THE GEORGIA STRAIGHT AND FREEDOM OF EXPRESSION IN CANADA

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In mid-1967 the first issue of the *Georgia Straight* was published in Vancouver. With the commencement of publication Vancouver joined many other North American cities in acquiring an underground newspaper. While the underground press and its members have never been popular with law enforcement officials, the experience of the *Georgia Straight* may be unique. Within a year and a half the paper became involved in a series of law suits which assist in delineating the scope of freedom of expression in Canada.

Six weeks after the paper received its publishers' licence, M. M. Harrell, the Chief Licence Inspector of the City of Vancouver sent the following notice to the paper:[1]

> This is to advise you that in accordance with the provisions of Section 277 of the Vancouver Charter, 1967 City of Vancouver Publishers License No. 24814 issued to you for the premises 619 W. Pender Street is hereby suspended until December 30, 1967.
> If you wish to appeal the suspension you are required to give notice, within ten days from September 29, 1967, to the City Clerk giving your grounds for appeal.
> This is further to notify you that I will be recommending to the City Council that this license be cancelled.
> The City Clerk will notify you of the date and time of this meeting.

The suspension came without any prior warning to the paper and must have provided a mild shock since no reasons for the suspension were given. However, the citation to the City Charter might have provided some information. Section 277 states:

> 277. The Chief License Inspector shall have power at any time summarily to suspend for such period as he may determine any license if the holder of the license:
> (a) Is convicted of any offence under any Statute of Canada or of the Province of British Columbia;
> (b) Is convicted of any offence under any by-law of the city with respect to the business, trade, profession, or other occupation for which he is licensed or with respect to the relevant premises;

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[1] *Hlookoff et al.* v. *City of Vancouver et al.* (1967), 65 D.L.R. (2d) 71, at p. 72, hereinafter cited as *Georgia Straight I.*

> (c) Has, in the opinion of the Inspector, been guilty of such gross misconduct in or with respect to the licensed premises as to warrant the suspension of his license.
>
> Any person whose license has been suspended under this section may appeal to the Council in accordance with the procedure for that purpose prescribed by by-law, and upon such appeal the Council may confirm or may set aside such suspension on such terms as it may think fit

Since neither (a) nor (b) could have been applicable unless the Chief Licence Inspector was operating under false information, it appeared the suspension was for gross misconduct, whatever that was.

Additional information concerning the licence suspension came forth the following day when Thomas Campbell, the Mayor of Vancouver and the two publishers of the *Georgia Straight* appeared together on a television show, "Mark Raines Pipeline Show". The Mayor publicly stated that he had recommended to the Chief Licence Inspector that the paper's licence be cancelled; in fact the Mayor took full credit for the decision. The Mayor further attempted to explain why the licence was cancelled although here he was less than successful. Two potential reasons emerged from his remarks: (1) the paper was "filth" and (2) it was being sold to school children on school grounds. Whether the two reasons coalesced into one rationale was not apparent although it was possible: "As far as I'm concerned, this was a 'rag' paper; it was a dirty paper; it was being sold to our school children; and I wouldn't tolerate it on the streets any longer."[2]

Rather than appeal to City Council the paper elected to seek judicial redress by having the suspension declared void. In an application for a preliminary injunction the paper lost, but later it was successful in having the suspension voided. Shortly after winning this case a column in the paper announced the awarding of the "Pontius Pilate Certificate of Justice" to a local Vancouver magistrate for some of his comments during a then recent trial. For this piece of writing the paper was found guilty of defamatory libel.[3]

While in theory most individuals support freedom of expression, in practice ample protection for freedom of expression has never been fully sufficient. Possibly a more full protection is unlikely until an entrenched Bill of Rights allows an individual constitutional security for his arguments against infringement.

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[2] Transcript from Mark Raines Pipeline Show, 11-12 a.m. Friday, September 29th, 1967, CHAN Vancouver reprinted in D. Huberman and L. A. Powe, Jr., Administrative Law (1969), pp. 2-141, hereinafter cited as Transcript. The transcript was accepted as correct in *Hlookoff et al.* v. *City of Vancouver et al.* (1968), 67 D.L.R. (2d) 119, at p. 122, hereinafter cited as *Georgia Straight II.*

[3] *R.* v. *Georgia Straight Publishing Ltd., McLeod and Cummings* (1969), 4 D.L.R. (3d) 383 (B.C. County Ct), hereinafter cited as *Georgia Straight III.*

However, regardless of the language used to secure protection for freedom of expression in a Bill of Rights, the ambit of the provision will be somewhat uncertain. One likely possibility of interpretation of any provision dealing with freedom of expression is that it incorporates the state of the law at the time of enactment. The three *Georgia Straight* cases and their related issues should give pause to anyone advocating such an interpretation. If courts of the future are to be afforded guidance in the area there must be more exploration of the proper ambit of freedom of expression before a Bill of Rights becomes entrenched. This article is intended to provide one opinion on the proper scope of freedom of expression in a democratic society in so far as that scope can be illustrated within the confines of the three *Georgia Straight* cases.

I. *Georgia Straight I: Administrative Discretion Under A Vague Delegation.*

Georgia Straight I was an immediate application for an injunction to restrain the City of Vancouver from acting on the licence suspension. Since constitutional issues were foreclosed by failure to notify the Attorney Generals for British Columbia and Canada,[4] the case was limited to two issues. The principal argument by counsel for the paper concerned the adequacy of the notice of the reasons for the suspension. Also, however, there was the *Roncarelli* v. *Duplessis*[5] argument that the Mayor had in fact ordered the suspension of the licence.

Mr. Justice Dohm viewed the applicable law as being reasonably clear. Section 277(c) of the Vancouver Charter was a summary procedure based on a subjective standard, that is "gross misconduct" is "left by the statute to the sole opinion of the Chief License Inspector".[6] However, if the Mayor in fact ordered the suspension, then it was illegal.

Mr. Justice Dohm did not accept the argument that the Chief Licence Inspector should have given a more detailed notice of his reasons for suspending the licence. "I agree there is some merit in this submission", but they know what they are doing; they could appeal to council instead of court; and "acting on this technical point would be 'hair-splitting' ".[7] Yet would it? Counsel's

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[4] *Supra*, footnote 1, at p. 73.
[5] [1959] S.C.R. 121.
[6] *Supra*, footnote 1, at p. 73.
[7] *Ibid.*, at p. 74. Earlier on the Mark Raines Show a similar thought was expressed by the mayor:

"G.S.: No appeal. Because we don't know what we're appealing. You never told us what . . .
Mayor: What do you mean? You know as well as I do. You read that garbage."
Transcript, at pp. 2-142.

argument is not unreasonable when one looks at the facts of the case and attempts to determine what "gross misconduct" is.

The Chief Licence Inspector is given the duty of enforcing the licensing provisions in the City Charter,[8] but by the terms of the Charter his decisions may be appealed to the City Council. It would appear likely, therefore, that to the extent City Council would provide guidance, the Chief Licence Inspector would follow Council's direction. The principal source of guidance in determining Council's views on gross misconduct, comes from the interpreting sections passed under Council's power to enact by-laws for the revoking or suspending of licences.[9] Two licensing by-laws are relevant. The first merely enacts section 277 of the Charter.[10] The second authorizes the Chief Licence Inspector to suspend or revoke the licence of any theaters should the theaters produce "any immoral or lewd" performance.[11] While the by-law relates only to theaters, it offers the Chief Licence Inspector the only legislative interpretation of gross misconduct by the body that has been given an appellate jurisdiction over his determinations. Probably the phrasing of the by-law provides only a partial definition of "gross misconduct", but at the least it alerts the Chief Licence Inspector to the fact that "gross misconduct" has something to do with morality. In dealing with morality two possibilities for "immoral or lewd" suggest themselves: (1) it may be intended to duplicate the Criminal Code definitions of obscenity; (2) more likely it is probably a catch-all intended to include all of the Criminal Code definitions as well as providing a supplement to the Criminal Code by suppressing plays or materials that for some reason the Code does not cover.

