CHAPTER 1

Freedom of Expression in Canada

LEARNING OUTCOMES

After reading this chapter, you will understand:

- The history of freedom of expression and the media's right to report the news in Canada.
- The scope and impact of section 2(b) of the *Canadian Charter of Rights and Freedoms*, the constitutional guarantee of freedom of expression, including "freedom of the press and other media of communication."
- The role of the courts in defining the limits on freedom of expression and in striking a balance between the media's right to report the news and competing rights and interests.
- The open courts principle and the right of journalists to cover the justice system.

CHAPTER OUTLINE

Introduction

The *Canadian Charter of Rights and Freedoms*[1] guarantees the right of freedom of expression for all Canadians. Journalists, performers, artists, musicians, advertisers, political activists, concerned citizens—anyone with an agenda to promote or an opinion or a point of view to express has the right to be heard. Freedom of expression, however, is not absolute. Governments can pass laws limiting free speech if the restriction is reasonable and in keeping with the freedoms afforded to the citizens of a democratic state. Our Constitution[2] also specifically protects freedom of the press and other media of communication, a recognition of the media's special role in ensuring that the public is informed and government institutions and the courts are held accountable.

Why do Canadians consider freedom of expression to be one of their fundamental rights? How did journalists free themselves from government efforts to control their reporting on public issues? And how has the Charter transformed the right of the media—and the freedom of all citizens—to debate, expose, and criticize? This is a story older than the country itself.

"An Unshackled Press"

The case has been hailed as "the most momentous freedom-of-the-press precedent" in early Canadian journalism.[3] On New Year's Day in 1835, *The Novascotian* published a letter accusing

1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].
2 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
3 Wilfred H Kesterton, *A History of Journalism in Canada* (Toronto: McClelland & Stewart, 1967) at 21.

the magistrates in charge of Halifax's police department, poor asylum, and other services of pocketing £1,000 a year at the expense of the "poor and distressed."[4] The missive, signed with the pseudonym "The People," went on to claim that three of these officials had been fleecing the public purse for three decades. It was a brazen attack, even in an era when reputations regularly took a drubbing in the press. The outraged magistrates struck back, urging Nova Scotia's Attorney General to charge *The Novascotian*'s proprietor, Joseph Howe, with criminal **libel**. In the legal jargon of the time, he stood accused of "wickedly, maliciously and seditiously desiring and intending to stir up and excite discontent among His Majesty's subjects."[5]

libel
a defamatory statement made in permanent form via print, writing, pictures, or signs

After lawyers told Howe that his case was hopeless—the newspaper's rabble-rousing motives were clear and truth was not yet recognized as a defence to libel—he chose to represent himself at trial. Howe's courageous stand against the colonial powers of the day has become the stuff of legend. For more than six hours, he regaled the jury with fresh allegations of civic corruption. One magistrate was storing vegetables in the cells of the city prison and forcing inmates to make shoes for his family. The director of the poor asylum, another magistrate, was furnishing the institution with inferior, overpriced supplies. Howe ended his speech by challenging the jury "to leave an unshackled press as a legacy to your children."[6] Despite the judge's stern reminder of the jurors' duty to follow the law and find Howe guilty, they returned in ten minutes with an acquittal. Howe and his supporters paraded through the streets in triumph; six magistrates promptly resigned in disgrace. In the next edition of *The Novascotian*, Howe declared that "the press of Nova Scotia is free."[7]

Howe's acquittal was a turning point that made colonial officials across British North America wary of using the criminal law to try to stifle their critics, especially as a libel trial might do little more than provide a public forum for airing allegations and grievances. By 1848, in the words of Nova Scotia Lieutenant Governor Sir John Harvey, that colony's press was "as free as that of England, claiming and enjoying in fact the same privileges."[8]

The growing power and independence of the press in Britain and the United States inevitably spilled over into Canada. The official "gazettes" published by governments were joined in the 19th century by upstarts that provided a forum for local news, political debate, and the airing of democratic ideas. William Lyon Mackenzie attacked Upper Canada's "Family Compact" in the pages of his *Colonial Advocate*, while Howe used his *Novascotian* to demand constitutional reforms and responsible government. By the 1830s, media historian Paul Rutherford noted, "the very number of journals and journalists had made the press a force in the politics of the land."[9] Newspapers took either a Tory or a radical bent, evolving into pro-Conservative and pro-Liberal factions of the press that dominated Canadian journalism in the decades after Confederation. Papers were, by one account, "blatantly partisan and often hysterical … designed to pump propaganda into the national bloodstream."[10] Writers and editors attacked their political opponents with glee as they launched or promoted their own political careers.

4 Quotation drawn from Dean Jobb, "An Unshackled Press" in Dean Jobb, ed, *Daring, Devious & Deadly: True Tales of Crime and Justice From Nova Scotia's Past* (Lawrencetown, NS: Pottersfield Press, 2020) ch 2.
5 J Murray Beck, "'A Fool for a Client': The Trial of Joseph Howe" (1974) 3:2 Acadiensis 27 at 34.
6 Jobb, *supra* note 4.
7 Beck, *supra* note 5 at 39.
8 Quoted in DC Harvey, "Newspapers of Nova Scotia, 1840-1867" (1945) 26:3 Can Historical Rev 279 at 282.
9 Paul Rutherford, *The Making of the Canadian Media* (Toronto: McGraw-Hill Ryerson, 1978) at 7.
10 Walter Stewart, "No Virginia, There Is No Lou Grant" in Walter Stewart, ed, *Canadian Newspapers: The Inside Story* (Edmonton: Hurtig Publishers, 1980) 9 at 14.

The Press in the 20th and 21st Centuries

In the 20th century, the media broke free of its partisan fetters. Newspaper and magazine circulation climbed as literacy increased, advertising revenues gave publications financial independence, and the advent of broadcasting created new audiences. As news went mainstream, its readers, listeners, and viewers demanded more than political posturing and partisan bickering. By the mid-20th century, if a newspaper's editorial columns endorsed a party or candidate, it was on the basis of platforms and policies rather than blind allegiance. Media outlets and their writers and editors came to see themselves as independent agents with a duty to safeguard and promote the public interest.[11] "Every man and woman will be better off if the transmission and reception of fact and opinion are left free from the intervention of government," the *Montreal Daily Star*'s editor, George V Ferguson, declared in 1955. "The general will of a political society cannot be fully expressed without this freedom. Freedom of information thus becomes an essential part of any system of democracy."[12]

The era of fiercely independent journalists who owned their own printing presses—the likes of Joseph Howe and William Lyon Mackenzie—is long gone. The news business is now dominated by large corporations. By 2003, two media giants—CanWest Global Communications and Québecor—owned one out of every two daily newspapers sold in Canada, accounting for 16 million papers every week (in 2010, CanWest's *National Post* and other big-city dailies were sold to Postmedia Network Inc, making it Canada's largest newspaper chain). While the Crown-owned Canadian Broadcasting Corporation operates the country's largest radio network, ten private companies together operate two-thirds of the country's radio stations. CBC Television and Radio-Canada compete with three privately owned national networks, two broadcasting in English and one in French. This concentration of ownership and the media's power to mould and influence public opinion have been the subject of three federal inquiries since 1969; the latest, an investigation by a Senate committee, filed a report in 2006 recommending stricter monitoring of broadcast licences and automatic investigations of most mergers involving media companies.[13] Although these inquiries have heard and expressed concerns about the concentration of media ownership in fewer and fewer hands, the federal government has been reluctant to take any action that could interfere with the media's hard-won independence.[14]

The Courts and Freedom of Expression

Pre-Charter Rulings: The Battle for Freedom of Expression

Desperate times call for desperate measures, and the hardships created by drought and economic depression in Western Canada made the 1930s one of those times. In Alberta, a Social Credit

11 This transformation is examined in Kesterton, *supra* note 3 at 222-26.

12 George Victor Ferguson, "Freedom of the Press" in George Victor Ferguson & Frank Hawkins Underhill, eds, *Press and Party in Canada* (Toronto: Ryerson Press, 1955) 1 at 1.

