In this article Professor MacKay argues that effective interpretation of section 2 of the Charter of Rights and Freedoms requires the weighing of real world impacts beyond the traditional liberal parameter of judicial decisions. The usual judicial unwillingness to acknowledge "freedoms", as opposed to "rights", limits governmental legal action while not recognizing political and economic barriers to freedom of expression. The trend toward limiting protected expression both at the definitional stage and through section 1 reasonable limits reflects this cautious approach.

The article examines who the early beneficiaries of freedom of expression have been: those affected by criminal sanctions and those who can afford litigation. The latter group consists largely of business pursuing commercial free speech and the corporate-controlled media pursuing "freedom of the press".

Focusing on freedom of the press, the author asks the "crucial question": whose interests are being served? The tacit acceptance of liberalism is implicit in the usual notion of a free press. This fails to consider that the press is not neutral and most frequently favours business elites whose interests are already well-served by the political process without the protections of the Charter. The balancing of various interests by the courts is closely examined in sections covering media access to the courts and possible conflict between freedom of the press and other legal rights.

In conclusion, MacKay calls for a shift away from the role of freedom of expression as an instrument in the democratic process, toward its use to promote primarily community self-actualization, entailing judicial willingness to stop relying on liberal theory and focus on actual life impacts on disparate, and often marginalized, groups in society.

Dans cet article le professeur MacKay soutient que, pour être valable, l'interprétation de l'article 2 de la Charte des droits et libertés doit prendre en considération les conséquences de la vie pratique qui vont au delà des paramètres traditionnels libéraux des décisions judiciaires. Le manque d'enthousiasme habituel des tribunaux à reconnaître les "libertés", par opposition aux "droits", limite la liberté d'action en justice du gouvernement sans pour cela reconnaître les entraves politiques et économiques mises à la liberté d'expression. La tendance qui existe de limiter l'expression protégée à la fois au stade de la définition et par les limites raisonnables de l'article 1 reflète la prudence de cette approche.

* A. Wayne MacKay, Professor at Dalhousie Law School, Dalhousie University, Halifax, Nova Scotia.

I would like to acknowledge the valuable research assistance of Pamela Rubin, a 1989 graduate of Dalhousie Law School, and to thank Professor Robin Elliot for reading the manuscript and making helpful suggestions.
L'auteur se demande ensuite quels ont été les premiers bénéficiaires de la liberté d'expression: ceux qui courent les risques de poursuites criminelles et ceux qui peuvent se permettre d'aller en justice. Dans ce dernier groupe, il s'agit en grande partie de commerces qui réclament la liberté d'expression pour leur commerce et de médias dirigés par des grandes compagnies, qui réclament la "liberté de la presse".

MacKay s'intéresse alors plus particulièrement à la liberté de la presse et pose la question capitale: quels intérêts cette liberté sert-elle? L'acceptation tacite du libéralisme est implicite dans l'idée qu'on se fait habituellement de la presse libre. Cette attitude ne tient pas compte du fait que la presse n'est pas neutre mais qu'elle favorise le plus souvent les dirigeants du monde des affaires dont les intérêts sont déjà bien servis par les institutions politiques sans avoir recours à la Charte. On trouvera un examen détaillé de la considération par les tribunaux des divers intérêts dans les parties qui traitent de l'accès des médias à la justice et du conflit qui peut exister entre la liberté de la presse et les autres droits.

MacKay affirme en conclusion qu'il est temps de changer le rôle de la liberté d'expression pour en faire non plus un instrument de la démocratie mais un instrument destiné à encourager avant tout le développement de la communauté dans le sens où elle veut s'exprimer, ce qui implique, pour les tribunaux, la volonté non plus de s'appuyer sur la théorie libérale mais de considérer avant tout l'influence de la vie réelle sur les divers groupes, souvent en marge, qui forment la société.

I. The Nature and Purposes of Section 2(b) of the Charter

A. The Basic Rationales

Freedom of expression was not invented by the Charter of Rights and Freedoms ¹ but it has acquired new dimensions as a consequence of its entrenchment. Similarly freedom of the press is being raised with new vigour in Canadian courts. Whose interests are being promoted in the advancement of both these freedoms? This article will attempt to address this question at this early stage in Charter development.

As with most sections of the Charter, the claims are arising in two major settings. Section 2(b) claims are being raised by accused persons in both criminal trials and young offender proceedings. The costs of such challenges are often borne by legal aid defence counsel. The second area of claims is challenges raised by the corporate media who can afford to pursue such matters in expensive litigation. There have been few claims by Canadians in other contexts to section 2(b) and some of those are advanced by organized lobby groups. So far the Charter has not been used by poor people who speak out against administrators of welfare or by poverty legal aid clinics, which have suffered funding cuts for

¹ Constitution Act, 1982, Part I.
supporting parties opposed to the government. The early trend is that freedom of expression has not been a major weapon for the poor except when they are facing a criminal sanction. How the courts deal with the cases will determine if this trend will continue.

The need for a purposive analysis of Charter guarantees has been well established by the Supreme Court of Canada. I shall not repeat here the oft quoted passages from Law Society of Upper Canada v. Skapinker, Hunter v. Southam Inc. and R. v. Big M Drug Mart. Instead, I shall attempt to follow them by briefly putting section 2(b) in its historical, linguistic and philosophical contexts.

Historically, freedom of speech and the press in Canada had acquired quasi-constitutional status even prior to the Charter. Freedom of speech was regarded as a vital part of the proper operation of Parliamentary institutions in a democratic society. To that extent freedom of speech and the press are implicit in the phrase "a Constitution similar in Principle to that of the United Kingdom", found in the preamble to the Constitution Act, 1867. Many of the pre-Charter cases arose as judicial responses to repressive provincial regimes in Alberta and Quebec.

The focus of judicial review prior to the Charter was the division of powers. Any issue related to civil liberties was restricted to a narrow analysis of the federal or provincial competence over the subject matter. The Alberta Press Reference exemplifies this approach with respect to freedom of expression and the press. The case concerned a bill introduced by the Alberta Legislature to compel newspapers to disclose their sources of news information and to print government statements correct-

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2 In Nova Scotia, Social Services Minister Edmund Morris retaliated against a sharply worded newspaper critique of him and his department by a single parent mother on welfare, Ms. Thompson, by dismissing her as an N.D.P. ghost writer. He then went on to reveal personal information from her welfare files as a way of attacking her credibility. Ms. Thompson had the last say in the matter, however, as she launched a private prosecution against Mr. Morris, alleging breach of the Freedom of Information Act, S.N.S. 1977, c. 10. Mr. Morris was found guilty and fined $100.00. This same Minister of Social Services was instrumental in cutting funding to Dalhousie Legal Aid, a poverty clinic, because it was a breeding ground for N.D.P. supporters. So far none of this has produced a section 2(b) challenge because of the time and cost of pursuing such a claim.

3 I have not done a proper survey of the section 2(b) cases, and thus cannot make this observation with statistical authority. However, it does seem to be borne out by the cases that I have located.

7 Ibid., at pp. 344 (S.C.R.), 359-360 (D.L.R.). This three part purposive approach to section 2(b) was followed in Re Cromer and B.C. Teachers' Federation (1986), 29 D.L.R. (4th) 641, 24 C.R.R. 271 (B.C.C.A.).
ing previous articles. In striking down the bill, Duff C.J.C. concluded that the province had no jurisdiction over the free working of the political institutions of the State. Thus, even prior to the Charter, political expression, being a freedom vital to all of Canada, could not be eliminated by provincial legislation.

One significant departure from the division of powers approach was seen in the judgments of Rand and Abbott JJ. in *Saumur v. City of Quebec* and later in *Switzman v. Elbling and Attorney General of Quebec*. Both judgments accepted the approach taken in the *Alberta Press Reference*, but went on to establish an "implied bill of rights" guaranteeing freedom of expression and the press in Canada, based on the fact that the Constitution Act, 1867 referred to "a Constitution similar in Principle to that of the United Kingdom". This theory did not gain much attention outside these two decisions and was later rejected totally by the Supreme Court of Canada in *Attorney General of Canada and Dupond v. City of Montreal*.

The *Alberta Press Reference*, *Saumur* and *Switzman* all demonstrate that the courts in Canada recognized the importance of freedom of the press despite the lack of any express constitutional guarantee. If one is seeking to define the scope of such a freedom, however, the cases are of little use. All three dealt with political speech only and left unaddressed any questions concerning the extension of protection outside that realm. It would be a mistake to view these cases as indicative of the courts' desire to create a broader idea of freedom of the press in Canada; in fact, later cases like *Cherneskey v. Armadale Publishers Ltd.* indicate an unwillingness to promote a broad role for freedom of the press in Canada. Protection of the inviolability and privacy of the individual and personal reputation often won the day over freedom of the press.

Linguistically, section 2(b) of the Charter is a broad statement of freedom of expression:

2. Everyone has the following fundamental freedoms:
   (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

This guarantee is quite detailed compared to the simple reference to freedom of speech in the First Amendment to the American Constitution. It is also significant that the term press has also been extended to include more modern forms of communication, such as the electronic media. The term expression is semantically broader than speech and

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should extend to cover symbolic speech and other non-verbal forms of expression. Since the state only limits "thought, belief and opinion" in subtle ways and without known effect, expression will be the major source of Charter challenges other than freedom of the press.

The guarantees of freedom of expression in section 2(b) are not internally limited in the same way as the equivalent guarantees in the European Convention on Human Rights and the International Covenant on Civil and Political Rights. As can be seen from the relevant provisions from these two documents, the Canadian guarantee bears more resemblance to these documents than the American First Amendment, with the exception of the internal modification, which is relevant to the proper judicial approach to section 2(b)—discussed in the next section of this article.

**European Convention on Human Rights**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

**International Covenant on Civil and Political Rights**

19. (1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary;

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre publique), or of public health or morals.

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Philosophically the approach to questions of freedom of expression has not varied significantly from one western democracy to another. The United States has been the main point of reference for Canadian judges in respect to free speech theory, aided and abetted by the early academic writers in the field.\textsuperscript{14} In simple terms the American theorists offer two major rationales for freedom of speech. One is the instrumental or political process rationale; the other is the individual self-actualization rationale. Both of these rationales are distinctly liberal in their origins and emphasize the role of the individual in society and the predominant value of liberty. Both of the foregoing values have been central in the interpretation of the American Bill of Rights. Whether they will be as central to Charter interpretation in Canada remains to be seen.

The instrumental or political process rationale regards the guarantee of freedom of expression as a means to other values rather than an end in itself. There are two strands to this instrumental rationale as developed in the United States. One sees freedom of speech as a means to truth by the creation of a free "marketplace of ideas" in which competing ideas can vie for supremacy on the basis of rational logic. This strand has been much criticized even by liberal academics such as Laurence Tribe:\textsuperscript{15}

This "marketplace of ideas" argument for freedom of speech may at times serve liberty well, but it relies too dangerously on metaphor for a theory that purports to be more hard-headed than literary. How do we know that the analogy of the market is an apt one? Especially when the wealthy have more access to the most potent media of communication than the poor, how sure can we be that "free trade in ideas" is likely to generate truth? And what of falsity: is not the right to differ about what is "the truth" subtly endangered by a theory that perceives communication as no more than a system of transactions for vanquishing what is false? What, finally, of speech as an expression of self? As a cry of impulse no less than as a dispassionate contribution to intellectual dialogue?

Tribe goes on in his text to describe the second branch of instrumental role for freedom of expression—the political process branch:\textsuperscript{16}

Closely related to the "marketplace of ideas" theory but even narrower in its reach and more preclusive in its implications has been the view that free speech is protected by the first amendment as essential to intelligent self-government in a democratic system. As expounded by Alexander Meiklejohn, its most widely cited proponent, this theory would limit the special guarantees of the first amendment to public discussion of issues of civil importance; in exchange for offering supposedly "absolute" protection to a political category of discourse, the theory would relegate to only minimal due process protection everything outside that category.


\textsuperscript{16} \textit{Ibid.}
This is the rationale that fits most comfortably with the emphasis on the maintenance of parliamentary institutions in the pre-Charter Canadian cases discussed previously. However, Tribe is also critical of this rationale for being under-inclusive and not doing justice to the majestic sweep of the American First Amendment:¹⁷

Yet when the theory has been thus expanded, it tells us disappointingly little. Indeed, in none of its forms does it tell us a great deal, since it takes for granted the virtues of the self-governance to which it argues that free speech is so necessary.

More generally, it must be said that Meiklejohn's conception of the first amendment, and Holmes', were both far too focused on intellect and rationality to accommodate the emotive role of free expression—its place in the evolution, definition, and proclamation of individual and group identity.

Tribe is most attracted to the individual self-actualization rationale for free speech because it regards the First Amendment as a value in itself and not simply a means to other values:¹⁸

To speak of "purposes" of the first amendment's protections of speech, press, assembly, petition, and (by implication) association, is to risk begging the central question posed by the Constitution's most majestic guarantee: is the freedom of speech to be regarded only as a means to some further end—like successful self-government, or social stability, or (somewhat less instrumentally) the discovery and dissemination of truth—or is freedom of speech in part also an end in itself, an expression of the sort of society we wish to become and the sort of persons we wish to be? No adequate conception of so basic an element of our fundamental law, it will be argued here, can be developed in purely instrumental or "purposive" terms.