If either of the above interpretations of gross misconduct is accepted, then constitutional problems are immediately present in the case because of intrusion into the field of criminal law. A recent Quebec case, *R.* v. *Board of Cinema Censors, Ex parte Montreal Newsdealers Supply Co.*,[12] presented a similar issue and the court decided against the Province's arguments that *O'Grady* v. *Sparling*[13] and *Mann* v. *The Queen*[14] serve to authorize provincial enactments in spheres other than control of the highways which, while overlapping federal jurisdiction, deal with different subjects and support different purposes. In rejecting the Province's argu-

[8] S.B.C., 1953, c. 55.
[9] City Charter, s. 272.
[10] License By-Law 2944, s. 10.
[11] *Ibid.*, s. 36(10): "It shall be deemed cause for the cancellation, suspension, or revocation of any license granted hereunder for anyone to produce in any building or place in the City any immoral or lewd theatrical or dramatic performance or exhibition of any kind, and the Inspector shall have full power to prohibit or prevent any indecent or improper performance or exhibition."
[12] (1967), 69 D.L.R. (2d) 512 (Que. S.C.).
[13] [1960] S.C.R. 804.
[14] [1966] S.C.R. 238.

ment the court properly noted that highway traffic is a field where the courts have always recognized a "substantial provincial regulatory interest" while public morals have always been deemed part of the criminal law.[15] In this connexion it is worth noting that the Vancouver City Council accepted these arguments in mid-1969 and repealed the section authorizing suspension for "immoral or lewd" performances.[16]

It is possible that the Chief Licence Inspector suspended the licence of the paper because he thought his job was a censorial supplement to the Criminal Code. Immediately following the suspension one of the major Vancouver papers reported the reason for the suspension was obscenity in the *Georgia Straight*.[17] In his testimony, the Chief Licence Inspector indicated that he had "been concerned about the *contents* of the paper" before the Mayor had spoken to him.[18] Also in a letter removing the suspension, the Chief Licence Inspector stated "In view of the *contents* of the most recent issue [distributed free to avoid a fine] . . .".[19] If his concern was content, and his remarks indicate it was, then it seems likely he saw his job as that of a censor. His later actions under the "immoral or lewd" suspension provision further illustrate this position. In May 1969 he informed the artistic director of the Vancouver Playhouse that putting on a production of the hit musical "Hair" would contravene the applicable by-law, and the director acquiesced.[20] Then in July 1969 the Chief Licence Inspector closed down another play, "Camera Obscura" because the actors wore only clear plastic dresses.[21]

Some of the Mayor's comments indicate a possibility that he, too, related the case to obscenity. However, this must be clarified in two ways. First the Mayor was reasonably clear in stating that

[15] *Supra*, footnote 12, at p. 519.

[16] Vancouver Province, July 23rd, 1969, p. 19, cols 1-6. A totally new licensing by-law (4450) which came into force on January 1st, 1970 omits any mention of grounds for suspension.

[17] Vancouver Sun, September 29th, 1967, p. 1, col. 1.

[18] *Supra*, footnote 1, at p. 75, emphasis added.

[19] *Supra*, footnote 2, at p. 122, emphasis added.

[20] Vancouver Sun, May 17th, 1969, p. 17, cols 3-4 and Vancouver Sun, May 28th, 1969, p. 37, cols 1-6 and 38, cols 1-3. The director's principal stated reason for acquiesence was that it would be irrational to put on any production which might result in the loss of the Playhouse's licence. By publicly announcing his standard ("No genitals will be exposed on a stage in Vancouver." Vancouver Sun, July 9th, 1969, p. 51, col. 3) the Chief Licence Inspector accomplished two things: (1) he inhibited production of certain types of plays and (2) he caused a public discussion of appropriate standards which resulted in his loss of the power to censor plays. Before the "lewd or immoral" by-law was repealed, however, the controversy had reached absurd proportions. A Vancouver promoter offered the Chief Licence Inspector a free trip to Los Angeles to see "Hair" in return for an exact declaration whether it contravened the city by-law. The Chief Licence Inspector had the good sense to refuse. Vancouver Sun, July 10th, p. 10, col. 6.

[21] Vancouver Sun, July 9th, 1969, p. 51, cols 1-6.

the paper was not obscene under the Criminal Code. Second the Mayor said so much concerning the *Georgia Straight* that it is possible to find quotes by him on all sides of the issue. It may be that the Mayor simply did not like the paper, but never knew why, that is, "[t]he paper itself is a 'gross misconduct' ".[22] After suggesting that "filth" such as the *Georgia Straight* should not be published or circulated in Vancouver, the Mayor stated, "It's aimed at sex deviation—you name it". However, he ducked a question asking if he had an objection to any specific thing by answering: "The whole paper. The tone of it; the attitude of it; everything."[23]

Slightly more plausible is the possibility that in the facts of the case "gross misconduct" concerns the distribution of non-obscene filth to children. As indicated, the Mayor was never sufficiently precise in his statements to allow one to know why the licence was suspended. Possibly his reluctance to be precise was a logical corollary to his belief that not giving any reasons for the suspension was a good idea.[24] Yet probably Mayor Campbell viewed the case as presenting an issue of the distribution of non-obscene filth to children. It is indisputable that the Mayor classified the paper as filth. This may be coupled with his frequent statements of concern about the paper being sold to children. The evidence is further buttressed by the Mayor's statement that he went to the Chief Licence Inspector *after* he was informed that the paper was being sold to school children.[25] Finally one must conclude that Mr. Justice Dohm's cavalier treatment of counsel's notice argument stemmed from a conviction that the case concerned distribution of non-obscene filth to children.

If "gross misconduct" presents the city's licensing power as a censorial supplement to the Criminal Code, then not only do the constitutional issues limit the city's actions but also subsections (a) and (b) of Section 277 of the Charter relating to convictions for offenses are rendered irrelevant. If the Chief Licence Inspector so chooses he could become prosecutor, judge, jury, and executioner under the vague gross misconduct standard. The case is not so clear, however, when the case involves distribution of non-obscene filth to children. Yet if this were the reason for the suspension the paper was never so informed. Nowhere could the paper find a legislative guide notifying it of potential problems, and it appears the paper tried to cover this possibility by requesting—and receiving—permission from the various principals

[22] Transcript, pp. 2-144.

[23] The latter two quotes come from part of the Transcript which is unpublished. A complete copy is on file in the University of British Columbia Law Library.

[24] Vancouver Sun, September 29th, 1967, p. 1, col. 1.

[25] *Supra*, footnote 1, at p. 74.

to sell the paper on the school grounds.[26] Even under this alternative, however, the licensing power is being used to protect the morals of children, a field where the constitution demands achievement of a national solution.

A final possibility for defining "gross misconduct" would concern sales practices. This would assume the propriety of selling the *Georgia Straight* but question the methods. There was some evidence of high pressure salesmanship being applied to children and abusive language used on individuals who would not purchase a copy of the paper,[27] but it appears unlikely that any of the city officials viewed "gross misconduct" in this way. Defining "gross misconduct" to relate to methods of selling would not strip the city of the licensing power, but would eliminate much of the inherent vagueness of "gross misconduct" as well as limit the licensing power to avoid encroachment of federal powers.

Unfortunately all these possible interpretations of "gross misconduct" were ignored. Since Mr. Justice Dohm did not find adequacy of notice a compelling issue, he was never forced to define "gross misconduct".

Having disposed of the adequacy of notice, Mr. Justice Dohm's opinion moves on to the prime evidentiary point: what was the extent of the Mayor's influence on the Chief Licence Inspector? The evidence showed that the Chief Licence Inspector had been concerned about the paper before the Mayor called on him; that the Mayor asked him to consider a licence suspension, but that the Mayor was not "ordering him to do it";[28] and that publicly the Mayor took full credit for the action: "I had a right to cancel the license and I exercised my right".[29] The issue was disposed of in favour of the Mayor and Chief Licence Inspector, thus giving the Mayor a perfect score: full political credit for suppressing an unpopular hippie paper and no judicial credit for the same decision. However, the facts are a long way from *Roncarelli* v. *Duplessis*[30] and it is almost certain that Mr. Justice Dohm's conclusion was correct. Finally, the opinion concluded with judicial thanks to the Mayor and Chief Licence Inspector for their prompt action in suspending the licence and preventing distribution of filth to the school children of Vancouver.[31] Outside of this striking conclusion, the decision is most notable for its explicit assump-

[26] Transcript, pp. 2-142.
[27] Vancouver Sun, September 23rd, 1967, p. 33, col. 4.
[28] *Supra*, footnote 1, at p. 74.
[29] See *supra*, footnote 23.
[30] *Supra*, footnote 5.
[31] *Supra*, footnote 1, at p. 76: ". . . and quite apart from the legal points in this matter I am of the opinion that his Worship Mayor Campbell and Chief License Inspector Harrell should be highly commended for their prompt actions (in a situation which called for promptness and not 'buck-passing'). . . ."

tion that as long as an administrative appeal procedure is provided any breach of natural justice (adequacy of notice, denial of hearing) is a "technical point". This is totally erroneous.[32]

The vast powers of the Chief Licence Inspector, a civil servant, should also be noted. First Mr. Justice Dohm announces the standard to be applied is subjective. The standard is not "when the Chief License Inspector is of the opinion that certain facts constituting an objective standard of 'gross misconduct' have been reached"; rather the standard is "when the Chief License Inspector is of the *opinion* that facts constituting his *opinion* of 'gross misconduct' have been reached". The standard not only is doubly subjective, but Mr. Justice Dohm requires no procedural safeguards for its exercise. This is a vast amount of power even to place in an elected official or a judge when considering freedom of expression, but to place it in the hands of a civil servant is absurd.