13 Canada, Minister of Supply and Services Canada, *Royal Commission on Newspapers* (Ottawa: Supply and Services Canada, 1981), online: *Government of Canada* <https://publications.gc.ca/site/eng/472245/publication.html>; Senate of Canada, *The Uncertain Mirror: Report of the Special Senate Committee on Mass Media*, vol 1 (Ottawa: Parliament of Canada, December 1970) (Chair: Keith Davey), online: <https://parl.canadiana.ca/view/oop.com_SOC_2802_5_4/1>; Senate of Canada, Standing Senate Committee on Transport and Communications, *Final Report on the Canadian News Media*, vol 1 (June 2006) (Chair: Lise Bacon), online: *Parliament of Canada* <https://sencanada.ca/content/sen/committee/391/tran/rep/repfinjun06vol1-e.htm>.

14 To date, Ottawa's only response has been to temporarily prevent newspaper proprietors from owning a television or radio station in the same city. See Senate of Canada, Standing Senate Committee on Transport and Communications, "Part II: The State of the Canadian News Media" in *Interim Report on the Canadian News Media* (April 2004) (Chair: Joan Fraser) at 30-31.

government headed by Bill Aberhart, an evangelical radio preacher, swept to power on a promise to pay residents a $25-a-month "dividend" to kick-start the economy. Social credit theory was considered dubious, and Aberhart's policies were subjected to sharp criticism in the province's newspapers, which became the main political opposition. Premier Aberhart introduced legislation to bring the press under the government's thumb.

An Act to ensure the publication of accurate news and information,[15] or the Press Bill, as it was known, was an Orwellian law designed to enforce the government's version of the facts. Under the legislation, the government could demand that newspapers publish an official statement in response to any published report about a Social Credit decision or policy. Furthermore, anyone who was maligned in the official corrections was barred from suing the government for defamation. The bill also enabled the government to force newspapers to reveal their sources and identify the author of any article, editorial, or letter appearing in their pages. Any newspaper that disobeyed such orders could be shut down, possibly for good. One observer did not exaggerate when he termed Aberhart's proposals "authoritarianism in its most overt form."[16]

The federal government, contending that the bill and other Social Credit measures were unconstitutional, referred the legislation to the Supreme Court of Canada for a ruling. The Court found that the Press Bill was a clear attack on press freedom, but the Court also acknowledged that the *British North America Act, 1867*,[17] the constitution of the day, afforded no right to freedom of speech or expression. Fortunately, the Supreme Court found other means to strike down legislation that it considered "retrograde" and "autocratic." In March 1938, it declared the Press Bill ***ultra vires*** (beyond the jurisdiction and powers granted to provinces under the BNA Act) and an infringement on the federal government's responsibility for the criminal law. The Court ruled that the *Criminal Code*[18] already outlawed seditious libels calling for rebellion or an overthrow of the government and that a provincial government did not have the power to criminalize the legitimate criticism and healthy political debate that the newspapers provided. The Press Bill, it opined, would stifle this debate and criticism.

ultra vires
beyond the power of a level of government or a corporation

Despite the BNA Act's silence on the real issue at stake, the Court made some forceful pronouncements on the importance of freedom of speech in a democracy. Chief Justice Lyman Duff described the "right of free public discussion of public affairs" as "the breath of life for parliamentary institutions."[19] But freedom of speech in Canada was not an absolute right—citizens and journalists alike who defamed others or spread sedition, he noted, would face legal consequences. A fellow judge, Justice Lawrence Cannon, was just as adamant that a free exchange of views on political issues was

> essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy.[20]

15 Bill 9, 5th Sess, 8th Leg, Alberta, 1937 (third reading 4 October 1937).
16 Kesterton, *supra* note 3 at 230.
17 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [BNA Act].
18 RSC 1985, c C-46.
19 *Reference Re Alberta Statutes—The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] SCR 100 at 133, 1938 CanLII 1.
20 *Ibid* at 145-46.

In the 1950s, Justice Ivan Rand of the Supreme Court of Canada produced a pair of significant rulings on freedom of speech. In a 1951 judgment that narrowed the legal definition of "sedition," Rand J declared that "freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are the essence of our life."[21] The second ruling arose from the so-called Padlock Law[22] that the Quebec government passed in 1937 to combat the spread of communism. The legislation gave the province's Attorney General the power to lock up any home or building used to "propagate communism or bolshevism by any means whatsoever." It was also an offence to print or distribute newspapers or other publications containing communist propaganda. Although the implications for freedom of speech and a free press were obvious, the law did not come before the Supreme Court for review until the mid-1950s, when a lawsuit between a tenant and the owner of a padlocked apartment reached Ottawa on appeal.

The Court once again cited the constitutional division of powers between the provincial governments and the federal government, ruling in 1957 that the Padlock Law was a criminal measure and beyond the jurisdiction of the Quebec legislature. Rand J, like Duff CJ almost two decades earlier, described freedom of speech as "little less vital to man's mind and spirit than breathing is to his physical existence."[23] Rand J went on to emphasize the link between democracy and freedom of speech:

> Whatever the deficiencies in its workings, Canadian government is in substance the will of the majority expressed directly or indirectly through popular assemblies. This means ultimately government by the free public opinion of an open society. … But public opinion, in order to meet such a responsibility, demands the condition of a virtually unobstructed access to and diffusion of ideas.[24]

Three years after the Padlock Law was struck down in 1960, the government of Prime Minister John Diefenbaker introduced a *Canadian Bill of Rights*.[25] Section 1 set out an array of human rights and fundamental freedoms that have "existed and shall continue to exist" in Canada, including freedom of speech and freedom of the press. As an Act of Parliament, however, the *Canadian Bill of Rights* did not form part of the Constitution and applied only to federal laws.[26] However, the *Canadian Bill of Rights* set the stage for the *Canadian Charter of Rights and Freedoms* and the constitutional protection of free speech. "Canadian judges have always placed a high value on freedom of expression as an element of parliamentary democracy," noted one constitutional scholar, "and have sought to protect it with the limited tools that were at their disposal."[27] The Charter has given the courts a new tool to protect and expand freedom of expression.

21 *Boucher v the King*, [1951] SCR 265 at 288, 1950 CanLII 2.

22 *An Act to Protect the Province Against Communistic Propaganda*, 1 Geo VI, c 11, RSQ 1941, c 52 [repealed].

23 *Switzman v Elbling and AG of Quebec*, [1957] SCR 285 at 306, 1957 CanLII 2.

24 *Ibid* at 306. Justice Rand used similar language to stress the importance of freedom of expression in *Saumur v City of Quebec*, [1953] 2 SCR 299 at 330, 1953 CanLII 3. For an analysis of Rand J's contribution to the development of freedom of speech and other democratic rights, see William Kaplan, *Canadian Maverick: The Life and Times of Ivan C Rand* (Toronto: University of Toronto Press, 2009) ch 4.

25 SC 1960, c 44.

26 Robert Martin & G Stuart Adam, eds, *A Sourcebook of Canadian Media Law* (Ottawa: Carleton University Press, 1991) at 70.