What if anything should Canadian courts do with these various rationales evolved in the United States? As a first preliminary matter, account should be taken of the significant political and social differences between the two countries and how this has been reflected in their historical approaches to freedom of expression and the press. As a second preliminary matter, the linguistic differences between the respective guarantees of freedom of expression should be considered, and in particular the European roots of the Canadian provision—section 2(b) of the Charter.

On a more substantive basis the American rationales should only be used to the extent that they are useful for advancing the purposes and values of the Canadian document. The emphasis of the Supreme Court of Canada on a purposive approach to the Charter might be a sign that it will embrace an instrumental rationale. The Charter will be seen as a means to achieve other values. However, many of the early Charter cases have also stressed the dignity and the worth of the individual and this could push the court towards a rationale of individual self-actualization.¹⁹

¹⁷ Ibid., p. 787.
¹⁸ Ibid., p. 785.
Most likely the Supreme Court of Canada and lower courts will pick and choose between various theories depending upon the facts and context of a particular case. While Beckton in her writings calls upon the courts to develop a consistent theory of freedom of expression, I see no problem with embracing various theories to be applied as the justice of a particular situation demands. It is important that Canadian judges not be limited to American theories of free speech, or indeed to those of other liberal western democracies. The extent to which freedom of expression can be interpreted to change rather than affirm the existing society may depend upon the range of theories the courts are willing to embrace. Pluralism seems to be the ultimate conclusion of Tribe as the desirable path for American courts:

Any adequate conception of freedom of speech must instead draw upon several strands of theory in order to protect a rich variety of expression. Modes.

Freedom of the press as a protection of the rights of the Canadian people illustrates the limitations of liberal theory in analyzing freedom of expression. In a country where there is high corporate concentration in all aspects of the media, giving rights to the media is more likely to advance the interests of the corporate elite than those of the average Canadian citizen. Professor Harry Glasbeek puts the issue clearly:

There is a (not very deeply) hidden agenda which causes the angst about concentration of ownership. There are two items on this agenda. The first is endemic to the Charter of Rights and Freedoms. As it is based on the idealized notion that each individual is a sovereign, autonomous will, juridically equal to all other such individuals, it does not allow for the fact that the granting of rights to all regardless of class or history might lead to distortions, or better, augmented distortions in power.

To ignore the starting positions of people in discussing their rights and freedoms is to ignore the real world impact of Charter decisions.

Although protected expressly in s. 11(d) of the Charter, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the Charter (see Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, per Lamer J.). The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from community, as well as other social, psychological and economic harm. In light of the gravity of these consequences, the presumption of innocence is crucial.

20 Supra, footnote 14.


Ignoring the power and biases of the media is an equally shaky basis for developing a meaningful doctrine of freedom of the press in Canada. However, analyses such as those put forward by Glasbeek are too easily dismissed as paranoid and Marxist in their orientation. The real objection is that they are to the left of the narrow liberal spectrum and therefore not worthy of consideration by our courts. Whatever the ideological orientation of the writer, the crucial question is whether his or her views reflect a reality that should be taken into account in interpreting freedom of expression.

Failure to consider views about freedom of expression outside the normal liberal spectrum, would in itself be a denial of freedom of expression in the real sense. Feminist perspectives on the issue of pornography and freedom of expression is another illustration of the value of considering a variety of perspectives—including those which fall outside the liberal mainstream. Values associated with the equality of women, by adopting a feminist analysis, would be given greater weight in the balance of constitutional values than individualistic rights to freedom of expression. Whether this result would be achieved by excluding obscene expression from the ambit of section 2(b) or tipping the balance of the section 1 scales in favour of reasonable limits is not clear. Feminist analysis would certainly focus attention on the impact of certain modes of expression on the lives of women. On this latter point, some courts have shown some sympathy with the feminist perspective.

What judges will do with freedom of expression under the Charter will in most cases be limited by the parameters of liberalism. Indeed, the "free and democratic society" which has emerged as the major touchstone in Charter interpretation is primarily a liberal construct. Whether this is good or bad depends on one's views on liberalism, and whether it can accommodate real change in favour of the disadvantaged in society.

Freedom of expression is a classic liberal value and would be foremost in the minds of scholars such as Robert Samek who dismissed the

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Charter as a middle class document that would have little real impact on the lives of average Canadians.\(^{27}\) While such a prediction may prove true, it is not inevitable. Freedom of expression, like all the Charter rights, can be put to various uses, depending upon the values of the judges interpreting it. Freedom of expression can be used to change society as well as buttress the status quo, but the early cases do not indicate a trend towards a radical transformation of society. The first Supreme Court of Canada decision on freedom of expression set a cautious tone.

The vital nature of freedom of expression in a liberal society was emphasized by McIntyre J. in \textit{Retail, Wholesale and Department Store Union v. Dolphin Delivery Ltd.}\(^{28}\) Referring to the works of John Milton and John Stuart Mill, MacIntyre J. described freedom of expression as a vital aspect of western democracies and thereby gave support to the political process rationale for this freedom:\(^{29}\)

\begin{quote}
Freedom of expression is not, however, a creature of the Charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.
\end{quote}

As a variation on this political process rationale McIntyre J. also adopted the search for truth analysis alluded to earlier, and in particular referred to the American concept of a market place of ideas as expounded in \textit{Abrams v. United States}.\(^{30}\) In particular he cited the following passage with approval:\(^{31}\)

\begin{quote}
Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.
\end{quote}

Indicating that freedom of expression has roots as a constitutional value in Canada even prior to the Charter, he cited a number of pre-Charter cases to the effect that freedom of speech is a pre-condition to

\footnotesize\begin{quote}
\(^{29}\) \textit{Ibid.}, at pp. 583 (S.C.R.), 183 (D.L.R.).
\(^{30}\) 250 U.S. 616 (1919).
\end{quote}
the proper operation of parliamentary institutions in Canada. Finally he cited Professor Hogg to the following effect:

Canadian judges have always placed a high value on freedom of expression as an element of parliamentary democracy and have sought to protect it with the limited tools that were at their disposal before the adoption of the Charter of Rights.

The first Supreme Court of Canada case on freedom of expression indicates a cautious but not niggardly approach to section 2(b) of the Charter. While not drawing a clear line between speech and conduct, the court is willing to exclude things from the ambit of section 2(b). Furthermore, the social and economic costs of giving effect to freedom of expression will weigh heavily on the state’s side of the balance in the reasonable limits analysis. There were no real surprises in *Dolphin Delivery* with respect to freedom of expression. Courts will engage in a purposive analysis of freedom of expression, but the purposes likely to be adopted are reflective of the liberal values of both the judges and the larger Canadian society.

Although his later conclusions on state action in *Dolphin Delivery* make all of McIntyre J.’s comments obiter on the issue of freedom of expression, he appeared to adopt the instrumental approach to freedom of expression rather than accept that expression is an end in itself. To put the matter another way, the Supreme Court appears to adopt the political process rationale rather than the one based on individual self-actualization. However, there is no express reference to the latter rationale and the court has embraced it in its recent judgment in *Ford v. Quebec (Attorney-General)*, ruling on whether Bill 101 violates freedom of expression by restricting the language used for expression. The court fused a broad version of the instrumental approach with self-actualization rationales:

... the guarantee of freedom of expression in s. 2(b) ... cannot be confined to political expression important as that form of expression is ... [it] is only one form of the great range of expression that is deserving of constitutional protection because it serves individual and societal values in a free and democratic society.

The court also described freedom of expression as meaning more than the content of the expression it its narrowest sense, because of the

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freedom of thought, belief and opinion in section 2. Language is regarded as "so intimately related to the form and content of expression that there cannot be true freedom of expression . . . if one is prohibited from using the language of one's choice". Language is recognized not only as a medium for an idea in the marketplace of ideas, but rather as something which affects the very meaning and content of expression which is an end in itself.

While mentioning individual and societal values, the judgment stopped short of explicitly recognizing group rights to self-actualizing expression. Implicit acceptance, however, might be inferred from this judgment by the very fact that language of choice is at issue which implies a community of speakers and listeners.

From the cases so far it appears that the courts will engage in a purposive analysis of freedom of expression, but the purposes likely to be adopted are reflective of the liberal values of both the judges and the larger Canadian society.

B. Distinctions Between Freedoms and Rights

What significance, if any, is there in the designation of section 2 guarantees as freedoms rather than rights? In terms of what is expected from governments there are some possible significant differences. In respect to a freedom, the government is viewed as the enemy and the role of the courts is to prevent the government from regulating what has been identified as a free area of human conduct. A right, on the other hand, may require positive government intervention as well as non-intervention. In a liberal society courts are more comfortable dictating that the state actors refrain from certain conduct than mandating positive action on the part of government.

Professor William Lederman describes the traditional distinction between a freedom and a right in the following passage:

The Charter speaks of both rights and freedoms, and there is a jurisprudential difference between these concepts. Speaking first of the nature of the freedoms (specified in Charter section 2), one must realize that the total legal system is quite partial in its direct and specific coverage of all aspects of community life, individual or collective. There are not laws about everything, and life would be quite intolerable if there were . . .

Freedom of expression affords a good example. The potential range and depth of natural and original freedom of expression is as broad and varied as the capacity of the human mind to conceive things to be expressed. The law intervenes only marginally with a few specific negative limits on what may be expressed. Obscene words are forbidden, in aid of minimum standards of public decency. Defamatory

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37 Ibid., at pp. 748 (S.C.R.), 604 (D.L.R.).
words (libel and slander) are forbidden in order to protect personal reputations from false and damaging disparagement. Reasonable or seditious words are prohibited because they promote the overthrow of basic institutions of the democratic state by force, and so on.

In other words, the direct relevance of law to the positive definition of freedom of expression is residual only. What is not forbidden is permitted, and only a few specific forms of expression are legally prohibited. Moreover, Charter section 1 requires that these few prohibitions must be "reasonable limits prescribed by law that are demonstrably justified in a free and democratic society". Whether they have this character can always be reviewed in the courts... So, the direct impact of the Charter guarantee of freedom of expression is, through Charter section 1, to determine only which legal prohibitions on expression are justifiable as exceptions to freedom. The same reasoning applies to the other freedoms specified in Charter section 2... Generally speaking, if I wish to express political opinions I can do so, but I must make my own opportunities and take my own chances on whether an audience can be attracted. No public official or other citizen has any legal duty to see to these things for me. Contrast with this Charter section 3 which says that every citizen of Canada has the right to vote and hold elective office. The positive definition of this right in meaningful detail is in the election laws themselves, which establish voters lists, polling stations and elaborate administrations staffed by public officials with the legal duty to see that eligible citizens wishing to vote have the opportunity to do so. There are sanctions if the public officials do not do their duty. So, when one speaks of a right under the Charter, one is usually contemplating a complex of relevant lawsthat specifically define, implement and vindicate the right, and without which there would be no right. The rights of accused persons to a fair trial, or of young people to minority language education are also of this character, as indeed are many other guarantees of the Charter.

Lederman does recognize that in real fact situations, as opposed to pure theory, the line between a freedom and a right cannot always be drawn. Nonetheless, the identification of the unregulated area in which governments cannot act has animated the early jurisprudence on fundamental freedoms. The Lederman analysis of the distinctions between rights and freedoms was adopted by the Saskatchewan Court of Appeal in Retail, Wholesale & Department Store Union v. The Government of Saskatchewan (the Dairy Worker's case):

To understand what one has and what one can do when one has a freedom (as opposed to a right), one must "delineate the unregulated area"—the sphere of activity within which the freedom reigns. To do that, according to Professor Lederman, one must "first define the regulated area".

This approach to fundamental freedoms is also consistent with the pre-Charter approach which is described by Duff C.J.C. in Reference re Alberta Statutes as "freedom governed by law". Whether or not such

41 Supra, footnote 8, at pp. 133 (S.C.R.), 107 (D.L.R.).
an approach is analytically correct, it represents a liberal "laissez-faire" approach to the activities of government. It fails to take account of some important realities such as the fact that many people face political and economic as well as legal barriers to the exercise of their fundamental freedoms. In doing a purposive analysis of the Charter judges must also be mindful of the real effects of a particular interpretation. In many instances positive government action and not merely restraint is required to make a fundamental freedom meaningful. This is particularly true for people who fall outside the mainstream of Canadian society and thus do not fit the liberal image of the autonomous and self-activating individual. Adopting an exclusively liberal approach to fundamental freedoms will produce a status quo interpretation of the Charter.

C. Limiting Fundamental Freedoms: One Stage or Two?

One of the most important issues to emerge in the early Charter cases is whether limits can be placed on section 2 in the definition of the right itself, or only as part of a reasonable limits balance under section 1 of the Charter. Because the burden is on the state actor in section 1 and because the Supreme Court has taken a restrictive approach to the reasonable limits clause in R. v. Oakes, it is easier to limit fundamental freedoms by the process of defining the unregulated area under section 2. Perhaps the difficulty in justifying limits under section 1 of the Charter explains the trend towards imposing limits at the first stage of Charter analysis as well as the second. In any event, the two stage limitation is the trend.

Another possible explanation for this more limiting two stage balancing process is the pre-Charter experiences with fundamental free-
Because there was no pre-Charter equivalent of section 1, limits were imposed on the process of defining the freedom itself. The pre-Charter free speech case of Fraser v. The Public Service Staff Relations Board is a case in point:

On the other side, however, it is equally obvious that free speech or expression is not an absolute, unqualified value. Other values must be weighed with it. Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens, the value of speech may be cut back if the competing value is a powerful one. Thus, for example, we have laws dealing with libel and slander, sedition and blasphemy. We also have laws imposing restrictions on the press in the interests of, for example, ensuring a fair trial or protecting the privacy of minors or victims of sexual assaults.

