FREEDOM OF EXPRESSION—THE FIRST STEP

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The following paper focuses on the existence of freedom of expression as the recognized leader of all civil liberties. The term "expression" is used since it refers to more than just speech itself. Also, the author discusses the implied Bill of Rights theory and whether freedom of expression is a legal concept in our constitution.

I. INTRODUCTION

More than at any other time in the history of our country there is a concern about civil liberties. But having surveyed the reported decisions on the *Canadian Bill of Rights*[1] I have been left with the distinct impression that there is little if any legal protection for our civil liberties in the sense that the term has acquired in 1976. A survey of the cases shows that the concern is not being reflected by our courts. The *Canadian Bill of Rights* has in the main been given short-shrift in the vast majority of cases in which it has been considered. Although not indicated by the Bill of Rights cases, there does exist in Canadian jurisprudence cases and opinions which would lead one to conclude that there does indeed exist legal limitations on the power of legislatures, both provincial and dominion, with respect to civil liberties. There arose the very real possibility of an "implied Bill of Rights" in our constitution following several cases in the 1950's, and in a sense this paper, by its very existence, will test the continued vitality of a theory of an implied Bill of Rights. The purpose of this paper is not to discuss civil liberties in general but rather to focus on one—freedom of expression, the recognized leader of all civil liberties, and to study freedom of expression as it exists in our constitution. If one were to create a sub-title for this paper it would be the constitutionalizing of freedom of expression.

A review of the case law in Canada in regard to freedom of expression reveals confusion and conflicting statements. Some cases would appear to deny any constitutional protection for freedom of expression and even at times to deny the existence of such a concept as freedom of expression in the law, while others reveal strong statements in the opposite direction. Confusion and contradiction arises from the issue of whether such a concept as freedom of expression exists in our law. This is compounded by the difficulty which can arise if it should be held to exist. As a result little is known among Canadian lawyers and laymen of the protection which our law gives to freedom of expression, or for that matter, to any of the fundamental freedoms.

It is stating the obvious to say that an article of this size cannot do justice to a topic of such complexity, but it is my hope to provide some light in such a shadowy area, although there will probably be more questions posed than answers given. In the end it may come as a surprise to many not how little is the protection that is given by our constitutional law, but in fact, how great is the protection.

The phrase "freedom of expression" has been used and will continue to be used in this article rather than the familiar phrases "freedom of

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[1] S.C. 1960, c. 44; R.S.C. 1970, app. III.

speech" or "freedom of discussion" because the word "expression" is more descriptive of what requires legal protection, than are the words "speech" or "discussion". What we are concerned with is the expression or communication of ideas and facts by words, written or oral, or by conduct, and it is not speech alone which is being protected, nor is it necessary that a discussion be involved. It is doubtful that the users of the phrase "freedom of speech" intend to restrict themselves to only oral speech, or that the users of the phrase "freedom of discussion" intend to restrict themselves to the discussion of ideas and facts as opposed to the expression of them, but it is hoped that the phrase "freedom of expression" will avoid any unnecessary debate.

II. NOT AN ABSOLUTE FREEDOM

At the beginning of any discussion of freedom of expression it is best to assert that it is not an absolute freedom; all would agree that limits may be attached to the expression of ideas and facts which cannot be constitutionally challenged. The setting forth of a view of an absolute freedom has become a classic straw man, with the result that once a non-absolutist view is agreed upon it is assumed that anything goes. There are limits to the limits if there is freedom of expression.

It is possible to agree that the form of the expression can be regulated. That is, when the expression is made, where it is made, and how it is made can be the subject of restrictions. Of the restrictions suggested, when, where, and how it is obvious that if "what" is involved then we have a situation fraught with danger. Although one can assert that freedom of expression is not absolute it should not be thought that any admission has been made; rather it is only a statement of reason, which recognizes that absolutes seldom, if ever, exist. With the acceptance of the existence of limits on expression it does not mean that all possible limits are acceptable.

III. THE NON-LEGAL CONCEPT

The nature of our constitution is such that I would expect no debate that a concept of freedom of expression exists in it. That of course does not mean that a legal concept exists. For as Mr. Justice Riddell said in *Orpen* v. *A.G. Ont.*:[2]

> The word 'Constitution' has a different connotation in American and in Canadian (i.e., British) usage. Speaking somewhat generally—in the United States, 'the Constitution' is a written document, containing so many letters, words and sentences, which authoritatively and without appeal dictates what shall and what shall not be done; in Canada, 'the Constitution' is 'the totality of the principles, more or less vaguely and generally stated, upon which we think the people should be governed.' In Canada anything unconstitutional is wrong, however legal it may be; in the United States anything unconstitutional is illegal, however right and even advisable it may be; in Canada to say that a measure is unconstitutional rather suggests that it is legal, but inadvisable.

A qualification on the above quotation must be made with regard to the B.N.A. Act, in which case anything unconstitutional means it is illegal. We in Canada actually have a constitution partly like that of the United States, *e.g.*, the B.N.A. Act, and partly like that of Britain.

The nature of the British Constitution is illustrated by an article by

[2] [1925] 2 D.L.R. 366 at 372; 56 O.L.R. 327 at 334, quoted with approval by Wells C.J.H.C. in *R.* v. *Smythe* (1971) 17 D.L.R. (3d) 389 at 407 (Ont.).

Lord Denning in which he expressed the opinion that the spirit of the British Constitution consists of certain instincts, one of which is the instinct for liberty.[3] He was of the view that the spirit is the same in the Canadian Constitution. The instinct for liberty finds its expression in certain fundamental principles of law, and means that the basis of government is to be free will and not force, which requires that there be free and timely elections so that people may have the government they choose to have. In addition there must be freedom of association so that people may form themselves into a party to advocate an alternative government. In the opinion of Lord Denning the keystone of political liberty and the primary requisite for the instinct is freedom of expression. Although freedom of expression is an integral part of the British Constitution, and also the Canadian, yet, in the opinion of Lord Denning, it could not be considered to be a legal part of the constitution in the sense that the judges would apply the concept to question the validity of legislation or law in general, since, as Lord Denning stated, it is also part of the British Constitution that "judges, of course, administer the law, good or bad, as they find it."[4] Freedom of expression as a non-legal concept finds its protection through the political rather than the legal process. The elected representatives of the people are the protectors of the rights of the people who elected them. Parliament is conceived as a check on the executive, but it is difficult to accept the opinion that the House of Commons, the Senate or the Governor-General have the ability to check the executive today to the extent that this opinion would have us believe. Members of Parliament obtained legal recognition of freedom of expression by the *Bill of Rights, 1689*,[5] in their struggle against the executive; now nearly three hundred years later it may be time for the same legal recognition to be passed down to the people who elect the members of Parliament. The use of the political process to protect freedom of expression is based on the view that a government which infringes upon the principle faces defeat at the next election, assuming that its infringement of the freedom has not been so severe that there cannot be a free election.

In much the same vein as Lord Denning, Professor Goodhart has written that "the people as a whole, and Parliament itself, recognize that under the unwritten constitution there are certain established principles which limit the scope of Parliament."[6] In Professor Goodhart's belief there are four of these basic principles, three of which are freedom of expression, of thought and of assembly. Another of the principles is that Parliament governs Britain in a representative capacity, which is obviously dependent on the principle of freedom of expression. Although the courts are powerless to enforce these principles it does not mean that they are not binding or ineffective, writes Professor Goodhart, since Parliament "could not, even if it wished to do so, abolish freedom of speech,"[7] and any attempt to do so would result in revolution. In the end the real protection for freedom of expression and what it ensures is "the conviction, ingrained in the average Englishman by tradition and by

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[3] Denning, *The Spirit of the British Constitution*, (1951), 29 Can. Bar Rev. 1180.

[4] *Id.* at 1193.

[5] Article 9: "The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament."

[6] Goodhart, *English Law and the Moral Law* 55 (1955).

[7] *Id.* at 60.

education, that it is his moral duty to be free."[8] Lord Denning also emphasizes that the spirit of the British Constitution is "felt" and is to be experienced rather than learnt. "It is an atmosphere that springs out of our long experience and tradition," writes Lord Denning.[9]

A very important point in any discussion of freedom of expression is that, even if freedom of expression, or any other freedom, be expressed in writing in a constitution or Bill of Rights the words are hollow if the tradition and belief of the people, or the power of the government, is contrary to the existence of the freedom.[10]

It is sometimes said that freedom of expression is like a convention,[11] which means that the government and the people of Canada feel an obligation to maintain the freedom and to resist interference with it. There is no legal obligation involved, only a consensus that the freedom should be maintained and will be maintained. A view of the freedom as a convention is basically the same view as that held by Denning and Goodhart.

If there is an obligation to maintain the freedom and to resist interference with it, then the obligation must also be felt by judges, and if this concept has a strong foundation in our constitution it must infiltrate the decisions of the courts, although not necessarily to the extent of an express declaration that a particular law is invalid. Perhaps at least we can rely on Coke's view that given the appropriate circumstances a judge would do what a judge should do.