27 Peter W Hogg, *Constitutional Law of Canada*, 2nd ed (Scarborough, Ont: Carswell, 1985) at 713.

Freedom of the Press in Canada: A Timeline

1752	Boston printer John Bushell founds the *Halifax Gazette*, the first newspaper published in what would become Canada.
1764	American printers Thomas Gilmore and William Brown found the *Quebec Gazette/La Gazette de Québec*, published in English and French.
1776	As the American Revolution begins, the Nova Scotia government forbids the "reprinting or Publishing" of "treasonable papers"* supporting the rebels.
1780s	An influx of Loyalist refugees after the Revolution leads to the formation of Upper Canada, New Brunswick, and other colonies. King's Printers are appointed to publish laws, proclamations, and government-controlled newspapers.
1835	Halifax newspaper editor Joseph Howe is acquitted of seditious libel after appealing to jurors at his trial "to leave an unshackled press as a legacy to your children."† The verdict makes colonial governments wary of using the criminal law to stifle critics.
1892	Parliament adopts a *Criminal Code* that formalizes the offences of defamatory, seditious, and blasphemous libel and creates defences to protect political debate and press freedom.
1914-1918	During the First World War, federal government regulations restrict the publication of information considered useful to the enemy.
1938	The Supreme Court of Canada strikes down Alberta laws curtailing freedom of the press and describes the "right of free public discussion of public affairs" as "the breath of life for parliamentary institutions."‡
1939-1945	The Second World War brings the return of censorship. A network of censors advises news editors on war-related information that can be published.
1951	The Supreme Court restricts the legal definition of sedition, saying "freedom in thought and speech … are the essence of our life."§
1960	Ottawa introduces a *Bill of Rights* to protect human rights and fundamental freedoms, including freedom of speech. It applies only to the federal government and its laws.
1969	The *Report of the Special Senate Committee on Mass Media* calls government interference "the gravest potential threat"# to press freedom in Canada.
1982	The Charter is adopted as part of Canada's Constitution. Section 2(b) guarantees "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."
1994	The Supreme Court's *Dagenais*** ruling calls on judges to limit the use of publication bans and to strike a balance between freedom of the press and a suspect's right to a fair trial.
2008	The Supreme Court strengthens the fair comment defence to defamation, ruling that Canadians "have as much right to express outrageous and ridiculous opinions as moderate ones."††
2009	The Supreme Court creates the defence of responsible communication on matters of public interest, which can defeat a libel claim if writers and publishers demonstrate high journalistic standards.
2017	Parliament passes the *Journalistic Sources Protection Act*,‡‡ Canada's first press shield law. It makes it less likely that the courts will order journalists to reveal the identity of a confidential source when their reporting serves the public interest.

* Marie Tremaine, *A Bibliography of Canadian Imprints, 1751-1800* (Toronto: University of Toronto Press, 1952) at 116.

† Quotation drawn from Dean Jobb, "An Unshackled Press" in Dean Jobb, ed, *Daring, Devious & Deadly: True Tales of Crime and Justice From Nova Scotia's Past* (Lawrencetown, NS: Pottersfield Press, 2020) ch 2.

‡ *Reference Re Alberta Statutes—The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] SCR 100 at 133, 1938 CanLII 1.

§ *Boucher v the King*, [1951] SCR 265 at 288, 1950 CanLII 2.

Senate of Canada, *The Uncertain Mirror: Report of the Special Senate Committee on Mass Media*, vol 1 (Ottawa: Parliament of Canada, 1970) at 101-2.

** *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 1994 CanLII 39.

†† *WIC Radio Ltd v Simpson*, 2008 SCC 40 at para 4.

‡‡ SC 2017, c 22.

Sources: WH Kesterton, *A History of Journalism in Canada* (Toronto: McClelland & Stewart, 1967); Dean Jobb, "'The First That Ever Was Publish'd in the Province': John Bushell's Halifax Gazette, 1752-1761" (2008) 11 Royal Nova Scotia Historical Society J 1; J Murray Beck, "'A Fool for a Client': The Trial of Joseph Howe" (1974) 3:2 Acadiensis 27.

Freedom of Expression Under the Charter

Defining the Scope of Free Speech

Thomas Jefferson best summed up US attitudes toward freedom of speech when he described government as "the opinion of the people." If he ever faced a choice between "government without newspapers, or newspapers without a government," he added, "I should not hesitate a moment to prefer the latter."[28] The First Amendment to the US Constitution,[29] ratified in 1791, sets out the fundamental freedoms of US citizens, among them a declaration that "Congress shall make no law … abridging the freedom of speech, or of the press." In the 20th century, US courts invoked this right to give journalists wide latitude to gather news and to protect the media against laws, government policies, and judicial rulings that inhibited the publication of information.[30]

Canadian courts, in contrast, are newcomers to the business of defining the scope of free speech. It wasn't until 1982 that the Charter appeared, guaranteeing "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

FIGURE 1.1 While Prime Minister Pierre Trudeau looks on, Queen Elizabeth signs Canada's constitutional proclamation on April 17, 1982, bringing the *Canadian Charter of Rights and Freedoms*, and its protection of the freedom of the press, to life.

28 Quoted in John Tebbel, *The Media in America* (New York: New American Library, 1976) at 90.

29 US Const amend I.

30 See Marc A Franklin, "An Introduction to American Press Law" in Philip Anisman & Allen M Linden, eds, *The Media, the Courts and the Charter* (Scarborough, Ont: Carswell, 1986) ch 2.

The guarantee, set out in section 2(b), is broad, suggesting that the framers of the Charter intended a wide array of forms of expression to fall within its scope. The guarantee was also drafted to encompass the press—a term that includes television and radio as well as traditional print journalism—and all other "media of communication." Books, plays, television documentaries, websites, videos, DVDs, Internet chat groups, online magazines, social-networking sites, and new forms of media technology yet to be invented—whatever the medium, Canadians are free to publish and disseminate images and ideas, subject only to laws and government restrictions that can be justified under section 1 of the Charter, which states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Supreme Court of Canada has taken the view that the right to free expression was entrenched in the Constitution "to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream."[31] Expression, the Court has said, must be given a broad definition, embracing both verbal and physical means of communication: "The content of expression can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts." Even the act of illegal parking could be a form of expression if the driver was engaged in a protest against unfair parking restrictions. In the Court's view, "activity is expressive if it attempts to convey meaning."[32] A firm line is drawn, however, at threats or acts of violence, which the Court has repeatedly said will not be granted Charter protection: "A murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen."[33]

In 1992, Justice Beverley McLachlin, later the Court's Chief Justice, summarized the interests protected under section 2(b) as "truth, political or social participation, and self-fulfilment."[34] Freedom of expression is a right enjoyed not only by those making a statement but also by those reading it or seeing it.[35] In the words of media law expert Robert Martin, the Charter protects "a process … that extends from gathering information to publishing information, to selling and distributing information, and finally to receiving information."[36]

Political Expression

In Charter rulings on freedom of expression, the Supreme Court of Canada has reiterated its earlier pronouncements on the importance of free speech to Canadian democracy. It is nothing less than "one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society."[37] In a 1989 judgment on media rights, Justice Peter Cory wrote:

> Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.[38]

---

31 *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927 at 968, 1989 CanLII 87.
32 *Ibid* at 968-70.
33 *Ibid* at 970. See also *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 588, 1986 CanLII 5.
34 *R v Zundel*, [1992] 2 SCR 731 at 752, 1992 CanLII 75.
35 *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326 at 1339-40, 1989 CanLII 20.
36 Robert Martin, *Media Law* (Concord, Ont: Irwin Law, 1997) at 39.
37 *RWDSU v Dolphin Delivery Ltd*, *supra* note 33 at 583.
38 *R v Zundel, supra* note 34 at 1336.

