these deliberations from the political proclivities of government-appointed adjudicators. Administrative tribunals are, however, inevitably creatures of government, and frequently of government patronage. Indeed, in many instances it is not only proper but expected that appointees, while adjudicating individual cases fairly and impartially, will generally implement the broad ideological vision of the party in power or the constituencies they represent. In the case of press regulation, however, the absolutely fundamental importance of maintaining independence from political interests or influences would make the slightest political taint all but fatal to the Tribunal's legitimacy. Therefore, the mechanisms and membership of a Press Ownership Review Tribunal might well make or break its constitutionality. If the structure of the Tribunal itself makes this taint inescapable, the entire scheme would fail as being a violation of freedom of the press, rationally unconnected to the advancement of legitimate press-objectives.

The Press Ownership Review Tribunal created by the Canadian Newspaper Ownership Act would


seem ready to meet the highest standards for independence, both in its fundamental structure and subsequently in the record and conduct of its members. The Supreme Court has defined independence as, "a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees." Of course, it is unlikely that newspaper proprietors would ever acquiesce to the idea of legitimate government scrutiny of their conduct. It is not, however, ipso facto impossible for the government to create a Tribunal which, considering the "nature of the appeal tribunals themselves, the interests at stake, and other indices of independence," can credibly fulfill the task at hand.

Given the very high societal and economic stakes at hand, it would be imperative that Tribunal members have no recent or active links to any political party or publishing interest. Sections 5 and 7 of the Act ensure that individuals with political or publishing interests are ineligible for membership on the Tribunal. Additionally, under section 6 members face a substantial "cooling-off" period before being eligible for other government appointments or employment by private publishers and their related companies after leaving the Tribunal, thus eliminating the appearance, and hopefully also the potential for any practice, of any financially motivated impropriety. Section

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436 The Supreme Court has held that, irrespective of "whether or not any particular judge harboured pre-conceived ideas or biases, if the system is structured in such a way as to create a reasoned apprehension of bias on an institutional level, the requirement of impartiality is not met." R. v. Lippé Lamer C.J.C.: [1991] 2 S.C.R. 114 at 140.

437 Valente v. The Queen, [1985] 2 S.C.R. 673 at 685. While the court was speaking in the context of the constitutional guarantee of a hearing before an independent tribunal, as provided for by section 11(Dagenais) of the Charter, the same principles apply, in appropriately modified form, to all administrative tribunals. C.P.R. v. Matsqui Indian Band, [1995] 1 S.C.R. 3 at 50.

438 See for instance the hostile reaction of the press to the U.K. Royal Commission on the Press 1974-77, supra note 19 at 3.

439 C.P.R. v. Matsqui Indian Band, supra note 437 at 50.
5 also ensures that the Tribunal be provided with a minimum component of expert journalistic experience. And finally, in light of the infrequency with which reviewable transactions arise, and the substantial restrictions placed on Tribunal members, the Act allows outside appointment and security of tenure. The guidelines and composition of the Press Ownership Review Tribunal, as set out by the proposed act, should meet both the structural and substantive concerns raised above. The level of administrative safeguards provided by the Act go as far as reasonably possible to insulate the decision-making process relating to newspaper ownership from political and commercial pressure and influence. They provide, very literally, the least intrusive means possible to allow governmental supervision of newspaper transactions.

4.5 Salutary Effects vs. Deleterious Effects

The final stage in the proportionality analysis under section 1 calls for a final re-evaluation of whether, all things considered, the salutary effects derived from the infringement of a Charter right outweigh the obvious negative impact. As discussed in chapter 1, this test is largely repetitive and, if the purpose of the legislation at hand has been thoroughly defended and the extent of the infringement found to be as limited as possible, there is little work to be done at this stage. Nevertheless, there are a few final considerations which must be weighed before a final judgement is rendered on the constitutionality of the proposed scheme of ownership regulation. The first of these is an examination of the practical effects of similar legislation which has been in place in the United Kingdom for almost three decades.

440 The importance of adequate compensation is considered both in C.P.R. v. Matsqui Indian Band, ibid, and in M. Priest, "Structure and Accountability of Administrative Agencies" supra note 434.
For the most part, the British experience with ownership concentration controls has been positive, and underscores the merits of such legislation. Since the Mergers and Monopolies Commission was mandated to review effectively all major newspaper transactions, the English newspaper industry has not become any less vigorous, vociferous, or competitive. Although relatively few transaction have been rejected, the Commission has made qualified endorsements which resulted in editorial freedom being safeguarded in the wake of take-overs by measures such as the appointment of independent directors to a newspaper’s oversey operations. Significantly, the Commission itself has never been the subject of any allegations of impropriety or political interference.