Within any society or community there exists many interests and rights which compete for recognition at any given time, and the exercise of a right invariably involves an interference with a right of someone else. Of the interests existing in a community some are interests of the individual and some are interests of the community, and one must be careful not to balance an individual interest against a community interest as the balance must always tilt in favour of the community. The right to express what one wishes can be both an interest of the individual and of the community, in that an individual may have a desire to express his views and the community may have a desire to allow an individual to be able to express his views. But it is the community's interest in freedom of expression which must be considered. Although an individual may wish to say something whenever, however, and wherever he wants, he can only do so when it conforms to the community's view of freedom of expression as to where, when, and how.

In a community which is a democracy there is "a profound national commitment to the principle [of] debate on public issues,"[12] and as long as Canada remains a democratic state then we must make this profound national commitment, and if our judges reflect the values of the community then the commitment has been made, since freedom of expression has been termed essential for our community, and the

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[8] *Id.* at 62.

[9] *Supra*, n. 3 at 1181.

[10] Article 125 of the Constitution of the Soviet Union states: "In accordance with the interests of the working people, and in order to strengthen the socialist system, the citizens of the U.S.S.R. are guaranteed by law: (a) Freedom of speech; (b) Freedom of the press; (c) Freedom of assembly and meeting; (d) Freedom of street processions and demonstrations." Professor Scott in *Civil Liberties and Canadian Federalism* (1959) at 13 says that "parliamentary restraint in legislation, bureaucratic restraint in administration, and a strong and live tradition of personal freedom among the citizens generally" are the basis of the British method of protecting human rights.

[11] Dawson, *The Government of Canada* 58-60 (5th ed. 1970).

[12] *New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254; 84 S. Ct. 710 at 721.

foundation of our nation.[13] Chief Justice Duff in *Re Alberta Legislation* spoke of it as the breath of life for our parliamentary institutions.[14] Mr. Justice Rand considered it as vital for our nation's existence as breathing is to an individual's existence.[15]

The balancing of interests has been mentioned, but freedom of expression cannot be simply balanced against all other interests or values. It has, what American jurisprudence calls a "preferred position",[16] which it must have if it is truly essential, the foundation, the breath of life of our community. It can only be outweighed by a very compelling counter-interest. The ability to express one's thoughts is one of the most human of activities, and the silencing of people has a dehumanizing effect. Also, if we accept democracy and the participation of the bulk of the population in the political process, then the population must be able to participate by expressing their views of government and its actions. If an election is to be free and meaningful the issues must be presented and discussed. Perhaps, like the members of the Special Committee of the House of Commons on Hate Propaganda,[17] we should not allow ourselves to accept naively the notion of a market place of ideas where one will be able to discover the truth and reject the lie.[18] However, to be skeptical of this notion of a market place cannot mean that we must reject it because with the rejection would go a rejection of a notion of a meaningful participation by the people of Canada in their governing. One can certainly agree with the Committee that freedom of expression is the main cornerstone of our way of life, at least of our political way of life, and although we can be skeptical of free enterprise in theory we cannot reject it.[19]

IV. FREEDOM GOVERNED BY LAW

It has sometimes been stated by judges in Canada that freedom of expression means "freedom governed by law".[20] If such an assertion means that it is justifiable for expression to be restricted by legal rules, and in essence is a rejection of an absolute freedom then it is perfectly acceptable, but not very helpful; on the other hand if it can be taken to

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[13] Cannon J. in *Re Alberta Legislation* [1938] S.C.R. 100; [1938] 2 D.L.R. 81 at 119; aff'd without consideration of the "Press Bill" [1938] 4 D.L.R. 433; [1939] A.C. 117.

[14] *Id.* at 107 (D.L.R.).

[15] *Switzman* v. *Elbling and A. G. Quebec* [1957] S.C.R. 285; 7 D.L.R. (2d) 337 at 358; 117 C.C.C. 129. In *Boucher* v. *The King*, [1950] 1 D.L.R. 657 at 682 he termed it the essence of our life, and at 684, a constituent of modern government. In a more recent case Branca, J.A. of the British Columbia Court of Appeal called the Freedom fundamental and limited only by wrongful acts resulting from speech: *Church of Scientology of British Columbia* v. *Radio N.W. Ltd.*, (1974) 46 D.L.R. (3d) 459 at 463; and in *Daylight Theatre Co. Ltd.* v. *The Queen*, (1973) 48 D.L.R. (3d) 390 at 396, Hughes D.C.J. of the Saskatchewan District Court said that freedom of expression is "basic to the maintenance of our present society."

[16] *Thomas* v. *Collins* (1945) 323 U.S. 516; 65 Sup. Ct. 315.

[17] Canada, House of Commons, *Report of the Special Committee on Hate Propaganda*, (Ottawa 1966) pp. 6-9.

[18] *See Saumur* v. *City of Quebec and A.G. Quebec* [1953] 2 S.C.R. 299; [1953] 4 D.L.R. 641 at 671; 106 C.C.C. 289, Per Rand J. for the marketplace of ideas view.

[19] There is freedom behind freedom of expression called freedom of opinion. If one lived in a society whose members were constantly bombarded with governmental propaganda and taught what to think the freedom of expression could be meaningless as one would only spout what he has been taught. Freedom of expression must be based on freedom of opinion, the aim of which is to prevent official propaganda. In political matters the citizenry must be free to make up their minds and choose who will govern them and how they will be governed.

[20] Duff C.J.C. in *Re Alberta Legislation, supra*, n. 13 at 107 (D.L.R.): "In a word freedom of discussion means 'freedom governed by law'." The source of the phrase is Lord Wright in *James* v. *Commonwealth* [1936] A.C. 578 at 627, where he was considering the words "absolutely free" in s. 92 of the Australian Constitution Act, 1900 with respect to trade among the states. He used free speech as an analogy to deny the existence of any absolute freedom, and trade free from all governmental control. *See also Robertson and Rosetanni* v. *The Queen* [1963] S.C.R. 651; 41 D.L.R. (2d) 485 at 492-3 (Ritchie J.); *Koss* v. *Konn* (1961) 30 D.L.R. (2d) 242 at 264; 36 W.W.R. 100 (B.C.C.A.) (Tysoe J.A.); *R.* v. *McLeod* (1970) 1 C.C.C. (2d) 5 at 8 (B.C.C.A.).

deny the existence of a freedom by the absence of any restriction of the meaning of the word "law" then it is open to dispute.

That there is a concept of freedom of expression within our community should admit of no dissent, but because of the legal concept of supremacy of Parliament there has been a tendency to deny that the concept is legal. Parliamentary supremacy has been called the dominant characteristic of the British Constitution[21] and in fact it has been said that it is the British Constitution.[22] In sum it means that there are no legal restrictions on the power of the legislature, and the importance of the concept is the role which it creates for a judge with the rejection of legal power in the judge to question the validity of statutes duly enacted by the legislature. Mr. Justice Riddell of Ontario put it this way:

> The legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule, human or divine.[23]

And with reference to fundamental freedoms specifically, Mr. Justice Pigeon of the present Supreme Court of Canada had this to say in the now famous *Drybones* case:

> Where is the extent of existing human rights and fundamental freedoms to be ascertained if not by reference to the statute books and other legislative instruments as well as to the decisions of the courts?[24]

The legal concept, known as supremacy of parliament, has been said to have found its way into our Constitution through the Preamble to the British North America Act, 1867. Chief Justice Duff in the *Persons* case said:

> The constitution was . . . to be 'similar in principle' to that of the United Kingdom; a canon involving the acceptance of the doctrine of parliamentary supremacy;[25]

although Cannon J. in *Re Alberta Legislation* cited the Preamble and the words "similar in principle to that of the United Kingdom", as the source of democratic principles in the Canadian Constitution and the foundation of these principles "free public opinion and free discussion."[26] Duff C.J. himself, in the same case, looked to the Preamble as contemplating "a parliament working under the influence of public opinion and public discussion."[27]

In a nation with a written constitution it is left to the judiciary as a general rule to determine if the legislation which has been passed comes within the grant of legislative powers as indicated by the constitution, and in a federal state the judiciary is given the task of acting as a referee between the components of the federation since as interpreter of the constitution the judiciary determines when the legislature has gone out of bounds. Consequently the courts are thrown into the fray and they must determine the validity of laws. In the quote of Mr. Justice Riddell, *supra*, it is said that "within its jurisdiction" the legislature is supreme. Riddell J. and the other judges determine when the legislature is within its jurisdiction. Mr. Justice Riddell also said: "my duty is loyally to obey

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[21] Jennings, *The Law and the Constitution* 144 (5th ed. 1959).

[22] *Id.* at 314 (App. II); but as he points out at 170 "The supremacy of Parliament is a legal fiction, and legal fiction can assume anything."

[23] *Florence Mining Co. Ltd.* v. *Cobalt Lake Mining Co. Ltd.* (1908) 18 O.L.R. 275 at 279, aff'd 43 O.L.R. 474.

[24] *R.* v. *Drybones* [1970] S.C.R. 282; 9 D.L.R. (3d) 473 at 488; [1970] 3 C.C.C. 355; 10 C.R.N.S. 334.

[25] *Re Section 24 of the B.N.A. Act* [1928] S.C.R. 276 at 291; [1928] 4 D.L.R. 98 at 112-3.