Justice Gérard La Forest endorsed this view in a 1996 ruling, calling open discussion about government policies and practices "crucial to any notion of democratic rule. The liberty to criticize and express dissentient views has long been thought to be a safeguard against state tyranny and corruption."[39] In one application of this facet of freedom of expression, the Supreme Court of Canada ruled in 2009 that municipal transit authorities do not have the power to ban political advertisements from the sides of buses.[40] Political expression, however, has its limits. In 2004, the Supreme Court upheld limits on how much money so-called third parties—individuals and groups not affiliated with the major political parties—can spend on advertising in federal elections. The law also imposes an advertising blackout on polling day. Although these provisions of the *Canada Elections Act*[41] clearly restrict freedom of political expression, a majority of the Court ruled that the limits are justified because they "create a level playing field" and prevent wealthy interests from having an undue influence on voters and, potentially, on the outcome of an election.[42]

Commercial Expression

Under the Charter, freedom of expression is no longer limited to the political realm. The Supreme Court has ruled that the Charter protects commercial advertising, including advertising aimed at children.[43] It also protects the right of union members to stage most forms of peaceful picketing during labour disputes.[44] This right to freedom of commercial speech may also limit the ability of governments to ban or regulate the distribution of spam email messages.[45] It does not, however, prevent a municipal government from using a noise by-law to prevent a commercial enterprise from employing a loudspeaker to attract customers to its premises.[46]

Obscenity and Child Pornography

Certain forms of pornography have won Charter protection from being prosecuted as obscenity under the *Criminal Code*, but the Supreme Court has ruled that freedom of expression does not extend to depictions of explicit sex with violence, degrading or dehumanizing treatment, or the exploitation of children.[47] The offence of possession of child pornography has been upheld as a reasonable limit on free expression under section 1 of the Charter, with the exception of certain written or visual material created for personal use.[48]

Hate Propaganda

The Court has had some difficulty grappling with the rights of those accused of spreading hate propaganda. In the case of Jim Keegstra, an Alberta schoolteacher charged under the *Criminal Code* with promoting hatred against an identifiable group,[49] the Court ruled that the anti-Semitic views he was foisting on his students were "repugnant" but, since they conveyed meaning, they fit the Charter definition of expression. However, Keegstra's ravings about Jewish plots were so

39 *Canadian Broadcasting Corp v New Brunswick (AG)*, [1996] 3 SCR 480 at 494, 1996 CanLII 184.
40 *Greater Vancouver Transportation Authority v Canadian Federation of Students—British Columbia Component*, 2009 SCC 31.
41 SC 2000, c 9.
42 *Harper v Canada (AG)*, 2004 SCC 33.
43 Hogg, *supra* note 27.
44 *UFCW, Local 1518, v KMart Canada Ltd*, [1999] 2 SCR 1083, 1999 CanLII 650; *Allsco Building Products Ltd v UFCW, Local 1288P*, [1999] 2 SCR 1136, 1999 CanLII 651.
45 Cristin Schmitz, "CBA Warns Anti-Spam Bill May Violate Charter Free Speech," *The Lawyers Weekly* (9 October 2009) 2 at 2.
46 *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62.
47 *R v Butler*, [1992] 1 SCR 452, 1992 CanLII 124.
48 *R v Sharpe*, 2001 SCC 2.
49 Section 319(3)(a).

extreme and so far removed from the core values of freedom of expression—the quest for truth, individual self-fulfillment, and participation in social and political life—that the law could stand as a reasonable limit on free speech.[50]

Ernst Zündel was more fortunate. A prominent Holocaust denier based in Toronto, he was charged with promoting hatred under a section of the *Criminal Code* that made it an offence to publish a false "statement, tale or news" that is likely to cause damage or mischief to a public interest.[51] There was no question that Zündel's pamphlet *Did Six Million Really Die?* was a form of expression, and the Charter protects the rights of minorities to voice opinions. The Supreme Court ruled that this infringement on freedom of expression could not be justified, even though Zündel's published views were untrue. Constitutional protection must extend to such statements since determining precisely what is true and what is false can be a difficult and subjective exercise. A majority of the Court struck down the law against spreading false news as unconstitutional.[52]

Freedom of Expression and the Media

The Charter's explicit protection of "freedom of the press and other media of communication" begs a question: Do writers, publishers, and broadcasters, who make their living expressing themselves, enjoy special constitutional status? The Supreme Court has taken the view that freedom of the press and other media stands apart from the free-expression rights of ordinary citizens. The Court has underscored the link between press freedom and the open exchange of information and ideas in a democratic society, stating: "It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being."[53] Former Chief Justice Beverley McLachlin contended that the Charter "affirms the special position of the press and other media in our society." In her opinion, the guarantee of freedom of the press "must be interpreted in a generous and liberal fashion."[54] And, in a ruling released in 2018, Justice Rosalie Abella of the Supreme Court reiterated the news media's crucial role: "A strong, independent and responsible press ensures that the public's opinions about its democratic choices are based on accurate and reliable information," she wrote. "This is not a democratic luxury—there can be no democracy without it."[55]

Broadcast Restrictions and the Role of the Canadian Radio-television and Telecommunications Commission

For print media, the right to free expression means that newspapers are not obliged to carry every item or advertisement submitted to them for publication. Because the press is free to select the information and opinions it reports, it follows that newspapers have the right to refuse to publish material as they choose.[56]

Canada's electronic media are in a different position. As in most countries, broadcast frequencies are considered public property and their use by radio and television stations is a privilege, not a right. A federal agency, the Canadian Radio-television and Telecommunications Commission (CRTC), regulates the broadcasting industry and issues renewable licences for the use of specific frequencies. These licences carry an array of conditions. Stations must meet

50 *R v Keegstra*, [1990] 3 SCR 697, 1990 CanLII 24.
51 Section 181 [repealed].
52 *R v Zundel, supra* note 34.
53 *Canadian Broadcasting Corp v New Brunswick (AG), supra* note 39 at para 475.
54 *Canadian Broadcasting Corp v Lessard*, [1991] 3 SCR 421 at 449-50, 1991 CanLII 49.
55 *R v Vice Media Canada Inc,* 2018 SCC 53 at para 110.
56 *Gay Alliance Toward Equality v Vancouver Sun*, [1979] 2 SCR 435, 1979 CanLII 225.

requirements to include certain levels of Canadian shows and music in their programming schedule. Broadcasters must devote a "reasonable amount of time" to coverage of public issues, and, to ensure that this coverage is balanced, they must provide an opportunity for contrary points of view to be aired. CRTC regulations forbid licensees from airing any "abusive comment that … tends to or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability."[57]

In July 2004, a major clash between the CRTC's mandate and the media's independence occurred when the commission refused to renew the licence of Quebec City radio station CHOI-FM after fielding dozens of complaints about program content. The CRTC ruled that the station's owner, Genex Communications, had violated broadcast regulations and the terms of its licence by allowing the two hosts of a morning talk show to "use the public airwaves to make personal attacks and to harass, insult and ridicule people." The hosts described African university students studying in Canada as "sons of plunderers, cannibals" and advocated that hospital staff "pull the plug" on a psychiatric patient. Another complaint came from a female television host who was the target of lewd remarks (and later won $340,000 in damages after suing the station for defamation).[58] Genex appealed, claiming that the CRTC ruling amounted to censorship and violated its right to freedom of expression. The Federal Court of Appeal upheld the CRTC's decision in September 2005, ruling that Charter guarantees of "freedom of expression, freedom of opinion and freedom of speech do not mean freedom of defamation, freedom of oppression and freedom of opprobrium."[59] The Supreme Court of Canada denied leave to appeal in 2007,[60] but the station remained on the air because, by that time, it had been sold to a new owner and relicensed.[61]

Human Rights Commissions and Freedom of Expression

Canada's human rights laws are designed to curb public statements so extreme they could incite hatred or contempt against members of minority groups or the groups themselves. While media organizations have been investigated for publishing such statements, action is usually taken against the person or group that made the statement, not the messenger. Journalists and columnists who express extreme opinions about minorities face the greatest risk, but, as free-expression expert Richard Moon noted, human rights probes are not triggered "by everyday racist stereotypes and claims." The focus of these laws is extreme, non-mainstream, and racist expression.[62]

The Canadian Human Rights Act

Under federal human rights legislation, it is an act of discrimination "to publish or display before the public or to cause to be published or displayed before the public any notice, sign, symbol, emblem or other representation" that "expresses or implies" discrimination or "incites or is calculated to incite others to discriminate."[63] Section 13 of the Act barred individuals or groups

57 *Broadcasting Act*, SC 1991, c 11; *Radio Regulations, 1986*, SOR/86-982, s 3(b).