Professor Frank Scott has suggested that the English method of protecting human rights may rest on three basic assumptions: "parliamentary restraint in legislation, bureaucratic restraint in administration, and a strong and live tradition of personal freedom among the citizens generally".[33] Scott suggested, to some degree at least, all are lacking in Canada.[34] He was most clear in noting that because of the diverse backgrounds of the Canadian citizens, there is no "common understanding of the process of parliamentary democracy by centuries of shared struggle and live history".[35] The facts of *Georgia Straight I* provide an appropriate context to appraise the other two assumptions.

Neither the provincial government nor the City Council approached the problem of licence suspensions with appropriate restraint. The provincial government set the "gross misconduct" standard without defining terms. Effectively the government said "If you think you have a problem, deal with it as you please". However, the government's vague delegation of problem solving to a subordinate body would have created few problems if the City Council had used their power to enact licensing by-laws in such a way as to provide a limited and clearly defined standard both for the Chief Licence Inspector and the licencees. Instead the City Council expanded the vagueness of "gross misconduct" by offering

[32] *Georgia Straight II* demonstrates this point. A decision which denies the elements of natural justice is void and thus there is nothing to appeal from, *Ridge* v. *Baldwin*, [1964] A.C. 40, although if the aggrieved party chooses to appeal the denial of natural justice may be cured. See *Posluns* v. *Toronto Stock Exchange & Gardiner* (1964), 46 D.L.R. (2d) 210, per Gale J., aff'd (1965), 53 D.L.R. (2d) 193 (Ont. C.A.), aff'd (1968), 67 D.L.R. (2d) 165. See generally, Wade, Unlawful Administrative Action, Void or Voidable? (1967), 83 L.Q. Rev. 499, and (1968), 84 L.Q. Rev. 95.

[33] F. Scott, Civil Liberties and Canadian Federalism (1959), p. 13.

[34] *Ibid.*

[35] *Ibid.*, p. 14.

an interpretation identifying the problem as one of enforcing public morality. And in mid-1969 when the City Council repealed the "immoral and lewd" suspension provisions, members happily noted that the repeal would have no effect because the "gross misconduct" standard would allow the Chief Licence Inspector to continue suspending on the same basis since he need not give reasons.[36] However, one week later the City Council directed the Chief Licence Inspector not to use his licensing powers to effect censorship of theatrical performances. During the whole discussion there was no indication whether City Council believed the "gross misconduct" section could be used to censor non-theatrical materials.

If legislative restraint is lacking, can one assume bureaucratic restraint will operate in a compensatory way? I would think it would be most unlikely that a civil servant would intentionally narrow the interpretation of a vague statute which infringes on human rights. Where is the civil servant to receive his guidance? Will he look to the civil libertarians for interpretation? It would seem that he would look to the relevant legislative body for guidance. If the legislation is broad, the administrative interpretation will be broad. *Georgia Straight I* provides a partial illustration of this. At the least the Chief Licence Inspector might have warned the paper that it was transgressing in a forbidden area. This would allow the paper a chance to determine the propriety of its course of conduct. However, not only was no warning before suspension forthcoming, even after suspension the paper did not know exactly why its licence had been suspended. Thus the paper could not be fully certain how to gauge its conduct for the future.

In *Georgia Straight I* there was neither legislative nor bureaucratic restraint. Professor Scott suggested we should seek additional methods of protecting human rights.[37] *Georgia Straight I* illustrates one possibility. The judiciary has the responsibility to interpret statutes authoritatively. In exercising this responsibility the judiciary

[36] Vancouver Sun, July 16th, 1969, p. 19, cols 7-8: "Then Mr. Harrell can do under that section unrepealed what is ultra vires under the other repealed section?" Corporate Counsel: "Yes." See also, Vancouver Province, July 16th, 1969, p. 19, cols 1-6. Part of the discussion was along the following lines:

Ald. Rankin: "If we want a censor, let's appoint him— I don't believe we should have one under the guise of a license inspector." He then said the police were the appropriate body to deal with obscenity.

Ald. Adams: Disagreed because police action might be too slow and the obscene performance could go on without interruption. "If we put ourselves in the position of not being able to take immediate action, you are, in effect, allowing anything to happen. . . . Maybe the time will come when people will go around naked like horses but it isn't now."

[37] F. Scott, *op. cit.*, footnote 33, p. 14.

must be aware of the way a statute is being applied, its potential application, legislative objectives and the extent of interference with preferred values.

It does no injustice to anyone if vague statutes are given definite meanings: the citizen can know the limits of protected conduct and the administrator may see limits on his authority. This is especially important where a statute has a potential application which might infringe on certain basic freedoms of the citizen.

The context of *Georgia Straight I*, a narrowing application of section 277(c) would merely have required Mr. Justice Dohm to determine whether the application of the by-law to the paper was either infringing on freedom of expression or an area covered by the Criminal Code. To the extent that the Chief Licence Inspector infringed on those areas Mr. Justice Dohm should have held that section 277(c) provided no authority for the suspensions. Not only would constitutional questions be avoided but greater sensitivity on the part of the judges to the necessity of protecting human rights by statutory interpretation when plausible alternatives of construction are available would assist in creating a climate where human rights are more fully protected.

II. *Georgia Straight II: Over-Broadness And Ultra Vires: Preserving Protected Freedoms.*

Having lost the preliminary application for an injunction the case went to trial with the paper asking for a declaration that the suspension was invalid, an injunction, and damages.[38] For purposes of this article two principal issues are involved. Was section 277(c) *ultra vires* as an infringement on freedom of speech and the press? Were the principles of natural justice violated by the inadequacy of the notice or the failure to conduct a hearing before suspension? The issues of the legal effect of the Mayor's involvement in the case and damages were also present, but were easily resolved in favour of the Mayor and the Chief Licence Inspector.

Counsel for both the paper and the Attorney General of Canada attacked section 277(c) as an infringement on freedom of the press. The court viewed the problem as characterizing section 277(c) as either having for its sole purpose the regulation of the press or relating to property and civil rights or matters of a purely local nature.[39] Brushing aside references to *Switzman* v. *Elbling*,[40] *Saumur* v. *City of Quebec*[41] and the *Alberta Press* case[42]

[38] *Supra*, footnote 2.
[39] *Ibid.*, at p. 123.
[40] [1957] S.C.R. 285.
[41] [1953] 2 S.C.R. 299.
[42] [1938] S.C.R. 100.

the court found a British Columbia Court of Appeal decision, *Koss* v. *Konn*[43] despositive of the case.

Koss held four to one that peaceful informational picketing could be regulated by provincial labour relations statutes. However, in view of the fact that there was no evidence that the picket was acting for a union, that there was neither evidence of nuisance nor a tort, and that the picket sign simply read "Non-union men are working on this job", the dissent appears correct in stating the majority validated a curb on the dissemination of information "without limitation as to time or place or information of general interest".[44] The majority in *Koss* recognized the need for distinguishing the recent Supreme Court of Canada cases concerning freedom of expression. This was accomplished in several ways. First there was the major premise: freedom cannot be unlimited.[45] From this there flowed a presumption in favour of regulation which was aided by an incredibly narrow interpretation of the Supreme Court of Canada decisions. Counsel had emphasized Mr. Chief Justice Duff's opinion in the *Alberta Press* case and Mr. Justice Rand's judgments in *Switzman* and *Boucher* v. *The King*.[46] These opinions with their emphasis on freedom of expression were dismissed by noting "Statements and expressions of opinion made in the course of judgments must not, at least except in special cases, be treated as having general application".[47] The cases cited were further distinguished as relating to political or religious subject matter. Finally Mr. Justice Cartwright's dissent in *Saumur* is quoted to show the Provinces may regulate freedom of expression to some extent.[48] Yet his effort was in dissent and he was trying to justify a by-law which "establishes no rule or regulation for its application except that nothing but which is permitted by the censor may be distributed".[49]

It is perfectly true that no consistent rationale for the *Alberta Press* case, *Boucher*, *Saumur*, and *Switzman* can be developed. The Supreme Court of Canada reached no consensus. But in result at least the cases validate claims for freedom of expression. *Koss*, however, validates Mr. Justice Cartwright's dissent in *Saumur*, that is, legislation is not rendered invalid solely because it interferes with freedom of expression. Thus the majority decision in *Koss* masks a value judgment (favouring regulation) which is at variance with the value judgments (in result) of the Supreme Court of Canada. My conclusion may be tempered somewhat if one assumes the *Koss* opinion relates only to signal picketing and

[43] (1961), 30 D.L.R. (2d) 242.
[44] *Ibid.*, at p. 254.
[45] *Ibid.*, at p. 265.
[46] [1951] S.C.R. 265.
[47] *Supra*, footnote 43, at p. 262.
[48] *Ibid.*, at p. 263.
[49] *Supra*, footnote 41, at p. 336, opinion of Kellock J.

leaves effective informational picketing untouched.[50] Such an assumption is plausible although the opinion in *Koss* does not justify it; consequently, reliance on *Koss* was not necessarily an appropriate way of disposing of the freedom of the press claim of the *Georgia Straight*.