[26] *Supra*, n. 13 at 146 (S.C.R.). *See also R.* v. *Hess* (No. 2) at n. 30.

[27] *Id.* at 133 (S.C.R.).

the order of the Legislature,"[28] but it is Riddell J. who determines what the order of the legislature is.

Parliamentary supremacy involves an assumption that the laws which are enacted by the legislature are within certain bounds, and if an enactment exceeds the bounds of tolerance of the society then parliamentary supremacy dictates that the remedy is to be found politically and not legally through the courts. A danger which can arise from a too rigid adherence to the concept of parliamentary supremacy and its underlying assumption that the legislature will act in conformity with certain basic values, is the view that whatever is the law, is what it ought to be. There is a danger of a dismissal of criticism of the law, and a blind acceptance of it. The law is the law.

Since Canada is a federal state, and the constitution distributes legislative power between the Dominion and the provinces, the judiciary has become involved in determining the validity of law, and it is perhaps natural that having entered upon the exercise of determining the validity of law, together with the acceptance of certain basic values, such as freedom of expression, in our society and constitution, that our judges have not allowed the concept of supremacy of parliament to go unchallenged. Mr. Justice Rand in *Murphy* v. *C.P.R. and A.G. Canada*[29] said that the totality of legislative power is subject to express or necessarily implied limitations of the British North America Act. The express limitations would be the division of powers in sections 91 to 95, while the idea of "necessarily implied limitations" allows for further restrictions by the courts based on certain basic principles. Indeed there is one case in which a law has been expressly held to be beyond the power of any legislature in Canada. In *R.* v. *Hess (No. 2)*[30] O'Halloran J.A. held that section 1025A of the Criminal Code, which authorized the detention of a person acquitted on an appeal, pending the determination of a further appeal by the Crown to the Supreme Court of Canada, was beyond the competence of parliament or any provincial legislature. The basis for his decision was that a constitutional democracy had been established by the British North America Act, 1867 through the words of the Preamble, which provides for a "constitution similar in principle to that of the United Kingdom"; by the establishment of a constitutional democracy certain principles were incorporated into our constitution, for instance, those principles which were expressed by *Magna Carta, Petition of Right, Bill of Rights,* and the *Act of Settlement,* as well as those principles which are necessary for the viability of a constitutional democracy, which would seem to include its "breath of life", freedom of expression. In the opinion of Mr. Justice O'Halloran, section 1025A was contrary to the principles of a constitutional democracy.

V. A LEGAL CONCEPT

As has been mentioned earlier if we talk of freedom of expression as a constitutional freedom, even though we give it a non-legal status, we must recognize that it can surface in judicial decisions and is always present in the minds of the judges when expression in some form is before the courts. But it is rare that one reads statements such as the

[28] *Smith* v. *City of London* (1909) 20 O.L.R. 133 at 142.

[29] [1958] S.C.R. 626; 15 D.L.R. (2d) 145 at 153.

[30] [1949] 4 D.L.R. 199; 8 C.R. 52; 94 C.C.C. 57 (B.C.C.A., O'Halloran J.A. in Chambers).

one made by Mr. Justice Dennistoun of the Manitoba Court of Appeal. In 1940, in reference to the stringent restrictions imposed on the freedom by the defence of Canada regulations under the War Measures Act,[31] he said:

> In time of peace civil rights of the people, the liberty of the subject, the rights of free speech, and the freedom of the press, are entrusted to the courts.[32]

Legal protection for the freedom can and does exist through the court's construction of legislation and in its application of law so as not to derogate from the freedom. We are involved with what Professor Willis has called the Common Law Bill of Rights,[33] in that courts will apply certain presumptions when construing legislation and applying law. The presumption against interference with the personal liberty of the individual is the most firmly established of the intent controlling presumptions in the opinion of Professor Willis. The presumption will be applied, writes Professor Willis, because "the courts regard themselves as the guardians of freedom,"[34] and "although English and Canadian courts have not the power of the Supreme Court of the United States to check the activities of legislatures, the . . . use of the . . . presumptions does go some distance to establishing a sort of fourteenth amendment to the British North America Act."[35]

R. v. *Boucher*[36] is a case which highlights the "legalizing" of the concept. The case involved a conviction for publishing a seditious libel. The pamphlet which the accused, a Jehovah's Witness, distributed was entitled "Quebec's burning hate for God and Christ and Freedom, is the shame of all Canada", and the issue which the Supreme Court of Canada had to consider was whether an intention to promote feelings of ill-will and hostility between different classes of His Majesty's subjects or an intention to bring them into hatred or contempt, or to excite disaffection against the administration of justice was sufficient to be a seditious intention. The authority for classifying the above as capable of being a seditious intention was said to be the definition of the Royal Commission on Codification of the Criminal Law in Britain, 1880, which was generally considered to accurately reflect the legal position. That the definition may once have been accepted may be true, but by 1950 it had ceased to reflect what the Supreme Court of Canada perceived to be the meaning of seditious intention in mid-twentieth century Canada. The definition was:

an intention—

(1) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or the government and constitution . . . or of any part of it as by law established, or either House of Parliament, or the administration of Justice; or

(2) to excite Her Majesty's subjects to attempt to procure, otherwise than by lawful means, the alteration of any matter in church or state by law established; or

(3) to raise discontent or disaffection amongst Her Majesty's subjects; or

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[31] R.S.C. 1927, c. 206, now R.S.C. 1970 c. W-2.

[32] *Yasny* v. *Lapointe* [1940] 2 W.W.R. 373; 74 C.C.C. 29, cited in *R.* v. *Coffin* [1940] 2 W.W.R. 592 (Alta. Pol. Ct.).

[33] Willis, *Statute Interpretation in a Nutshell* (1938) 16 Can. Bar Rev. 1.

[34] *Id.* at 23.

[35] *Id.*

[36] [1950] 1 D.L.R. 657, and on rehearing [1951] S.C.R. 265; [1951] 2 D.L.R. 369; 11 C.R. 85, 99 C.C.C. 1.

(4) to promote feelings of ill-will and hostility between different classes of such subjects.

A majority of the Supreme Court saw the issue as involving the concept of government in Canada. In the opinion of Mr. Justice Rand our concept of government had changed over the years and by 1950 the governors were not seen as superior beings, who were beyond criticism, but they were to be looked upon more as servants, "bound to carry out their duties accountably to the public."[37] Stephen in his *History of the Criminal Law of England*[38] had said that if one views the ruler as the agent and servant, and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because, being a multitude, he cannot use it himself, then carried to its logical conclusion, there can be no such offence as sedition. There may be breaches of the peace and incitements to breach the peace, but only censure of government which has the immediate tendency to produce a breach of the peace is to be regarded as a crime.

The court held that sedition had ceased to mean the bringing into hatred or contempt, or exciting disaffection with our rulers, or to raise discontent or disaffection among the people, or to promote feelings of ill-will and hostility between different classes of subjects, and since our concept of government had changed "new jural conclusions" were needed to be formed to conform to the new concept of government. The focus must be placed on the consequences which arise from the use of words, or other form of expression, and not on the expression itself. Strong words, or words which would be likely to annoy or anger the reader, would not be sufficient to be branded as criminal since in a free society "controversial fury" can be absorbed, and discontent, disaffection, and hostility are part of our being.[39] In the final analysis, the court held that only an intention to incite violence against government in the broadest sense, or against the administration of justice could be called criminal as constituting a seditious intention. Criticism of government is protected till the expression used would tend to arouse people against it in the form of insurrection or rebellion, or something approaching it. Expression of opinion which would arouse people against the government but without disturbance to society in the sense of rebellion would be protected.

Rand J. added the words "in the broadest sense" to the word "government" and it is difficult to define with precision what he meant by doing so. It is possible that he would include a disturbance within society which hindered the governing of the society, without the disruption being aimed specifically at the existing government; for as Rand J. said: it "may be through tumult or violence, in resistance to public authority, in defiance of law."[40] By leaving it undefined Rand J. left future courts to fill it with meaning.

In *Boucher* the Supreme Court of Canada decided that it would focus its attention on the possible result of an expression of opinion rather than on the expression itself. No matter how one might view the opinion being expressed it could not be classed as criminal and subject to punishment if it did not arouse people against government in its

[37] *Id.*, [1950] 1 D.L.R. at 680.

[38] 299-300 (1883).

[39] *Supra*, n. 36, [1950] 1 D.L.R. at 682.