58 CRTC, "Broadcasting Decision CRTC 2004-271" (13 July 2004), online: *Government of Canada* <https://crtc.gc.ca/eng/archive/2004/db2004-271.htm>.

59 *Genex Communications Inc v Canada (AG)*, 2005 FCA 283 at para 221.

60 *Genex Communications Inc c Procureur général du Canada et Conseil de la radiodiffusion et des télécommunications canadiennes (CRTC)*, 2007 CanLII 22312 (SCC).

61 CRTC, "Broadcasting Decision CRTC 2006-600" (20 October 2006), online: *Government of Canada* <https://www.crtc.gc.ca/eng/archive/2006/db2006-600.htm>.

62 Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 56.

63 *Canadian Human Rights Act*, RSC 1985, c H-6, s 12.

from using the telephone or "the facilities of a telecommunication undertaking" to distribute messages likely to expose a person or group to hatred or contempt based on their race, ancestry, religion, and other characteristics. This restriction was later expanded to include material posted to the Internet.[64]

In 2006, *Maclean's* magazine published "The Future Belongs to Islam," an excerpt from Canadian-born writer and political commentator Mark Steyn's book *America Alone: The End of the World as We Know It*.[65] In it, Steyn linked the threat of Muslim extremism to the growing size and power of Muslim communities within Western countries. While conceding "not all Muslims are terrorists," he wrote that "enough are hot for jihad to provide an impressive support network of mosques from Vienna to Stockholm to Toronto to Seattle."[66] The Canadian Islamic Congress lodged complaints with the Canadian Human Rights Commission, accusing Steyn of discrimination and promoting hatred against Muslims.

The complaint sparked a debate over freedom of speech and whether human rights commissions should have the power to dictate what Canadians can publish and read. "Freedom of speech is most important when it expresses strong disapproval," observed civil liberties advocate Alan Borovoy, expressing concern that writers and editors were being forced to "look over their shoulder, worried about being charged or even investigated."[67]

The Canadian Human Rights Commission ultimately dismissed the complaint against Steyn. While his writing was "polemical, colourful and emphatic" and "obviously calculated to excite discussion and even offend certain readers, Muslim and non-Muslim alike," the Commission conceded his words fell short of the extreme statements its legislation targets.[68] Controversy over the action against *Maclean's* led to the passage in 2013 of a private member's bill that repealed section 13, ending the federal commission's power to police commentary disseminated on the Internet and via other electronic means.[69] Extreme statements inciting hatred against minorities, however, can be prosecuted as hate crimes under the *Criminal Code* (see Chapter 13).

Provincial and Territorial Codes

Human rights legislation in each province and territory prohibits the publication or public display of material that discriminates against individuals or groups on the basis of race, religion, or other characteristics.[70] These provisions appear to target notices and advertisements, but the wording is broad enough to apply to any material published or broadcast, including news and opinions. Section 11 of Quebec's *Charter of Human Rights and Freedoms*,[71] for example, makes it a human rights violation to "distribute, publish or publicly exhibit a notice, symbol or sign involving discrimination, or authorize anyone to do so."

Ontario's legislation, like the federal Act, refers to the publication of a "notice, sign, symbol, emblem, or other similar representation," and similar wording is used in the codes of New

64 *Ibid*, ss 13(1), (2), (3). The legislation's application to messages distributed on the Internet was confirmed in *Warman v Kulbashian*, 2006 CHRT 11.

65 Mark Steyn, "The Future Belongs to Islam," *Maclean's* (20 October 2006), online: <https://www.macleans.ca/culture/the-future-belongs-to-islam>.

66 Quoted in Haroon Siddiqui, "The Weighty Matter of Hate," *Toronto Star* (23 March 2008).

67 Arnold Ceballos, "Critics and Defenders Agree: Hate Speech Laws Need Reform," *The Lawyers Weekly* (31 October 2008) 17 at 17.

68 "Rights Commission Dismisses Complaint Against Maclean's," *CBC News* (28 June 2008) at para 4, online: <https://www.cbc.ca/news/canada/rights-commission-dismisses-complaint-against-macleans-1.766963>.

69 Postmedia News, "Hate Speech No Longer Part of Canada's Human Rights Act," *National Post* (27 June 2013), online: <https://nationalpost.com/news/politics/hate-speech-no-longer-part-of-canadas-human-rights-act>.

70 *Human Rights Act*, RSY 2002, c 116, s 12. While Yukon's legislation makes no specific reference to publications, it forbids "systemic discrimination," which is defined as "any conduct that results in discrimination."

71 CQLR c C-12.

Brunswick, Newfoundland and Labrador, Nova Scotia, Nunavut, Prince Edward Island, and Saskatchewan.[72] Alberta, British Columbia, and Manitoba have added a published "statement" to the list of prohibited acts.[73] Human rights codes in Alberta, British Columbia, and the Northwest Territories restrict not only discriminatory publications but also those likely to expose individuals or groups to "hatred or contempt."[74]

Several jurisdictions specify that their human rights restrictions apply to material published in newspapers or broadcast on radio and television or through other media. This is the case in New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, and Saskatchewan. Each of these provinces has added the caveat that these restrictions do not interfere with freedom of speech or the free expression of opinion on any subject.[75] Codes in Alberta, the Northwest Territories, and Ontario also contain provisions respecting freedom of speech and protecting opinions expressed in the course of public debate.[76] A BC human rights tribunal concluded that provincial human rights codes do not apply to material disseminated on the Internet because the federal government is responsible for telecommunications.[77]

Human rights commissions have the power to investigate complaints under these and other provisions that outlaw discrimination. An investigation may lead to a formal inquiry, and anyone found to have violated the legislation can be fined or ordered to pay restitution or damages. Courts in Alberta and Saskatchewan have ruled that only "ardent and extreme" expressions of "detestation" and "vilification" violate provincial human rights codes.[78] Judges in other provinces and territories are likely to take the same approach, keeping the focus on extreme expressions of hatred and contempt rather than the work of journalists and media columnists. The following examples of provincial human rights cases will help writers and editors understand where the line is likely to be drawn:

- The Alberta Human Rights Commission dismissed a complaint against the Calgary-based *Western Standard* magazine in 2008 after it reproduced controversial cartoons depicting the Prophet Muhammad. Then-editor Ezra Levant, who termed the images "innocuous," argued he was asserting his right to freedom of expression by saying, "I want my readers to have the right to judge for themselves." No major Canadian media outlets reproduced the cartoons, citing ethical concerns (see Chapter 14).[79]

72 *Human Rights Code*, RSO 1990, c H.19, s 13(1); *Human Rights Act*, RSNB 1973, c H-11, s 6(1); *Human Rights Code*, RSNL 1990, c H-14, s 14(1); *Human Rights Act*, RSNS 1989, c 214, s 7(1); *Human Rights Act*, SNu 2003, c 12, s 14(1); *Human Rights Act*, RSPEI 1988, c H-12, s 12(1); *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 14(1).