One problem, totally avoided by the court, was articulating the claim being made for the paper, for in fact the statement of the claim rested on an interpretation of section 277(c). Neither Mr. Justice Dohm nor Mr. Justice Verchère articulated the purpose of the by-law. If the by-law was intended to regulate the press, then the appropriate starting points are *Saumur* and *Switzman*. Although we lack an authoritative decision on the matter one can at least state that it would prove to be immensely difficult for the Provinces to win by arguing that freedom of expression falls within either sections 92(13) or 92(16) of the British North America Act. However, licencing of *businesses* seems clearly to be a provincial matter and if "gross misconduct" relates only to the method of sales and distribution then it is difficult to see how an attack on section 277(c) along these lines could succeed.

Even assuming the argument that section 277(c) was intended to regulate the press fails, as it should, *Saumur* provides an additional argument against the application of the section. The argument is that a power granted by legislation which is or can be exercised in a way which is *ultra vires* is invalid.[51] Of course, the argument rests on the assumption that freedom of speech, the press, and religion are matters beyond provincial control.

As has been noted, the by-law involved in *Saumur* gave absolute powers of censorship to the Chief of Police concerning distribution of pamphlets. Since the Province has powers over its streets, Quebec argued the by-law was valid under section 92 of the British North America Act as relating to the streets and further that that submission was sufficient to end additional enquiry. However, the by-law was sufficiently broad to allow Quebec to do considerably more than regulate the streets if Quebec were so inclined. Four judges in fact found the by-law so broad that they were unable to conclude that it was in relation to the streets; they found it in relation to religion and freedom of speech. Mr. Justice Rand expressly queried whether a by-law which is sufficiently broad to be applied in ways both *ultra vires* and *intra vires* could stand. His answer, when dealing with matters of freedom of speech, the press, and religion, was no; the by-law "must be sufficiently definite and precise".[52] Although there is the hint that the test applies to all legislation, it is more useful and important in sensit-

[50] See Cox, Strikes, Picketing and The Constitution (1951), 4 Vand. L. Rev. 574.
[51] B. Strayer, Judicial Review of Legislation in Canada (1968), p. 160.
[52] *Supra*, footnote 41, at p. 333.

ive areas such as freedom of the press or religion. In those areas unpopular minorities are less likely to be able to turn to the local political process and expect any satisfactory redress. Furthermore, a broad discretionary licensing power limits freedom of action since, not knowing what conduct is prohibited or why it is prohibited, an individual will more consciously circumscribe his conduct to avoid what *may* be a prohibited area. Not all individuals will limit their conduct, but most probably will and if any do their freedom has been unnecessarily circumscribed. In the case of the press, if any limit their conduct and writing, their readers' ability to acquire information has been circumscribed.

If the overbroadness test is applied to the *Georgia Straight* it would appear that section 277(c) would be *ultra vires* assuming, of course, that the by-law, properly construed, did authorize the actions of the Chief Licence Inspector. As indicated above, the opinion of Mr. Justice Dohm authorized a double subjective test for section 277(c) and proceeded to place no safeguards in the way of a civil servant's discretion. While this is less subject to abuse than the Quebec by-law, its potential for abuse is nonetheless sufficient, as the total failure to articulate exactly why the *Georgia Straight's* licence was suspended indicates. A narrowing of section 277(c) to a standard relating to methods of sales and distribution would alleviate the problem and provide the city with adequate and appropriate licensing power, but until such narrowing occurs, section 277(c) appears over-broad within the meaning of the test articulated by Mr. Justice Rand in *Saumur*.

Not only did the over-broadness test fail to acquire a majority in *Saumur*, it has never commanded acceptance by the court. However, cases involving claims of freedom of speech, the press or religion are few and lack of acceptance is not surprising. An equally appropriate question is whether it has been expressly rejected. And over-broadness may have been rejected in *Saumur*. Three judges expressly stated that freedom of religion and presumably freedom of the press were matters of provincial jurisdiction.[53] Four expressly disagreed.[54] The remaining two[55] did not reach the question although in voting to uphold the by-law they were willing to authorize sufficient provincial power to make federal jurisdiction irrelevant (absent directly contrary legislation) if it existed. In *Switzman* although only two judges rested their judgment on federal jurisdiction over freedom of speech, it is noteworthy that of the *Saumur* dissenters, only Mr. Justice Taschereau dissented. Naturally *Koss* v. *Konn* is contrary to the over-broadness test in *Saumur*, (although the British Columbia Court of Appeal did not

[53] Rinfret C.J., Taschereau and Kerwin JJ.
[54] Rand, Kellock, Estey, and Locke JJ.
[55] Cartwright and Fauteux JJ.

find it necessary to face the issue), but as indicated, the reasoning and use of precedents in *Koss* makes the decision suspect.

The facts of *McKay* v. *The Queen*[56] made that case an ideal vehicle for applying an over-broadness test and a narrowing construction result. Unfortunately the majority of the court did not reach a constitutional question in determining the case. Instead of holding the by-law *ultra vires* as over-broad and forcing Etobicoke to rewrite it in a narrower way, the Supreme Court accomplished the draftsmanship themselves by applying the Canada Elections Act which was not in point and by refusing to apply the Etobicoke by-law which squarely covered the facts. In result the decision is a functional equivalent of the over-broadness test; however, nothing but the result indicates the potential consideration of over-broadness.

Finally, in 1969 the court decided *Walter* v. *A.-G. Alberta*[57] and upheld Alberta's Communal Property Act over a Hutterite freedom of religion claim. In *Walter,* unlike *Saumur*, the claim to freedom of religion could be neatly separated from freedom of speech and the press, but this was not necessary as the court never reached the issue of provincial versus federal jurisdiction. A unanimous court held the Communal Property Act "was enacted in relation to ownership of land in Alberta . . . because it deals with property in the Province".[58] Although that terse statement seemingly would authorize legislation prohibiting ownership of land by Hutterites, the court noted the legislation did not forbid Hutterite colonies, perhaps indicating an outer limit of the court's rationale.[59]

Again the court did not repudiate the over-broadness test in *Saumur* because it was not necessary to reach the question. Even if the decision authorizes a Province to regulate religious land holdings regardless of how it affects religion, the holding is a long way from authorizing over-broad licensing power from regulating speech or the press. In fact *Walter* presented an easier section 92 (13) of the British North America Act claim than licensing the press since the Communal Property Act's relation to property was not incidental; it was direct. The Alberta legislation did affect religion, but only in the context of regulating property holdings and all communal property holdings, religious or not, were subject to the same legislation. This is not to defend Alberta's blatantly discriminatory legislation. Rather it is to suggest that the appropriate argument against the legislation is that it is discriminatory, not that it is in respect to religion. The case was argued as it was because there is no constitutional requirement of equality

[56] [1965] S.C.R. 798.
[57] (1969), 3 D.L.R. (3d) 1.
[58] *Ibid.*, at p. 5.
[59] *Ibid.*, at p. 8.

of treatment in Canada.[60] It is difficult to conceive of legislation dealing with freedom of speech or the press that could relate as easily to section 92(13). Thus the over-broadness test suggested in *Saumur*, if not accepted, has not been rejected in the few cases on appropriate issues before the Supreme Court of Canada and may in fact have been applied *sub silentio* and in a slightly different way in *McKay*. In licensing cases affecting freedom of speech and the press the over-broadness test appears to be an intelligent way of handling the conflict between section 92(13) and federal jurisdiction. Therefore it should be adopted.

