

FREEDOM OF EXPRESSION—ACCESS TO THE COURTS

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In order to assess the validity of any limitations that may be placed upon the guaranteed right of freedom of expression the courts must create a theory which broadly defines the ambits of the right. In this article American jurisprudence is examined as a guide to assist the Canadian courts in formulating a theory which is compatible with Canadian societal values. Following this, access to courts, particularly by the electronic media is used as an example of how the theory will be utilized in the context of an existing limitation. This analysis points out the need to have a sound theory of freedom of expression in order to rationally and uniformly assess the acceptability of any proposed limitation.

Afin de déterminer si toute limitation apportée à la liberté d'expression garantie par la Charte est valable, les tribunaux doivent créer une théorie établissant d'une manière large les limites à ce droit. Dans cet article, l'auteur se livre à l'étude de la jurisprudence américaine qui doit servir de guide aux tribunaux canadiens appelés à formuler une théorie compatible avec les valeurs de la société canadienne. L'auteur examine ensuite l'accès aux tribunaux, en particulier par les "media" électroniques, à titre d'exemple sur la façon dont cette théorie sera utilisée compte tenu des limites existantes à ce droit. Cette analyse fait ressortir la nécessité d'une théorie solide sur la liberté d'expression, qui permette d'évaluer rationnellement et uniformément l'admissibilité de toute proposition limitant ce droit.

Introduction

It is one thing to assert that a vigorous criticism of the government must be permitted. It is another to choose among the calibrations of freedom that legal institutions can provide.¹

The search for the appropriate degree of individual liberty that is consonant with the effective functioning of a modern democratic society can be compared to the quest for the Holy Grail. Just when it appears that an acceptable balance has been attained between individual values and societal values, an issue arises which makes this merely illusory. Part of the failure to achieve a balance stems from the difficult relationship between the individual rights and the public or societal rights. In many instances public rights may also encompass individual rights, because without the public right an individual right would be lost. As a consequence the degree of liberty that an individual has at any given time is in a state of flux.

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¹ Harry Kalven, Jr., *The New York Times Case: a Note on the Central Meaning of the First Amendment*, [1964] Sup. Ct. Rev. 191, at p. 221.

Liberty can be defined as comprising a whole spectrum of rights, or in an alternate manner, the freedom to do as one desires without restriction.

Freedom of expression and the press is considered to be the foundation of individual liberty in Western democratic theory. It has been characterized as "... the matrix, the indispensable condition of nearly every other form of freedom".² It is a freedom that has evoked passionate statements for centuries such as Milton's *Areopagitica* to Voltaire's famous cry: "I do not believe a word that you say, but I will defend with my life your right to say it." The history of the First Amendment to the United States Constitution is replete with statements by statesmen and academics about the fundamental significance of maintaining free expression and free press if a nation is to survive as a democracy. In fact, the First Amendment itself is a recognition of the value placed by the American people upon this facet of individual freedom.³ It also recognizes the societal interest in maintenance of freedom of expression so that the democratic state can continue to function as one. In that sense freedom of expression is both an individual and a societal right.

In contrast, there is a dearth of jurisprudence in Canada pertaining to freedom of expression. Prior to the enactment of the Canadian Bill of Rights it could not be said with certainty that freedom of expression was recognized in Canada except as a possible "class of subjects" primarily within the legislative competence of Parliament. Even the *Alberta Press Reference*,⁴ which is generally considered to be the classic statement concerning freedom of expression in Canada, did not establish that freedom of expression had an independent existence which could not be abrogated or abridged by Parliament. No specific guarantees of freedom of expression existed prior to its entrenchment in section 2 of the new Charter of Rights and Freedoms. This marks a departure from the traditional approach to protection of freedom of expression in Canada, now more closely resembling the American method of protection. Section 2 guarantees that:

- (a) everyone has the following fundamental freedoms;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

It is a clear direction to the courts to depart from their past history of treating infringements on freedom of expression as simply requiring a division of powers analysis and to focus on the ambit of the right to freedom of expression.

² Justice Cardozo dissenting in *United States v. Schwimmer* (1929), 279 U.S. 644, at pp. 654-655.

³ The First Amendment to the U.S. Constitution, ratified in 1791 provides in part: "Congress shall make no law—abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

⁴ *Reference re Alberta Legislation*, [1938] S.C.R. 100, [1938] 2 D.L.R. 81.

While freedom of expression and the freedom of the press are such highly valued rights, there has never been agreement as to the limitations that may be imposed in order to reconcile these interests with other individual and societal values. In fact, in American jurisprudence, there has been an extensive debate concerning the question of whether the free speech and press guarantees of the First Amendment made such freedoms absolute rights since the First Amendment appears to speak in absolute terms. A minority of Supreme Court Justices championed the absolute view, but it never gained wide acceptance before the court.⁵ While there were some academic champions of freedom of expression as an absolute right when it related to the activities of government,⁶ there were no advocates of an absolute right to freedom of expression when it extended beyond the sphere of activities of the government.

Such a debate should be largely foreclosed in Canada by the existence of sections 1 and 33 of the Charter.⁷ Section 1 makes it clear that none of the rights guaranteed in the Charter are absolutes, but are instead subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Additionally, section 33 would permit abrogation of freedom of expression by the enactment of a *non obstante* clause. The existence of section 33 might prompt a sceptic to speculate on the value of any guarantee of freedom of expression that can be overridden by legislative action. To continue the debate there must be an assumption that it would be a very brave legislature that would seek to abrogate freedom of expression.⁸ Since there is no doubt that freedom of expression is subject to limitation, the next step is to ascertain the degree of limitation that is acceptable.

In order to effectively invoke limitations, it is important to analyze the theory of the right of free speech or expression and the press. In Canada there has always been an assumption that freedom of expression and of the press are central to our democratic system but there have been few attempts

⁵ Justices Black and Douglas appeared to be the strongest advocates of this theory. In *Konigsberg v. State Bar of California* (1961), 366 U.S. 36, at pp. 60-61, Justice Black articulated his view as: "... [F]or I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in the field. ...

[T]he very object of adopting the First Amendment ... was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to 'balance' the Bill of Rights out of existence."

⁶ The greatest advocate was Alexander Meiklejohn who even wrote an article, *The First Amendment Is an Absolute*, [1961] Sup. Ct Rev. 245.

⁷ The Canadian Charter of Rights and Freedoms, is Part 1 of the Constitution Act, which is Schedule B of the Canada Act 1982, c. 11 (U.K.).