73 *Alberta Human Rights Act*, RSA 2000, c A-25.5, s 3(1); *Human Rights Code*, RSBC 1996, c 210, s 7(1); *The Human Rights Code*, CCSM c H175, s 18.

74 *Alberta Human Rights Act*, s 3(1)(b); *Human Rights Code* (BC), s 7(1)(b); *Human Rights Act*, SNWT 2002, c 18, s 13(1)(c).

75 *Human Rights Act* (NB), ss 6(1), (2); *Human Rights Code* (NL), ss 14(1), (2); *Human Rights Act* (NS), ss 7(1), (2); *Human Rights Act* (PEI), ss 12(1), (2); *Saskatchewan Human Rights Code*, ss 14(1), (2).

76 *Alberta Human Rights Act*, s 3(2); *Human Rights Act* (NWT), s 13(2); *Human Rights Code* (Ont), s 13(2). For instance, an Alberta court ruled that a published letter to the editor—warning readers that a "homosexuality machine" was educating children to view homosexuality as morally acceptable—was intemperate and overstated but a legitimate expression of opinion under s 3(2) of the province's human rights legislation. *Lund v Boissoin*, 2012 ABCA 300.

77 *Elmasry and Habib v Roger's Publishing and MacQueen (No 4)*, 2008 BCHRT 378.

78 See e.g. *Owens v Saskatchewan (Human Rights Commission)*, 2006 SKCA 41; *Boissoin v Lund*, 2009 ABQB 592.

79 "Publisher Defends Decision to Reprint Cartoons," *CTV News* (13 February 2006), online: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060213/cartoons_060213/20060213> (offline as of July 2022).

- In 2016, a Quebec human rights tribunal ordered a comedian to pay $42,000 in damages after he mocked a teenager with a genetic condition characterized by skull and facial malformation. The comedian described the young man (who became famous in Quebec after singing for the Pope at age nine) as "ugly" and joked that he had been disappointed to discover the teenager was still alive. The Supreme Court of Canada overturned the ruling and award of damages in 2021, however, noting the remarks were offensive but not dehumanizing.

  In a similar case, British Columbia's Supreme Court upheld a human rights tribunal's $15,000 damage award levied on a comic who unleashed "a tirade of ugly words" and insults during an exchange with a lesbian couple in the audience of a comedy club. The judge said the issue was not "the scope of expression in a comedy performance or an artistic performance. It is about verbal and physical abuse that amounts to adverse treatment based on sex and sexual orientation."[80]
- In another BC case, a complaint was filed against newspaper columnist Doug Collins, who questioned whether six million Jews died in the Holocaust. A tribunal ordered Collins and his Vancouver-area paper, *North Shore News*, to pay $2,000 in compensation to the complainant after finding them in violation of the BC *Human Rights Code*.[81]
- In 2006, the Saskatchewan Court of Appeal ruled that an advertisement that quoted Bible passages describing homosexuality as a sin was not discriminatory. The ad included the image of two stickmen holding hands, placed inside a red "not permitted" symbol. A complaint was filed against the man who bought the ad and the Saskatoon *StarPhoenix*, where it appeared. No action was taken against the newspaper, but the ad's creator was found in violation of the Saskatchewan code and ordered to pay damages of $4,500. The Court of Appeal overturned the finding and penalty. While the advertisement's message was "bluntly presented and doubtless upsetting to many," it did not cross the line and violate the *Saskatchewan Human Rights Code*.[82]
- In 2002, an Alberta human rights inquiry ruled a clergyman, who was the chair of a group called the Concerned Christian Coalition, had promoted hatred against the LGBTQIA+ community in a letter to the editor that was published in the *Red Deer Advocate*. The letter described homosexuals as a form of "evil" and "wickedness" and called on people to take a stand "against horrendous atrocities such as the aggressive propagation of homo- and bisexuality." An Alberta judge reversed the finding in 2009, saying the clergyman's words were "jarring, offensive, bewildering, puerile, nonsensical and insulting" but not so extreme as to risk inciting hatred or contempt. The human rights complaint against the *Advocate* was settled without a hearing after the newspaper amended its letters policy to prevent the publication of statements "likely to expose people to hatred or contempt because of … sexual orientation."[83]

80 Kalina Laframboise, "Quebec Comedian Mike Ward Will Appeal $42K Human Rights Tribunal Ruling," *CBC News* (21 July 2016), online: <https://www.cbc.ca/news/canada/montreal/mike-ward-appeal-verdict-petit-jeremy-1.3688771>; Sean Fine, "Comedian Mike Ward's Mockery of Disabled Singer Not Discriminatory, Supreme Court Rules," *The Globe and Mail* (29 October 2021), online: <https://www.theglobeandmail.com/canada/article-comedian-mike-wards-mockery-of-disabled-singer-not-discriminatory>; Tristin Hopper, "Slurs Force Comic to Pay $15,000 for 'Tirade of Ugly Words' Against Lesbian Patron After Appeal Falls Flat," *National Post* (23 June 2013) at para 19, online: <https://nationalpost.com/news/canada/supreme-court-upholds-decision-to-force-comedian-to-pay-15000-for-tirade-of-ugly-words-against-lesbian-heckler>.

81 *Abrams v North Shore News (No 3)* (1999), 33 CHRR D/435.

82 SS 1979, c S-24.1; *Owens v Saskatchewan (Human Rights Commission)*, *supra* note 78 at para 86.

83 *Boissoin v Lund*, *supra* note 78 at paras 13, 90, 169.

Understanding Media Law

Open Courts: "The Very Soul of Justice"

Jeremy Bentham, a British philosopher of the late 18th century, was wary of judges and the power they wielded. The best means to ensure that the courts acted with fairness and impartiality, he believed, was to subject their work to intense public scrutiny. "In the darkness of secrecy, sinister interest and evil in every shape have full swing," he wrote. "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity."[84]

Two centuries later, Bentham's call for openness still rings true. At a 1984 forum on media coverage of criminal cases, *Toronto Star* publisher Beland Honderich described secrecy as the "most sinister enemy" of justice. "If we restrict public knowledge of how justice is being administered—and to whom—we give rise to fears and suspicions of favouritism and injustice," he warned, "and slowly but surely the confidence in our courts would decline. The courts would be brought into disrepute."[85]

Section 11(d) of the Charter guarantees "a fair and public hearing" to every person accused of a crime. But Canada's courts recognized the importance of open justice long before the Charter. Openness is the rule; restrictions on access to court proceedings are the exception. The Ontario Court of Appeal has described the openness of the courts as "one of the hallmarks of a democratic society." Echoing Bentham, the Court went on to declare public accessibility to be "a restraint on arbitrary action by those who govern and by the powerful."[86]

Open Courts

The Supreme Court of Canada has adopted a wide definition of the Charter guarantee of freedom of expression and has recognized the crucial role of the media in our democracy. And other than the regulations governing broadcasting, Canada's media face little direct state intervention in the way they gather and disseminate information. An exception is media access to Canada's courts. Judges and lawmakers use publication bans and other restrictions to impose limits on news coverage of court proceedings to protect other interests, the most important being the right of persons accused of crimes to have a fair trial. In 1994, media organizations invoked the Charter to challenge these restrictions, which lead to a seminal Supreme Court of Canada ruling—*Dagenais v Canadian Broadcasting Corp*[87]—that has added new clout to the media's right to freedom of expression (see pages 19-21 for more on this case).