Although the constitutional issue was resolved against the paper, the contention that the suspension violated the rules of natural justice because of denial of a hearing was upheld by the court. Although six years earlier *Calgary Power* v. *Copithorn*[61] *and Nakkuda Ali*[62] might have been persuasive authority against a claim to an administrative hearing, the court had little trouble placing itself on the side of the better Canadian authority by following *Ridge* v. *Baldwin*[63] and similar Canadian cases[64] even though the court's method of distinguishing *Copithorn* and *Nakkuda Ali* seems much narrower than necessary. Basically the court appears to have reasoned that the statutory scheme authorizes an appeal from the Chief Licence Inspector's decision and therefore the reasoning process of the Chief Licence Inspector must be apparent. From this it followed that a hearing was necessary. If Mr. Justice Verchère's reasoning was somewhat tortured, it flows from the fact that he found it necessary to build his rationale around the quasi-judicial versus administrative characterization. Since the necessity of a licence to continue in business in our welfare society bespeaks the importance of the licence and no rationale beyond administrative convenience is advanced for potential governmental arbitrariness it is apparent that revocation or suspension of a licence cuts too close to the interests the common law has traditionally protected to occur without a hearing. Characterization as quasi-judicial or administrative does not assist any analysis of the problem of whether a hearing is necessary. The proper focus is on the power granted[65] by statute in determining whether the rules of natural justice apply and this is especially true where, as here, the political process affords no check on the administrative decision. The court's citation of

[60] Query if *R.* v. *Drybones* (1970), 71 W.W.R. 161, limits the statement to Canadian Provinces.

[61] [1959] S.C.R. 24.

[62] *Nakkuda Ali* v. *Jayaratne*, [1951] A.C. 66.

[63] [1964] A.C. 40.

[64] *E.g., Klymchuk* v. *Cowan* (1964), 45 D.L.R. (2d) 587; *Re Watt & Registrar of Motor Vehicles* (1957), 13 D.L.R. (2d) 124.

[65] See *R.* v. *Criminal Injuries Compensation Board, Ex parte Lain*, [1967] 2 Q.B. 864.

Klymchuk v. *Cowan*[66] may have been a step away from characterization but in general the opinion seems post *Ridge* v. *Baldwin* in result but pre *Ridge* v. *Baldwin* in reaching the result.

By finding the rules of natural justice had been violated by failure to give the paper a hearing it became unnecessary to determine the adequacy of notice to the paper concerning the charges against it. Nevertheless the opinion clearly indicates that the Mayor's statements the day after the suspension (probably on the Mark Raines Show) gave the paper sufficient notice of the charges against them assuming the paper chose to appeal to council.[67] Mr. Justice Verchère here made the same mistake as Mr. Justice Dohm in *Georgia Straight I* in assuming the clarity of section 277(c) although perhaps it may be excusable since his remarks were made in passing.

III. *Georgia Straight III: Political Expression.*

Since the Chief Licence Inspector had withdrawn the licence suspension before Mr. Justice Verchère determined that the suspension had been void, the city had no need to repeat the process, even with a hearing. However, the *Georgia Straight* after a short time became involved in the judicial process again.

For some time hippies had been frequenting the grounds in front of the Vancouver Courthouse. Initially nothing was done, but in early 1968 a decision was made to prosecute under a British Columbia order in council which prohibited loitering in areas appurtenant to government buildings.[68] On March 8th, 1968 a crowd of up to 200 persons, including some hippies, gathered in front of the Courthouse. The police arrived and arrested a number of persons, one of whom was Stanley Persky, a University of British Columbia student. Subsequently Persky was tried and convicted before Magistrate Lawrence Eckhardt. During the trial the magistrate commented that the order in council was discriminatory but that he was bound to apply it anyway.[69] Not surprisingly an announcement that the law is bad, but must be applied anyway did not meet with great favour among many people Persky's age. The *Georgia Straight* responded by awarding Magistrate Eckhardt the Pontius Pilate Certificate of Justice. The award's citation read as follows:[70]

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[66] *Supra*, footnote 64.

[67] "Here the plaintiffs were, of course, informed on the following day . . . of the nature of the complaint against them and of the reason for the suspension . . . their right of appeal therefore . . . was [un]affected by lack of notice of the charges against them. . . ." *Supra*, footnote 2, at p. 131.

[68] Order in Council No. 104, B.C. Reg. 10/63 amending B.C. Reg. 99/58. S. 8.

[69] *Georgia Straight III, supra*, footnote 3, at p. 386.

[70] *Ibid.*, at p. 384.

> Eckhardt, Magistrate Lawrence—The Pontius Pilate Certificate of Justice—(Unfairly maligned by critics, Pilate upheld the highest traditions of a judge by helping to clear the streets of Jerusalem of degenerate non-conformists.) To Lawrence Eckhardt, who, by closing his mind to justice, his eyes to fairness, his ears to equality, has encouraged the belief that the law is not only blind, but also deaf, dumb and stupid. Let history be your judge—then appeal.

Critically viewed the sardonic piece published by the *Georgia Straight* might have constituted in any given point in Anglo-Canadian history defamatory (criminal) libel, seditious libel, or constructive contempt of court by scandalizing. However, any prosecution seemed unlikely. It had been over thirty years since a case involving criminal libel had been reported.[71] Even then the case was most noteworthy for the judges' indications that they felt it necessary to protect Alberta bankers from a hostile populace.[72] It had been seventeen years since Quebec's use of seditious libel was thwarted in *Boucher* v. *The King*.[73] Finally, it was almost fifteen years since the last flagrant contempt of court cases had been reported.[74] Thus one might easily conclude that tolerance of public criticism had increased and the remarks would go largely unnoticed. This was not to be so; the prosecutor laid an indictment for defamatory libel under section 251 of the Criminal Code.[75]

Several things are reasonably clear concerning the award. To anyone familiar with the facts of the *Persky* case, the award criticizes Magistrate Eckhardt for applying a law which he admitted was discriminatory. The criticism was hardly as temperate as it might have been, and it might bring the authority and administration of laws into disrepute and disregard. What is not as clear is the purpose of the paper in giving the award. One cannot be certain the criticism was directed at the magistrate. Although ostensibly directed at Magistrate Eckhardt, the criticism may, in fact, have been levelled at the order in council. If this were the case, had the magistrate reached a decision satisfactory to the *Georgia Straight*, he would have been subject to criticism for not applying a validly

[71] *R.* v. *Unwin*, [1938] 1 W.W.R. 339 (Alta C.A.); *R.* v. *Powell*, [1938] 1 W.W.R. 347 (Alta C.A.).

[72] *R.* v. *Unwin, ibid.*, at pp. 346-347: "It is a scurrilous attack on men of prominence and all of high repute, but over and above that it is shown by the evidence that the state of feeling throughout the province was such that the broadcasting of such a libel might have very disastrous consequences."

[73] *Supra*, footnote 46.

[74] *Re Nicol*, [1954] 3 D.L.R. 690 (B.C.S.C.); *R.* v. *Western Printing and Publishing Ltd.* (1954), 111 C.C.C. 122, 34 M.P.R. 129 (Nfld S.C.).

[75] "Every one who publishes a defamatory libel is guilty of an indictable offense and is liable to imprisonment for two years." The definition of defamatory libel is in section 248: "(1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule or that is designed to insult the person of or concerning whom it is published."

promulgated order in council under a statute containing an "as if enacted clause".[76] The paper may have directed the criticism at the "Establishment" in general: the defendant Cummings testified that he was "trying to take pomposity out of the Establishment".[77] While probably the paper did not intend (or consider) bringing the administration of justice into hatred, there might have been an intention to excite disaffection against the administration of justice or bring it into contempt. It is relatively certain that the paper was trying to bring the particular example of the administration of justice into contempt.

Satire and sardonic humour cloak value judgments concerning society. The award by the paper to Magistrate Eckhardt was an expression, albeit an ambiguous one, of political principles. The phrasing of the award certainly lacks the reasonableness and rationality one normally expects in political expression, but nevertheless its calling laws and the way they are applied into question clearly places the award in the category of political expression.

The *Georgia Straight* was a modern newspaper being given a chance to relive history. It is interesting to compare Stephen's definition of seditious libel with the publication by the *Georgia Straight*. Stephen, omitting technicalities, summed up the law of seditious libel at the end of the eighteenth century as "written censure upon public men for their conduct as such or upon the laws, or upon the institutions of the country".[78] The definition is almost an exact description of the satire published by the *Georgia Straight* concerning Magistrate Eckhardt.