⁸ While this may be true in times of peace, this assumption may be invalid in crisis times.

to articulate such freedoms as a theory. In contrast, Europe and the United States are replete with writings expounding the philosophy which justifies the primacy of the right to free expression in a democratic society. While appearing as early as Roman times in Cato's letters, the theory took root and expanded with the development of the modern liberal constitutional state through the writings of Milton and Locke and later John Stuart Mill, Bagehot and Jefferson and Madison.⁹ Despite the centuries in the evolution of this theory, a consensus on the ambit of the right to freedom of expression has never been attained and perhaps never will.

In the United States there has been a continuing debate presented by such authorities as Meiklejohn and Kalven, who argue that the protection of freedom of expression only extends to expression in dealing with government.¹⁰ According to their theory it is essential to the functioning of a democracy that free expression concerning the activities of government be protected from limitation by the state, so that every individual is free to form his or her own beliefs and to communicate these without fear of reprisal. It is assumed that the truth will appear if all facets of an argument are presented. This latter view has been eloquently expressed by Mr. Justice Douglas in his dissent in *Dennis v. The United States*:¹¹

When ideas compete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

Meiklejohn's argument assumes that the primary value served by the First Amendment is the guarantee of and enhancement of the democratic process. Without the individual ability to freely discuss the merits or demerits of government activities, the principle of democracy would soon wither and die. Since he regarded this liberty as the only true value served by the First Amendment guarantees, there was no room in his theory for an extension of the protection to the realm of literature, scholarship, and the arts. He did relent somewhat in his later years from this narrow position to concede that the protections may extend to philosophical or literary expression, but only if they contribute to the furtherance of the democratic system of government. Judge Bork has now become one of the leading exponents of this narrow view of the ambit of First Amendment guarantees.¹² He has regressed to Meiklejohn's original pure theory which

⁹ This is not intended to be an exhaustive list of those who wrote concerning the philosophy of freedom of expression.

¹⁰ See Alexander Meiklejohn, *op. cit.*, footnote 6; also his *Free Speech and Its Relation to Self-Government* (1948), p. 107; also see for example Harry Kalven, Jr., *op. cit.*, footnote 1; Bork, *Neutral Principles and Some First Amendment Problems* (1971), 47 Ind. L.J. 1.

¹¹ (1951), 341 U.S. 494, at p. 584.

¹² Bork, *op. cit.*, footnote 10.

restricts the guarantees solely to speech which is used in the governmental process. There is no justification for extending this protection to the realm of philosophy, literature or the arts.

In contrast theorists such as Zechariah Chafee, Jr., and Thomas I. Emerson, rejected Meiklejohn's narrow thesis in relation to the First Amendment.¹³ They believed that freedom of expression is valued not only for its political functions, but as an end in itself: free expression is essential to the dignity of all individuals. As a consequence, expression in the political, artistic, social and cultural context must be protected to the point where it becomes action which the state may have a legitimate interest in prohibiting. At least one adherent to the broader theory of the function of free speech has argued that individual self-realization is the only value that free speech serves.¹⁴ In his thesis, political speech is protected because it is essential to ensure that each individual develops to his or her full potential.

The courts have moved from what appeared to be a form of Meiklejohn's theory, where they stated that certain classes of speech were unprotected to a more moderate view which more closely approximates the theories of Emerson. Since their position has changed it is difficult to pinpoint the use of any one general theory in relation to freedom of speech. In order for the decisions to be consistent, courts must articulate what they consider to be the values which are served by the First Amendment guarantees and they should then make their decision in accordance with these principles.

Since the Canadian courts will be approaching the problem of determining limitations that may be placed upon the guarantee of freedom of expression in section 2 of the Charter, it is important that they examine the values that freedom of expression and the press serves. Professor Emerson's theory, it can be argued, would be an acceptable foundation from which Canadian courts can evolve a theory of freedom of expression. His theory has the distinct advantage in that it recognizes that the values served by freedom of expression extend beyond the political process and embrace individual self-realization. In order for development of an individual's full potential, artistic, literary and philosophical expression must be protected. For many the ability to speak freely in the political arena is only secondary to the need to express oneself in the social environment. Furthermore, a broad theory of freedom of expression is more capable of enhancing the values served by a democratic system.

A further advantage of Emerson's theory is that all areas of speech would be protected by the freedom of expression guarantees, none would automatically be excluded. The United States Supreme Court, when inter-

¹³ See for example, Zechariah Chafee, Book Review: Alexander Meiklejohn's *Free Speech and Its Relation to Self Government* (1949), 62 Harv. L. Rev. 891; Thomas I. Emerson, *The System of Freedom of Expression* (1970).

¹⁴ Martin H. Redish, *The Value of Free Speech* (1982), 130 U. of Penn. L. Rev. 591.

preting the First Amendment, implied certain restrictions on the scope of First Amendment protections. These restrictions were that certain forms of speech, or speech in certain contexts were considered to be outside the scope of constitutional protection. *Chaplinsky v. New Hampshire*¹⁵ is the decision often cited for its articulation of the notion of categories of speech excluded from the First Amendment protection. The courts were never consistent with respect to excluded categories, they were also not consistent in determining how to define the ambit of the category. As stated earlier, this appeared to reflect their adherence to the narrow theory of the values served by the First Amendment. The major flaw in this approach was that it led to courts asking which kinds of speech are not worthy of protection, rather than what competing societal or individual values are deemed to be more important than this category of speech. As a result, unwarranted restrictions were placed upon free speech. However, in recent years the United States Supreme Court seems less inclined to hold entire categories of speech to be outside the scope of the First Amendment. It would appear that the court is now embracing a broader theory of the values served by freedom of expression which requires balancing of interests rather than absolute exclusion. With this wisdom of hindsight the Canadian courts can avoid the interpretation dilemma faced by the American courts, by articulating a wider theory of freedom of expression. This broader approach assumes that all categories of free speech or expression are protected. While accepting the wisdom to be gained by an examination of the American approach, it is not suggested that Canadian courts should necessarily adopt an identical theory, although the essential differences between Canadian and American society should be reflected more in the limitations that may be imposed than in the general theory of freedom of expression. The question then becomes the acceptable limitations that may be placed upon these categories when they conflict with other valued individual and societal interests in Canada such as the right to privacy, the right to a fair trial and the nation's right to security against hostile forces.

It is vital that freedom of expression only be limited in accordance with principles that can withstand the pressures created in times of crisis and that can be rationalized in all cases to which they are applied. The dangers of undue limitations arise because of the inherent tendency of human beings to eliminate opposition to their views even where the differences are minimal. John Stuart Mill recognized this problem when he stated:¹⁶

¹⁵ (1942), 315 U.S. 568, at pp. 571-572 where Murphy J. stated: "There are certain classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words. . . . It has been well observed that such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

¹⁶ Mill, *On Liberty and Other Essays* (Neff. ed., 1926), p. 18.