In R. v. Keegstra, the Alberta Queen's Bench emphasized that while the Charter is remedial it is not revolutionary and adopted the philosophy articulated by E.G. Ewaschuk in the following passage:

On balance, the Charter should be viewed as a Canadian product which entrenches most safeguards already recognized by statute or at common law and which can work in the context of existing rules and procedures. In that sense, the Charter affirms the new and re-affirms the old and should be viewed from the perspective of protecting basic values, and not from the perspective of destroying the old regime. The Charter can and will work to the mutual benefit of all Canadians if interpreted from the positive perspective of goodwill and the proper balancing of the interests of all.

A similar emphasis on historical consistency emerges from the British Columbia Court of Appeal in Re Cromer and the B.C. Teachers Federation.

A third possible explanation for the two stage limitation is the use of American cases. The Americans have no express equivalent to section 1 of the Charter, and thus any limitation on the rights or freedoms must be considered in the context of defining the guarantee. In respect to the First Amendment to the American Constitution the question is not about the stage at which limitations may be imposed but rather whether the right is absolute or subject to limitation. Laurence Tribe summarizes the situation effectively:

A recurring debate in modern first amendment jurisprudence has been whether first amendment rights are “absolute” in the sense that government may not “abridge” them at all, or whether the first amendment requires the “balancing” of competing interests in the sense that free speech values and the government’s competing justifications must be isolated and weighed in each case. The two poles of this debate are best understood as corresponding to the two approaches, track one and track two.

50 Supra, footnote 7.
track two: on the first, the absolutists essentially prevail; on the second, the balancers are by and large victorious. While the "absolutes"—"balancing" controversy may have been "unfortunate, misleading and unnecessary," it has generated several important observations. First, the "balancers" are right in concluding that it is impossible to escape the task of weighing the competing considerations. Although only the case-by-case approach of track two takes the form of an explicit evaluation of the importance of the governmental interests said to justify each challenged regulation, similar judgments underlie the categorical definitions on track one. Any exclusion of a class of activities from first amendment safeguards represents an implicit conclusion that the governmental interests in regulating those activities are such as to justify whatever limitation is thereby placed on the free expression of ideas. Thus, determinations of the reach of first amendment protections on either track presuppose some form of "balancing" whether or not they appear to do so. The question is whether the "balance" should be struck for all cases in the process of framing particular categorical definitions, or whether the "balance" should be calibrated anew on a case-by-case basis.

The two tracks alluded to above, refer to track one analysis—concerning limitations aimed at the content of expression, and track two analysis—concerning restrictions on the flow of information, which is not aimed directly at the content of the expression. Americans are much more receptive to limitations in the track two situation—time, place and manner restrictions being classic examples. As Tribe states:52

On track two, when government does not seek to suppress any idea or message as such, there seems little escape from this quagmire of ad hoc judgment, although a few categorical rules are possible. But on track one, when the government's concern is with message content, it has proven both possible and necessary to proceed categorically.

A good illustration of the fusion of section 1 analysis and American jurisprudence on time place and manner restrictions is Canadian Newspaper Co. Ltd. v. Directeur des Services de la Voie Publique,53 which holds that freedom of the press includes freedom from the licensor. While agreeing that a municipality can place reasonable time, place and manner restrictions on newspaper distribution, the Quebec Superior Court held that a ban on all vending machine distribution boxes is a Charter violation. In reaching this conclusion the court appears to mix analogies to the American situation and a reasonable limits analysis under section 1 of the Charter.

In Canadian Newspaper Co. and Globe and Mail v. City of Victoria,54 the British Columbia Supreme Court held that the refusal to allow newspaper vending boxes does not constitute a violation of freedom of the press under section 2(b) of the Charter. Stressing the bona fide intention of the City Council to preserve the unique aesthetic appearance of the

52 Ibid., p. 584.
city of Victoria and the importance of that appearance to the tourist industry, the court held:\textsuperscript{55}

In my view these interests are sufficient to justify the prohibition against placing coin-operated newspaper boxes on the streets. Such a prohibition in my view does not amount to a prohibition against distribution of newspapers. That would offend against the Charter. . . No doubt the prohibition affects the pocket book of the petitioner but that is not the test.

Although Murray J. appeared to be speaking the justification language of section 1 of the Charter, he at no point referred to section 1. Instead he resorted to the American doctrine, of "time, place and manner restrictions" not constituting a violation of the right in the first instance.\textsuperscript{56} He emphasized that other means of distribution were open to the newspaper and that what was really at stake was not freedom of the press but rather the economic rewards associated with it. The judge had no difficulty in concluding that the Charter was not intended to protect the economic interests of a large newspaper chain. Whatever the merits of this conclusion, the mode of analysis adopted is American rather than Canadian and fails to consider properly section 1 of the Charter. The result would likely be the same either way but this case is a clear illustration of the confusion that can be engendered by relying too heavily on American cases.

Because of section 1 of the Canadian Charter judges cannot avoid some degree of \textit{ad hoc} or contextualized assessment of when limitations are appropriate. While this does not produce a clear theoretical framework, it does give more scope for doing justice in a particular case. The early signs are that Canadian judges want to limit fundamental freedoms at both stages of analysis. Whether this is done in the name of theory or contextualized conclusions is not clear.

As was noted in the previous section, \textit{Dolphin Delivery}\textsuperscript{57} indicated a willingness on the part of the Supreme Court of Canada to limit freedom of expression at both the first and second stage of Charter analysis. Certain kinds of picketing would fall outside the ambit of protected free speech, making it unnecessary to decide whether such an exclusion from freedom of expression was a reasonable limitation on the right. But even though it was unnecessary for him to do so, McIntyre J. indicated how he would balance the competing interests in a secondary picketing situa-
tion. Little evidence was presented in respect to section 1, but the court felt that certain aspects of the reasonable limits analysis were obvious and could be discussed even in the absence of evidence. McIntyre J. concluded that the state could successfully discharge its section 1 burden. The crucial factor was that this was secondary picketing affecting parties outside the normal collective bargaining relationship. He felt that the limitation was proportional because the injunction was only temporary. The essence of the reasoning on section 1 is captured in the following quotation:

The social cost is great, man-hours and wages are lost, production and services will be disrupted, and general tensions within the community may be heightened. Such industrial conflict may be tolerated by society but only as an inevitable corollary to the collective bargaining process. It is therefore necessary in the general social interest that picketing be regulated and sometimes limited. It is reasonable to restrain picketing so that the conflict will not escalate beyond the actual parties. While picketing is, no doubt, a legislative weapon to be employed in a labour dispute by the employees against their employer, it should not be permitted to harm others.

This case illustrates the wisdom of resolving disputes about the limits of freedom of expression by openly balancing the competing values. In the context of the Charter this is most effectively done in section 1. While the Americans must do their balancing in the context of the definition of the right, Canadians can take advantage of the existence of section 1. A priori exclusions of whole categories of free expression are not necessary in Canada. Because the burden is on the state rather than on the applicant under section 1, a decision to balance interests there, rather than in the right itself, would be one in favour of expanding freedom of expression. The Supreme Court of Canada, as well as the lower courts, has kept its options open on this vital question of the judicial approach to fundamental freedoms, but the trend is toward a two stage limitation.

II. Who Claims the Benefits of Freedom of Expression?

The limits of time and space allow only a rather cursory review of the early cases on freedom of expression. Freedom of the press which has spawned the majority of litigation to date, will be explored in more detail in the next section of this article. In this section I will identify six major categories of freedom of expression cases and explore the question of who appear to be the early beneficiaries of the Charter guarantee of freedom of expression.

A. Political Expression

It could be argued that all expression is political but I am using the term in its narrower traditional sense. *National Citizens Coalition Inc. v.*

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Attorney General for Canada\(^59\) involved a challenge to provisions that prohibited the printing and distribution of election literature unless it bore the authorization of a registered political party, and prevented anyone other than authorized parties from incurring election expenses. Arguments that such expenditure restrictions are needed to ensure equality among all participants did not prevail. The court refused to recognize the clear advantages that well-funded lobbies such as the National Citizens Coalition have over less financially secure groups. The challenged restrictions were struck down in the name of freedom of expression.\(^60\) Liberty prevailed over equality as a Charter value.

The Manitoba Court of Appeal took a more progressive approach to election expenses in \textit{MacKay v. Government of Manitoba}.\(^61\) This case involved state reimbursement of some election expenses of a minority group. Government financial aid to political candidates was found to be a legitimate effort to enlarge public discussion and debate rather than an unconstitutional effort to abridge freedom of expression. Everyone else is free to assess the views expressed by the subsidized minority group and free to express his or her views on the same issues.

Access to the relevant information is an important part of freedom of expression. In \textit{International Fund for Animal Welfare Inc. v. The Queen}\(^62\) there was a challenge to regulations which prohibited unlicenced people from observing or interfering with the seal hunt. The Federal Court held as follows:\(^63\)

An expansive and purposive scrutiny of paragraph 2(b) leads inevitably, in my judgment, to the conclusion that freedom of expression must include freedom of access to all information pertinent to the ideas or beliefs sought to be expressed, subject to such reasonable limitations as are necessary to national security, public order, public health or morals, or the fundamental rights and freedoms of others.

Although concluding that section 2(b) was violated, the Federal Court upheld the regulation on the basis of reasonable limits pursuant to section 1 of the Charter. It stated that the collective governmental interest in protecting the livelihood of the sealers in pursuing their historical avocation, and in protecting the seals themselves, outweighed the claimed freedom of expression. Implicit in this holding is the idea that there is a


\(^{60}\) \textit{Buckley v. Valeo}, 424 U.S. 1 (1976), charts a similar course in the United States.


fundamental right for sealers to earn their living in the historically accepted way, and that this took precedence over freedom of expression. The Federal Court of Appeal, however, (in reversing the decision in part) while agreeing with the "pressing and substantial" purpose characterization of the legislation in protecting the sealers' right to livelihood, found the restrictions on unlicensed persons' freedom of access both going beyond the minimal interference necessary and failing the proportionality test under section 1. This indicates that access to information as part of freedom of expression must be weighed carefully against economic or social rights, being commensurate in importance.

Real participation in the political process involves not only money and access to information, but also access to an appropriate forum to express opinions. Comité pour la République du Canada v. The Queen\(^{64}\) raised the question of whether a group can have access to a public airport to propagate its views. At the Federal Court trial level airports were described as a contemporary extension of the streets and public places of yesterday in which freedom of expression can be limited but not forbidden. The political group was asked to leave the airport because it was engaging in political propaganda. At trial this was declared a violation of the Charter. This is consistent with the court's opinion in International Fund for Animal Welfare v. The Queen that section 2(b) includes within its guarantees a right of access.\(^{65}\)

On appeal in Comité pour la République du Canada v. The Queen, there were three separate judgments but the majority reversed the finding at trial. One basis for this reversal was the finding that airports are not public forums. The more alarming approach is that of Pratte J. who characterizes the issue in terms of property rather than expression. He holds that since the government owns the airports it can legitimately restrict their use.\(^{66}\) The early victors in the battle for political free speech appear to be those with money and a platform to present their views. Those on the fringes have not fared so well.

There have been also some unusual claims made on the basis of section 2(b) of the Charter. In R. v. Reid\(^{67}\) the accused failed to file income tax returns for the years 1979-1983 on the basis that he did not have the expertise to fill out the forms and could not afford to hire someone to perform the task for him. Surprisingly, the argument that


\(^{65}\) Supra, footnote 63.

\(^{66}\) This same property analysis is used to limit access to public radio frequencies. Infra, footnote 136. Fortunately, Pratte J.'s view is the dissenting one as the other two find a violation of freedom of expression.

requiring a taxpayer to estimate the amount of tax payable was a violation of the section 2(b) guarantee of "freedom of opinion" was accepted at the Provincial Court level. Both the Alberta Queen's Bench and Court of Appeal rejected the argument that Mr. Reid's section 2 rights were violated.

In reaching its conclusion the Alberta Court of Appeal limited the reach of section 2(b) of the Charter by referring to the purposes and interests to be protected by that provision of the Charter. In stressing that some limits must be placed on the scope of the Charter rights themselves, and not all imposed by way of section 1 reasonable limits, Laycraft C.J.A. stated:

In their widest sense, the words, "thought, belief and opinion" would encompass virtually every mental process. Every human action is preceded by some thought, however fragmentary, giving rise to some opinion as to the appropriate course to follow; to the extent to which that opinion is not susceptible to rigorous proof, it becomes a belief. Yet the section cannot have been intended to protect, as a "fundamental freedom", the mental aspect of every human activity. The section has some finite limit.

The above case reinforces the idea of limiting rights at the definitional stage as well as under section 1 of the Charter. Such an approach is invited when litigants push Charter claims to extreme limits as appears to be the case in R. v. Reid. Other expansive and novel claims made under section 2(b) of the Charter have been limited by relying on the non-application of the Charter under section 32 and the imposition of reasonable limits under section 1. One message is clear. While political expression will be protected, limits will be imposed at various stages in the Charter analysis.

B. Hate Propaganda

Another illustration of the limited uses of freedom of expression for those on the fringes of the political and moral spectrum is hate propaganda. Two early cases concerning expressions of hatred against the Jews present conflicting views regarding the limitation of the definition of protected expression as well as different approaches to the weighing of section 1 justifications.