[40] *Id.* at 683.

broadest sense to the point of rebellion and disturbance to society. As Coleridge J. said in *R.* v. *Aldred,*[41] "nothing short of direct incitement to disorder and violence is a seditious libel" and the test is "whether the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of state." Chief Justice of Canada Rinfret was able to say in *Boucher* that "obviously pure criticism, or expression of opinion, however severe or extreme, is, I might say, almost to be invited."[42]

The nonacceptance of the definition of seditious intention written in the 19th Century in order to meet what the Supreme Court considered to be our new concept of government is highlighted by the fact that in 1919 a Special Committee of the House of Commons, created to consider the law of sedition, accepted the definition. It is also interesting to note that the then section 133A,[43] which sets out defences to a charge of sedition, and which Rand J. called "a fundamental provision which, with its background of free criticism as a constituent of modern democratic government, protects the widest range of public discussion and controversy,"[44] was once section 133. As section 133 the Special Committee recommended that it be struck out, which was done.[45] The language of the section was said to be too broad, and "in many cases prosecutions have failed on account of that particular section."[46] Section 133A, referred to by Mr. Justice Rand, was a re-enacted section 133, added in 1930.[47] As well as removing the defence section in 1919 the penalty for sedition was also altered from two years maximum to one year minimum and twenty years maximum. If Mr. Justice Rand is correct in saying that section 133A is a fundamental provision then in the thirty years which passed after section 133 was removed from the Code Canadian society changed. When the court today looks at freedom of expression it must create new jural conclusions, those which fit with the late twentieth century.[48]

The expression of ideas can be divided between a "public" and a "private" use. Expression which involves government, as in *Boucher*, is a public use, and from that case we can see that the expression of ideas concerning government is given a wide protection as only comment which has an immediate tendency to produce violence is punishable. The creation of discontent, disaffection, ill-will, or hostility toward government or between citizens is not punishable. There must be the use of expression which would incite something approaching an insurrection or a rebellion before the expression is forbidden and punishable. The merits or demerits of a government is of concern to the public or community, and not simply to the person expressing the view. The democratic process demands the scope for the expression of views as given in the *Boucher* case.

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[41] (1909) 22 Cox, C.C. 1 at 3.

[42] *Supra*, n. 36, [1950] 1 D.L.R. at 666; [1951] 2 D.L.R. at 378.

[43] Now s. 61.

[44] *Id.*, [1950] 1 D.L.R. at 684.

[45] S.C. 1919, c. 46, s. 4.

[46] Hansard, June 10, 1919, p. 3289, The Hon. Hugh Guthrie, Solicitor General, in moving adoption of the report of the Committee.

[47] S.C. 1930, c. 11, s. 2.

[48] A recent example of the Supreme Court of Canada's willingness to do so is *Thorson* v. *A.G. Canada (No. 2)* (1974) 43 D.L.R. (3d) 1, in which the rule with regard to standing in constitutional cases was changed. In effect a common law rule was held to be beyond the power of any legislature to enact. In light of the decision in *Thorson* it is difficult to understand the opinion of the role of the Court as given by the majority in *Harrison* v. *Carswell, infra*, at n. 58.

A very obvious surfacing of freedom of expression can be seen in the recent Manitoba Court of Appeal decision in *R.* v. *Carswell.*[49] The case involved picketing at a shopping centre during a lawful strike. The accused was charged under the Petty Trespasses Act,[50] and the case involved a balancing of the interest of the owner of the shopping centre in his property right versus the interest of the accused in freedom of expression, in the guise of a right to engage in peaceful picketing during a strike. In a majority decision the Court held that there was a legal right of freedom of expression and that "in the conflict between the property right of the owner in the sidewalk, and the policy right of the employee to engage in peaceful picketing in the course of a lawful strike, the latter right should prevail. It seems . . . that considerations both of public policy and good sense dictate such a conclusion."[51] The majority of the Court relied on cases from the United States, which concerned freedom of expression as set out in the First Amendment of the Constitution of the United States.[52] The majority of the Manitoba Court of Appeal said that whenever the American courts referred to the constitutional right of freedom of expression Canadian courts should substitute the phrase "common law right".[53]

The majority, Freedman C.J.M., and Matas J.A., distinguished an Ontario case, *R.* v. *Peters,*[54] which had gone to the Supreme Court of Canada.[55] In *Peters* the accused, who had been charged under the Petty Trespass Act[56] of Ontario, was protesting the selling of California grapes by a Safeway Store in a shopping centre due to a labour dispute in California between the growers and the workers. He carried a sign which read: "Local 1285 U.A.W. requests that you don't shop at Safeway because they sell California grapes." He had been requested to leave the premises but had refused to leave. The Supreme Court of Canada affirmed Peters' conviction and upheld the decision of the Ontario Court of Appeal. The appeal court had held that the owner of a shopping centre could withdraw the general invitation from a member of the public and if the person did not leave he would become a trespasser. The Manitoba Court of Appeal distinguished the case on the ground that *Peters* did not arise during a strike or in the course of a current labour dispute in Ontario.

The factors which the majority of the Court considered material were firstly, that the property right of the owner of the shopping centre has been affected by the nature of the use made of the property. Secondly, in the opinion of the Manitoba Court, in order for the picketing to be effective it would have to be conducted close to the store involved and its purpose would have been defeated by a decision upholding the action of the owner. The allowing of freedom of expression to overcome the property rights in the case came as a result of the policy to allow strikes and picketing and the freedom was necessary in order to give efficacy to the right to strike and picket.[57]

[49] (1974) 48 D.L.R. (3d) 137; 17 C.C.C. (2d) 521.

[50] *Id.* at 139. The Petty Trespasses Act is R.S.M. 1970, c. P-50.

[51] *Id.* at 142-3.

[52] "Congress shall make no law . . . abridging the freedom of speech or of the press . . .".

[53] *Supra*, n. 49 at 141.

[54] [1971] 1 O.R. 597; 16 D.L.R. (3d) 143; 2 C.C.C. (2d) 336 (C.A.).

[55] (1971) 17 D.L.R. (3d) 128n.

[56] R.S.O. 1960, c. 294, now R.S.O. 1970, c. 347.

[57] In *Grosvenor Park Shopping Centre Ltd.* v. *Waloshin* (1964) 46 D.L.R. (2d) 750, the Saskatchewan Court of Appeal accomplished the same result as in *Carswell*, with almost identical facts, but without any reference to

On appeal to the Supreme Court of Canada[58] the decision of the Manitoba Court of Appeal was reversed since a majority of the court could find no well-founded distinction between the case and *Peters*. There was no rejection in the Supreme Court of freedom of expression as a common law right, only a difference of opinion as to its position vis-a-vis the right to the enjoyment of property. In the opinion of the majority of the court the right of the individual to the enjoyment of property is a fundamental right, and in the case before the court that right outweighed freedom of expression as asserted by the accused. It appears that a majority of the Supreme Court of Canada was of the view that the interest of Sophie Carswell was an individual interest which had to give way before the community's interest in the protection of the concept of private property no matter what use was being made of it. Although the Court of Appeal was able to find a community interest for the accused in the allowance of strikes and picketing by legislation, the Supreme Court of Canada felt that the Labour Relations Act of Manitoba[59] maintained the community interest in private property by specifically preserving rights against trespassers; this could be contrasted with the legislation in British Columbia[60] which prevents an action for trespass to real property to which a member of the public ordinarily has access.[61]

The "private" use of expression involves an individual or individuals and is illustrated by the tort of defamation which protects a person's interest in his reputation by exposing the person who publishes the defamatory material to an action and possible liability in damages. The tort aims at words which are false and in the case the individual defendant's interest in his freedom to express what he wants is not the community's interest in freedom of expression. Lies told about a person which would damage his reputation have always been considered outside the protection of freedom of expression. But in defamation cases a clear assertion of the existence of freedom of expression occurs in the granting of an injunction to restrain the publication of an alleged libel. The injunction has been held to be an exceptional remedy, to be granted only in the rarest and clearest of cases, since there is a "necessity under our democratic system to protect free speech and unimpeded expression of opinion."[62] In *Canada Daires Ltd.* v. *Seggie*[63] Mackay J. said: "The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done."

If the person whose reputation is being sullied is a public person and it is his public reputation that is being attacked, as opposed to his private life, then today new jural conclusions might be called for. In *The Globe and Mail* v. *Boland*[64] the plaintiff brought an action in

freedom of expression. An injunction was set aside on the ground that the owner did not have the necessary control over the premises to maintain an action in trespass, although the Court did say that a remedy in nuisance would have been available if the picketers had engaged in unlawful acts or interfered with the rights of others who had a right to be on the premises.

[58] *Harrison* v. *Carswell* [1975] 6 W.W.R. 673; 62 D.L.R. (3d) 68.

[59] S.M. 1972, c. 75, s. 24. Section 23(1) was not referred to as showing a community interest: "Nothing in this Act deprives any person of his freedom to express his views if he does not use intimidation, coercion, threats, or undue influence."

[60] S.B.C. 1973 (2nd), c. 122, s. 87.

[61] It has been reported, following the decision of the Supreme Court of Canada in *Harrison* v. *Carswell*, that Manitoba will amend its legislation this fall by enacting the equivalent to the British Columbia legislation.

[62] *Canada Metal Co. Ltd.* v. *Canadian Broadcasting Corp.* (1975) 7 O.R. (2d) 261 (Div. Ct.).

[63] *Canada Dairies Ltd.* v. *Seggie* [1940] 4 D.L.R. 725 at 730 and 733; 74 C.C.C. 210; quoted in *Canadian Tire Corp. Ltd.* v. *Desmond* [1972] 2 O.R. 60; 24 D.L.R. (3d) 642 at 644.