The disposition of mankind, whether as rulers or as fellow citizens, to impose their own opinions and inclinations as a rule of conduct on others is so energetically supported by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power.

While Mill may be sceptical he has identified a tendency which must be checked. The true test of free expression in any society is whether it can tolerate criticism of its fundamental values and institutions. This tolerance is crucial in times of stress when the forces that Mill has identified tend to be the strongest. When limitations are proposed they must be examined to assess whether they are imposed because it is a form of expression that is contrary to the views of a majority or a form of expression which, if not limited, may cause harm to other protected values. It is only this latter category which should be used as a justification for placing limitations on the right to freedom of expression.

Since there are many forms that expression can take, a definition or limitation has often been framed very broadly in order to catch all the possible forms of expression. The overall effect is to unduly restrict expression. An example is the test created by the United States Supreme Court in relation to obscenity in *Miller v. California*:¹⁷

The basic guidelines for the trier of fact must be (a) whether "the average person applying contemporary community standards" would find that the work taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct — specifically defined by the applicable state law, and (c) whether the work, taken as a whole lacks serious literary, artistic, political or scientific value.

This broad test does not contain any statement of harm that may be caused if the speech is permitted. Furthermore, there has been no conclusive evidence that many forms of erotica cause any harm. Broad tests such as this often fail to demonstrate the superior interest to which freedom of speech must be subsumed.

In order to ensure that limitations are reasonable, the courts must use tests which measure the harm that will result from an unchecked expression. It is not sufficient to demonstrate that there may be harmful action resulting from the expression; the danger must be clear. If the expression is to be prohibited, along with the harmful conduct which may result from the expression, then the limitation must be framed in specific and narrow terms. This is a reflection of the philosophy that it is more costly to society if freedom of expression is eroded, than that some other interest is not given its full effect. Reflected in the tests used to assess the validity of limitations must be sensitivity to the need for tolerance and a concern to resist the temptation to crush opposition, identified by Mill. One example of this approach is the clear and present danger test created by the American courts in dealing with seditious expression which was later invoked in non-sedition contexts. The test underwent a series of changes, reaching a low

¹⁷ (1973), 413 U.S. 15, at p. 24.

ebb during the cold war period when the courts appeared to give in to Mill's temptation.¹⁸ However, following the cold war, the Supreme Court in *Brandenburg v. Ohio*¹⁹ revised the expansive view of the protection that the court should accord to the unpopular advocacy of ideas. The per curiam opinion in *Brandenburg* held that:²⁰

[T]he constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed toward inciting or producing imminent lawless action and is likely to incite or produce such action.

While there was no mention of the clear and present danger label, this test was clearly a reformulation of the original Holmes-Brandeis clear and present danger test.²¹ The test focuses on the inciting language of the speaker adding the requirement that speech not only be directed to producing immediate lawless action, but that, in fact, the situation in which the words are spoken must make this purpose likely to succeed. The creation of this test demonstrated that the courts had succumbed to the temptation to permit extensive limitation of speech when the country was in a time of crisis. It is submitted, however, that a formulation such as that developed in *Brandenburg* would meet the criteria for provision of a strong measure of protection to the right of freedom of expression. Our courts can benefit from the wisdom and mistakes of the American courts that has developed through periods of trial and error. That is not to say they should slavishly follow the tests created by the Supreme Court but merely that they examine some tests which offer, or fail to offer adequate protection to freedom of expression. By examining the successes and the failures these undesirable tests can be avoided in Canada.

It can be argued that the Canadian Charter of Rights and Freedoms places an obligation on both the governments and the courts to ensure that the guarantees in the Charter are meaningful. The governments, at the very least have the responsibility not to enact or impose undue limitations upon any of the rights guaranteed in the Charter, and the courts are to act as guardians to ensure that the governments fulfil their obligations. However, as Judge Learned Hand warned, while the judiciary must be vigilant it cannot be the sole protector of guaranteed rights and freedoms:²²

¹⁸ See *Dennis v. U.S.*, *supra*, footnote 11, at p. 510 where the majority defined the parameters of the test to include permissible limitations on speech which advocated extreme danger, such as overthrow of the government, may be prohibited even though the danger is remote: "We must therefore reject the contention that success or probability of success is the criterion. . . . In each case [courts] must ask whether the gravity of the 'evil' discounted by its improbability, justified such invasion of speech as is necessary to avoid the danger."

¹⁹ (1969), 395 U.S. 444.

²⁰ *Ibid.*, at p. 447.

²¹ This test was first formulated by Justice Holmes in 1919 in *Schenck v. United States* (1919), 249 U.S. 47; *Abrahams v. United States* (1919), 250 U.S. 616; and Justice Brandeis expanded upon the test in *Whitney v. California* (1927), 274 U.S. 357.

²² *The Spirit of Liberty, Papers and Addresses of Learned Hand* (1959), at p. 144.

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes, believe me these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can ever do much to help it. While it lies there it needs no constitution, no law, no court to save it.

Mr. Justice Hand is correct that without a commitment by the people of a nation to liberty and protection of fundamental values such as freedom of expression, and the press, the laws and courts cannot sustain these rights. However, the courts can play a substantial role in fostering freedom of expression by their interpretation of what will constitute reasonable limits on freedom of expression. The courts must play a positive, even aggressive role, and jealously guard the guaranteed rights from infringement by the state. If the courts adopt a negative or submissive attitude toward protection of a guaranteed right by, for example, legitimizing government action that is contrary to the principles of free expression, this will quickly undermine or render valueless the guarantees in the new Charter.

The courts have advantages over other institutions which equip them to effectively undertake the task of acting as guardians of guaranteed rights. Firstly, the judiciary is independent and therefore not bound by the limitations imposed on legislatures which must respond to the demands of the majority of their constituents. Courts need not be swayed by political concerns, but are free to act without fear of redress. Secondly, courts have traditionally acted as the guardians of individual liberties. Legislatures are not effective in this role because they tend to be governed by majoritarian interests. While those who do not have strength in the political arena may not be able to seek protection of their interests in that forum, they can always look to the courts to be alert to protect individual rights. That is not to say the courts have not protected vested interests in the past and failed to protect unpopular minority interests. In fact, many judgments of the Canadian courts reflect the concern for the protection of vested property interests, to the detriment of other legitimate interests. The courts have not always been bastions of liberty, but they do have a great potential for assuming that role. It is important that the courts accept this responsibility under the new Charter and not be overly deferential to the legislatures. They cannot forget, however, to consider the greater public interest when assessing the degree of protection to give to individual interests.