The "crime" with which the paper was charged is an anachronism in modern law. A look at its past shows its danger in the present. Before the Star Chamber era criticisms of rulers, laws or institutions which became the foundation of libels were apparently treated as treason.[79] But with the advent of the Star Chamber the law of libel, vague though it was, became prominent. As Stephen pointed out[80] the law in this area rests on a particular view of governmental authority. If the ruler is above the subject and by the nature of his position wise, just, and good, then criticism, especially criticism which is intemperate, will not be well received; naturally this is accentuated when criticism may diminish the ruler's authority. The Star Chamber case of *de Libellis Famosis* illustrates the supreme ruler theory: the case states that if a libel "be against a magistrate, or other publick person, it is a greater offense; for it concerns not only breach of the peace, but also the scandal of government; for what greater scandal of government can

[76] Department of Public Works Act, R.S.B.C., 1960, c. 109, s. 49.
[77] *Supra*, footnote 3, at p. 385.
[78] J. Stephen, History of the English Criminal Law (1883), vol. 2, p. 348.
[79] *Ibid.*, p. 302.
[80] *Ibid.*, p. 299.

there be than to have corrupt or wicked magistrates" to govern the King's subjects.[81]

Although, as Stephen notes, the theory of the supreme ruler co-existed with an alternative theory of the ruler as agent, the actual law of libeling public figures even after the King's Bench assumed jurisdiction reflected an unhappy balance: pious statements of judicial restraint and freedom of the press flowing from the theory of ruler as agent[82] as opposed to the reality of actual prosecutions and convictions for expressing unpopular views flowing from the supreme ruler theory.

Over time the rationale of the criminal side of the law of libel was demolished by history. As once radical new ideas became commonplace and past prosecutions appeared childish each succeeding generation could be appropriately shocked by the narrow-mindedness of its predecessors.[83] Thus while one may argue that at some point political expression becomes so dangerous to society that it ought to be punished, the historical experience demonstrates the risks of prosecuting harmless expression so far outweigh any perceived gains in prosecuting dangerous expressions that there should be no law of sedition or criminal libel.

Professor Chafee further assisted the demolition of the rationale of the criminal side of libel by noting that if words become criminal only when they have an immediate tendency to produce a breach of the peace, then a law of sedition was irrelevant because normal standards of criminal attempt and solicitation would suffice.[84] Defamatory libel outlived its rationale, which was to provide a deterrent to those who would provoke breaches of the peace. The rationale ceased to be a necessary element of the crime,[85] probably by the simple recognition that the best way to deal with breaches of the peace was to prosecute them.[86] Defamatory libel has even been less frequently used than seditious libel in the twentieth century, probably not so much from the judicial

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[81] (1605), 5 Coke's Rep. 125.

[82] Stephen suggested that the glowing rhetoric concerning freedom of the press derived part of its energy from the consciousness of those who employed it of its insecure legal foundations. *Op. cit.*, footnote 78, p. 349.

[83] D. Schmeiser, Civil Liberties in Canada (1964), p. 206: "Although the charge of sedition was never a common one, most of the reported prosecutions ended in conviction, even though some of them were based on rather petty incidents." Schmeiser was writing about the Canadian experience, but his statement is appropriate for both England and the United States also.

[84] Z. Chafee, Free Speech in the United States (2nd ed., 1948), p. 23.

[85] *R.* v. *Unwin, supra,* footnote 71; *R.* v. *Powell, supra,* footnote 71; *R.* v. *Wicks* (1936), 25 Cr. App. R. 168.

[86] *Cf. Saumur* v. *City of Quebec, supra,* footnote 41, at p. 322. Mr. Justice Kerwin refuted a provincial argument with the terse statement: "The peace and safety of the Province will not be endangered if that Catholic majority do not use the attacks as a foundation for breaches of the peace."

caveats about its use which are present in cases of conviction[87] as from the obvious fact that the civil remedy for defamation is not only equally effective in inhibiting borderline statements, but more likely to be successful and often more rewarding.

While the criminal aspects of libel remain on the statute books, they have probably now acquired a new rationale: support for the distinction between liberty and licence.[88] Because of its inherent elusiveness the distinction can operate as a substitute for thought.[89] Its current force has largely come from the problems of obscenity where censorship rested on a concept of sin and received no critical evaluation.[90] Unfortunately with the explosion of sexually explicit literature public recognition of the impossibility of separating liberty and licence has not grown. The distinction has at least twice been involved in licensing in Vancouver, once when the director of the Vancouver Playhouse was defending his decision to acquisce in the Chief Licence Inspector's suggestion not to produce "Hair"[91] and once during the Mark Raines Pipeline Show in an exchange between the Mayor and members of the *Georgia Straight*:[92]

> G.S.: For example: if you object to Acidman because it shows male genitals, then why don't you take steps to have the statue in front of the Pacific Press Building removed?
> Mayor: You're talking about two different things.
> G.S.: What is the difference?
> Mayor: One is art, and the other is perversion.

How can one argue with the Mayor when the terms of reference are entirely subjective? As Chafee noted three decades ago: "And 'license' is too often 'liberty' to the speaker and what happens to be anathema to the judge".[93] An analysis of *Georgia Straight III* demonstrates Chafee's explanation is still apt.

In *Georgia Straight III* the defendants were found guilty of publishing a defamatory libel. It is difficult to discuss the judgment

[87] *E.g.*, *R.* v. *Wicks*, *supra*, footnote 85, at p. 172: "It is true that a criminal prosecution for libel ought not be instituted, and, if instituted will probably be regarded with disfavour by Judge and jury, when the libel complained of is of so trivial a character as to be unlikely either to disturb the peace of the community or seriously to affect the reputation of the person defamed."

[88] The distinction itself has a long and questionable history. Stephen notes that in seditious libel cases the Crown prosecutors would extol "liberty of the press as an invaluable part of the British constitution, though they used always to contrast it with the license of the press, which was always likened to Pandora's box". *Op. cit.*, footnote 78, pp. 348-349.

[89] Even former law professors will use the distinction. See P. Trudeau, A Canadian Character of Human Rights (1968), p. 16.

[90] See Henkin, Morals and the Constitution: The Sin of Obscenity (1963), 63 Col. L. Rev. 391, at p. 395: "Obscenity is sin."

[91] Vancouver Sun, May 28th, 1969, p. 36, cols 1-6.

[92] See *supra*, footnote 23.

[93] Z. Chafee, *op. cit.*, footnote 84, p. 14.

because the authorities cited were not relevant to the issue at bar, there are conclusions given without reasons (that is, the comments were unfair and were not for the public benefit),[94] and there is scarcely any appreciation of the place of free discussion in an open society. I have trouble reaching any conclusion other than that the defendants were convicted for publicly expressing a value judgment which is not universally held.

The principal defense in the case was under section 260 of the Criminal Code:[95] fair comment upon the public conduct of a person who takes part in public affairs. Since it is indisputable that Magistrate Eckhardt falls within the latter part of the section, the only issue was fairness. Fairness is not necessarily truth and this is illustrated in the way truth is carefully circumscribed as a defense by section 261.[96]

Assuming words are to be made criminal the extent to which men in public affairs may be criticized is closely related to both the definition of fairness and the prosecutor's propensity to silence discussion by commencing a prosecution.[97] Although defamatory libel appeared relatively dormant until *Georgia Straight III*, possibly others will be less willing to criticize public men following the case.

The ambit of criticism allowed by the judicial interpretation of fairness probably regulates in part the prosecutor's propensity to bring actions even though the latter may have more influence on conduct than the rules laid down in actual cases because fear of conviction may be translated into fear of prosecution.[98] In civil actions for defamation fair comment according to Salmond must

[94] *Supra*, footnote 3, at p. 387.

[95] S. 260: "No person shall be deemed to publish a defamatory libel by reason only that he publishes fair comments (a) upon the public conduct of a person who takes part in public affairs."

[96] Truth is a defense only *if* the accused also proves it was for the public benefit when published. By s. 521(3) if the defense fails the judge may "consider whether the guilt of the accused is aggravated or mitigated by the plea". This effectively renders the defense useless when the alleged libel is an analogy.

[97] Although *R.* v. *Unwin*, *supra*, footnote 71, left open the question of when a private prosecution for defamatory libel will be allowed, the public prosecutor may ignore the statute. When United States Supreme Court Justice Robert H. Jackson was United States Attorney General he replied to a request by Senator Millard Tydings to prosecute for criminal libel by stating "that he did not intend to prosecute under it [the relevant statute] until hell froze over". Quoted in K. Davis, Discretionary Justice (1969), p. 69, note 18. Jackson's position was vindicated two decades later when the Supreme Court held criminal libel was an unconstitutional restraint on freedom of expression absent a showing of both malice and falsehood. *Garrison* v. *Louisiana* (1964), 379 U.S. 64.