68 For purposes of this analysis it relies on R. Moon, The Scope of Freedom of Expression (1985), 23 Osgoode Hall L.J. 331.
69 Supra, footnote 67, at p. 6.
70 For two more novel, but unsuccessful, attempts to use s. 2(b), see Brisebois v. Chabot (1988), 50 D.L.R. (4th) 381, 3 W.W.R. 669, 66 Sask. R. 126 (Sask. C.A.) where a mayor challenged provisions of The Urban Municipality Act which required the mayor to disclose pecuniary interests in matters before council and precluded him from taking part in related council debates, and McKinney v. Liberal Party of Canada (1987), 43 D.L.R. (4th) 706, 61 O.R. (2d) 680 (Ont. S.C.), where the plaintiff challenged a political party's right to exercise party discipline over his Member of Parliament. The former argument was dismissed under s. 1; the latter under s. 32.
In *R. v. Keegstra*\(^1\) an Alberta teacher was charged with promoting hatred against the Jews by the style and content of his high school history class. James Keegstra was charged under section 281.2(2) of the Criminal Code\(^2\) for the wilful promotion of hatred against an identifiable group. As part of his defence he challenged the constitutionality of the relevant Criminal Code provision as a violation of his rights to freedom of expression under section 2(b) of the Charter. The Alberta Court of Appeal overturned a Queen’s Bench decision which would have placed hate propaganda outside the ambit of section 2(b) protection. The Court of Appeal, using the "marketplace of ideas" rationale, held that it is not just careful and correct speech that is to be protected for the "safe working of a democracy". This approach ignores "freedom" in the context of Charter guarantees against discrimination and the promise to promote multi-culturalism: regarding hate literature as merely imprudent speech fails to take into account the abridgment of the freedoms of the target groups. This conclusion did not escape Quigley J. at trial, who concluded that the challenged provision promoted rather than abridged freedom of expression.\(^3\)

In my view, the wilful promotion of hatred under circumstances which fall within s. 281.2(2) of the Criminal Code of Canada clearly contradicts the principles which recognize the dignity and worth of the members of identifiable groups, singly and collectively; it contradicts the recognition of spiritual and moral values which impels us to assert and protect the dignity of each member of society; and it negates or limits the rights and freedoms of such target groups, and in particular denies them the right to the equal protection and benefit of the law without discrimination.

Under these circumstances, it is my opinion that s. 281.2(2) of the Code cannot rationally be considered to be an infringement which limits "freedom of expression", but on the contrary it is a safeguard which promotes it. The protection afforded by the proscription tends to banish the apprehension which might otherwise inhibit certain segments of our society from freely expressing themselves upon the whole spectrum of topics, whether social, economic, scientific, political, religious, or spiritual in nature. The unfettered right to express divergent opinions on these topics is the kind of freedom of expression the Charter protects.

\(^{71}\) *Supra*, footnote 48.

\(^{72}\) R.S.C. 1970, c. C-34.

\(^{73}\) *Supra*, footnote 48, at p. 268 (C.C.C.).
from hate mongering and the questioned section permits the conviction of a person who causes "no serious harm or risk of harm". Kerans J.A. dismissed the issue of difficulty in immediately proving the success of hate promotion: "If the accused offers any real threat to the target group, the Crown should be able to prove it." Kerans J.A. restricted the range of possible harm from mere annoyance to a sense of alienation and made a distinction between "isolated abuse" and "crushing systemic discrimination". The ability to draw a line easily between these two, especially while failing to consider the impact on the target group's freedom of expression as "serious harm", is questionable. What Kerans J.A. calls "psychological pinpricks" may be enough to intimidate minority groups from open expression, particularly those groups without established means of decrying hate propaganda.

In examining the same Criminal Code section, the Ontario Court of Appeal came to an opposite decision in R. v. Andrews. Freedom of expression was found not to be absolute, and hate mongering is not protected in that it is so completely antithetical to the very freedoms of which its promoters seek to avail themselves. That such speech is not intended for Charter protection is reinforced by the multicultural considerations in section 27.

Directly addressing the Keegstra decision, Cory J.A. held that, even if there were a section 2(b) infringement, section 281.2 is a reasonable limit under section 1:

One of the prime reasons put forward in R. v. Keegstra for determining that s. 1 should not be utilized was that s. 281.2 of the Code does not require proof that the statements of the accused had actually resulted in acceptance of the hatemonger's message which would lead to harm or the serious risk of harm to the identifiable group. I cannot accept that as a basis for disregarding s. 1.

Much of the Criminal Code is aimed at crime where no harm has been occasioned...

The empirical data derived from the history of the Third Reich and the studies of the Cohen committee establish not only the risk of harm occasioned to identifiable groups by the promotion of hatred but the actual harm caused. They establish the need to restrain its promotion and they fully justify the application of s. 1 of the Charter to its provisions. The impugned section is not simply paternalistic, well-intentioned meddling by Parliament, cutting back on free speech for no real reason. It is based on the hard, chilling facts of history.

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74 Ibid., at p. 237 (W.W.R.).
75 Ibid.
76 Ibid., at p. 230.
77 Ibid.
79 Ibid., at pp. 186-187.
A second high profile Ontario hate propaganda case is R. v. Zundel. Like Keegstra, this case stirred much comment and controversy and provided Mr. Zundel with a platform to express his views. He was charged under section 177 of the Criminal Code with knowingly publishing false statements likely to injure the public interest. The Ontario Court of Appeal concluded that Mr. Zundel’s exercise of freedom of expression was outside the protections of section 2(b). Emphasizing the distinction between a freedom and a right, the court concluded that section 177 of the Criminal Code is aimed at an area of free expression that can be legitimately regulated. It was fortified in its view by the similar conclusion reached in the United States on these kinds of issues. Protecting Zundel’s expression would advance none of the purposes of freedom of expression.

Hate propaganda has been recognized as a real problem in Canada and the rejection of Charter support for this form of expression is desirable. The cases are a reaffirmation of the value of equality in this area and the approach followed not only in the Criminal Code but also by human rights commissions. What is not so clear is whether Andrews and Zundel follow the correct path to this conclusion. Since both cases conclude that the relevant Criminal Code provisions could have been upheld as a reasonable limit on freedom of expression under section 1 of the Charter, this may have been the more appropriate way to balance the competing interests of liberty and equality. I am not, however, troubled to live in a country where hate propaganda is outside the realm of protected expression.

C. Public Criticism of the Courts

It is not surprising that Canadian courts have been extensively protected from public criticism. In keeping with British tradition, protections in the form of defamation laws, contempt powers and rules against scandalizing the courts, have been upheld as necessary to promote the

80 Supra, footnote 45.
81 H.R.S. Ryan, The Trial of Zundel, Freedom of Expression and Criminal Law (1987), 44 C.R. (3d) 334. Interestingly, the re-trial of Mr. Zundel, ordered by the Ontario Court of Appeal, received very little press or media coverage.
83 The Special Committee on Hate Propaganda in Canada (1966), chaired then by Dean Maxwell Cohen, and more recently the Law Reform Commission of Canada, Hate Propaganda, Working Paper 50 (1986).
proper administration of justice. In the United States such extensive protections of the dignity of the judiciary have been rejected as unnecessary, but, as the following passage from a judgment of the British Columbia Supreme Court shows, criticism of the judicial system is regarded as a serious matter in Canada:

No wrong is committed by any one who criticizes the courts or a judge in good faith, but it is of vital importance to the public that the authority and dignity of the courts should be maintained and that when criticism is offered it should be legitimate. To refer to the jurors in this case as criminals and to describe the judge as causing exquisite torture is calculated to lower the dignity of the court and to destroy public confidence in the administration of justice, and a practice of this kind must be stopped and stopped immediately in the public interest. I find the parties guilty of contempt and if it were not for the fact that The Vancouver Province possesses a long and respected background in this community and that an apology, even though inept, has been made, I would impose severe penalties.

Professor Robert Martin argues that Canadian courts have been given too much protection against public criticism and that the Charter should be used to reduce the broad powers of contempt. There is no doubt that such broad powers have a chilling effect on free discussion of the operation of our courts. There are however reasons why the courts should have some degree of protection from public criticism.

All society has an important stake in ensuring that the court’s reputation for integrity is not tarnished. If courts are viewed as incompetent to handle disputes or partial to particular interests, those already enmeshed in the system will be less likely to accept an unfavourable verdict. If the parties are not satisfied with the verdict in the sense that they know their dispute has received a full hearing and that the verdict was rendered according to accepted principles of law, the court, rather than decreasing the tension in a dispute, is likely to increase it.

The real question is how much protection judges should be afforded and how that protection should be balanced against the rights of the citizen to express freely criticism of the courts. Canadian courts are well

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protected from adverse comment. Indeed, many would suggest that Canadian judges have more protections from public scrutiny than is desirable in a free and democratic society. At a time when judges are making broad political decisions on rights and obligations in Canadian society, the courts as an institution should be more open to public scrutiny. This would be a constructive use of section 2(b), but one that is not likely to come from the very courts which benefit from this shield against criticism.

Common law powers of contempt, as augmented by statutes on contempt or scandalizing the court, do produce a "chilling effect" in respect to comments and criticisms about judges. At the Ontario Supreme court level in R. v. Kopyto, the Canadian Civil Liberties Association in an effort to intervene in the case made the following declaration by way of affidavit:

The Association has experienced the chilling effect resulting from the existence of the common law crime of scandalizing the Court. On many occasions, the Association has been invited by the media to comment on judicial decisions. The Association's awareness of the scandalizing offence has served periodically to inhibit its ability to make such comments in the most effective manner possible.

The experience of Mr. Kopyto, who was not allowed to practice law until he apologized to the court, is a vivid illustration of the courts' power in this area.

The decision of the Ontario Court of Appeal on Mr. Kopyto's appeal does offer some antidote to this rather bleak analysis of the likely use of section 2(b) in respect to contempt. The court overturned Mr. Kopyto's conviction on a charge of scandalizing the court. He had called a judge's ruling "a mockery of justice". While the court ruled that his comments were unreasonable and unprofessional, it concluded that to apply a criminal sanction to his conduct would violate his right to freedom of expression. In so holding the Ontario Court of Appeal emphasized that the courts were not fragile flowers in need of Criminal Code protection. This ruling is wide-ranging and thorough, and does suggest that the Charter will be a useful vehicle for breaking down the immunity from criticism that the judiciary has traditionally maintained.

D. Free Expression in the Workplace

One of the most important forums for the free expression of ideas is in the workplace. Picketing is one such form of expression and it is

89 *Dolphin Delivery*, supra, footnote 28.
accorded limited protection in *Dolphin Delivery*.\(^{93}\) Even before the Charter the rights of public servants to be politically active was restricted by the courts.\(^{94}\) The restrictive provisions on the political activities of civil servants in Nova Scotia were pared down by the use of section 2 of the Charter in *Re Fraser and Attorney-General of Nova Scotia*.\(^{95}\) While recognizing the value of a civil service that maintains neutrality, Grant J. concluded that the scales need to be tipped more towards the free political speech of government employees. Such an interpretation is easily justified on the political process rationale for freedom of expression. The degree of restraint that must be exercised depends on the position and visibility of the particular public servant.\(^{96}\)

In *Re Cromer and B.C. Teachers Federation*\(^{97}\) restrictions contained in a professional Code of Ethics were upheld as not violating a teacher’s freedom of expression. The Code did not prohibit a teacher from criticizing a colleague in public, but he or she was only to engage in such criticism after speaking to the colleague in person. The British Columbia Court of Appeal solved the problem by a balancing of interests and concluded that Mrs. Cromer’s freedom of expression was not violated on the facts of her case:\(^{98}\)

I now turn to the balancing of interests involved in determining whether Mrs. Cromer’s freedom of expression, guaranteed by the Charter, overrides the Code of Ethics which would otherwise apply to her.

The Code of Ethics is designed to avoid disharmony among teaching colleagues, and to promote professional standards, all in the interests of creating an environment where the children being taught will receive the best educational opportunity possible. As both the trial judge and the judicial committee noted, cl. 5 of the Code of Ethics does not preclude criticism by one teacher of another; it sets out a procedure for making criticism that is intended to increase the beneficial effects of the criticism and minimize the harmful effects.

On the other side of the balance lies the importance of Mrs. Cromer being able to speak her mind.

The effect of the levying of compulsory union dues on the individual employee’s freedom of expression was explored in *Re Lavigne and Ontario Public Services Employees Union*.\(^{99}\) In rejecting the American view that a compulsory payment of union dues can be a violation of

\(^{93}\) *Supra*, footnote 28.

\(^{94}\) *Supra*, footnote 47.


\(^{97}\) *Supra*, footnote 7.


freedom of expression,\textsuperscript{100} the Ontario High Court concluded that the rather minor depletion of Mr. Lavigne's financial resources was not likely to hamper seriously his freedom of expression. Nor was the court impressed by the argument that Mr. Lavigne might become associated with the political causes supported by his union. While the High Court of Justice drew a line between union contributions for legitimate collective bargaining purposes and political activity, the Ontario Court of Appeal rejected this stance,\textsuperscript{101} recognizing that judicial values ought not to be imposed on decisions which are rightly internal to unions, thereby nipping in the bud a potentially significant limit on freedom of expression for unions.