While the courts have a heavy responsibility, the governments, it is submitted, have more than the negative responsibility of not passing legislation or engaging in conduct which unduly infringes upon freedom of expression. In our complex democratic society, affirmative action by governments is required if the guarantee of freedom of expression is to be meaningful. If Canadians are to be able to fully participate in the political process, express informed opinions, and make informed judgments, effective access to information of legislation is essential. While in the time of Locke, or Mill or even Jefferson and Madison, the average person could

readily acquire information about his or her government, this is simply not so in our society where government tends to be large, complex and secretive. Effective freedom of information legislation promotes and fosters access to, and disclosure of, information held by various government departments and agencies so that the media can fulfill their responsibility of informing the public and individuals and groups can obtain information necessary to have informed participation in our democratic process of government. Along with legislation must go a genuine commitment to the creation of open government with bars to access only where this is truly necessary to protect legitimate interests. While section 2 merely guarantees freedom of expression, it is submitted that this should be read as meaningful freedom, particularly as it pertains to the political process. Since this freedom is foundational to the functioning of a democracy, it is not sufficient to say that limitations are unreasonable; there must be an affirmative commitment on the part of governments to foster this freedom. The courts cannot accomplish this alone.²³

I. *Limitations.*

Canadian law, both statute and the common law, places a number of limitations on the right of freedom of expression and the press. All of these limitations were imposed prior to the entrenchment of this right in the Charter. Therefore none have been tested against the new constitutional standard. Any previous challenges of any limitations that were placed on freedom of expression were made on the basis of lack of legislative competence. For example, when Mr. McNeil, then the editor of the Dartmouth Free Press, challenged the constitutionality of the Nova Scotia Theatres and Amusements Act on the ground that it infringed his right to freedom of expression, the Supreme Court of Canada summarily dismissed his argument and reverted to a division of powers analysis.²⁴ The legislation was validated by the majority of the court who stated that it was really legislation in relation to property and civil rights in the province. It was not surprising that the court rejected a fundamental freedoms basis for their decision since this was consistent with the approach adopted in previous decisions where fundamental freedoms were subject to infringements. It was also reflective of the dilemma confronting courts which had acknowl-

²³ An example of affirmative action is the American F.C.C. creation of a fairness doctrine with respect to the broadcast media. Frequencies available to broadcast are finite and only a few broadcasters are given the privilege to use them. Thus the fairness doctrine required broadcasters to give reply time to the public when a personal attack has been made upon them or a political editorial expressed one view only. This was to ensure that one individual or group was not permitted free expression on the airwaves while another was denied it. The U.S. Supreme Court upheld this doctrine in *Red Lion Broadcasting Co. v. F.C.C.* (1969), 395 U.S. 367, stressing that it was the right of the viewers and listeners, not the broadcasters which was paramount.

²⁴ *McNeil v. N.S. Board of Censors* (1978), 84 D.L.R. (3d) 1 (S.C.C.).

edged the need to protect fundamental freedoms from unjustifiable limitations and yet remain true to the principle of parliamentary supremacy which was deeply ingrained in the Canadian judicial tradition.²⁵

While the division of powers analysis represented the principle approach to protection of fundamental freedoms from legislative limitations, there was one deviation with the appearance of the "implied bill of rights theory". This theory was grounded in the preamble to the British North America Act which spoke of a constitution similar in principle to that of the United Kingdom. It was germinated in the judgments of Rand and Abbot J.J. in *Switzman v. Elbing and A.G. of Quebec*.²⁶ While it was implicit in Rand's judgment, Justice Abbot was explicit in his dictum:²⁷

Although it is not necessary, of course to determine this question for the purpose of the present appeal, the Canadian Constitution being declared to be similar in principle to that of the United Kingdom, I am also of the opinion that as our constitutional Act now stands, Parliament itself could not abrogate the right of discussion and debate.

Unfortunately, while this theory was created by eminent jurists, it never formed the basis of a Supreme Court of Canada decision. In fact, the Supreme Court specifically rejected the theory when it was argued before them in *A.G. of Canada v. Dupond*.²⁸ Justice Beetz made it clear that none of the so called fundamental freedoms were so enshrined in the constitution that no legislature had the power to abrogate them, thereby confirming judicial deference to parliamentary supremacy. Ironically, with the proclamation of the Charter, the approach offered by the implied theory will become the norm although the door has been left open for deference to parliamentary supremacy by section 33 of the Charter, which allows for a legislative override of the guarantees in section 2.

Despite the existence of section 33, it can be argued, however, that to subsume the fundamental freedoms by an overzealous deference to parliamentary supremacy would be to undermine the entire purpose of the Charter. The Charter should be regarded as a direction to depart from this tradition and to recognize that the Charter was intended to impose restrictions on parliamentary supremacy. No longer will the division of powers analysis suffice when the courts are asked to assess the validity of a purported limitation on a fundamental freedom, such as freedom of expression. This reinforces the premise developed earlier that the courts must now develop a theory of freedom of expression and the press whereby limits upon them can be assessed in the context of an evaluative analysis of the values served by the guaranteed right.

²⁵ *Union Colliery Co. Ltd v. Bryden*, [1899] A.C. 580 (P.C.), is a perfect example of where the courts used the vehicle of the division of legislative competence to strike down discriminatory legislation without infringing upon the sacred principle of parliamentary sovereignty.

²⁶ (1957), 7 D.L.R. (2d) 337 (S.C.C.).

²⁷ *Ibid.*, at p. 371.

²⁸ [1978] 2 S.C.R. 770.

Whatever theory is adopted, it is inevitable that the courts must engage in a balancing test to ascertain the impact that the expression which the legislature seeks to restrain would have on other individual and societal values. When interpreting the First Amendment to the United States Constitution, the Supreme Court of the United States has repeatedly asserted that "[f]reedom of the press, freedom of speech and freedom of religion are in a preferred position" in the sense that they should receive more active judicial protection than some other rights.²⁹ As a result, within the confines of their changing theory of the values served by free speech, the court developed a number of tests to use in assessing the validity of legislation which imposed restrictions on free speech. The emphasis was on precise and narrowly drawn statutes: the requirement that a state choose the most effective manner of protecting another legitimate interest with the least possible infringement on free speech; a clear and present danger test, and a strong judicial disapproval of prior restraints. In addition, once the court adopted an expanded theory of the First Amendment they created tests which widened the freedom to comment on the public activities of public figures, without the constant threat of a libel suit. While all of these tests have their imperfections, they have served as tools for the courts to use in making these important decisions on the constitutionality of government action when imposing limitations on freedom of speech.