It is also noteworthy that even in the United States, where the autonomy of the press is even more jealously guarded than in Canada, the courts have considered in some detail the lengths to which the government may go to foster and enforce diversity in the media without trenching on the First Amendment’s guarantee freedom of the press. In National Citizens Comm. for Broadcasting v. F.C.C. the courts were asked to decide whether the comprehensive scheme of cross-ownership regulations enacted by the F.C.C. pursuant to its mandate to ensure broadcast diversity

\[441\] A Report on the proposed transfer of the Observer, a newspaper of which Atlantic Richfield Company is a proprietor, to George Outram & Company Limited, a subsidiary of Scottish and Universal Investments Limited, whose parent company is Lonrho Limited, supra note 304.

\[442\] 555 F.2d 938 (1977). See also J.A. Barron, “The Cross-ownership Cases and the Trouble with Judge Bazelon’s Conversion” in J.A. Barron, Public Rights and the Private Press (Toronto: Butterworths, 1981) at 137. It is worth noting that the regulations in question did not restrict the purchase or ownership of newspapers, but merely prevented cross-ownership by denying newspaper owners the ability to acquire a television broadcasting license in the same city served by their print outlet. In affirming the decision, the Supreme Court explicitly noted that this “effort to ‘enhance the volume and quality of coverage’ through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not, 436 U.S. 775 at 800. For a superb discussion of the print-broadcasting regulation dichotomy, see L. Bollinger, supra note 15, 442.
violated the First Amendment. These regulations severely limited the ability of newspaper publishers to operate television and radio stations in cities served by their print media outlets. Ultimately, both the Federal Court of Appeals and the Supreme Court held that the principle of restricting owners to a single media, either television or newspaper, but not both, within limited geographic areas is consistent with the First Amendment as, "[t]he prospective ban is an attempt to promote diversity without government regulation of, or supervision over speech." 443 Adopting the words of Thomas Emerson, the Supreme Court stated that, "being forced to choose amongst applicants for the same facilities," the Commission has chosen on a "sensible basis," one designed to further, rather than contravene, "the system of freedom of expression." 444

The same can be said of the Canadian Newspaper Ownership Act. In the ultimate balance, the potential benefits of controlling ownership concentration in the print press are substantial. The risks associated with excessive and potentially abusive concentration of control over the nations' newspapers touches every Canadian. The historical connection between freedom of the press and democracy, which continues to this day, warns us that any compromise of press freedom is also an assault on the quality and legitimacy of our democratic system of government. With the advent of the Charter, the need for an equitable and diverse marketplace of ideas has been elevated to the level of a constitutional imperative. A free press, free from excessive or improper influence by any entity, be it government or private citizen, is as essential a right as we can conceive. A measured and moderate scheme of ownership control, well insulated from the

443 Decision of Federal Court of Appeals, ibid. at 950 [emphasis added].

444 Decision of the U.S. Supreme Court, ibid. at 802.
partisan political interests of government, presents little threat to the freedom and integrity of the media. Similarly, the obstacles erected in the way of the expressive ambition of the few media moguls with a control over a sufficiently large share of the newspaper industry to be affected by this legislation is trivial when compared to harm perpetrated against all Canadians if they are denied access to a free and diverse community of opinion and information on which to base their participation in society. The proportionality of the *Canadian Newspaper Ownership Act* is most obvious when one considers that domination of the newspaper industry by publishers who persistently exclude or under-represent opposing viewpoints necessarily would make it more difficult and costly for excluded individuals to get their message out. Raising the cost of publishing biased newspapers does not penalize monopoly publishers as much as it levels the playing field between ideological competitors, and ameliorates the unfair advantage which would otherwise inure to those who control the press.

Despite the public’s often ambivalent attitude towards the press, the instinct of taking “genuine” editorial content more seriously than paid-for expression remains deeply engrained in our media consciousness. While this attitude may be a modern fact of life, exploiting it to gain an artificial or unfair advantage over one’s less monied ideological opponents does not comport with the values of the *Charter*. Indeed, the courts have already recognized the inherent unfairness of the advantage afforded to those who can cloak their speech with the mantle of “The Press.” In *Somerville v. Canada (Attorney-General)*, Justice Kerans commented on the media exception contained in the provisions of the *Canada Elections Act* limiting third party spending, which exempt editorial commentary – even material explicitly promoting or criticizing individual parties
and candidates – from the definition of prohibited advertising expenses. His observations regarding the distinction between opinions expressed with the sanction of the ownership and management of a media outlet, and opinions which the speaker must pay a fee to express, aptly illustrate the tenuous nature of a claim that section 2(b) entitles one to speak with the privileged voice of the institutional media.