[64] [1960] S.C.R. 203; 22 D.L.R. (2d) 277.

defamation against the newspaper for one of its editorials during the Dominion election campaign of 1957 accusing the plaintiff, a candidate in the election, of using shoddy tactics in order to get elected. He was said to have accused the government of being soft on communism and employing pro-communists. The issue before the Supreme Court was whether the editorial was published on an occasion of qualified privilege. If the defence of qualified privilege could be raised by the newspaper it meant that the burden of proof would be on the plaintiff to prove that the newspaper had been actuated by malice, a real intent to harm the plaintiff; if the defence did not exist the burden would be on the defendant to justify the defamatory statements by proving that they were true. The difficulty of establishing truth or malice would be enough to conclude that the party who had the burden of proof would probably lose. The court considered that it was bound by authority to hold that the defence of qualified privilege was not available to the defendant, but, whether bound by precedent or not, it is clear from the unanimous judgment rendered for the court by Mr. Justice Cartwright that, as then constituted, the court agreed with the result. The interests which prevented the recognition of the defence of qualified privilege were that of not discouraging sensitive and honourable men from seeking public office, and the maintenance of the public character of public men. It was considered by the court that the defence of fair comment would be sufficient protection for newspapers in such circumstances. The authority which bound the Supreme Court in *Boland* was *Douglas* v. *Tucker*,[65] a case involving a provincial election, during which the defendant, the Premier, accused the leader of the opposition, the plaintiff, of being involved in fraudulent dealings in land. The defendant made a speech in the plaintiff's riding and then agreed to the speech being reported in a newspaper. The report in the newspaper became the basis for the libel action. The Supreme Court of Canada recognized the existence of the defence of qualified privilege for statements made by an elector to his fellow electors concerning the fitness of a candidate for office,[66] but the privilege is lost if the publication is made in a newspaper. The rationale for the destruction of the defence is that the interest in the fitness of a candidate does not exist beyond the electors concerned and publication in a newspaper is "publication to all the world" and therefore to persons not having the interest. In *Boland* the court cited *Arnold* v. *The King Emperor*[67] to the effect that newspapers have no privilege higher than that of the individual citizen, but in *Boland* we see that in fact a newspaper was denied the privilege afforded an individual elector of publishing non-malicious defamatory statements regarding a candidate's fitness for office. In addition to *Douglas* v. *Tucker* the court relied on *Duncombe* v. *Daniell*,[68] which was followed in the *Douglas* case. *Duncombe* v. *Daniell* was decided in 1837, and new jural conclusions may have been called for.

The defence of qualified privilege has been limited to an individual who stands in a special relation to the persons to whom he is communicating, and it has been held that a newspaper has no greater right than any other citizen to report and comment upon matters of a

[65] [1952] 1 S.C.R. 275; [1952] 1 D.L.R. 657.

[66] *Braddock* v. *Bevins* [1948] 1 K.B. 580; [1948] 1 All E.R. 450 (C.A.).

[67] (1914) 30 T.L.R. 462.

[68] (1837) 8 C. & P. 222; 173 E.R. 470.

public interest, but in fact they are less protected since an individual has the protection of qualified privilege while a newspaper has not. Should an individual choose the "world" as his forum then publication in a newspaper of material libelous of him would fall within the occasion of qualified privilege;[69] it is difficult not to conceive of the thought that a politician today aims at the widest possible audience. The statements of a candidate for one riding in a province are of interest as reflecting the possible stance of the party which he represents. If a candidate from one of the leading parties advocates in his home riding certain policies which would fundamentally affect Canadians, such as forms of discrimination, wage and price controls, nationalization of industry, then that is of interest to an elector 3,000 miles away as to the policy of the party which could form the government. The only realistic way in which the word is going to reach the country or the province at large is through the news media.

In *Boland* the court observed that the defence of fair comment would be available to newspapers, as well as to all members of the public. This defence can be raised when a matter of public interest is involved at which time the interest of a person in his reputation gives way before a fair comment on the matter of public interest. In order to succeed with the defence there must be a matter of public interest and the statement must be comment and not a statement of fact, which is indicated by the words themselves. In order to characterize the comment as fair the facts which form the basis of the comment must be truly stated, and comment without a basis of fact is said to be a statement of fact and not a comment, although the facts necessary to justify the comment need not be stated but may be implied from the terms of the statement. Also the comment must be honest, and not exceed the limits of fairness. When it is said that the comment must be fair it means that it must be reasonable in the eyes of a jury. There can be no imputation of corrupt or dishonourable motives, and as with the defence of qualified privilege malice will destroy the defence. The defence would seem to reduce considerably the impact of the tort of defamation upon freedom of expression, but particularly in matters of a political nature it is sometimes very difficult to obtain the facts and to prove their truth so that the defence may be largely ineffective.[70]

The *Globe and Mail* case raises the question of freedom of the press which often appears alongside freedom of expression, and as an illustration of the broader freedom. The press is only a particular vehicle for the expression of ideas and facts; a professional group of people whose job it is to inform the public and who take upon themselves the added job of expressing opinions on the information which they convey. As professional "expressors" they often demand greater liberty than the ordinary citizen. But newspapers, television, and radio are prone to abuse, control by a few, and also are capable of tremendous propagandizing power. At the same time as one could argue for greater freedom for the news media there is also an argument to be made for greater control,

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[69] *Mallett* v. *Clarke* (1968) 70 D.L.R. (2d) 67 (B.C.).

[70] The legal position in the United States is quite different as shown by *New York Times Inc.* v. *Sullivan* (1964) 376 U.S. 254, 84 S. Ct. 710, in which it was held that a libel action was an infringement on First Amendment Rights when brought by a public official against critics of his official conduct. Freedom of expression assured the unfettered interchange of ideas for the bringing about of political and social changes desired by the people, and public discussion was said to be a political duty and although some degree of abuse would be inevitable, yet the right of free public discussion was a fundamental principle of the American form of government. The newspaper was granted a qualified privilege and it was open to the plaintiff to prove malice.

and the question becomes whether the danger which is possible is a compelling reason for denying protection through qualified privilege for newspapers and the other news media when commenting on the conduct of people who seek public office.

Freedom of the press involves added problems when considered as a separate freedom from freedom of expression, but it is my opinion that freedom of expression need not be divided into freedom of the press and freedom of expression. Our tradition has been such that the press has been allowed no greater freedom than the individual and this seems to be an acceptable position to take, but the press and the individual are quite different in nature and this difference must be considered in the application of the legal rules.

I have used the term "public" use of expression rather than the term "political" use because the former term is wider and encompasses the latter. An event could be of public interest and yet not be political in the narrow sense of that word. Also the expression of views on issues of concern to the public could be protected under the theory of *Boucher* and still focus on the individuals involved in the issue, just as in *Boucher* a comment on the government of censure of it must involve the individuals which make up the government. It is of course difficult to differentiate on occasion between comment on an institution and the individuals who occupy positions within the institution.

The crime of sedition and the tort of defamation have been considered and there remains other areas of the law which could also be studied but such would make this paper of inordinate length. I must be content with making the following comments. If we are to develop new jural conclusions then the crime of publishing a defamatory libel could very well come up for reconsideration at this time. The crime of publishing a libel developed in an era very different politically from late twentieth century Canada and was developed by a court now regarded as an anathema—the Star Chamber. Freedom of expression should make its presence felt particularly when a matter of public interest is involved, and yet criminal libel has its impact when the victim of the libel is a "public person", and the words of Chief Justice Coke uttered in 1606 in *de Famiosis Libellus* appear to be still with us. He said:

> If [the libel] be against a magistrate or other public person, it is a greater offense, for it concerns not only a breach of the peace but also a scandal of government.[71]

It is not necessary for the prosecution to prove that the libel in question would have been likely to provoke a breach of the peace.[72] The crime of publishing a blasphemous libel has been adapted to changing times. To attack the religion of society is to attack one of its core values, and once an attack on religion would have been a crime under the common law, but today more than an attack *per se* is required to constitute the crime

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[71] (1606) 5 Co. Rep. 125a.

[72] *R.* v. *Unwin* [1938] 1 D.L.R. 529; [1938] 1 W.W.R. 339, 69 C.C.C. 197. Criminal libel arose in 1968 in *R.* v. *Georgia Straight* 4 D.L.R. (3d) 383. The case actually had its origin in an earlier case involving the arrest of a number of people for loitering contrary to a British Columbia Order in Council. At the trial the magistrate commented that the law which he was applying was clearly discriminatory but he had no choice but to apply it. Rather than engaging in a scholarly discussion of the effect of an obedience to Parliamentary Supremacy the Georgia Straight, an underground newspaper, chose to award the magistrate the Pontius Pilate Certificate of Justice. The newspaper was charged and convicted of publishing a defamatory libel. In his judgment the County Court Judge made the interesting observation that the newspaper item which was the subject of the charge was invective and did not advance the truth. A traditional justification for freedom of expression is that one cannot know the truth without the fullest presentation of ideas. If judges project themselves into the role of determining which expression advances the truth and which does not they will indeed be creating a very difficult role for themselves.

of publishing a blasphemous libel. To commit the crime the accused must be shown to have expressed a view on a religious question in bad faith, to have used indecent language, as well as words which would have the effect of leading to a breach of the peace.[73] It is not the opinion on a religious issue which is being restricted, but rather how the opinion is expressed, and the ill effects which the expression would have.