Legislation and the common law, as stated earlier impose a number of restraints on freedom of expression in Canada. None of these limitations were subject to scrutiny by the courts when enacted, to ascertain if they were unduly restrictive of freedom of expression. This was understandable since the use of the division of powers analysis did not permit an in depth examination of whether the restraint was undue beyond questioning the competence of the enacting legislature, to enact any of these limitations on freedoms of expression. Now, the courts are being asked to examine some of the existing limitations and to measure them against a constitutionally entrenched right of freedom of expression. In order to assess the validity of these limitations, the courts will have to create tests such as exist in the United States. While it would not be appropriate to slavishly follow the American jurisprudence in this area, for the reasons discussed earlier, it would be beneficial for the courts to seek guidance through an examination of the successes and failures of the United States Supreme Court's efforts to grapple with the interpretation of the First Amendment. Guidance in this regard may also be found in the jurisprudence of the European Court of Human Rights as it struggles to interpret somewhat similar provisions in the European Convention on Human Rights.³⁰

²⁹ See *Murdoch v. Pennsylvania* (1943), 319 U.S. 105, at p. 118.

³⁰ For example, see Z. Nedjati, *Human Rights under the European Convention* (1978).

II. Access to the Courts—The Extent of Permissible Limitations.

One of the societal values that freedom of expression and the press conflicts with, is the right of an individual when charged with a criminal offence to receive a fair trial. Intimately connected with this is also the broader concern for the effective functioning of and respect for the administration of justice. The concerns for both a fair trial and the proper administration of justice may require extensions of the ambit of free expression and the press and not necessarily limitations upon them. An example of this is the guarantee, in section 11 of the Charter, of a public trial. In order to have a public trial there must be access by the public and by the media who are charged with the responsibility of conveying information to the public. The issue of access to the courts poses a challenge for the courts. This is one example of where any theory of freedom of expression developed by the courts will be tested. Will the theory prove effective when the courts are asked to assess the validity of limitations that have been imposed upon freedom of expression through denial of access to the courtroom? This issue will be analyzed in the context of access to juvenile trials and access by the electronic media to the courtroom.

III. Juvenile Trials.

Shortly after the proclamation of the Charter in April, 1982, the courts were asked to determine whether section 12(1) of the Juvenile Delinquents Act³¹ infringed upon the right to freedom of expression and the press guaranteed by section 2 of the Charter. Section 12(1) provided:

The trials of children shall take place without publicity and separately and apart from the trials of other accused persons, and at suitable times to be designated and appointed for that purpose.

The principle that trials should be open to the public is a basic one which has been in existence for centuries and is fundamental to the Anglo-Canadian legal system. That the courts always be open and in full view of the public has been considered necessary to the proper and fair administration of justice. However, the Courts of Equity long had a concern for the protection of children as *parens patriae*. This concern eventually led the state to establish special juvenile courts and specific offences that could be committed by minors.

Along with this paternalistic concern for juveniles went the blanket restriction, reflected in section 12(1) that these trials should take place without publicity. The Supreme Court of Canada in the recent decision of *C.B. v. Kimelman, Radio Station CJOB, Radio Station CHMM and A.G. Manitoba*³² concluded that "without publicity" meant *in camera*. This reinforced the tradition of excluding the public and the media from trials of juveniles and the placing of an absolute ban on publication of any details

³¹ R.S.C. 1970, c. J-3.

³² (1981), 36 N.R. 451.

which might identify the juvenile. Enforcement had been by the courts through the mechanism of contempt proceedings—the philosophy being that a child must be protected from the glare of publicity which could damage his or her chances of rehabilitation. The danger has been, however, that while the rationale for open courts was equally applicable to juveniles this right was being denied to them. In the interests of freedom there has always been a suspicion of trials that are held in private. Without the exposure to the public view there may be no mechanisms for checking potential abuses that occur. This rule has not operated without exceptions, however, for there are instances where the best interests of the accused or the proper administration of justice are served by forbidding publicity.

While the instances for permitting *in camera* hearings have not been numerous when dealing with adults or juveniles in adult court, closed doors have been the rule in juvenile cases. Now a change in philosophy has occurred which reflects a departure from the state's paternalistic attitude towards young persons to the adoption of an approach which basically stresses concern for the rights of young persons yet this approach also highlights the concern that young persons should bear responsibility when they contravene society's rules although not in the same manner or with the same consequences as adults. This change is now reflected in the provisions of the new Young Offenders Act.³³

It was a foregone conclusion that, with the proclamation of the Charter, section 12 of the Juvenile Delinquents Act would be challenged. Predictably it was members of the press who were most adamant in their demands that the principle of open trials should extend to juvenile trials, their argument being that an absolute bar against publicity in juvenile cases was an unjustifiable limitation on freedom of expression and the press. Although part of their arguments focused on section 11(d) of the Charter, the right "to be presumed innocent until proven guilty according to law in a fair and public hearing . . .", the primary vehicle in the major successful challenge made by Southam Press in Ottawa was section 2(b) of the Charter.³⁴ Section 11(d) stresses the rights of the accused to a fair and public trial. An Ontario provincial judge in *R. v. R.J.*³⁵ chose to rest his decision, allowing the London Free Press to attend the proceedings of a juvenile hearing, on section 11(d), stating that even if a person is a juvenile he or she has a right to a fair and public hearing.

However, when Southam Press went to court in Ottawa they argued that section 12(1) of the Juvenile Delinquents Act was invalid on the

³³ Bill C-61—Received third reading May 17th, 1982 but has not yet been proclaimed into force.

³⁴ *In the Matter of Section 24 of the Constitution Act, 1982*; and *In The Matter of the Judicial Review Procedure Act*, R.S.O. 1980, c. 229; and *In The Matter of an Application regarding the Constitutional Validity of Section 12 of the Juvenile Delinquents Act*, R.S.C. 1970, c. J-3. S.C. of Ontario, Smith J., not yet reported.

³⁵ (1982), 68 C.C.C. 285.

grounds that it was contrary to the guarantees of freedom of expression and the press. Smith J. made it clear that he accepted that the Charter had imposed limits on parliamentary sovereignty and that the courts now have a constitutional responsibility to deny effect to legislation which contravenes the Charter. The premise of his decision to strike down section 12(1) was that a blanket prohibition against access was contrary to freedom of expression and the press guaranteed in section 2(b) of the Charter. He did not, however, articulate a test to use in assessing limits, except to say that general social purposes are not acceptable justifications for restricting access.