Existing statutory limitations on unions' freedom of expression have recently been upheld in \textit{Re Ontario Public Service Employees' Union and Attorney-General of Ontario}.\textsuperscript{102} While recognizing that prohibiting a public service employees' union from making contributions to political parties was indeed a violation of section 2(b) of the Charter, as were restrictions on individual employees' abilities to engage in a broad range of political activities,\textsuperscript{103} the acts in question were saved under section 1. Eberle J. stressed the important purpose of such legislation:\textsuperscript{104}

\textit{The involvement of public servants in controversy over current political issues would, in my view, be a serious breach of that political neutrality and impartiality which it is so important to maintain. Once that neutrality and impartiality and the integrity of the public service have been eroded or even if, in the eyes of the public, those qualities appear to have become eroded, it would surely be a most difficult, lengthy and perhaps even impossible task to restore them.}

While restrictions on certain activities, such as running for office, seem reasonable, restrictions on such activities as canvassing, for instance, in actuality do little to maintain neutrality, impartiality or integrity. Further, Eberle J.'s perception of the public's view of the public service as impartial or neutral belongs to a kinder, gentler era which may never have existed. Particularly if unions can opt to give money to high profile political causes vehemently opposed or supported by the existing political parties (as per the Court of Appeal in \textit{Re Lavigne}), a prohibition against direct contributions to political parties is a mincing distinction.

\textbf{E. Commercial Free Speech}

The protection of commercial freedom of expression is part of the larger debate about whether the Charter should extend to the protection of economic interests. Despite early indications that the courts are reluc-

\textsuperscript{100} \textit{Int'l Assoc. of Machinists v. Street}, 367 U.S. 740 (1961).

\textsuperscript{101} \textit{Supra}, footnote 99, at pp. 504 (D.L.R.), 566 (O.R.) (Ont. C.A.).


\textsuperscript{104} \textit{Supra}, footnote 102, at pp. 720 (D.L.R.), 709 (O.R.).
tant to extend the Charter to the economic sphere, the Supreme Court of Canada decisions in *Ford v. Quebec (Attorney-General)* and *Irwin Toy Ltd. v. Quebec (Attorney-General)* make it clear that commercial speech is protected under section 2(b) of the Charter. In *Ford*, a challenge was made to the provisions of Quebec’s Bill 101 which required advertising in French only. The court asked whether there is any reason the section 2(b) guarantee should not be extended to commercial expression, rather than whether section 2(b) should be construed as extending to particular categories of expression. The court pointed to advertising’s intrinsic value as expression, the protection such freedom affords to listeners as well as speakers, and the importance of (supposedly) informed economic choices to individual fulfilment and autonomy. Accordingly, no sound basis to exclude commercial speech from the ambit of section 2(b) was found. This reasoning raises questions about the real purposes of the Charter. It is a classic illustration of the free marketplace of ideas approach to freedom of expression. An important question is whether we can really trust companies or the media to fairly inform consumers. To raise the question is to answer it. In my view the Charter, as a remedial document, should be aimed at protecting those who are not well served by the political process. Large businesses do not fall into this category. Promotion of commercial free speech in a media dominated by business interests is more likely to impair consumer free choice than promote it.

The decision in *Ford* set the stage for the *Irwin Toy* decision, where issues of economic manipulation were considered and led to an easy application of section 1 of the Charter to the impugned legislation. Here, a consumer law prohibiting certain forms of advertising directed at children was saved under section 1, although violating section 2(b). Emphasizing the lack of any basis for excluding commercial speech from section 2(b) protection, the majority applied a section 1 analysis, first finding a pressing and substantial need for the legislation and then going on to discuss proportionality. Here, in addressing “deleterious effects” on advertisers, the majority quite easily held that there was “no prospect” that the potential loss of revenues would outweigh the importance of the purposes of the legislation. The court implied that the Charter’s purpose is not to insure the economic status quo and that restrictions on commercial speech would more easily be saved under section 1 than those on

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105 Dickson C.J.C. ’s comments about the reach of s. 7 in *R. v. Edwards Books and Art Ltd.*, supra, footnote 39, is one example of this judicial reluctance.

106 *Supra*, footnote 34.


108 *Supra*, footnote 35.


110 *Supra*, footnote 107, at p. 249.
political speech, for example. While not eliminating the possibility of
two-stage limitations on fundamental freedoms, the court’s choice of
section 1 as the practical means of balancing interests is encouraging.

F. Freedom of Expression on the ‘‘Moral Fringes’’

Morality is an inherently debatable issue and what practices are
central or on the fringes changes. It could be persuasively argued that
neither prostitution nor pornography are issues of morality—be they at
the centre or on the fringes of our society. What prostitution and pornog-
raphy have in common is the exploitation of people (predominantly women
and children) for economic gain. So characterized, both prostitution and
pornography raise issues of equality and fundamental justice rather than
expression. Courts have, nonetheless, perpetuated the liberal conception
that regulation of both prostitution and pornography is primarily a limi-
tation upon freedom of expression in section 2(b) of the Charter. This
section provides a classic example of the need for judges to consider
legal perspectives outside the liberal mainstream, such as those of some
feminists. It also emphasizes the importance of interpreting the Charter
in a real-life context.

Limitations on freedom of expression based on liberal concerns about
morality are well established. A flurry of early cases have been precipi-
tated by Canada’s tougher new laws on prostitution. In R. v. McLean,111
MacKay J. held that freedom of expression does not extend to discus-
sion between a prostitute and his or her customer:

... the constitutional values sought to be protected and enhanced by s. 2(b) are
as described by Emerson in his seminal article ‘‘Towards A General Theory of the
First Amendment’’ (1962-63), 72 Yale L.J. 877:

The values sought by society in protecting the right to freedom of expres-
sion may be grouped into four broad categories. Maintenance of a system of
free expression is necessary (1) as assuring individual self-fulfillment, (2) as
a means of attaining the truth, (3) as a method of securing participation by
the members of the society in social, including political, decision-making,
and (4) as maintaining the balance between stability and change in the society.

It is those values which, I trust, we have enshrined in our Constitution. It is to
demean the grand concept of freedom of opinion and expression to relate it to the
bargaining between a prostitute and a customer as to what sexual services are
available and at what price.

It is significant to note that the claimed freedom of expression was
excluded from the realm of protected speech and not balanced against
competing values in section 1 of the Charter. The Alberta Court of Appeal
in R. v. Jahelka112 also concluded that communication for the purposes

(B.C.S.C.).

112 (1987), 79 A.R. 44 (Alta. C.A.). This case has been heard but not decided by
the Supreme Court of Canada.
of prostitution is not protected expression, but it reached this conclusion by a balancing of the competing interests in section 1 of the Charter rather than by a prima facie exclusion from section 2(b) itself. Ontario courts have gone in every direction on this issue and there is no guidance from that province’s court of appeal.

In Nova Scotia, *R. v. Skinner*\(^{113}\) took a different approach and protected communication for the purposes of prostitution under the Charter. More accurately it struck down the offending provisions of the new prostitution law\(^ {114}\) on this topic. MacKeigan J.A., speaking for the majority, expressly rejected the conclusion in *R. v. McLean*:\(^{115}\)

> I respectfully believe this opinion is clearly wrong: freedom is not to be denied because of the unpopularity of views expounded or the immorality of the exponent. As Voltaire said, “I do not believe in a word that you say, but I will defend to the death your right to say it.”

Accepting the political purposes of freedom of expression, the Nova Scotia Court of Appeal also recognized broader purposes—even including commercial activity. Adopting a John Stuart Mill approach to the topic MacKeigan J.A. stated:\(^ {116}\)

> No matter how much one disapproves of the prostitute and her customer, the law must preserve through the Charter their right to live, sexually and otherwise, without interference by the law where no harm is done to anyone else.

The Manitoba Court of Appeal took quite a different approach to the question of the Charter and prostitution in *Reference re Sections 193 and 195(1)(c) of the Criminal Code*.\(^ {117}\) This court went even further than its Alberta counterpart in concluding that there was no constitutional protection for carrying on the trade of prostitution in either sections 2(b) or 7 of the Charter. Characterizing the claim as a strictly economic and commercial one, the Manitoba Court of Appeal ruled that such claims are beyond the scope of the Charter. While the judges agreed in the result they had many different reasons why the challenge should fail. There was, however, general agreement that to use the Charter to protect prostitutes would demean the document and that the issue could be resolved without getting to the balancing of interests under section 1 of the Charter. The Supreme Court of Canada will have to reconcile or reject the conflicting court of appeal cases when it renders judgment on these cases in the near future.

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\(^{113}\) (1987), 79 N.S.R. (2d) 8 (N.S. App. Div.). This case has been heard but not decided by the Supreme Court of Canada.

\(^{114}\) *Criminal Code, supra*, footnote 72, s. 195.1.

\(^{115}\) *R. v. Skinner, supra*, footnote 113, at p. 11.

\(^{116}\) *Ibid.*, at p. 16. Jones J.A. dissented, concluding that the public exploitation of women in the streets should not be given constitutional protection.

\(^{117}\) [1987] 6 W.W.R. 289 (Man. C.A.). Both the Alberta and Nova Scotia cases were heard in the Supreme Court of Canada during the spring of 1988. The Manitoba decision has not been appealed.
The decision of the Manitoba Court of Appeal is illustrative of the limits that will be placed on the guarantees of the Charter when it comes to protecting outcasts and people on the fringes of Canadian society. In the words of Huband J.A.:\textsuperscript{118}

I think that Milton and Mill would have been astounded to hear that their disquisitions were being invoked to protect the business of whores and pimps. I confess my own astonishment.

I would question whether Milton and Mill would indeed be so astounded. The statement may say more about the limits of the Manitoba Court of Appeal’s liberalism than those of the originators of liberal theory. Such statements do reflect the limits of liberal theory in action and throw doubt on the value of an overarching theory of fundamental freedoms. It also raises the question of whether other sections of the Charter, such as sections 7 and 15, might be a more direct way of confronting the thorny problem of prostitution.\textsuperscript{119}

Another age old problem of freedom of expression is what to do about obscenity. Obscenity offences have been traditionally conceived as raising freedom of expression concerns, although as indicated earlier there are other ways of looking at such provisions. As with commercial speech there is an initial question about whether obscenity should be excluded from the categories of protected speech, or balanced against competing claims such as the need to protect children and the rights of women to equality. \textit{R. v. Red Hot Video}\textsuperscript{120} accepted that obscenity is a form of expression and balanced the competing interests in section 1 of the Charter. Since this balancing option is not open to the United States, courts there have tended to exclude obscenity from the First Amendment. Anderson J. in \textit{Red Hot Video} engaged in an impact assessment of obscenity on the lives of children and women which has won favour with some feminists and other commentators.\textsuperscript{121} Of course, the section 1 Charter analysis presupposes that obscenity raises freedom of expression issues.

Most of the early Charter cases in this area concern censorship. The pre-Charter backdrop is \textit{Nova Scotia Board of Censors v. McNeil}\textsuperscript{122} in which a distribution of powers attack on censorship did not succeed. In \textit{Re Ontario Film and Video Appreciation Society}\textsuperscript{123} the powers of the

\textsuperscript{118} \textit{Ibid.}, at p. 295.


\textsuperscript{120} (1985), 18 C.C.C. (3d) 1 (B.C.C.A.). Leave to appeal to the Supreme Court of Canada was refused.

\textsuperscript{121} Such an approach is not as clearly advocated by the Fraser Committee in Report of the Special Committee on Pornography and Prostitution (1985).


Ontario Board of Censors was curtailed because the guidelines for censorship were vague and not prescribed by law within the meaning of section 1 of the Charter. Another challenge came in the customs context in *Luscher v. Deputy Minister of Revenue*.\(^\text{124}\) The Federal Court of Appeal concluded that the words "immoral" and "indecent" are too broad to be prescribed by law for the purposes of section 1. These words were the key tests for not allowing books to pass through customs. In both the foregoing Charter cases obscenity, blatantly falling within the Criminal Code definition, is accepted as a form of protected speech and the issues are resolved in section 1 of the Charter.

Finally, in *Re Information Retailers Assoc. of Metropolitan Toronto*\(^\text{125}\) the Ontario Court of Appeal held that the freedom to distribute and sell is as essential to freedom of expression as the freedom to publish. Echoing the approach taken by the Nova Scotia Court of Appeal in *Skinner v. The Queen*, the Ontario court held that freedom of expression extends beyond what is pleasing, to expressions that are distasteful and morally offensive. While recognizing the validity of reasonable limits to protect the sensibilities of children, the net was cast too wide in this case and the court struck down the relevant by-law.

There is really no pattern to freedom of expression cases at this point. There are some noteworthy developments, such as the reduction of the state’s powers of censorship, but there are also some questionable rulings on commercial speech and the denial of political speech to those who do not have access to the modes of communication. Whether the courts limit freedom of expression in the definition of the guarantee or as part of the section 1 analysis varies from one context to another. While the rationales for the protection of freedom of expression have been largely liberal in origin they have not been exclusively so. One pattern is that the people most likely to benefit from freedom of expression are those who can afford to litigate.

G. Application of the Charter to Judges

Since many of the limitations on freedom of expression, freedom of the press and peaceful assembly operate through the exercise of judicial discretion, the question arises as to whether or not the exercise of this discretion is governed by sections 2(b) and (c) or any other part of the Charter. Contempt of court, rules barring media access to the courts and injunctions to limit or forbid a parade or demonstration are examples of such judicial actions. The Charter expressly provides for the application of the Charter to the Parliament and Government of Canada.\(^\text{126}\)


\(^{125}\) (1985), 22 D.L.R. (4th) 161, 52 O.R. (2d) 449 (Ont. C.A.). This case is on appeal to the Supreme Court of Canada.