Obscenity inevitably occupies the bulk of any writing on freedom of expression and yet is probably the area of the law restricting expression which is the least deserving of a detailed exposition. If a form of expression has a dominant characteristic which is sex, and the treatment of sex is undue in the sense that there is an excessive emphasis which offends the community standard of tolerance then the expression is obscene.[74] Obscenity is an illustration of the regulation of "how" an idea is expressed. Society holds certain values of morality and decency and asks that an idea be expressed in a certain way. The content of the expression is not being restricted, only the way in which it is presented. It may be possible that in regulating the "how" one may also regulate the "what", and this could occur if the "what" is concerned with sex, in which case obscenity legislation, if used to prevent the diffusion of the expression, could involve a restriction of freedom of expression.[75]

A new area of the law which could raise questions concerning freedom of expression is the tort of privacy. Unlike the tort of defamation which aims at lies which injure someone's reputation, the tort of privacy aims at the telling of true stories which injure someone. It is said to be part of the right to be left alone. It is doubtful how much of this right should remain once someone has projected himself into the public arena. It has been reported that the Privacy Act of British Columbia[76] had been referred to by the past Premier of British Columbia in regard to a radio program. An apology was apparently demanded by the Premier in a letter written to the radio station for "the unlawful, unauthorized use of [his] portrait" in an advertisement run by the radio station promoting the show whose purpose it was to investigate "why our government bought a certain company at a price that's unreal".[77]

The newest provisions of the Criminal Code which concern the expression of ideas are sections 281.1 to 281.3, concerning hate propaganda, enacted in 1969.[78] Basically the provisions make it a crime to advocate or promote genocide,[79] to incite hatred against any identifiable group by communicating statements in any public place which are likely to lead to a breach of the peace,[80] and to wilfully

[73] *Bowman* v. *Secular Society Ltd.* [1917] A.C. 406, per Lord Parker of Waddington at 446, quoted by Kellock J. in *Saumur, supra*, n. 18 at 691 (D.L.R.). *R.* v. *Rahard* [1936] 3 D.L.R. 230. Murphy, *Annotation* (1927) 48 C.C.C. 1 at 22, quoted *id.* at 237.

[74] *R.* v. *Brodie* [1962] S.C.R. 681; 32 D.L.R. (2d) 507; 132 C.C.C. 161; 37 C.R. 120. *Dominion News and Gifts (1962) Ltd.* v. *The Queen* [1964] S.C.R. 251; [1964] 3 C.C.C. 1; 42 C.R. 209, affirming the judgment of Freedman J.A. in the Manitoba Court of Appeal, [1963] 2 C.C.C. 103; 40 C.R. 109; 42 W.W.R. 65.

[75] Freedom of expression arguments have met with such a complete lack of success in obscenity cases that an argument was made that there is a freedom to read, which has also been denied: *R.* v. *Prairie Schooner News Ltd. and Powers* (1970), 1 C.C.C. (2d) 251 at 271 per Dickson J. A. (Man. C.A.).

[76] S.B.C. 1968, c. 39.

[77] Vancouver Sun, February 22, 1974, at 1. The advertisement can be found in The Vancouver Sun, February 19, 1974, at 13.

[78] 1969-70, c. 39. *See* Tarnopolsky, *Freedom of Expression* v. *Right to Equal Treatment* (1967) U.B.C.L. Rev.—C. de D. 43, for a review of the development of the provisions as they appeared in Bill S-49, 1966, and a discussion of them.

[79] S. 281.1.

[80] S. 281.2(1). *See Jordan* v. *Burgoyne* [1963] 2 W.L.R. 1045 (Q.B.D.) for a consideration of a similar English provision.

promote hatred against any identifiable group by communicating statements, other than in private conversation.[81] The following defences are available for the third crime of promoting hatred:

(a) if he establishes that the statements communicated were true;
(b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
(d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.[82]

The promotion of genocide would seem to necessarily involve the promotion of hatred against the identifiable group; thus the provisions can be divided into the one which focuses on the effect which would likely occur, that is a breach of the peace, and the others which do not. These latter provisions are a filling in of the gap left by *Boucher*,[83] when it was held that an intention to provoke feelings of ill-will and hostility between different classes of subjects could no longer be called a seditious intention, and if *Boucher* is used to define freedom of speech in the Canadian Bill of Rights then this provision could be in some difficulty. Provisions such as these could have the uncanny habit of being used by the majority against a vocal minority; what if Boucher had been charged under these provisions?[84]

VI. CONSTITUTIONAL FREEDOM: CHARACTERIZATION OF LAW

From the foregoing it can be concluded that freedom of expression is part of our constitution, but is it an instinct, a non-legal principle, or a convention, or is it possibly a legal principle in the constitution. In *Saumur* v. *City of Quebec and A.G. Quebec*[85] Mr. Justice Rand said "that legislation *'in relation' to* [freedom of expression] is not a local or private matter would seem to me to be self-evident: the dimensions of this interest are nationwide; it is even today embodied in the *highest level of the constitutionalism* of Great Britain . . .".[86] Let us now look at the question of a law being in relation to freedom of expression.

The legal source of law-making power in Canada is found in the sections of the B.N.A. Act dealing with the distribution of legislative power between the Dominion and the provinces, in particular sections 91 and 92, and our attention must now focus on these sections if we are to fit freedom of expression into our "written" constitution. Since our focus will now be on the division of legislative powers within our constitution it is appropriate that an attempt be made to fit freedom of expression into the traditional judicial approach to the question of the validity of a law.

In the adjudication of a constitutional dispute in Canada it is trite to say that the main task of the court is to characterize the law whose

[81] S. 281.2(2).
[82] S. 281.2(3).
[83] *Supra*, n. 36.
[84] *See Beauharnais* v. *Illinois* (1952) 343 U.S. 250; 72 Sup. Ct. 725.
[85] *Supra*, n. 18.
[86] *Supra*, n. 18 at 670 (D.L.R.). The emphasis is added. Rand J. was writing with reference to religion, but on p. 671 he states "so it is with freedom of speech."

constitutional validity is being questioned. The court must determine the "true nature and character" of the law, its "pith and substance", and then assign the law to its proper place within the distribution of legislative powers as set out in the B.N.A. Act. This is an illustration of something which sounds very simple but which is most difficult in execution. In sections 91 and 92 of the B.N.A. Act legislative authority extends to matters which come within the classes of subject set out in the sections. The characterization of the law reveals the matter, and it can then be said that the law is "in relation to" that matter. The matters identified must be legally significant in the sense that they are identifiable as coming within section 91 or 92.

A matter which has become important and legally significant today may not have been considered in 1867, and may not be readily identified as being within the heads of power. It could then be held to fall within the general words of section 91, "peace, order and good government", or as an alternative way of proceeding the court could distribute the various parts of the new matter to the Dominion and the provinces. As an example aeronautics cannot be found as a separate subject in the enumerated heads of power and therefore it was necessary for the court to consider whether the subject of aeronautics should be recognized as having legal significance, as opposed to recognizing its components, such as the regulation of flying, the building of airports, or the regulation of employees in airports, subjects which could possibly be identified separately as being within the heads of power. The court concluded that aeronautics as such was a subject of legal significance for the purpose of the distribution of legislative power and held that it fell within the general words of section 91.[87] In effect aeronautics became another head of power within section 91 and has been treated as such ever since. The question for the courts in succeeding cases was whether the law impugned was in relation to aeronautics; if it was it was then exclusively within Dominion jurisdiction. As another example, in the *Winner*[88] case there was no express allocation of citizenship as the subject-matter of legislation to either the Dominion or the provinces, but the court held that it fell within the general power of the Dominion because it lay at the foundation of the political organization of Canada and had a national character. Citizenship was a legally significant matter.

If we can say that freedom of expression has been accorded recognition as a legally significant matter, we are then able to attempt to place it within the distribution of legislative power in our constitution, and we no longer need to rely on the preamble to the B.N.A. Act as the source of the freedom. Aeronautics was not considered when the B.N.A. Act was drafted, but it has been held to be a legally significant matter. Citizenship does not expressly appear in the division of legislative power and yet it was said to exist by implication. Has freedom of expression been accorded the same recognition? In my opinion it has.

The recognition that freedom of expression could be a separate and legally significant matter for constitutional purposes occurred in two well known Supreme Court of Canada decisions, *Saumur* v. *City of*

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[87] *Johannesson* v. *Rural Municipality of West St. Paul* [1952] 1 S.C.R. 292; [1951] 4 D.L.R. 609.

[88] *Winner* v. *S.M.T. (Eastern) Ltd. and A.G.Canada* [1951] S.C.R. 887; [1951] 4 D.L.R. 529. *See also Smith and Rhuland* v. *The Queen* [1953] 2 S.C.R. 95; [1953] 3 D.L.R. 690 for another appearance of citizenship status and its significance.