[98] Thus contrasting a situation where one violates a law such that there is absolute certainty of conviction, but no chance of prosecution and a situation where conviction is unlikely but prosecution is relatively certain, it is the latter case where conduct is likely to be inhibited.

be an expression of opinion on facts which are truly stated; the opinion must be honestly held; and malice negates the defense.[99] Salmond was cited to the judge in the case, but the only treatment of the defense was the terse rebuttal that "they [the comments] were unfair".[100]

It appears the judge rejected Salmond and applied a more stringent test without indicating what the new test is. There can be no dispute that the operative facts (conviction of Persky by Magistrate Eckhardt under a rule acknowledged to be discriminatory) were true. Possibly the judge concluded no person could honestly compare Magistrate Eckhardt with Pontius Pilate especially since that implies equivalency between Stanley Persky and Jesus Christ, but if that is the basis for the judgment the judge neglected to tell anyone. The same is true if the decision was based on malice. It is difficult to argue against the use of historical analogies simply because one party may not approve of the opinion. Argument by analogy may bring home forcefully an otherwise obscure point.[101] Some would argue we must understand the past or else be committed to repeat it and this idea demands use of historical knowledge to provide present guidance.[102] If the historical knowledge is faulty, constructive correction is far more appropriate than punishment.

Any standard which potentially eliminates argument by analogy, even if bitter and confused, from discussion is wrong and dangerous. When one argues by analogy he cannot be either right or wrong; however, depending on his analogy he may be persuasive or unpersuasive. In *Georgia Straight III* a judge found the analogy unpersuasive. Yet mathematical certainty on analogies is rather unlikely. If we require analogies to attempt the achievement of exactness not only do we ask the impossible but we either mute public debate while everyone is buried in the archives researching or else we reduce public discussion to the level of

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[99] Salmond on Torts (14th ed., 1965), pp. 249-255.

[100] *Supra*, footnote 3, at p. 387.

[101] In a rhetorical question Professor Burns has reminded us of the Nazi judiciary's enforcement of the Nuremberg decrees and the suggestion is that we must not risk adoption of a servile role toward the judiciary. Burns, Defamatory Libel in Canada (1969), 17 Chitty's L.J. 213, at p. 217.

[102] Aron, Student Rebellion: Vision of the Future or Echo from the Past? (1969), 84 Poli. Sci. Q. 289, at p. 294 referring to the post-War generation has said: "There is a danger that everything will begin all over again because in their eyes everything begins with them." Aron's remarks have a twofold meaning in the present context. First we must not inhibit historical analogies because they provide one way of correcting the utter lack of historical perspective common to the younger generation. Second it means that due to lack of historical perspective the analogies suggested by the younger generation are likely to be less than apt.

American television programming: "A doily for your mind."[103]

By their nature certain analogies are devised to stimulate discussion by an association of events or objects in striking contrast. Not all discussion is likely to be calm and dispassionate; not everyone has each fact down perfectly. This is especially so concerning issues and events about which segments of a society are deeply concerned, and commitment breeds passion. To the younger generation in college whether laws are discriminatory, how and against whom police enforce certain laws, and how laws are applied in the courts are matters of no small consequence. The publication in the *Georgia Straight* spoke to these issues and whether it spoke well is irrelevant. Public debate is not carried on in a vacuum and persons participating in public affairs may not always be portrayed as heroes, but hopefully the *Alberta Press* case means something when it comes to government thought control. A free society will thrive on debate and innovation without the need for laws to protect public figures when their sensibilities are occasionally offended, an occurrence likely to happen to all at least once.

Although nothing in *Georgia Straight III* expressly raises the question of the duty to criticize the laws and the administration of justice, it is implicit in the facts. The *Georgia Straight* criticized both a law and the way it was applied; the defendants were convicted. Yet how can better laws be drafted and better decisions reached without effective criticisms? There is something troublesome about a newspaper being convicted for informing its readers that an injustice had been committed by either a bad law or a particular judge. If a newspaper ceases informing its readers about what the various branches of government are doing, then it is useless.

One wonders what the effect of the judgment in *Georgia Straight III* will be. Will newspapers shy away from controversial material? Will the papers dare evaluate judicial decisions? Or will they defend their alleged right to inform the citizen of the actions of his government? No answer is immediately forthcoming although coverage of the three *Georgia Straight* trials under discussion in Vancouver's two major newspapers indicates either (1) lack of concern of the problems of freedom of the press, (2) lack of concern for members of the "anti-establishment" press, or (3)

[103] Mason Williams "The Censor" who:
"Snips out
The rough talk
The unpopular opinion
Or anything with teeth
And renders
A pattern of ideas
Full of holes
A doily
For your mind."
Quoted in N. Johnson, The Silent Screen, T.V. Guide, July 5th, 1969, p. 12.

fear of legal restraints on effective reporting.

The coverage of the defamatory libel charge in the two major Vancouver newspapers was terse and bland. No critical or evaluative writing was done. Not once did either paper suggest to its readers that the case might raise serious questions about freedom of speech and freedom of the press. In fact about all either paper did was assist a much wider segment of the public in knowing what the *Georgia Straight* said about Magistrate Eckhardt.

I suggested several possible reasons why neither paper informed its readers of the issues involved in *Georgia Straight III*. The reasons merge gradually into each other. Thus the papers may be concerned about freedom of the press, but care little for hippies and deem the potential legal risks not worth the effort of protesting, or they may care a great deal but see the legal risks as sufficient to prevent any protest. And regardless of the exact mix of concern and legal restraint, the available laws which inhibit discussion of issues in a case are at least demanding of a serious look. Their application has always been random, but the fact of application is noticeable especially in Vancouver where one major paper had already been cited for constructive contempt in *Re Nicol*.[104] *Georgia Straight III* itself proved that prosecution under the law of libel is not beyond the realm of possibility. But far more serious in inhibiting discussion of cases is the law of constructive contempt. Although Lord Hardwicke in the oft-cited *St. James Evening Post* case[105] announced three categories of constructive contempt, today there are only two: prejudicing a case by denial of a fair trial and scandalizing the court.

Since any comments on the issue of freedom of the press could not deny the *Georgia Straight* a fair trial, it would only be the Crown's case which might be prejudiced. To the best of my knowledge there is no reported Anglo-Canadian case holding a newspaper in contempt for prejudicing the Crown's case. However, the established doctrine is certainly broad enough to apply to prejudicing the Crown's case, and the government has a right to a fair trial. The test for denial of a fair trial is probability of substantial interference with a fair trial.[106] While a critical editorial seemingly would not deny the Crown a fair trial in a case where the judge sits without a jury, *R.* v. *Thomas, Re Globe Printing Co.*[107] stands as a warning that judges will admit they can be prejudiced and that such an admission may bring the contempt power into use.

A much more likely doctrine to inhibit a critical evaluation of

[104] *Supra*, footnote 74.

[105] (1742), 2 Atk. 469, 26 E.R. 683.

[106] See *Attorney General for Manitoba* v. *Winnipeg Free Press Co. Ltd.* (1965), 52 W.W.R. 129; *R.* v. *Thomas, Re Globe Printing Co.*, [1952] O.R. 22.

[107] *Ibid.*

Georgia Straight III is scandalizing the court. Stripped of technicalities scandalizing the court is a milder form of seditious libel. Both have an identical foundation relating to a basic democratic assumption: that individuals will find and act on the truth. Both rest on either a rejection of the probability that the truth will be known and acted upon, or a fear that, in fact, the truth will be known and acted upon. In the former case the words are arguably false, in the latter arguably true.

After a disreputable history much like seditious libel, contempt by scandalizing the court was theoretically limited in the 1936 Privy Council decision of *Ambard* v. *A.-G. for Trinidad and Tobago*.[108] There the Privy Council reversed a citation for contempt of a writer who editorialized concerning judicial discretion in sentencing. In one sense the facts were somewhat similar to many contempt situations. The writer was appalled by two sentences which, when compared with each other, were totally incongruous; he informed his readers of this and recommended greater equalization in sentencing. For his column the writer was charged with marking "statements and comments which tend to bring the authority and administration of justice into disrepute and disregard".[109] By reversing the Privy Council at least guaranteed that moderate criticism of the judiciary was beyond the contempt powers. The judgment stated that so long as:[110]

> . . . members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune [from the contempt powers].

Ambard was, however, an easy case and the judgment still would allow contempt citations where the judge does not believe the writer was exercising a genuine right of criticism[111] or where the judge thinks there is an attempt to impair the administration of justice.