\(^{126}\) Section 32(1)(a).
and to the legislatures and governments of the provinces.\textsuperscript{127} When judges limit access to the courtroom, issue a contempt citation or enjoin a demonstration, they are usually acting pursuant to some statutory authority in the broad sense, and, as such, their actions might fall under section 32 of the Charter. The same reasoning can be applied to extend the Charter to regulatory agencies and administrative tribunals acting under statutory grants of power. Indeed, the general application of the Charter to administrative agencies is established in Singh v. Minister of Immigration and Employment.\textsuperscript{128}

Decisions like Re Southam Inc. and The Queen\textsuperscript{129} concerning access to juvenile trials under the old Juvenile Delinquents Act\textsuperscript{130} make it clear that judges consider themselves bound by the Charter. In R. v. Begley\textsuperscript{131} Smith J. flatly rejected the argument that judges enjoyed some special immunity from scrutiny under the Charter, and the recent New Brunswick case, Charters v. Harper,\textsuperscript{132} gives some indication that not only will judges' action be subject to scrutiny, but they may have lost their common law immunity from personal liability for those actions as well. Charters did not succeed in his action for damages against the judge on the basis that the judge was not a state actor, but not on the basis that judges are above the Constitution.\textsuperscript{133}

Whether one uses an agency argument or a statutory authority argument, it seems clear that the Charter will apply in many respects to judicial action. It would be an absurd position if the very agency chosen to oversee and protect the guaranteed freedoms of our society could itself be given a free hand to violate these guarantees. The Supreme Court of Canada decision in Dolphin Delivery\textsuperscript{134} does not go that far in limiting Charter challenges to judicial action. While recognizing that the Charter could apply to the common law and that the presence of a government actor in otherwise private litigation might change his conclusion, McIntyre J., speaking for the court, concluded that an injunction against picketing (as between two private parties) was not subject to the Charter. Dolphin Delivery was a claim for freedom of expression under

\textsuperscript{127} Section 32(1)(b).
\textsuperscript{129} (1983), 146 D.L.R. (3d) 408, 41 O.R. (2d) 113 (Ont. C.A.).
\textsuperscript{131} (1983), 38 O.R. (2d) 59 (Ont. H.C.).
\textsuperscript{132} (1986), 74 N.B.R. 264 (N.B.Q.B.).
\textsuperscript{133} Charters' application for damages against the judge for breach of his Charter rights was dismissed because the dispute between him and the judge was regarded as a private matter rather than one involving state action. Charters v. Harper (1987), 79 N.B.R. 28 (Q.B.).
\textsuperscript{134} Supra, footnote 28.
section 2(b) of the Charter, but the courts were exercising a common law power rather than a statutory one. If a judge is acting pursuant to statute that might change the situation, at least in a case where there is a clear public presence, such as a Crown prosecutor. There is a clear rejection of the broad view that the courts are part of the state machinery and therefore are subject to the Charter as the other branches of government.  

It is my view that s. 32 of the Charter specifies the actors to whom the Charter will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation.

With respect to the courts, McIntyre J. stated:

While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive and judicial, I cannot equate for the purpose of Charter application the order of the court with an element of governmental action.

In the rather unusual case of British Columbia Government Employees Union v. A.G.B.C. the Supreme Court of Canada applied the Charter to a judge who issued an injunction against picketing in front of the courts. Dickson C.J.C., writing for the court, did conclude that the judicial injunction interfered with the picketers' section 2(b) Charter rights, but saved the violation as a reasonable limitation under section 1 of the Charter. Stressing the importance of access to the courts as a vital aspect of the rule of law, Dickson C.J.C. had little difficulty in concluding that the section 1 test was met on these facts. McIntyre J. concluded that resort to section 1 was unnecessary because what was enjoined by the court order was conduct rather than expression. In Dolphin Delivery McIntyre J. drew no such distinction between conduct and expression and it is curious why he felt compelled to raise it here.

On the question of the application of the Charter to judges Dickson C.J.C. drew a line between the private and public functions of a judge, as indicated in the following passage:

As a preliminary matter, one must consider whether the order issued by McEachern C.J.S.C. is, or is not, subject to Charter scrutiny. RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, holds that the Charter does apply to the common law, although not where the common law is invoked with reference to a purely private dispute. At issue here is the validity of a common law breach of criminal law and ultimately the authority of the court to punish for breaches of that law. The court is acting on its own motion and not at the instance of any private party. The motivation for the court's action is entirely "public" in nature, rather than "private". The criminal law is being applied to vindicate the rule of law and the fundamental

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136a Supra, footnote 88.
136b Ibid., at pp. 243-244.
freedoms protected by the Charter. At the same time, however, this branch of the criminal law, like any other, must comply with the fundamental standards established by the Charter.

What is not so clear is how far the Supreme Court intends to go in removing the courts from Charter challenges. If there is a clear public component to the litigation, or if the judge is exercising a statutory rather than common law jurisdiction, the court might be more liberal in applying the Charter to the courts. There appears to be some inconsistency in holding that the Charter applies to the common law but that judges are not per se state actors. Be that as it may, there will still be situations where the courts will be considered subject to challenge for violating fundamental freedoms in section 2 or other Charter rights. It is safe to say that Dolphin Delivery limits challenges to freedom of expression, the press and assembly in respect to judicial limitations of these freedoms.

The application of the Charter to judges and other administrative agencies would have two significant results with respect to the media. First, judicial decisions would have to be made in such a way as not to violate freedom of expression, the press and other fundamental freedoms; secondly, discretionary powers to prohibit access to the courtroom, or otherwise limit fundamental freedoms, could not be exercised in such a way as to violate these freedoms. Limitations would have to meet the test enunciated in section 1 of the Charter, unless the courts are willing to accept limitations as part of the definitions of the freedom themselves.

III. Expanding Freedom of the Press: What Values Prevail?

A. A Critical Perspective on Freedom of the Press

One of the clearest illustrations of the tacit acceptance of liberal values in interpreting fundamental freedoms is the approach to freedom of “the press and other media of communication”. While the latter phase updates the concept of the press in a technological sense, it has sparked little in the way of new thinking about the role of the press in Canada’s “free and democratic” society. If anything, the entrenching of freedom of the press in section 2(b) of the Charter is likely to move Canada closer to the American idealized version of the vital role of a free press in a liberal-democratic society.

As Beckton observed, there was little Canadian writing about either freedom of expression or of the press prior to the Charter; since then there have been numerous academic articles on the topic—including several by Beckton herself. A common thread through many of these arti-

cles is a consideration of American, and to a lesser extent European, experiences as a guide to Charter interpretations. While Beckton and other writers are quick to point out that Canadian judges should not follow automatically American cases, there is little analysis of the philosophical and political differences between Canada and the United States. More particularly, there is little examination of the different experiences and roles of the press in the two countries.\(^{138}\)

Advocates of an expansion of freedom of the press speak in glowing terms about the important role played by the press in an open democratic society. By emphasizing the political purposes of freedom of the press, it can be assumed to have roots in Canada as well as in the United States. Indeed, its historical and geographical roots appear pervasive and compelling. Beckton states:\(^{139}\)

> 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 indispensible condition of nearly every other form of freedom". Without the freedom to exchange ideas, to seek access to information, and to criticize the policies of the governing body, an individual is incapable of participating in the operation of her state, and without individual participation a true democracy can neither exist nor flourish.

The role of the press in promoting the interests of the citizenry is not limited to the political realm:\(^{140}\)

> Freedom of the press is of vital concern in any democracy. Restraints imposed on the ability of the press to inform the citizens of a democracy about the activities of their government, other governments, art, literature and social and political events generally have to be examined with care.

When links cannot be found between the Canadian and American position, writers sometimes suggest that the American solution is the progressive one, and should be adopted in Canada.\(^{141}\) Traditional British values such as privacy and the importance of reputation, while acknowledged as important, are subordinated to the vital state interest in fostering a free press. This is the major thrust of the academic writings, but

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138 Glasbeek, in Anisman and Linden, *op. cit.*, footnote 23, p. 100, note 3 in particular.
141 D. Henry, *Electronic Public Access to Court: A Proposal for Its Implementation Today*, in Anisman and Linden, *ibid.*, p. 441. Cameras in the courtrooms is an interesting example of a situation where courts have not been receptive to the American analogies, but the Canada Law Reform Commission in Working Paper 56, Public and Media Access to the Criminal Process, and more recently the Canadian Bar Association have accepted that Canada should experiment with cameras in the courts. The Special C.B.A. Committee on Cameras in the Courts drew heavily on the American experience in its report as a way of reassuring the Bar about the viability of the experiment. Report of the C.B.A. Special Committee on Cameras in the Courts (August 1987).
judges have been more cautious in embracing American concepts of freedom of the press. There has been only one Supreme Court of Canada ruling on freedom of the press and little guidance from the lower courts as to what path Canadian judges will travel.

Professor Harry Glasbeek offers a totally different view of freedom of the press in Canada—a more sinister view from outside the realm of normal liberal discourse on this topic. Apart from indicating that there are important differences between Canada and the United States in respect to the historical and political roles of the press in the respective countries, he explodes a central fallacy of the liberal approach to freedom of the press. The press is not neutral. It is closely allied with the ruling elites of Canada, and because of the high concentration and monopolistic nature of the Canadian media, the general public have little real access to the press. The Canadian media is largely corporate in nature and its major revenues come from business advertising. It is little wonder that the views expressed most frequently are those which are sympathetic to business interests. Glasbeek puts it as follows:

Rather than leading to a true diversity of views reflecting idiosyncracies and individualism or creating something like a true marketplace or ideas, establishment views become, through newspapers, the core views which define the limits of debate.

On Glasbeek's view, expanding freedom of the press in Canada would advance none of the claimed purposes of freedom of expression and the press. The open marketplace of ideas is not really open to expressions of serious dissent and the media sets rather than discovers the agenda. A vivid illustration of the power of the media to limit rather than expand the range of freedom of expression is the Gay Alliance Toward Equality v. Vancouver Sun. This case involved the refusal of the Vancouver Sun to publish advertisements for an avowedly homosexual newspaper. Martland J., speaking for the majority of the Supreme Court of Canada, upheld the refusal to print the advertisements as a legitimate exercise of editorial discretion protected by freedom of the press. The rights of mainstream newspapers editors prevailed over the

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142 Glasbeek, in Anisman and Linden, op. cit., footnote 23, p. 101. I am indebted to Professor Glasbeek for his insights on this topic which have sparked a more critical assessment of the real value of expanding the rights of the press.

143 Ibid., p. 103.

144 Ibid., p. 107.


146 In reaching this conclusion Martland J. relied on Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Even in the United States, the courts have limited the rights of broadcasters to exclude views and upheld a fairness doctrine to allow the airing of conflicting views: Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969). Newspaper editors have greater discretion under the umbrella of freedom of the press than their counterparts in the electronic media.
rights of the gay minority to have access to the channels of communication. While the *Gay Alliance* case predates the Charter the conclusion might well be the same today.

Claims to freedom of the press are made not in the name of the media *per se*, but by the media on behalf of the general public. The early Charter cases have accepted this link between the media and the general public, in declaring that the rights of the media to freedom of the press are no greater and no less than those of any other member of the public. This may be false egalitarianism in light of the different and often conflicting positions of the media and the public. Glasbeek suggests that the public may be more in need of protection from the press than from the government. The media may be the enemy and the government the potential ally:

Inasmuch as the media have interests which coincide with those of the ruling class, they have the potential to become part of the machinery which makes the state beholden to the ruling class rather than to the general public. Should this be so, ordinary Canadian citizens ought to have a means to protect themselves from such influences. The real need may be to protect the state from the press, rather than the other way around.

One illustration of this reversal of media and government roles appears in *Canadian Newspaper Co. Ltd. v. Attorney-General for Canada*. This case concerned a Charter challenge to section 442(3) of the Criminal Code, which prohibits the publication of the name or information that would disclose the identity of a sexual assault complainant. The Ontario Court of Appeal held that an automatic ban on release of identifying information was an unwarranted limitation on freedom of the press. It did leave with the trial judge the discretion to decide whether or not a ban is needed on the facts of each particular case. In the Supreme Court of Canada, however, Lamer J. recognized that a discretionary ban would discourage rather than encourage complainants to come forward, since they would be denied certainty. The limits imposed were judged “minimal” and not disproportional to the legislative aims of eliminating

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149 (1985), 16 D.L.R. (4th) 642, 49 O.R. (2d) 557 (Ont. C.A.). In the context of a different section of the Criminal Code (s. 455.3), the court emphasized that openness is the general rule and the presiding judge must clearly establish the reasons for exclusion of the public: *Canadian Newspaper Co. v. The Queen*, unreported decision August 21, 1987 (Ont. S.C.).

150 *Supra*, footnote 72.

the fears of the complainants in one of the most under-reported of crimes. Women's groups would certainly see the press as the villain rather than the hero of this piece. This case also illustrates that freedom of the press may conflict with other rights—such as the equality rights of women.\footnote{Another example of conflicting rights is the interaction of the Charter and defamation. The complex attempts to balance freedom of the press on one side and reputation and privacy rights on the other are explored by Beckton, in Anisman and Linden, \textit{op. cit.}, footnote 23.}

If one accepts the view that the media is corporate in nature and allied with the interests of the business elites, an expansion of freedom of the press offers little hope for individual self-actualization. Because the media is not really open to views outside the liberal spectrum, it offers little promise as a real agent of change. By propagating and popularizing the established views, the media can be an impediment to significant change. This situation is reinforced by the decision in \textit{New Brunswick Broadcasting Co. Ltd. v. C.R.T.C.},\footnote{[1984] 2 F.C. 410, (1984), 13 D.L.R. (4th) 76 (F. C.A.).} which held that section 2(b) of the Charter grants a freedom to express ideas but not to use someone else's property to do so. There is no right of access to someone else's land, speech platform, printing press, public building or radio frequencies. Such a judicial approach ensures that those who own the means of communication will also be able to control the content of the message.