Quebec and A.G. Quebec[89] and *Switzman* v. *Elbling and A.G. Quebec.*[90] The *Saumur* case concerned a challenge to a by-law of the City of Quebec which forbids the distribution of written matter in the streets of the city without the written permission of the Chief of Police. The defendant, a member of the Witnesses of Jehovah, was charged for distributing religious literature on the streets of the city without the required permission, and he challenged the by-law on the basis that it infringed his freedom of religion and expression. What is of relevance is the manner in which the members of the Supreme Court of Canada characterized the by-law for constitutional purposes. Rand, Kellock, and Locke JJ. concluded that the real nature of the by-law was censorship, in that the by-law was aimed at the contents of the literature which was being regulated and it was in relation to the minds of the users of the streets. Mr. Justice Rand considered that freedom of expression was an original freedom which would allow no prior restraints such as censorship, while Estey J. held that the by-law was in relation to the free exercise and enjoyment of religious profession and worship, in other words freedom of religion. The dissenting judges, Rinfret C.J.C., Cartwright, Taschereau, and Fauteux JJ. held that the law was in relation to the use of the streets and was a police regulation aimed at the suppression of conditions likely to cause disorder. Cartwright and Fauteux JJ. expressly said that freedom of the press was not a separate subject matter, but it was something which had various aspects, some of which could be dealt with by the province and some by the Dominion, which would obviously mean, in their opinion, that freedom of expression, or any other fundamental freedom probably, was not to be accorded constitutional protection.

The reasons for judgment of the members of the Supreme Court of Canada in *Saumur* on most issues were so varied that there is a tendency to throw one's hands up in despair when attempting to discover an issue on which there was a consensus. Four of the judges, Rand, Kellock, Locke and Estey, were of the view that the by-law could be characterized as in relation to a fundamental freedom, and they characterized it as such. Two judges, Fauteux and Cartwright, expressly held that freedom of expression could not be a separate subject matter for constitutional purposes, while Chief Justice Rinfret and Taschereau J. did not give an opinion on the question of whether freedom of expression could be a separate subject matter since, whether it could or not, the by-law was in relation to the regulation of the streets. This leaves Kerwin J. who held that the Freedom of Worship Act[91] applied and the by-law had no application to the accused because of the conflict such an application would have with the Freedom of Worship Act, but Kerwin J. did characterize the by-law as in relation to freedom of expression when he took issue with Duff C.J.C.'s judgment in *Re Alberta Legislation* and held that freedom of expression fell within provincial jurisdiction, which meant that there was a majority on the issue of whether freedom of expression is capable of acquiring legal significance as a separate matter.

[89] *Supra*, n. 18.

[90] *Supra*, n. 15.

[91] R.S.Q. 1941, c. 307, now R.S.Q. 1964, c. 301. The Act was amended by S.Q. 1953-54, c. 15 by providing that the distribution of pamphlets attacking the religious beliefs of others is not covered by freedom of religious profession. The validity of the amendment has not been determined; an attempt to do so failed for lack of standing: *Saumur* v. *A.G. Quebec* [1964] S.C.R. 252; 45 D.L.R. (2d) 627. The decision on standing could now be decided differently since *Thorson* v. *A.G. Canada (No. 2)* (1974) 43 D.L.R. (3d) 1 (S.C.C.).

The characterization problem arose again in the *Switzman* case when the Quebec Act respecting communist propaganda was before the court. The Act provided that it was unlawful to print, publish, and distribute material which propagated communist doctrine, and it was made illegal for any person to use or allow to be used any house within the province for the propagation of the forbidden doctrine. On the issue of characterization Mr. Justice Abbott held that the Act was in relation to the propagation of ideas, while Rand and Kellock JJ. said that it was in relation to the preventing of the poisoning of men's minds. Mr. Justice Taschereau was the lone voice of dissent on the nine man bench, and he was of the view that since the basis of the dispute between the parties, a lease, had ended, there was nothing to be decided between them, but he went on to hold that in his opinion the law was in relation to property and the prevention of crime. With the exception of Mr. Justice Taschereau the members of the court were in agreement that the nature of the Act was the prevention of the propagation of communist doctrines. The Act was therefore clearly in relation to the expression of ideas.

The recognition of freedom of expression as a separate subject matter in our constitution is a necessary first step towards the creation of legal protection for the freedom, but a most important issue remains, that is, to use the words of Mr. Justice Rand, to know "the seat of its legislative control in this country".[92]

VII. THE SEAT OF LEGISLATIVE CONTROL

The starting point must be a consideration of *Reference re Alberta Statutes*.[93] So barren was the discussion of freedom of expression by Canadian courts up to 1938 that it is not surprising that only three of the six Justices of the Supreme Court of Canada felt compelled to say anything about it; in fact it is surprising that half of the judges did say something, and what was said has been referred to and approved repeatedly by succeeding courts.[94]

Chief Justice Duff, with whom Mr. Justice Davis concurred, noted that the British North America Act provided for a representative legislature for Canada, elected by the people. Such a legislature functions "under the influence of public opinion and public discussion",[95] and derives its "efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals."[96] Since the B.N.A. Act provides for a representative legislature it must also provide for freedom of expression, in the opinion of Duff C.J.C., but the freedom is subject to restrictions, those based upon interests which Canadians consider sufficiently important to

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[92] *Supra*, n. 18 at 667 (D.L.R.).

[93] *Supra*, n. 13.

[94] As a recent example Mr. Justice Martland for himself, and Fauteux C.J.C., Abbott, Judson, Ritchie, and Pigeon JJ., in *R.* v. *Burnshine* (1974) 44 D.L.R. (3d) 584 at 590-1; 25 C.R.N.S. 270; 15 C.C.C. (2d) 505 said in reference to the freedoms enumerated in s. 1 of the *Bill of Rights* that they "have existed" and were protected under the common law. The *Bill of Rights* did not define new freedoms, but it declared their existence and gave them protection from infringement by a Dominion statute. As an example of his point he referred to freedom of speech and freedom of the press, and to Duff C.J.'s judgment in *Re Alberta Legislation* to the effect that the preamble of the B.N.A. Act contemplated a Parliament working under the influence of public opinion and public discussion, and the Dominion could legislate for the *protection* of the freedoms.

[95] *Supra*, n. 13 at 107 (D.L.R.).

[96] *Id.*

limit "the breath of life for parliamentary institutions".[97] What these counter interests are was left unanswered, but one might speculate that they are the interests of the community which regulate the where, when and how of expression.

In the opinion of Duff C.J. and Davis J. the provinces lack the legislative authority to abrogate the right of freedom of expression because such provincial legislation would involve an interference with the Parliament of Canada, "the legislative organ of the people of Canada",[98] and would be "repugnant to the provisions of the British North America Act".[99] On the question of Dominion power Duff C.J. and Davis J. stated that "the Parliament of Canada possesses authority to legislate for *the protection* of this right."[100] It must be noted that in view the Dominion legislative power extended to protecting the right, probably from provincial interference, but the power would not necessarily extend to abrogating it, *expressio unius exclusio alterius.* The power to protect the constitution arose, in the opinion of Duff C.J. and Davis J., by implication from the constitution, but the fact that expression is affected by a law does not mean that freedom of expression is necessarily abrogated, and so Chief Justice Duff and Davis J. recognized that "some degree of regulation of newspapers everybody would concede to the provinces".[101] The limit of provincial legislative power, and, by implication, Dominion legislative power, is reached

> when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada.[102]

Cannon J., the third of the three judges who discussed freedom of expression, recognized the importance of the freedom as it was "essential to enlighten public opinion in a democratic state",[103] and "democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State".[104] In the view of Mr. Justice Cannon the provinces lack legislative authority to "interfere with the free working of the political organization of the Dominion",[105] and

> the federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion.[106]

In the opinion of Mr. Justice Cannon the limits to the freedom are set by the Criminal Code and the common law. That there are limits to the freedom is not contested, but if the above is taken to justify all restrictions by the Dominion then it is difficult to reconcile this view with Mr. Justice Cannon's concept of the freedom as the "foundation" of a democratic state such as Canada. Given that a province could not legislate so as to interfere with Dominion institutions, it would be

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[97] *Id.*
[98] *Id.* at 108 (D.L.R.).
[99] *Id.*
[100] *Id.* at 107 (D.L.R.). Emphasis is added.
[101] *Id.* at 108 (D.L.R.).
[102] *Id.*
[103] *Id.* at 119 (D.L.R.).
[104] *Id.*
[105] *Id.*
[106] *Id.* at 119-20 (D.L.R.).

reasonable to conclude that in the federation the Dominion should not be able to legislate so as to interfere with provincial institutions. Mr. Justice Cannon can be said to have limited the Dominion power when he stated that the curtailment must be "in the public interest". Would it be in the public interest for the Dominion to legislate in such a way as to reduce the public's ability to participate in meaningful discussions about political matters at the provincial level, and thereby reduce the ability of the public to participate in choosing a provincial legislature? What one sees in the judgment of Cannon J. is the tug between recognizing freedom of expression as a limitation on legislative power and maintaining the legal concept of parliamentary supremacy.