While it was not explicit in his judgment, it can be presumed from it that freedom of the press will be infringed when publication is banned without a justifiable reason. It may be acceptable to forbid publication of a juvenile's name, but there must be a need to protect some other legitimate interests if the press is to be totally excluded from a juvenile hearing. In his judgment Smith J. accepted the proposition that a discretionary exclusion such as is provided for in the Young Offenders Act will not unduly infringe on freedom of the press, since the assessment of access will be made on the basis of each case. Section 39 of the Young Offenders Act creates a presumption that the trial of a young person will be open unless the court or justice before whom a proceeding occurs is of the opinion that any evidence presented would be seriously injurious or prejudicial to the accused, a witness or victim or:

- (b) that it would be in the interest of public morals, the maintenance of order or the proper administration of justice to exclude any or all members of the public from the court room.

By section 39, the legislature has determined what values are more significant than the values served by freedom of the press or a public trial. While one can certainly applaud the legislature for their wisdom in removing the absolute exclusion that existed under the Juvenile Delinquents Act, these new provisions are stated in very broad terms. If the courts interpret them broadly, then the potential exists for this to have an adverse affect on freedom of the press and the individual young person's right to a fair trial, since it would not be difficult to include most juvenile trials within the language of section 39(b). In order to be consistent with the change in philosophy reflected by the Act and the guarantees in the Charter, the courts will have to establish criteria to narrow the scope of the broad grant of discretionary power to ensure that an appropriate balance is attained between the concerns for free press and public trial and the interests stated in section 39. There is no doubt that there will be occasions when the rights guaranteed in section 2 must give way to these other values, such as fair trial or the proper administration of justice, but this should occur only after a careful balancing of these values. Since the courts are both the guardian of the guaranteed rights in the Charter and the body vested with the responsibility for ensuring the maintenance of the values specified in section 39,

they must ensure that a satisfactory resolution of these conflicts can be attained without sacrificing any of these values.

In the Young Offenders Act the ban against publishing the identity of a young offender or information that would lead to disclosure of his or her identity, remains absolute. Undoubtedly this will be challenged as being an undue limitation on freedom of the press. The question which arises is whether the concept of an open trial and access by the press is consonant with an absolute ban on the publication of identity. If the concern is for prevention of injustice which can occur when justice is administered in secrecy, then this is adequately met by the public trial without excessive publication of a young person's identity. It therefore can be argued that this is a reasonable limitation under section 1 of the Charter.

This discussion has merely raised several of the issues that are of concern when determining the degree of access that should be permitted when young offenders are involved. It can be safely said that the issues will continue to cause problems for the courts, who in accordance with a theory of freedom of expression and the press, will have to seek a satisfactory resolution of the conflicting interests at stake.

IV. *Access—Television in the Courtroom.*

The second aspect of access to courts which is now becoming the centre of a controversy, is whether the electronic media have the right to televise trials. Chief Justice Howland of Ontario, in his report on the administration of justice in Ontario, indicated that the Radio Television News Directors Association of Canada was urging the televising of courtroom proceedings and had proposed a special educational programme which would contain segments of three different types of trials.³⁶ While televising trials has not been a serious issue in the past in Canada, this report is indicative of the rising impetus by the electronic media to obtain access to the courtroom for their medium of communication. One of the issues which will soon confront the courts is whether the Charter guarantees of freedom of expression and of the press and other "media of communication" are broad enough to include the right of access by the electronic media.

While this problem is relatively new to Canada, the American courts have been grappling with this problem for a number of years. In fact, the United States Supreme Court has handed down several decisions pertaining to televised trials. Since the debate in Canada is becoming serious, it will be very useful to examine the American experience.

Controversy has surrounded the introduction of and experimentation, with televised trials in the United States. In order to appreciate why the cameras are winning, it is helpful to briefly examine the American philosophy with respect to the free press fair-trial issue. The American courts have

³⁶ (1982), 16 L.Soc. U.C. Gaz. 15.

always taken the view that prior restraint is a more objectionable infringement on free speech than is *post facto* punishment when speech has exceeded its permissible limits. The classic statement of judicial disapproval of prior restraint was made by Chief Justice Hughes in *Near v. Minnesota*³⁷ when he indicated that prior restraint could only be justified in exceptional circumstances. This approach has been followed by the courts even where the result was a difficulty in ensuring a fair trial. With respect to facts or comments concerning a pending trial, the courts have opted in favour of permitting the publicity and seeking to achieve the guaranteed right to a fair trial through other mechanisms. While prejudicing a fair trial appears to be a strong interest, alternate methods of protection are considered to be superior to abridging free speech in order to accomplish this goal. The result of the court's choice to give preference to First Amendment values is that resort to change of venue or to holding a new trial must occur when a widely publicized case occurs. It is against this background that televised trials must be assessed.

The controversy surrounding televised trials began following the sensational reporting during the trial of Bruno Hauptmann charged with the murder of the Lindbergh baby. The press turned the trial into a spectacle making it very difficult for the judge to control the court proceedings. Even though the verdict was not overturned on the ground of the lack of a fair trial, there was a tremendous sense of dissatisfaction with the process. Following this the American Bar Association drafted Canons of Judicial Ethics in 1935, which were adopted by over half the states in 1935. At the time that they were adopted the Canons prohibited the taking of photographs in the courtroom, later being amended as technology developed to include a ban on broadcasting, recording and televising in courtrooms unless the purpose was educational and strict procedures were followed.³⁸

Not all of the states adopted the Canons or even agreed with them. As a result television in the courtroom was not completely banned. One of the states which ignored the Canons was Texas, which merely left the determination to the discretion of the trial judge. It was from Texas that the first opinion of the Supreme Court on televised trials originated. In 1964, the Supreme Court of the United States was asked to overturn Billie Estes conviction for swindling, on the ground that massive publicity had impaired his right to a fair trial.³⁹ In fact, most of the publicity had occurred about a month prior to the trial when the judge had a hearing to determine whether television would be permitted in the courtroom during the trial. This predetermination hearing resembled a circus, much like the Haupt-

³⁷ (1931), 283 U.S. 697.

³⁸ See Kiebowitz, *The Story Behind the Adoption of the Ban on Courtroom Cameras* (1979), 63 *Jud. 14*; Abugov, *Televising Court Trials in Canada We Stand on Guard for a Legal Apocalypse*, [1979] *Dal. L.J.* 694.