Glasbeek is not even willing to concede that expanding the freedom of the press would advance an instrumental or political process purpose for freedom of expression.\footnote{Glasbeek, in Anisman and Linden, \textit{op. cit.}, footnote 23, p. 118.}

Regrettably, progressive people may well be seduced into believing that by making freedom of the press the core of our free speech law (because it offers the potential to shackle the brooding state), the cause of political freedom will be advanced. They will be wrong.

Whether advancing freedom of the press performs a useful political role depends on one's political perspective. Freedom of the press is a central tenet of the liberal state and the problem is less with the ideal than with its corruption in practice. The problems of the media as an agent of change in society has less to do with judicial interpretations than with the monopolistic and self-interested nature of the Canadian media itself. Taking account of these realities, the courts may still find some progressive ways to advance freedom of the press in areas such as prior restraints on publications, contempt powers and defamation laws. What judges have done with freedom of the press so far is neither surprising nor alarming. Because most of the freedom of the press claims have arisen in criminal trials, young offenders proceedings or disciplinary hearings, the early cases concern the interaction of the media and the courts.
B. The Courts and the Media: A Case Study in Freedom of the Press

In Canada, the common law rule of the open court is well established. Public access is accepted as a necessary part of our legal system.\(^{155}\) The rule of access, however, is not absolute. In order to protect other interests involved in a judicial proceeding, both the common law and statutes impose numerous limitations on accessibility to the courtroom. What is required is a balancing of these competing interests.

Federal statutes do not expressly address the electronic media, but a number of them contain general restrictions with regard to the press. The Criminal Code, for example, contains various discretionary and mandatory provisions which prohibit the publication of certain items of evidence,\(^{156}\) names of the accused,\(^{157}\) or victims,\(^{158}\) or banning public access altogether.\(^{159}\) The Young Offenders Act\(^ {160}\) also provides prohibitions on access or publication of information relating to juvenile trials.

The provincial jurisdiction relating to the administration of justice in section 92(14) of the Constitution Act, 1867, grants the provinces powers to deal with such matters as camera access to the courtroom. Despite this apparent authority, Ontario’s Judicature Act\(^ {161}\) is the only provincial statute which prohibits camera access to the courtroom. In all other provinces, limitations on access are a matter of common law and judicial practice. This may raise problems of application as previously discussed.

Although section 92(14) gives the provinces authority to deal with camera access, pre-Charter case law indicates that this authority is strictly limited to administrative and procedural matters. The provincial power ends at the boundary of infringement of individual rights. This is true of all aspects of the administration of justice but most of the issues have risen in criminal trials.

1. Media Access to the Courts

The exact scope of section 2(b) of the Charter is still unclear. One of the major unresolved issues is whether it grants a right of access to

\(^{155}\) R. v. Southam Inc. No (1) (1983), 146 D.L.R. (3d) 408, at p. 418, 41 O.R. (2d) 112, at p. 123 (Ont. C.A.), per MacKinnon A.C.J.O.: "...such access, having regard to its historic origin and necessary purpose, already recited at length, is an integral and implicit part of the guarantee given to everyone of freedom of opinion and expression which, in terms, includes freedom of the press."

\(^{156}\) Supra, footnote 72, ss. 470 and s. 76.1(1).

\(^{157}\) Ibid., s. 457.1(1).

\(^{158}\) Ibid., s. 442(3).

\(^{159}\) Ibid., ss. 442(1), and during testimony of witnesses, s. 465(1)(j).

\(^{160}\) S.C. 1980-81-82, c. 110, s. 38(1).

\(^{161}\) R.S.O. 1983, c. 223, s. 67.
the courtroom. The issue arises because the construction of the section seems to restrict freedom of the press to a form of expression. This was addressed in *Re Edmonton Journal and Attorney-General for Alberta*, where Dea J. distinguished between freedom of the press as a separate right and freedom of the press as a form of expression:

> Freedom of expression is the right to express orally, in writing, or howsoever and by the media thoughts, beliefs and opinions. . . The freedom which is guaranteed is the right to express—to speak, to write to communicate. Freedom of the press—on the other hand—would arguably appear to consist of the right of expression plus some right to secure the information upon which the expression is based—a right of access.

Dea J. concluded that on the wording of section 2(b), no right of access was intended. As such, section 12(1) of the Juvenile Delinquents Act providing "in camera" trials for young offenders did not violate the Charter. Dea J.'s decision seems to see section 2(b) as merely freezing the rights of the press at the time of the enactment of the Charter, a view which cuts deeply into the scope of the Charter's protection and violates the "living tree" doctrine of Estey J. in *Skapinker v. Law Society of Upper Canada*.

*R. v. Banville* also adopts a narrow view of section 2(b) in holding that publication bans in the criminal justice system do not interfere with freedom of expression and the press. The case was, however, decided on the basis of non-retroactivity of the Charter so the findings with regard to section 2(b) are obiter.

A different approach was taken in *Reference re Constitutional Validity of Section 12 of the Juvenile Delinquents Act*. Rather than follow the path set out by Dea J. in *Edmonton Journal*, the Ontario High Court read section 2(b) as including a right of access and held invalid all mandatory provisions requiring juvenile trials to be held "in camera". This view was supported in *R. v. Southam Inc.*, where the Ontario Court of Appeal held that access to the courts is an integral part of freedom of the press. MacKinnon A.C.J.O., in a purposive approach to section 2(b), concluded that the objects of a free press—maintenance of democracy, achievement of justice and the old principle that justice be seen to be done—cannot be fostered by an absolute publication ban on criminal proceedings.

164 *Supra*, footnote 4.
167 *Supra*, footnote 155.
This does not mean that there can be no ban of access to the courts. In *Re Southam Inc. and The Queen* sections 38 and 39 of the Young Offenders Act were upheld as reasonable limitations on the principle of a free press. The sections forbid the publication of the names or identifying information about young offenders and give judges the discretion to exclude the public from trials in accordance with certain statutory guidelines. Central to the court’s conclusion was the fact that the protection and rehabilitation of young people is a value of such superordinate importance that it justifies placing reasonable limits on the freedom of the press.

While courts are reluctant to exclude the press from criminal or juvenile trials, they are less reticent in civil proceedings. In *Edmonton Journal v. Attorney-General for Alberta* the Charter challenge was to section 30 of the Judicature Act which severely limited what could be published about matrimonial causes and pre-trial civil proceedings. Accepting that there was a violation of section 2(b) of the Charter, the court engaged in an extensive section 1 analysis and upheld the challenged provisions. Concerns about damage to children, the privacy of non-parties, and encouragement to use the courts outweighed the public interest in access to this kind of information. Kerans J.A. accepted that the challenged provisions may be overly broad but rather than strike them down, he reserved the right to make a constitutional exception to the statute in a case where the administration of justice would demand the publication of the information in issue.

Similarly in *Re Hirt and The College of Physicians and Surgeons of British Columbia*, where the issue was disciplinary action against a doctor, the British Columbia Court of Appeal held that the names and identities of complainants before the discipline board should be kept secret. The limitation was accepted as reasonable because there was only a partial ban on publication and the value of having complainants come forward is great. There are also occasions where it is appropriate to conduct administrative proceedings in camera. Even where the rule

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169 Supra, footnote 160.


is openness, the courts have upheld broadly worded exceptions, holding that they did not swallow up the rule so as to violate section 2(b) of the Charter.\footnote{174}{The Edmonton Journal v. City of Edmonton (1987), 24 Admin. L.R. 205 (Alta. Q.B.).}

Courts have been less generous in protecting the privacy of the subject of a complaint before a lawyer’s disciplinary board. In \textit{Canadian Newspaper Ltd. v. Law Society of Upper Canada}\footnote{175}{November 27, 1986 (Ont. Div. Ct.).} the Ontario Divisional Court held that the Law Society had no authority to issue a ban on the publication of disciplinary proceedings. The potential damage to the reputation of innocent lawyers did not outweigh the values of freedom of the press in this context. However, the court also held that there was no obligation on the Law Society to supply the media with information or even notice of the disciplinary hearings. Thus when access is granted it is not always meaningful in media terms. Many disciplinary hearings will take place without the press because their existence is unknown. The degree of access may also be limited.

In \textit{Toronto Sun v. Attorney-General for Alberta}\footnote{176}{[1985] 6 W.W.R. 36 (Alta. C.A.).} the court indicated a strong inclination to protect the identities of the complainant in a sexual assault case, or any other innocent parties. This case involved a 	extit{voire dire} about the sexual relations between the accused and the complainant as well as others. In order to protect the identity of innocent parties the Alberta Court of Appeal was willing to extend its normal Criminal Code powers. While the privacy of the accused is not a major consideration, the privacy rights of other parties often prevail over full press access.

While meaningful media coverage requires access to information, as well as to the proceedings, courts have not extended freedom of the press that far. \textit{The Queen v. Thompson Newspapers Ltd.}\footnote{177}{December 8, 1983 (Ont. H.C.).} held that freedom of the press is essentially freedom from censorship. It is freedom in the classic liberal sense of restraining government action but not requiring the agents of the state to make access meaningful by allowing the media to examine physical evidence or documents before the court or make photocopies of such evidence.

Accepting that section 2(b) includes a right of access to judicial proceedings, is this broad enough to cover the electronic media? Although earlier cases do not address the electronic media, the Ontario case of \textit{R. v. Squires}\footnote{178}{(1986), 23 C.R.R. 31 (Ont. Prov. Ct.).} indicates the importance that this issue will have in the future. The significance of the cameras in the courtrooms issue is also
underscored by the studies of the Law Reform Commission of Canada and a special Canadian Bar Association report on the topic.\textsuperscript{179}

As noted by Clare Beckton and Wayne MacKay,\textsuperscript{180} while it was open to the American courts to use limitations implicit in the term "press" and to distinguish between conventional and other forms of the media, section 2(b) will not support such a distinction, because it guarantees the right to a free press \textit{and} other media of communication. This wording indicates an intention not to limit the press to its traditional print form. In a society where so much emphasis is placed on television as the major source of information, to exclude the electronic media from section 2(b) would leave unprotected a major segment of today's press. This argument was met head on and dismissed by Provincial Court Judge Vanek in \textit{R. v. Squires}.

The \textit{Squires} case concerned a challenge to section 67(4) of the Ontario Judicature Act.\textsuperscript{181} The accused, a journalist, was charged with directing the filming of a person emerging from a trial. In an application to quash the charge on the basis that section 67 was inconsistent with section 2(b) of the Charter, Judge Vanek held that there was no infringement of freedom of the press. Since this ruling the journalist has been convicted for breach of the Judicature Act and fined $500.00. This clears the way for an appeal to the Charter issue, which has been launched. \textit{Squires} is the test case on the rights of the electronic media.

Judge Vanek in \textit{Squires} adopted the narrow approach seen in \textit{Edmonton Journal}\textsuperscript{182} and \textit{Banville},\textsuperscript{183} accepting section 2(b) as an entrainment of the common law rights relating to the press. He viewed the freedom of the press as a right to disseminate information obtained, without a right to news gathering itself. It definitely is not to include a right to bring photographic or broadcast equipment into the courtroom:\textsuperscript{184}

Moreover, it [the right of access] is a right of members of the general public; representatives of the press and other media of communication possess the same right of access but merely in their capacity as members of the general public.

Two things in Judge Vanek’s judgment are encouraging to an expansion of free press values. He recognized that “other media of communication” was meant to include the electronic media, and more important, that the press and the electronic media have equal rights of access. It is

\textsuperscript{179} \textit{Supra}, footnote 141.


\textsuperscript{181} R.S.O. 1980, c. 223.

\textsuperscript{182} \textit{Supra}, footnote 162.

\textsuperscript{183} \textit{Supra}, footnote 165.

\textsuperscript{184} \textit{Supra}, footnote 178, at p. 52.
on the question of the extent of this access that Judge Vanek took a narrow view. If his recognition of the equal rights between the print and electronic media are combined with the wider definition of access seen in Southam\textsuperscript{185} the right to televise judicial proceedings would easily fall under freedom of the press and other media of communication.

Judge Vanek placed considerable weight on the conclusion that the effect of televised news coverage was qualitatively different from the effects of the conventional media. He felt a disproportionately greater effect resulted because of the ability of the electronic media to project the image of the participants in the proceedings. The weakness of this argument is the fact that newspaper coverage often includes sketches or photographs of the participants which makes their identification almost as likely. That the televised proceeding reaches a greater number of people should not result in the automatic conclusion of negative impact. The majority of people who get their information from the electronic media have as much right to know what happens in courts as the smaller group who read newspapers. That the reality will be distorted is no more justification for excluding the electronic media than the press.

Allowing television reporters to attend and report only in the same manner as conventional media (by sitting in a courtroom and taking notes), fails to consider several essential elements. First, televised reporting relies almost exclusively upon video presentations. The ability to film and report on events using film is an essential feature of television journalism. Second, the decision in Squires does not put the electronic media on an equal footing with the print media; it makes them the equivalent of the print media. Equality should not mean that the electronic media must perform their functions in the same manner as the print media. If the right under section 2(b) includes access to the courtroom, then both the print and electronic media should have an "equal benefit" of this access. Failure to accommodate the unique characteristics and tools of the trade of the various forms of the electronic media is a potential denial of the equality guaranteed by section 15 of the Charter.