The Media as Watchdog

The right of public access to the courts is meaningless if citizens are unable to exercise that right by monitoring what happens inside the courtroom. Few people have the time or the inclination to attend trials and hearings. Even if they did, the nation's courtrooms can only accommodate so many people at any given time. Therefore, the public must rely on the media to be its eyes and ears. "Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court," Peter Cory J of the Supreme Court of Canada observed. "Practically speaking, this information can only be obtained from the newspapers or other media."[88]

84 Cited in *AG (Nova Scotia) v MacIntyre*, [1982] 1 SCR 175 at 183, 1982 CanLII 14.
85 Ontario Press Council, *Trial by Media: An Account of an Open Forum on Pre-Trial Publicity Held by the Ontario Press Council* (Ottawa: Ontario Press Council, 1984) at 17-18.
86 *Re Southam Inc and The Queen (No 1)*, 1983 CanLII 1707 at 17, 41 OR (2d) 113 (CA).
87 [1994] 3 SCR 835, 1994 CanLII 39.
88 *Edmonton Journal v Alberta (AG), supra* note 35 at 1339-40.

The business of the courts, then, must be open to media scrutiny. Journalists fulfill the dual role of informer and watchdog, publicizing how cases unfold while holding accountable the judges, prosecutors, lawyers, and police officers who put the justice system into action. The media's right of access, the Supreme Court of Canada has ruled, is clearly guaranteed under the Charter:

> Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. … [The Charter] protects the freedom of the press to comment on the courts as an essential aspect of our democratic society. … As a vehicle through which information pertaining to these courts is transmitted, the press must be guaranteed access to the courts in order to gather information.[89]

Media coverage also shields the justice system from allegations of favouritism and unfairness. Furthermore, news accounts play an important role in apprehending criminals and may prompt people who can implicate or exonerate a suspect to come forward. Witnesses are less likely to perjure themselves if they know their words may reach people who could expose their lies. Litigants may think twice about pursuing dubious claims in the civil courts. Finally, media reports of the sentences that judges mete out for crimes are crucial to the justice system's goal of deterring others from committing offences.

Limits on Openness

Openness, however, is not absolute. The media's right to report on the justice system and the right of citizens to attend court proceedings often conflict with competing rights. Restrictions on access to the courts and what journalists can publish about court proceedings will be examined in detail in Chapters 9, 10, and 11.

The Proper Administration of Justice

administration of justice
the court process of doing justice to parties and upholding legal rights

Restrictions on media access may be justified to protect the **administration of justice**—that is, to ensure that the justice system can perform its function and that justice is done. Consider the example of a child victim of sexual assault who is frightened about testifying in front of spectators and reporters in open court. If the child is too intimidated to clearly describe what happened, the prosecution's case may collapse and an abuser may go free. A similar scenario could arise in the civil courts; to pursue a lawsuit, a company may have to disclose financial or sales information that could benefit its competitors. To avoid having the information aired in open court, the company may drop the lawsuit and forgo a valid claim for damages. In the case of the reluctant child witness, the restrictions may take the form of an order that only counsel and the defendant be present when the child testifies. Likewise, in the civil case, the judge may grant a request to seal any sensitive financial information filed with the court. In both instances, the goal of these limits is to overcome obstacles that could stand in the way of justice being done.

Privacy Rights

There may be compelling reasons to restrict openness to protect the privacy of those involved in the court process. Judges have the power under the *Criminal Code* to make an order preventing the media from identifying victims of sexual offences, extortion, or loansharking as well as witnesses under the age of 18 involved in such cases. These bans are intended to encourage victims, and any young witnesses who support their complaints, to come forward by shielding them from the embarrassing publicity that such prosecutions often attract. Publication bans are also issued to prevent defence counsel from disclosing confidential medical and psychiatric records or the details of a victim's sexual history. The *Criminal Code* has been amended to extend the right of

89 *Canadian Broadcasting Corp v New Brunswick (AG), supra* note 39 at paras 23, 26.

privacy beyond sex-related offences. Victims of all crimes and any witnesses testifying in a criminal case can ask a judge for an order restricting the publication of their identities.

The Right to a Fair Trial

The Charter guarantees everyone accused of a crime the right to have the allegations against them tested at a trial that is conducted fairly and impartially.[90] If the people serving on the jury were subjected to media reports offering a steady diet of gossip about the crime and slurs on the defendant's character, they would cease to be impartial triers of fact. And if the media were permitted to report freely on the evidence put forward during pre-trial hearings, jurors might come to court having already decided that the person on trial was guilty. To avoid such outcomes and to ensure fairness, judges have the power to ban the publication of information that could compromise the defendant's right to a fair trial. In addition, the *Criminal Code* enables prosecutors and defendants to seek a court order delaying the publication of evidence revealed at hearings in the pre-trial phase of a prosecution. Media organizations have invoked the Charter to challenge these *Criminal Code* bans, but, for the most part, the courts have found them to be reasonable limits on the right to free expression.[91]

Case Highlight

Fair Trial Versus Free Press: An Even Playing Field

> The pre-*Charter* common law rule governing publication bans emphasized the right to a fair trial over the free-expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the *Charter*, and, in particular, the equal status given by the *Charter* to ss. 2*(b)* and 11*(d)*. It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11*(d)* over those protected by s. 2*(b)*. A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.
>
> —Chief Justice Antonio Lamer, writing for the majority in *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 877, 1994 CanLII 39.

Balancing Rights: The Dagenais Ruling

For all the solemn pronouncements about the value of a free press, and despite the stack of rulings that emphasize the importance of open courts, Canada's judges once tended to put the rights of accused persons ahead of those of the media and public. When asked to choose between a defendant's request for a publication ban and the right of access to court proceedings, judges traditionally erred on the side of caution and granted the ban, giving precedence to fair-trial rights.

All this changed in 1994 after a legal tug-of-war between fact and fiction. The Canadian Broadcasting Corporation planned to televise the National Film Board's production of *The Boys*

90 Sections 7, 11(d).

91 For example, in *R v Banville*, 1983 CanLII 3027, 45 NBR (2d) 134 (QB), the New Brunswick Court of Queen's Bench found that s 539(1) of the *Criminal Code*, which bans the publication of evidence presented at preliminary hearings, is a justifiable limit on the media's freedom of expression under s 1 of the Charter. In *Re Global Communications Ltd and Attorney-General for Canada*, 1984 CanLII 2153, 44 OR (2d) 609 (CA), the Ontario Court of Appeal upheld the s 517(1) ban on publishing information presented at bail hearings.

of St Vincent, a gritty made-for-TV drama based on the real physical and sexual abuse of children at Newfoundland's infamous Mount Cashel orphanage. Meanwhile, in Ontario, Lucien Dagenais and three other members of the Christian Brothers—the Roman Catholic order that ran Mount Cashel—were charged with similar acts of abuse involving children at Ontario training schools where they had taught. Dagenais was the first to stand trial, and the Mount Cashel drama was scheduled to air just before the jury was sent out to begin deliberations.