³⁹ *Estes v. Texas* (1964), 381 U.S. 532.

mann trial, only here it was television not ordinary photography, which caused the problem. When the trial actually took place the cameras were quite unobtrusive and the proceeding was strictly controlled by the judge. Despite this, the Supreme Court reversed his conviction on the basis that the televising, over the accused's objection, of the proceedings of his criminal trial, in which there was widespread public interest, was inherently invalid as infringing the fundamental right to a fair trial guaranteed by the Due Process clause. The court emphasized that the freedom granted to the press under the First Amendment must be subject to the maintenance of absolute fairness in the judicial process; and with the state of television technology as it then existed, such freedom did not confer the right to use equipment in the courtroom which might prejudice a fair trial.

In a less dynamic country, this decision may have stemmed the tide of electronic media in the courtroom. While it may have temporarily halted the flood a number of states, contrary to the decision continued to allow televised trials and to experiment with them. By 1980, at least twelve states had adopted statutes or court rules permitting press coverage, while at least as many states again had implemented pilot projects permitting the televising of trials on an experimental basis.

In 1981 the court was again faced with the issue of televised trials. *Chandler v. Florida*⁴⁰ involved a burglary charge, originating in the state of Florida. The Florida court had permitted coverage despite the defendant's protest pursuant to their Supreme Court rules, of what proved to be an uneventful trial. When the accused was convicted he moved for a new trial, claiming that because of the television coverage, he had been denied a fair and impartial trial. The majority of the court, while not specifically overruling *Estes*, stated that it had not created a constitutional rule that all electronic media coverage of criminal trials was inherently a denial of due process. Chief Justice Burger stated:⁴¹

An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pre-trial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage.

. . . The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case be it printed or broadcast compromised the ability of the particular jury that heard the case to adjudicate fairly.

This decision was a recognition by the Supreme Court that they were in an electronic age. In the seventeen years since *Estes* there had been a dramatic change in the quality of camera equipment available to the media,

⁴⁰ (1981), 101 S.Ct 802.

⁴¹ *Ibid.*, at p. 810.

such that now it was possible to film surreptitiously, no lights or constant movement being required. It was these developments that led the court to conclude that the argument of physical disruption to the trial process was no longer valid. In the interim period there had also been a change in attitude on the part of state courts, with twenty-three states now allowing in, or experimenting with, television cameras in the courtroom.⁴²

While *Chandler* removed the barrier to the use of television in the courtrooms it did not deal with the issue of whether the First Amendment implicitly guaranteed a right of access to trials to electronic media journalists. Since the challenge in *Chandler* was by the accused it is understandable that his concerns were for a fair trial and not a media right of access. Since the question was never raised the court showed no inclination to deal with it.

While the American Supreme Court has not been squarely confronted with this issue as regards the electronic media, they had to face the issue with respect to the print media. In *Richmond Newspapers Inc. v. Virginia*,⁴³ the Supreme Court held that the right of the print media to attend criminal trials was implicit, in the guarantee of the First Amendment and that, without that access, important aspects of freedom of speech and of the press could be infringed. This affirmation was premised upon the assumption that trials have traditionally been open to the public (an assumption shared by Canadian jurisprudence) and the First Amendment prevents them from being arbitrarily closed by the government. This can also be seen as an access to information decision, the First Amendment protecting the press right of access to the information contained in the trial process. It is not, however, an absolute right of access because the court made it clear that, absent an overriding interest such as fairness of the trial, the trial must be open to the public. In *Richmond* the court stressed that a mere claim of danger to a fair trial is not sufficient to warrant exclusion of the press. There must be evidence that there are no reasonable alternatives for preserving the defendant's right to a fair trial before a denial of access will be permitted. However, the trial judge does have the power to impose reasonable limitations, such as forbidding typewriters or the number of persons permitted in the courtroom in the interest of ensuring an orderly proceeding.

Richmond was restricted to the print media and epitomized the dichotomy that has crept into American jurisprudence. The courts, whether

⁴² Some of the states that have rules or statutes permitting television coverage are, for example, Alabama (Alabama Canons of Judicial Ethics), Alaska (Canon 3A(7) (c)), Colorado (Colorado Canons of Judicial Ethics), Georgia (Georgia Code of Judicial Conduct). A few states of those experimenting with cameras are: Arizona (Order Temporarily Suspending Rule 45, Rules of the Supreme Court), California (California Rules of Court), 6 Med. L. Rep. 1252), New Jersey (Supreme Court Order Concerning a Trial Program of Electronic Media Coverage of Court Proceedings).

⁴³ (1980), 100 S.Ct 2814.

consciously or not, have developed a double standard with respect to the electronic media. They have never permitted limitations on the print media whereas they quite freely encouraged limitations that apply to the electronic media.⁴⁴ Part of this dichotomy stems from the First Amendment guarantees' reference to the press which has traditionally been regarded as communication only through the medium of print. It appears that with the rapid growth in technology the courts have failed to assimilate the media of communication and instead have tended to stress the differences between them.

The change in the attitude of the American Supreme Court between *Estes* and *Chandler* is reflective of the growing awareness in the United States that the First Amendment guarantees would rapidly become eroded if this protection were not extended to the new developing media mass communication. Television and radio have replaced the newspapers in many areas as the means of disseminating of information and ideas. With the decision in *Richmond* and *Chandler* it can be speculated that the Supreme Court will soon determine that the First Amendment guarantees a right of technological access, so that others, beside the print media, can exploit the full potential of their medium of communication. It is no longer acceptable to deny cameras on the same rationale that typewriters are forbidden to the print media. Without cameras, much of the effect of the medium is lost whereas typewriters are merely a tool for expediting the speed by which a story can be produced for the newspaper.

While this issue has been the subject of extensive debate, experimentation and judicial thought in the United States,⁴⁵ as stated earlier it is relatively new in Canada. As implied in Chief Justice Howland's report, the courts have not greeted the electronic media's request for access with open arms. In fact the fears expressed by those who oppose it have been expressed by those who opposed televised trials in the United States. One fear is that the increase in publicity engendered by television would impress those viewing with the notorious character of the accused. While the print media has this ability the impact is not as immediate or as strong as the

⁴⁴ *Red Lion Broadcasting Co. v. F.C.C.*, *supra*, footnote 23, where the court sanctioned the creation by the F.C.C. of a right to reply doctrine for the electronic media on the assumption that access to the industry is restricted because of the limits placed upon the availability of frequencies. However, the practical and financial limitations on access to newspapers is not seen as equivalent to the technological limitations on access to the broadcast media. In *Miami Herald Publishing Co. v. Tornillo* (1974), 418 U.S. 241, the Supreme Court struck down a Florida right of reply statute applicable to newspapers. While the monopolistic nature of the newspaper business was noted, as was the easier access to the wealthy to the press, a remedy of government coercion was labelled as too drastic a remedy, and one inconsistent with the First Amendment.