This simply says to me that those who own or control media outlets are offered special advantage to influence an election by disseminating their opinion in what they designate as the news portion of their publications. At the same time, those whose views may differ are driven to purchasing advertising space from these owners, with its inherent disadvantage as to apparent neutrality and cost.

A related line of reasoning is found in the Prince Edward Island Court of Appeal’s refusal to find that a scheme of professional regulation which reserved to Chartered Accountants the right to sign financial statements contravened the expression rights of others. In Walker v. Prince Edward Island, the court held that, “[a] construction which would have section 2(b) include a guaranteed right... to be regarded as authoritative in a field... overshoots its purpose and goes beyond what is necessary to give effect to it.” In other words, the personal and economic impediments entailed in qualifying for the Charter Accountant designation cannot be construed as an infringement of freedom of expression simply because they may prevent someone from expressing themselves effectively or authoritatively on certain subjects.

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445 Canada Elections Act, supra note 7, section 259.

446 Sommerville, supra note 215 at 243 [emphasis added].

This reasoning may be analogized to the situation of newspaper ownership. While there is no doubt that having one's hand on the levers of control over a newspaper's agenda-setting mechanism substantially enhances one's ability to influence the social and political discourse in a given community, it does not follow that one is constitutionally entitled to occupy that privileged position, or to purchase it. It is far more consistent to think that, where the value of ideas and opinions in the shaping of our nation's social and political life is concerned, the Charter should observe a strict separation of merit and money, one in which the quality of the information available to citizens is placed well ahead of the right of the wealthy to purchase and control social influence. This is clearly the sentiment which moved Justice Kerans to observe that granting individuals with enormous financial resources a privileged place in the marketplace of ideas is inconsistent with the values and purposes of the Charter. "because I am not aware of any natural association between wealth and wisdom."448 Under a scheme of ownership control such as that proposed in the Canadian Newspaper Ownership Act, the freedom of expression of those individuals wealthy enough to own newspapers is fully protected. Their ability to dominate or unduly influence the marketplace of ideas is, however, reasonably constrained for the benefit of all.

448 Somerville, supra note 215.
CONCLUSION

At the moment this conclusion was being written, the President of Southam Inc. was holding a news conference to announce the launch of a new national newspaper in Canada. It will be Conrad Black’s 61st Canadian newspaper, and the jewel in the crown of his publishing empire. It will also increase his already formidable stake and profile in the Canadian media, as he goes head-to-head with Thomson’s Globe and Mail for attention of the nation’s political, corporate and social elite. Black’s detractors will predictably decry this development as an acceleration of his media juggernaut, and a certain assault on the independence and objectivity of the Canadian press. The reaction amongst journalists themselves, however, is much more telling. The denizens of Canada’s “boneyards of broken dreams,” the people with the greatest vested interest in newspaper quality and often the ones best situated to assess it, are, for the most part, excited and enthusiastic. The new newspaper has been promised to be a vibrant and up-scale product, and a new national forum is being created. At the very least the quantity of discourse on matters of national importance will increase. Moreover, the rumours of this impending announcement have already spurred competing newspapers to improve their products.

It is hard to imagine anything closer to the core of freedom of the press under the Charter than


450 Report of the Senate Special Committee on Mass Media, supra note 22.

451 I am grateful to the 1997-98 Southam Fellows for sharing their insights on reaction to the launch of the new national newspaper amongst the journalistic community.

452 Reuters, supra note 449.

453 Ibid.
the launch of a new national newspaper. And yet, when all is said and done, the end result of this initiative will be an increase in the concentration of power and influence in the hands the man who already owns more than half the newspapers in Canada. These events provide an ideal illustration of the paradox which this thesis set out to resolve. The separation of the press from government control is the essence of press freedom, yet only the state can ensure that this freedom is employed for everyone’s benefit and not monopolized by a few individuals for their own greed and self-aggrandizement. History has taught us that whenever the press is in shackles, so too are the people. More recent experience has also taught us that unbridled laissez-faire capitalism can function to undermine freedom of the press in much the same way as state tyranny.