Two Canadian cases in 1954 indicate the potential narrowness of *Ambard*. *Re Western Printing and Publishing Ltd.*[112] presented an unusual fact pattern. During a criminal trial the judges issued a statement from the Bench referring to certain features of publicity concerning the trial and suggested use of their contempt powers to insure the accused a fair trial. One columnist thought the judges had overstepped appropriate boundaries; he said he had read the articles in question and found nothing wrong

[108] [1936] A.C. 322.
[109] *Ibid.*, at p. 334.
[110] *Ibid.*, at p. 335.
[111] Consider the following from *Georgia Straight III*, *supra*, footnote 3, at p. 388: "I agree that public discussions should not be muzzled but invective does not advance the truth. . . ."
[112] *Supra*, footnote 74.

with them. Thus he concluded the statement had a "faint tinge of the iron curtain to it" and he further analogized to Juan Peron's Argentina.[113] With a respectful citation to *Ambard*, the court found him in contempt. Obviously a court's desire for fair trial is not thought control, but that is no argument for use of the constructive contempt power. Public discussion of the controversy of free press-fair trial is essential if an appropriate balance is to be achieved. And if the column creates sufficient awareness legislation might be possible. *Ambard's* "genuine right of criticism" as a tool in the hands of judges provided no restraint in the case.

The other 1954 case, *Re Nicol*,[114] concerned an allegory written after a murder trial where following conviction the judge sentenced the defendant to hang. The allegory was a trial of the writer for murder because his agents "planned the murder" and the "exquisite torture of anticipation".[115] The article opposed capital punishment and presented an environmental view of crime. Although it was absolutely irrelevant to the contempt proceedings the judge appeared more worried about expostulation of the "materialistic philosophy of determinism"[116] than anything else but found contempt on two grounds: (1) future juries might be affected by this type of "obstruction", and (2) use of "torture" imputed improper motives to the judge within the meaning of *Ambard*. While the second reason appears to be a rather poor rationalization for punishing Nicol's allegory, the first reason is absurd because it would make publishing the Sermon on the Mount contempt. *Re Nicol*, like *Western Printing*, is simply a reminder that periodically judges do not appreciate written comments in the press.

Actually it may be that the Canadian and English approaches to scandalizing the court have fundamentally separated over the last two decades. *Sub silentio* and despite halting steps[117] England appears to have accepted Lord Morris's statement in *McLeod* v. *St. Aubyn*:[118] "Committals for contempt of Court by scandalizing the Court itself have become obsolete in this country [England]. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them." In 1968 the Court of Appeal tolerantly and tersely refused to find Quentin Hogg in contempt for writing an article all agreed was both rather critical of the court and, it appears, totally erroneous.[119] Lord Justice Salmon even

[113] *Ibid.*, at p. 123 (C.C.C.).
[114] *Supra*, footnote 74.
[115] *Ibid.*, at p. 692.
[116] See *ibid.*, at p. 694.
[117] One of the halting steps was the oft-cited *R.* v. *Gray*, [1900] 2 Q.B. 36, a case which Canadian judges frequently use as justification for an expansive view of the contempt powers. See *e.g.*, *R.* v. *Murphy* (1969), 4 D.L.R. (3d) 289 (N.B.S.C.).
[118] [1899] A.C. 549, at p. 561.
[119] *R.* v. *Metropolitan Police Commissioner, Ex parte Blackburn* (*No. 2*), [1968] 2 All E.R. 319.

suggested that if Mr. Hogg owed anyone an apology it was the readers of "Punch".[120] This may usefully be compared with a recent Canadian case[121] growing out of the Strax affair at the University of New Brunswick. One of Strax's witnesses wrote an article in the student newspaper complaining about specific treatment by the judge of defence counsel (who was dismissed *by the judge*) and further suggesting that the judiciary were political appointees, who had shown their "worth to the establishment" and were "instruments of the corporate elite".[122] In finding the author in contempt the court did not dispute a single fact in the article,[123] although the "most uncalled for attack on the integrity of the Courts of New Brunswick"[124] would undoubtedly have been classified as false. If the judges had looked at the facts of the Strax affair, they would have realized that tempers were flaring at the University and quiet criticism was unlikely.[125] Furthermore, all the contempt citations in the world will not dislodge the widely-held minority belief that the courts are instruments of the corporate elite. The Canadian position is thus much less tolerant than the English on scandalizing the court but no reasons for this are articulated in the decisions. Lord Morris suggested a rationale for stringent enforcement of scandalizing in the *McLeod* case when he distinguished England and the colonies where contempt "may be absolutely necessary to preserve . . . the dignity of and respect for the Court".[126] Unfortunately this explanation seems a bit shallow for Canada.

While the various restraints on freedom of the press might have hindered the two major newspapers in their coverage of *Georgia Straight III*, the papers should have commented on the case. Failure to comment raises serious questions about the press's role as traditional guardians of freedom of the press. One of the Vancouver papers did print an editorial on freedom of the press three months after *Georgia Straight III*, but while chastising a suggestion that Quebec might begin to exercise legislative and administrative control over the press and enthusiastically supporting freedom of the press, not once did the editorial mention previous events in Vancouver.[127]

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[120] *Ibid.*, at p. 321.

[121] *R.* v. *Murphy*, *supra*, footnote 117. [122] *Ibid.*, at p. 291.

[123] Truth would be no defense, *R.* v. *Glanzer*, [1963] 2 Q.R. 30 (Ont. H. Ct).

[124] *Supra*, footnote 117, at p. 295.

[125] The Strax affair involves the activities of Assistant Professor of Physics Norman Strax and the University of New Brunswick's suspension of Strax without notice or hearing and the subsequent court battle which resulted in an injunction forbidding Strax to enter onto the campus. Some details are reported in (1969), 17 C.A.U.T. Bull. 32 (February) and (1969), 17 C.A.U.T. Bull. 20 (April).

[126] *Supra*, footnote 118, at p. 561.

[127] Vancouver Province, April 23rd, 1969, p. 4, cols 1-2.

Georgia Straight III demonstrates two excellent reasons for abolition of all restraints on freedom of the press. A minority paper may not only be more sensitive to various injustices thereby bringing to public attention much that might easily pass without extended comment, but by doing this in blunt and argumentative ways it is more likely to run afoul of the restraints. Also the restraints may be sufficiently inhibiting so that established papers become unwilling to take even slight risks when the issue does not seem to affect immediately their own interests.

Conclusion

Once the necessities of life are satisfied, freedom of expression is the paramount value in a democratic society. Given sufficient information we assume the citizens of a democracy will see that they are governed well and sufficient information is unlikely happenstance when there are legal sanctions limiting one's ability to convey a political message. There must be ample scope for freedom of expression and achieving this may mean an end to laws of sedition and criminal libel, a demand that delegated authority which may affect freedom of expression be narrowly delimited, and a willingness on the part of the judiciary to use an overbroadness test as a means of protecting freedom of expression from outside encroachments.

Recently Professor Brett has provided a devastating summary of the judicial nullification of the Diefenbaker Bill of Rights.[128] His thesis is that one cannot trust the judiciary to safeguard adequately the guarantees of a Bill of Rights and that it is unwise "to hand over our most basic problems to a body of irresponsible [non-elective] and irremovable judges" so that they can guard while the citizen sleeps.[129] Brett would rather remain awake. While Brett poses a false choice, his article is most useful in pointing out how little the Bill of Rights has done. If entrenchment should come, and the response of the judiciary is similar to the response to the Diefenbaker Bill of Rights, the whole effort will be wasted energy.[130]

But before entrenchment comes it would be desirable to attempt to achieve some form of consensus on the ambit of protection to be afforded by a given provision of a Bill of Rights. This is not to suggest that a Bill of Rights be drafted with the detail of the Criminal Code; rather it is to suggest that preceding entrenchment of a Bill of Rights there ought to be sufficient public

[128] Brett, Reflections on the Canadian Bill of Rights (1969), 7 Alta L. Rev. 294.

[129] *Ibid.*, at p. 308.

[130] Unless, of course, *R.* v. *Drybones* indicates the beginning of a new trend, *supra*, footnote 60.

and legislative discussion so that the courts will have some feeling for appropriate interpretation *at the beginning.*

One may not agree with either my conclusions on the necessity to provide much expanded protection for freedom of expression or Professor Brett's conclusions that an entrenched Bill of Rights is a mistaken idea; rather the important thing is that there be a continuous expression of ideas on the proper scope of freedom of expression and other provisions of a Bill of Rights. In the decade since the Diefenbaker Bill of Rights came into force surprisingly little has been written relating to freedom of expression in Canada. Maybe this stems from apathy, the lack of reported cases, or from satisfaction with the current state of the law. But whatever the reason the situation must be changed. Freedom of expression in an entrenched Bill of Rights is possibly the most important guarantee of the citizen, and legal scholars should be providing more guidance as to its necessary scope in a democracy.