⁴⁵ See for example, Diane Zimmerman, *Overcoming Future Shock: Estes revisited or a Modest Proposal for the Constitutional Protection of the News Gathering Process*, [1980] Duke L.J. 641; Charles Ares, *Chandler v. Florida Television*, *Criminal Trials and Due Process*, [1981] Sup. Ct. Rev. 157.

impact from the electronic media. Secondly, there is the concern that televised cameras will interfere with the fair trial of an accused, because of the added publicity which will make it difficult to have an unbiased jury. Cameras would disrupt the proceedings and distract the judge, jury and counsel from their primary purpose in the conduct of the trial. Cameras have the potential for impairing the testimony of witnesses by causing some to be frightened and others to overstate their testimony.⁴⁶ In addition there is the oft-cited fear that the press will be irresponsible and engage in sensationalist reporting which will distort the truth; by editing and showing only excerpts from trials the public will be given a distorted image of what occurs in the courtroom. This last argument ignores the fact that distortions are created by the current recourse to sketches which are used because cameras are banned and overlooks the potential in the print media for distortion which has never been cited as a reason for barring access to the print media.

One of the "strawmen" created by those who oppose the presence of television cameras in the courtroom is that it would turn the courtroom into a circus. This is based upon the fallacious premise that a right of access means there cannot be controls imposed on the electronic media. Absence of television cameras is not synonymous with decorum nor is their presence with mayhem. In the United States the successful use of television cameras stems from the guidelines that are imposed. Cameras without lights in unobtrusive locations, and prohibitions against changing film or movement of personnel back and forth during the proceeding have ensured a minimal effect on the operation of the court. Beyond the awareness of the presence of the cameras this is no different than a journalist sitting in the courtroom.

Canadian courts will shortly be confronted with an argument of a constitutionally guaranteed access of the electronic media to the courtroom. While the American Supreme Court could use the limitations implicit in the term "press" to differentiate between the media of communication, section 2 of the Charter will not permit of such a distinction because it guarantees the right of "freedom of expression," "free press and other media of communication". It is suggested that this terminology was used intentionally to make it clear that the guarantees extend beyond the print media. Thus, if there is a right of access to the print media through the requirements of openness to the public, then similarly this must extend to the electronic media. Section 1 would permit of reasonable limitations on this right, such as controls upon movement in the courtroom and barring all media where other values need protection. However, there can be no justification for an arbitrary bar on access to the electronic media in the same manner that an arbitrary denial of access would be unreasonable in juvenile trials.

⁴⁶ This spectre of the horrors of the effect of cameras in the courtroom was raised in *Estes, supra*, footnote 39.

This premise, of necessity, evolves from the central theory of freedom of expression. The guarantees of free expression cannot be limited to the forms in which expression was possible when the concept first evolved. The theory must be broad enough to encompass new media of communication as they evolve.⁴⁷ For example, there is some distance between the notions that freedom of expression is guaranteed if you are free to express yourself on a soap-box in a park and freedom of expression guaranteed through the medium of motion pictures. It is not, however, only the medium that is affected, but the context of speech which varies with the development of modern communication techniques. For example, prior to the electronic age the medium was primarily print which allowed expression of ideas in a certain fashion, the reader fathoming the meaning from words. Radio added the element of sound whereas television and motion pictures communicated images in action. The era of mass communication permits ideas and events to be brought to the home rapidly and vividly, creating an immediate impact on the viewer. None of these media of communication are completely interchangeable, since they influence the recipient in different ways. Therefore the choice of medium determines in what manner and what information the communicator will present. While a newspaper is free to rely on the use of reinforcement of ideas and repetition in articles, the television must rely on a combination of words and images which can convey a message in a compact time frame. Books on the other hand provided a means for extended discourse and in depth analysis. If one form of communication is limited it has the effect of restricting an essential means of communication to an extensive audience.

Without the ability to use the primary vehicle of their medium, the television reporters are discouraged from fully covering trials. This has the effect of limiting access to information by the large segment of the public who rely on television as their primary source of information. Thus a theory of protection of free expression, as articulated earlier, must be flexible enough to encompass all new and developing forms of communication. Television is a conveyor of speech for the political process, but it also operates in the cultural and literary realm. If the above theory is accepted there can be no justification for excluding the electronic media from the courtroom where other forms of media are permitted. What must be recognized is that the goal of a fair trial is not sacrificed to the interests of freedom of expression, but is balanced against the need for protection of free expression thereby achieving the maximum protection of each right that is permissible without seriously harming either.

Conclusion

The courts in Canada must be prepared to accept the challenge offered by the Charter guarantees and evolve theories which will offer the maximum

⁴⁷ See Zimmerman, *op. cit.*, footnote 45.

protection of all of the valued rights. This requires that they be ever vigilant to prevent arbitrary or unjustifiable limitations imposed by the state. Vague fears or concerns are not adequate reasons for limiting rights, only actual demonstration of harm or a real likelihood of harm to some other valued interests are justifiable reasons for state imposed limitations.

The challenge created by the proclamation of the Charter will require the courts to be creative and liberal in their approach to its interpretation. Ordinary rules of statutory interpretation must give way to Lord Sankey's "living tree" approach to interpretation of a constitutional document. In order to develop an acceptable theory of freedom of expression and the press the courts must reflect upon the individual and societal values served by the guaranteed rights. These values must be assessed in the context of the political, social and economic structure of Canadian society. While judges may not feel adequately prepared for this role, they have the mechanism of the Brandeis style brief, to bring necessary information of this kind, before them. If this approach is used, it will prevent the adoption of theories that are premised solely on the judge's perception of which societal values are important.

With respect to the example cited, of televised trials, courts must reconcile the technological advances, which are an essential aspect of freedom of expression and the press, with the private and public rights of an open fair trial and the orderly administration of justice. Here the American Supreme Court's approach in *Richmond*, expanded to include the electronic media through the terminology of section 2 of the Charter, would be compatible with Canadian societal values.

This does not presume an unlimited right of access. Controls must be imposed on the conduct of the electronic media, in the courtroom. Through the courts' power to control activities in the courtroom and, if necessary, legislative action, acceptable limits can be placed on the access to protect the need for a fair trial and orderly administration of justice.

The assumption that cameras must result in an unfair trial is wrong. As a number of American states have demonstrated, properly controlled television in the courtroom does not detract from a fair trial and ensures that freedom of expression is protected. Since televised trials is not an issue that will disappear, the Canadian courts should not attempt to destroy the benefits of technological change but should tame it instead. Ultimately then, the right of freedom of expression will be fully protected without endangering the right to a fair trial and the proper administration of justice.