This study has identified a number of governing principles which guide us to a resolution of the press regulation paradox. Most fundamentally, it has shown that freedom of the press is a condition, in which a community of information and opinion, upon which citizens can found their informed participation in democratic society, is created by the gathering and dissemination of news by the press. This freedom is a condition to which all citizens have an equal right, and which forms the heart of their democratic entitlement. Indeed, the free and full performance of press functions is so essential to the workings of our society that they merit the highest level of protection from state interference. It has also shown that concentration of control over the media can, but does not necessarily, threaten the diversity, vibrancy, accuracy and honesty of the press, undermining its ability to discharge its social function. It has been seen that who owns a newspaper matters much less than what they seek to do with it. A publisher’s commitment to editorial quality is the key. Newspaper ownership concentration threatens to disempower the people by placing dangerous levels of power over important societal affairs in the hands of a few
media moguls. The cure to this ailment, however, must not be worse than the disease. It must be very carefully drafted to protect and encourage the performance of press functions, and prevent improper political manipulation of the press.

The terms of the proposed *Canadian Newspaper Ownership Act* carefully circumscribe the state’s interference with press functions in three ways. To begin with, no government scrutiny of any individual’s conduct vis-à-vis the press is permitted until he or she has already attained control of a sizeable portion of the newspaper industry, and is thus already one of the most heard voices in the marketplace of ideas. In this way, the regulation respects the right of individuals to become successful in that marketplace on their own merits, and without aid or hindrance by the state. Once the state does intervene in press ownership, it does so only to examine the publisher’s adherence to the values underlying freedom of the press. The right to passionately advocate alternative or contrarian views remains unfettered. The *Canadian Newspaper Ownership Act* demands only fairness and a commitment to editorial excellence. And lastly, the examination of publishers’ conduct takes place under the auspices of a tribunal as far removed from political influences as possible.

Critics of ownership concentration will assuredly argue that the solution presented in this paper is too little too late. They will argue that the mere fact of concentration, coupled with the openly ideological character of the press barons who control the Canadian media, are a crisis demanding far sterner reaction. In answer to this it must be emphasized that, notwithstanding recent experiences in western democracy, the state has been the prime antagonist of press freedom since the advent of the press itself. As the vigour of the Supreme Court’s rhetoric on freedom of the
press illustrates, we must be wary of blithely inviting the fox in to guard the hen house. Moreover, even if the major Canadian media conglomerates were dismantled tomorrow and sold to individual owners, there is no guarantee whatsoever that the scatter of new owners would espouse any less fierce ideological convictions or, most importantly, would do a better job of presenting their readership with a diversity of accurate and intelligent information. Short of the state allocating licenses to publish - a throwback to the worst censorial practices of old - there can be no guarantee that any newspaper owner will act responsibly. In this regard, the *Canadian Newspaper Ownership Act* is distinctly superior, as it accommodates the advantages of chain-ownership, while providing a potent incentive for publishers to produce a quality news product.

As an intrinsic and indispensable component of democratic society, freedom of the press is premised on a belief in the intelligence and good-will of individuals, and is thus committed to the uncertainties of a predominantly private marketplace of ideas. To regulate more may well be to regulate freedom of the press as we know it out of existence. To regulate less risks a tyranny of a very small minority. In the ever-evolving relationship between citizens, the state, and the press, a limited intervention aimed at stemming the concentration of ownership while encouraging and rewarding quality publishing offers the optimal balance of *Charter* values, and is the best the state can do to ensure that freedom of the press is truly guaranteed to everyone.

This thesis has proposed a very modest intervention by government, and found it to be amply justified under the *Charter of Rights and Freedoms*. While newspaper ownership concentration controls would hamper certain publishers’ ability to participate in and influence certain markets, the manner of these obstacles are not such that they would diminish freedom of the press in the
sense that it is guaranteed to everyone. And therein lies the key. The Charter guarantees freedom of the press to “everyone,” but while not everyone is able to publish a newspaper, everyone is effected by how newspapers are published. Everyone enjoys freedom of the press under the Charter, but we are not guaranteed the right to be the press, or to buy the press - at least if we already control large segments of the media. In the words of the Commission on a Free and Responsible Press, freedom of the press “does not mean that every citizen has a moral or legal right to own a press or be an editor or have access, as of right, to the audience of any given medium of communication.” As long as the individuals in whose hands control of the press rests use their power responsibly and fulfill the social mandate of the press, they will be protected from the state almost absolutely by the Charter and the courts. If, however, they lose sight of the higher functions of press freedom, and use their power to the detriment of the public who is at their mercy, the state not only can, but must, intervene.

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454 A Free and Responsible Press, supra, note 17 at 9.
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