2. Freedom of the Press v. Other Legal Rights

Despite the recognition of the common law concept of the open court, it is clear in all the judgments to date that this is a concept which yields readily to other legal interests. Concern for the protection of witnesses, jurors, victims and the accused, the integrity of the judicial system, and, most often, the emphasis on the accused's right to a fair trial, have all been used to validate limitations on media access to the courtroom. These concerns have been emphasized in the past and in some early cases

\textsuperscript{185} Supra, footnote 155.
under the Charter. The past practice has failed to balance competing legal interests, but relied instead on the subordination of one right to another. This position must be re-evaluated if any meaning is to be given to the constitutional guarantees of: freedom of expression and the press; the right to a fair and public trial before an impartial tribunal; and, the right to life, liberty and security of the person.

(a) A Fair and Public Hearing

The concept of an accused’s right to a fair trial has been the most consistent justification for limitations on access to the courtroom. The traditional position is that the clash of the fair trial and freedom of the press must always result in the subordination of the press to the trial. An interesting contrast is the American view, where the mere claim of danger to the fair trial is not sufficient to warrant an exclusion of the press, unless there is no reasonable alternative for preserving the accused’s right to a fair trial. Although there is some support for this position in Canada, the weight of authority leans heavily towards the fair trial.

The publicity that arises out of judicial proceeding admittedly can have negative effects. There is the possibility that pre-trial publicity could prejudice unfavourably potential jurors against the accused. Media coverage could stigmatize the accused as guilty even before he or she is convicted, a result that destroys the presumption of innocence. Witnesses may be less likely to step forward or to tell the truth if they fear identification, embarrassment or injury. Certain complainants may refuse to cooperate if they cannot be guaranteed privacy, and there is the threat that publication of information of pre-trial proceedings, which may not be admissible evidence at trial, could affect the jury prejudicially.

On the other hand, openness and publicity also serve a vital role for the accused. It places judges, counsel, witnesses and the jury under public scrutiny so their fairness, competence and honesty can be judged. In these respects, both the public and the accused have a mutual interest in the fairness of a trial. But there is more at stake in the issue of openness than the fairness of the trial. Openness serves a number of

186 See, for example, Re Global Communications Ltd. and Attorney-General of Canada (1983), 148 D.L.R. (3d) 331, 42 O.R. (2d) 13 (Ont. H.C.), aff’d (1984), 5 D.L.R. (4th) 634, 44 O.R. (2d) 609 (Ont. C.A.); R. v. Begley, supra, footnote 131; R. v. Banville, supra, footnote 165. While publication bans are accepted as sometimes necessary to ensure a fair trial, such a ban would be temporary and imposed in the least restrictive manner. R. v. Sophonow (No. 2) (1983), 150 D.L.R. (3d) 590 (Man. C.A.).

187 The potential conflicts between s. 2(b) of the Charter and legal rights, such as ss. 7 and 11(d), have been important in determining the scope of freedom of the press.

188 Supra, footnote 186.

189 Richmond Newspapers Inc. v. Virginia, 100 S. Ct. 2814 (1980).

social values that may conflict with the accused’s right to a fair trial, but are nonetheless of sufficient importance to justify serious consideration. Secrecy has always been the foundation of suspicion. Openness removes this suspicion and places the proceeding in the public eye. The ability to attend and observe a judicial proceeding may enhance confidence in our legal system and the administration of justice. Procedures that the public perceive as fair will be more readily accepted than those done behind closed doors. There is an important interest in regulating the conduct of the courts to ensure that they are performing their function properly.

These public concerns must be given strong consideration in deciding upon the reasonable limitations on media access. A suspected threat to a fair trial should not be enough to justify exclusion. Section 11(d) of the Charter guarantees not only a fair trial but also a public trial. This dual guarantee may not always operate in favour of the accused. While an accused may rely upon the guarantee of a fair trial to limit possible prejudicial conduct, the media is equally able to argue that limitations on access would infringe the right to a public trial. Media reliance on section 11(d) has been very limited to date, and most cases have been based on section 2(b) directly.

(b) Security of the Person

There also exists a number of interests not directly involved with the accused’s guaranteed fair trial that may conflict with the rule of the open court. At common law, it is recognized that the court has an inherent power to protect witnesses, victims and the accused from the injurious effects of publicity in certain circumstances. As stated by Viscount Haldane:

As the paramount object must always be to do justice, the general rule as to publicity, after all only a means to an end, must accordingly yield.

The Criminal Code expressly recognizes the rule of the open court, but also lists three general exceptions to this rule: the interest of public morals; the maintenance of order; or the proper administration of justice. There also exist various powers such as the discretion to ban publication of the names of victims of sexual assault and the powers to exclude any or all members of the public during testimony of witnesses. In addition, the Young Offenders Act permits the judge to restrict access to the court if there would be a threat of serious injury or prejudice to a

192 S. 442(1) of the Criminal Code, supra, footnote 72.
193 Ibid., s. 442(3).
194 Ibid., s. 465(1)(j).
195 Supra, footnote. s. 39.
young accused, witness or victim. All these provisions and exceptions indicate a recognition of various private interests involved in a trial that must be balanced against the rights of media access to the courtroom.

Although there appears to be a reluctance to apply widely these protections, the Supreme Court of Canada in Attorney-General of Nova Scotia v. MacIntyre emphasized the superordinate importance of the protection of the innocent. This is a protection that could seem to extend to witnesses and victims—presumably innocent participants in the trial—and to the accused who is guaranteed the right to be presumed innocent until proven guilty. Nonetheless, MacIntyre concludes that the general rule is openness.

There are several arguments which favour the protection of witnesses in a judicial proceeding. Fear of public identification, whether for reasons of embarrassment, or danger, may prevent prospective witnesses from coming forth or from cooperating to their full ability. Generally speaking, courts are reluctant to restrict publicity merely to avoid embarrassment or to protect the sensitivities of the witness. As Huband J.A. stated in Re F.P. Publications and The Queen:

There are enormous numbers of witnesses in both civil and criminal trials who find it embarrassing, inconvenient, damaging or even dangerous to testify. Yet there are few known cases where the Court has protected a witness from such hazards by clothing the witness with the anonymity of the closed courtroom. I have difficulty in understanding why the time-honoured concept of an open trial should come crashing down to the ground to convenience such witnesses.

Bans on publicity have been used to encourage a witness to testify and most often to protect witnesses from potential physical danger.

The accused is generally denied protection from publicity even when identification could lead to substantial harm. In R. v. Several Unnamed Persons the court refused to prohibit the publication of the names of several men charged with acts of gross indecency. One area where protection has been guaranteed to the accused stems from Dickson J.'s decision in Attorney-General for Nova Scotia v. MacIntyre. The value of protecting an accused, whose house was searched under a warrant but

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200 R. v. McArthur (1984), 13 C.C.C. (3d) 152 (Ont. H.C.). This case involves the testimony of inmates in a prison where revealing the identity of informants could result in death.
202 Supra, footnote 197.
nothing found, was held to justify curtailment of public access. In Canadian Newspaper Co. v. Attorney-General of Canada a freedom of the press challenge was raised to section 443.2(1) of the Criminal Code prohibiting the publication of certain information in search warrants. While accepting that privacy is an important value, the Ontario court concluded that the means adopted to protect this value are too intrusive of freedom of the press and thus do not meet the section 1 test of the Charter. The Charter may be changing this area of the law.

Section 7 may offer protections to individuals because of the guarantee of “security of the person” which can be read broadly. Security of the person can be argued to provide the right to be protected from injury or harm caused by publicity. The Ontario High Court, however, in R. v. Several Unnamed Persons, refused to apply security of the person to shield the identity of the accused. There is also the possibility that section 7 could be read as including a right of privacy that could protect individuals in a trial. R. v. Several Unnamed Persons may indicate that privacy will not be read into section 7, but, in light of the Supreme Court of Canada decision in Hunter v. Southam Inc. holding that the section 8 right to be secure against unreasonable searches encompasses a reasonable expectation of privacy, could indicate a willingness to read an overall right of privacy into the Charter. This remains to be seen.

Press gag orders to protect the identity of the complainant in a sexual assault case have been routinely upheld. That is the direction of section 442(3) of the Criminal Code, and courts have not accepted Charter challenges to this provision. The more difficult problem is determining when a judge should issue a gag order to protect the identity of the accused in sexual assault cases. Two recent Ontario Supreme Court rulings emphasized the importance of open trials and held that there should only be a publication ban if publicizing the accused’s name might reveal the identity of the victim. These cases stress the need for the judge to hear evidence on the issue prior to imposing a ban. In Smith v. Crampton, which involved charges of gross indecency against an Ottawa school teacher, a gag order was imposed without hearing evidence. Dis-

204 Supra, footnote 72.
205 Supra, footnote 201.
206 Supra, footnote 5.
207 Supra, footnote 72.
208 D. Brillinger, Press gag order only if victim's identity revealed, Lawyer’s Weekly, October 16, 1987. This article discusses two Ontario Supreme Court cases, Southam Inc. v. The Queen and R. v. Dalzell, which are both unreported decisions rendered in October, 1987.
209 Unreported decision, October 21, 1987 (Ont. S.C.).
agreeing with the earlier ruling, Smith J. imposed a ban because he was concerned about revealing the identity of the fifteen year old male victim.

There have been many cases dealing with the access of the media to the courts. The number of cases is explained, in part, by the ability of the media to fund such litigation. This in itself is a reminder that the media is not in the same position as a private citizen.\textsuperscript{210} To date Canadian courts have not accepted an extravagant version of freedom of the press, but have pursued a cautious path of balancing the competing interests against freedom of expression. Even though this balancing has been done as an evaluation of reasonable limits in section 1 of the Charter, many limits have been accepted. There has been little real consideration of the nature and role of the media in Canadian society. Instead the Charter guarantee of freedom of expression allows judges to give constitutional status to the common law principle of open adjudication.

**Conclusion**

In any democratic society freedom of expression and freedom of the press are important ideals. The difficult task facing the courts is giving these ideals some concrete form in the practical world. One of the frequently raised criticisms of the judicial approach to the task of interpretation is that it is unduly cluttered with liberal theories and middle class values. Freedom of expression may be an important liberal value but it does not put food on the table or compensate for the hardships of poverty. Poor people often cannot afford freedom of expression in either the political or economic sense. Litigation costs money and if you are on welfare or a marginal worker the political price of speaking out may be the loss of your livelihood.

In a critical analysis of freedom of speech in the United States, Adeno Addis and David Fraser describe the limits of the American liberal approach to freedom:\textsuperscript{211}

In modern capitalist societies freedom of the press and the right to free speech offer those of us who strive for qualitative change little solace. The freedom of the press is the freedom of property. The right to free speech is the "right" to an ideology of domination through generalization to the ever tightening circle of one-dimensional thought.

Addis and Fraser reserve their most biting attacks for the press which, like Glasbeek,\textsuperscript{212} they regard as the enemy, not the ally of freedom of expression:\textsuperscript{213}

\textsuperscript{210} An important question is whether the media’s desire for access to the courts is only a desire to enhance profits or also a genuine desire to perform an important civil duty.

\textsuperscript{211} A. Addis and D. Fraser, Chant Down Babylon: Libertarian Socialism and Free Speech, an unpublished paper, at p. 34.

\textsuperscript{212} Glasbeek, in Anisman and Linden, *op. cit.*, footnote 23.

\textsuperscript{213} *Loc. cit.*, footnote 211, at pp. 28, 32.
Notions of freedom of the press in the United States have always involved disputes between elites. The "public's right to know" is often invoked when pressing claims for media freedom but the public's right to know is limited by the boundaries of capitalist ownership of the means of production and communication. Freedom of the press has had, and under capitalism still informed by a liberal mythology, will continue to have, a purely negative character, the right to be free from state intervention.

Nuclear weapons and Miss America deserve and get the same treatment on the Evening News. The distinction between quantity and quality becomes imperceptible. Like the Martin Sheen character in Apocalypse Now, we sit in a stinking hotel room while the enemy is out there, getting stronger every day. As each moment passes, the utopian kernel, the potential for radical disruption in communicative action seems to slip further from our grasp.

The authors do not give up in despair but call for a democratization of the media and the practice of freedom of expression as a self-actualizing and liberating experience. Communication is a powerful tool in changing society—a fact recognized by liberals as well as those on the left of the political spectrum. Thomas Emerson sets out the following basic purposes of freedom of expression: 214

(1) assuring individual self-fulfillment;
(2) advancing knowledge and discovering truth;
(3) providing for participation in decision-making by all members of society; and
(4) achieving a more adaptable and hence a more stable community. . . . maintaining the precarious balance between healthy cleavage and necessary consensus.

The emphasis has been on the elements of consensus rather than cleavage, but freedom of expression can sow the seeds needed to transform society, as well as consolidate the status quo. There needs to be a shift away from an instrumental role for freedom of expression to a role designed to promote self-actualization, not just for individuals but also for communities of people. In this latter role, freedom of expression and its related freedoms can be agents of change. For this to happen judges will need to consider alternative perspectives on freedom of expression, such as those expounded by Critical Legal Scholars and Feminists. More importantly, judges need to escape the American straight jacket of liberal theory and concentrate on the real impact of judicial interpretations on the lives of those who live on the margins of society, as well as those who dwell in the centre. If this were to happen, the freedom in section 2 of the Charter would become truly fundamental.