Lawyers for Dagenais and his co-accused appeared before a judge of the Ontario Court of Justice and obtained an injunction to block the CBC from broadcasting *The Boys of St Vincent* anywhere in Canada until all four trials were completed. *The Globe and Mail* was forced to withdraw its TV guide insert for the week, which featured a cover story about the program. The media were even prohibited from reporting that an injunction had been granted. The *Globe* published a terse item, under the headline "Banned," that cleverly addressed the sweeping nature of the Court's order:

> Somewhere in Canada yesterday, a group requested a court ban on the publication/broadcast of a certain work for certain reasons. The court granted the ban on publication/broadcast and, in addition, imposed a ban on reporting the fact of the ban.[92]

The Ontario Court of Appeal narrowed the scope of the ban, preventing the program from being broadcast in Ontario and by a Montreal-based French-language station that sent its signal into Ontario.[93] The injunction was appealed to the Supreme Court of Canada, which produced a landmark ruling in late 1994 that quashed the ban and set new ground rules for how the courts could deal with the media's right to freedom of expression.[94] By a margin of 6 to 3, the Court ruled that an accused person's right to a fair trial should not trump the media's right of free expression. Writing for the majority, Chief Justice Antonio Lamer said these competing rights have equal status under the Charter and must be balanced, not regarded as a winner-take-all "clash between two titans."[95] Courts must avoid a "hierarchical approach to rights, which places some over others" when interpreting the Charter and developing the common law.[96]

Lamer CJ proceeded to set out the rights to be balanced. The Charter entrenches the right of accused persons to a fair trial, and it is in the public interest that suspects are acquitted or convicted at trials that are fair and appear to be fair. As well, the courts have an interest in protecting the reputation of the administration of justice by ensuring that justice is done and seen to be done. The publication ban imposed on *The Boys of St Vincent*, however, had a profound impact on the right of the film director to express himself, the CBC's interest in broadcasting the film, the public's interest in viewing it, and society's interest in having an important issue—child abuse—publicly exposed and debated.[97] But, the Chief Justice added, these rights are not always in conflict. Persons accused of crimes have an interest in ensuring that there is "public scrutiny of the court process, and all of the participants in the court process."[98]

When considering a motion to ban the publication of information, Lamer CJ ruled, judges must assess the objectives of a proposed ban and whether its impact on freedom of expression is in keeping with those objectives. He articulated the test as follows:

> A publication ban should only be ordered when:
>
> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

92 "Banned," *The Globe and Mail* (5 December 1992).
93 *Canadian Broadcasting Corp v Dagenais*, 1992 CanLII 2837, 12 OR (3d) 239 (CA).
94 *Dagenais v Canadian Broadcasting Corp, supra* note 87.
95 *Ibid* at 881.
96 *Ibid* at 877.
97 *Ibid* at 879-80.
98 *Ibid* at 882.

(b) The salutary [beneficial] effects of the publication ban outweigh the deleterious [harmful or detrimental] effects to the free expression of those affected by the ban.[99]

Lamer CJ set out additional criteria for a ban. The ban must relate to an important objective, and, if granted, the judge must ensure that it is "as limited (in scope, time, content, etc.) as possible."[100] The judge must also consider a range of options, short of banning publication, that would protect the right to a fair trial. The list includes adjourning the trial, holding the trial in another location, sequestering jurors, permitting counsel to question those called for jury duty, and issuing strong instructions to jurors to disregard media reports.[101]

Note that the ***Dagenais* test** does not apply to all publication bans, only those where a judge has the discretion, under the common law or under a statute, to impose or deny a ban. The precedent does not apply to mandatory bans—for example, the *Criminal Code*'s ban on publishing the evidence presented at a preliminary hearing, which must be imposed if requested by the defendant.

***Dagenais* test**
developed by the Supreme Court of Canada in its ruling in *Dagenais v Canadian Broadcasting Corp,* this test states that a publication ban should only be imposed when no other measures could prevent a serious risk to the interests at stake; if a ban is imposed, it should only be to the extent necessary to prevent a real and substantial risk to the fairness of the proceedings in question

Applying Dagenais

The *Dagenais* ruling has been described as nothing short of "revolutionary," enhancing the openness of the courts and giving the media a powerful weapon to fight restrictions on publication and access to the courtroom.[102] The ruling represents a watershed, a fundamental rethinking of how freedom of expression applies to the courts.

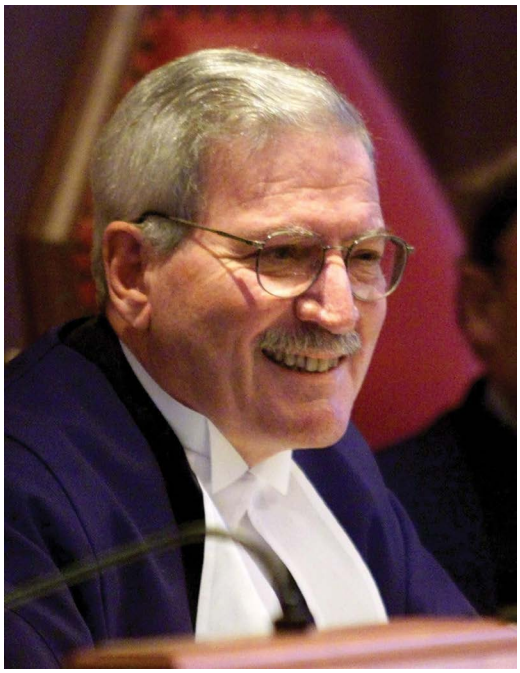

FIGURE 1.2 Chief Justice Antonio Lamer, in the *Dagenais* ruling, held that the rights of the media and the public must be considered before judges impose restrictions on publishing information presented in court cases.

99 *Ibid* at 878.
100 *Ibid* at 891.
101 *Ibid* at 881.
102 Michael R Doody, *Reporting on Adult Courts and Tribunals* (Toronto: Hallion Press, 1995) at 19, 21.

The Supreme Court of Canada has put the *Dagenais* approach to work in other contexts. It has applied the rights-balancing approach to the way that judges use their discretionary power under section 486(1) of the *Criminal Code* to close a courtroom to the public. As in *Dagenais*, judges must consider alternatives to excluding the public and, if an exclusion order is granted, ensure that it is as limited in scope as possible. The benefits of closing the courtroom must be weighed against the principle of openness and the right of free expression.[103]

In late 2001, the Court revisited the publication ban issue in a pair of rulings (including one known as *Mentuck*[104]) that rejected sweeping bans on police undercover operations. Declaring that Canada "is not a police state," the Court said the public must be free to scrutinize the tactics used in apprehending suspected criminals. Openness and media scrutiny ensure that trials are conducted fairly and, just as importantly, help to vindicate defendants who are found not guilty by informing the public of the reasons for an acquittal. Because neither ban related to the fair-trial rights of the defendants, the Court ruled that judges should apply what are now known as the *Dagenais*/*Mentuck* principles when faced with applications for publication bans that could protect or hinder the proper administration of justice.[105] The Court has also applied this test to applications for an order sealing confidential information presented in court cases. Judges must weigh free expression and openness against the need to protect other important interests, including commercial interests.[106] The Supreme Court of Canada went further in 2005, asserting that "the *Dagenais*/*Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings." It also ruled that the media can challenge publication bans and access restrictions "at every stage of the judicial process," including during police investigations and before criminal or other charges are filed. The Court's bottom-line position, that "[i]n any constitutional climate, the administration of justice thrives on exposure to light—and withers under a cloud of secrecy," bodes well for further successful media challenges to restrictions on coverage of the justice system.[107]

103 *Canadian Broadcasting Corp v New Brunswick (AG), supra* note 39.
104 *R v Mentuck*, 2001 SCC 76.
105 *Ibid*; *R v ONE*, 2001 SCC 77.
106 *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.
107 *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41 at paras 1, 7, 8.

KEY TERMS

administration of justice, 18
Dagenais test, 21
libel, 4
ultra vires, 6

DISCUSSION QUESTIONS

1. Freedom of expression in Canada is not absolute. Identify and briefly describe three limits on free expression.
2. What is the significance of Nova Scotia journalist Joseph Howe's libel trial in 1835?
3. How did the Supreme Court of Canada's 1994 *Dagenais* ruling change media law in Canada?