The conclusion which can be drawn from the judgments outlined above is that the provinces lack authority to legislate in such a manner as to reduce the ability of the people of Canada to participate in the democratic process through the expression of opinions and the discussion of matters of public interest. An interference with freedom of expression on matters of public interest would be a substantial interference with the working of the parliamentary institutions of Canada. The reference to parliamentary institutions of Canada could be taken to include those for the provinces as well as those for the Dominion. Since the provinces within their jurisdiction are equal to the Dominion within its jurisdiction, then there is no justification for granting Dominion institutions immunity from provincial interference and not also granting provincial institutions immunity from Dominion interference. Restrictions on the expression of ideas are necessary, but the restrictions created must be in the public interest.

In *Saumur* v. *Quebec and A.G. Quebec*[107] the judges who characterized the law in the case as in relation to freedom of expression, and therefore *ultra vires* the legislative power of the province were content to say that the question of whether it was within Dominion legislative power should be left to be decided when the question would arise.[108] Both Mr. Justice Rand and Mr. Justice Kellock went to Duff C.J.C.'s judgment in the *Alberta Legislation* case, and found the source of the freedom in the preamble to the B.N.A. Act. Estey J. held that it was possible to find a Dominion source of legislative power in the criminal law power, section 91(27), but one cannot conclude that Estey J. would find legislative authority over the fundamental freedoms *per se* in section 91(27). He defined the criminal law power as law "designed for the promotion of public order, safety, or morals", quoting from *Russell* v. *The Queen*[109] and in his opinion the by-law belonged "to the subject of public wrongs rather than to that of civil rights".[110] It would appear that he viewed the by-law as validly aimed at the ill effects which could result from expression, valid that is, if enacted by the Dominion parliament, not the provincial legislature.

The question of the extent of the criminal law power under section 91(27) is raised, and the test for whether a law is criminal law cannot be the test of whether the law involves the prohibition of an act with penal

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[107] *Supra*, n. 18.

[108] Kerwin J. went contrary to Duff C.J.C.'s views in *Re Alberta Legislation* and held that the legislative power could be found in s. 92(13), but it is doubtful whether this opinion is tenable in light of the opinions to the contrary.

[109] (1882) 7 App. Cas. 829 (P.C.).

[110] *Supra*, n. 18 at 700 (D.L.R.), quoting from *Russell* v. *The Queen*, *id.*

consequences.[111] Such a test would provide an unlimited power to the Dominion which would be contrary to the intent of creating a federal state. A law which prohibits an act with penal consequences has the appearance of criminal law, but more is needed if a balance is to be struck between Dominion and provincial power. The domain of criminal legislation test[112] has been abandoned as unworkable,[113] and the test which seems the most effective is that of Rand J. in the *Margarine* case

> We can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.[114]

If freedom of expression is an interest of Canadian society then criminal legislation to be valid could be a law which suppresses an evil which could result from the use of expression, but the test enunciated by Rand J. would not uphold legislation which was an infringement, abridgment or abrogation of freedom of expression.

It is considered by many that *Switzman* v. *Elbling and A.G. Quebec*[115] is authority for the exercise by the Dominion of control over freedom of expression by the use of its criminal law power, but I submit that such a conclusion does not necessarily flow from the decision of the Supreme Court of Canada. Clearly freedom of expression is not absolute in the sense that if expression is involved then the law is in relation to freedom of expression. The judgments of Mr. Justice Rand in *Saumur* and *Switzman* are definitely the clearest exposition of an implied Bill of Rights of all the judgments rendered in the Supreme Court, and yet he recognizes the prohibition of expression "as an evil" as within the criminal law power of the Dominion.[116] As Fauteux J. stated in *Switzman* the Dominion could legislate on the subject matter of the statute in question if the social order or safety of the state was injuriously affected.[117] The issue in the *Switzman* case was whether the province could enact the law in question and the majority of the court answered the issue by saying that the province lacked legislative authority to make criminal the propagation of communism because it was considered to be a public evil. If there was such legislation authority it would be found within section 91(27) of the B.N.A. Act. It is entirely possible that the difference between legislation in relation to freedom of expression and legislation in relation to a perceived evil which may result from expression is what resulted in the famous dictum of Mr. Justice Abbott in *Switzman* to the effect that neither the provinces nor the Dominion could abrogate the right of discussion and debate.[118] Mr. Justice Abbott was considering a law which in his opinion was in relation to freedom of expression. The express reservation of the answer to the query of whether the Dominion could enact the law under section 91(27) by Mr. Justice Kellock and Rand J. could also be

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[111] *P.A.T.A.* v. *A.G. Canada* [1931] A.C. 310; [1931] 2 D.L.R. 1; 55 C.C.C. 241 (P.C.).

[112] *Re The Board of Commerce Act* [1922] 1 A.C. 191 (P.C.).

[113] *Supra*, n. 111.

[114] *Reference re Validity of Section 5(a) of the Dairy Industry Act* [1949] S.C.R. 1; [1949] 1 D.L.R. 433 at 472-3, aff'd [1951] A.C. 159; [1950] 4 D.L.R. 689.

[115] *Supra*, n. 15.

[116] *Id.* at 358 (D.L.R.).

[117] *Id.* at 364 (D.L.R.).

[118] *Id.* at 371 (D.L.R.).

explained on the same basis. For Rand J. his characterization resulted in the law being *ultra vires* the province and he did not have to go further and consider the issue of whether the Dominion had the legislative authority to enact such a law; but Abbott J. did take the further step and said that freedom of expression could not be abrogated by any legislature in Canada. The issue in the minds of most of the judges was whether the Act could be characterized as criminal law or a law dealing with property and civil rights, possibly because they perceived the restricting of the propagation of communist doctrine as a valid use of section 91(27) power, that is, as a restriction of an evil in the public interest, and there is nothing in the other judgments which would indicate that they would have disagreed with Rand, Kellock, and Abbott JJ. if they had considered the law to be in relation to freedom of expression as contrasted with a law in relation to an evil resulting from the use of expression. Rand J. echoed Duff C.J.C. when he said that under the B.N.A. Act "government is by parliamentary institutions, including popular assemblies elected by the people at large in both provinces and Dominion: Government resting ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under licence, its basic condition is destroyed".[119] This statement can apply with equal force to a province and to the Dominion Parliament.

That the provinces and municipalities lack legislative competence in the area of freedom of expression or in relation to a perceived evil of expression must be considered to be settled.[120] While the issue of whether the Dominion also lacks legislative jurisdiction, as suggested by Mr. Justice Abbott in *Switzman,* may be considered by some to be still an open question, I submit that if the court were to characterize a law as in relation to freedom of expression the Dominion would lose legislative competence, as well as would the province. One need not rely on the preamble to the B.N.A. Act as the restriction on legislative power can arise by necessary implication from the distribution of powers.[121]

VIII. ELECTIONS

The tying of freedom of expression to elections has occurred, and such a union highlights the "public" aspect of freedom of expression in Canada. The Dominion legislative power resides primarily in the House of Commons which must have a session at least once every year, and whose members must be elected for each of the provinces and territories, such elections to take place every five years and no longer.[122] For the provinces there is to be a legislature for each, whose members are also to

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[119] *Supra*, n. 18 at 671 (D.L.R.); *Switzman, supra*, n. 15 at 358 (D.L.R.).

[120] In addition to the leading cases *see Dionne* v. *Municipal Court of the City of Montreal* (1956) 3 D.L.R. (2d) 727 (Que.); *R.* v. *Beattie* [1967] 2 O.R. 488; 64 D.L.R. (2d) 207; [1968] 2 C.C.C. 55; *R.* v. *Mustin, R.* v. *Millard* [1940] O.R. 393; *R.* v. *Board of Cinema Censors of Province of Quebec* (1967) 69 D.L.R. (2d) 512 (Que.). In *Koss* v. *Konn, supra*, n. 20 at 264 (D.L.R.), Tysoe J.A. said that: "Provinces have no power to enact legislation which in its true nature and character relates to freedom of expression concerning any policy or activity of Government or political parties or public men or concerning public affairs or religious subjects or bodies." This statement was adopted in *Hlookoff* v. *City of Vancouver* (1968) 67 D.L.R. (2d) 119 (B.C.).

[121] In *A.G.* v. *Canard* (1975) 52 D.L.R. (3d) 548 at 572, Beetz J. held that judicial power was an implied power; he said "The powers of Parliament are limited by the wording of section 101 of the British North America Act, 1867, as well as by the federal and fundamental nature of the Constitution which implies an inherent and entrenched jurisdiction in the courts to adjudicate in constitutional matters".

[122] *See* B.N.A. Act, 1867.

be elected, and which have set durations and yearly sessions.[123] Basic to our system of government are free elections, and elections are meaningful and free only if the issues are known and able to be discussed and questioned by the electorate. A provincial law which interfered with a Dominion election would be *ultra vires*, or at least interpreted by a court so as to exclude any serious affect on Dominion elections. The reverse would seem to be obviously the case as well, that is, a Dominion law which interferes seriously with a provincial election. Elections and freedom of expression are inseparable as long as our present concept of government is maintained, and therefore it seems appropriate to consider two cases which concern political matters, elections, and freedom of expression. The cases are *Oil, Chemical and Atomic Workers International Union* v. *Imperial Oil Ltd.*,[124] and *McKay* v. *The Queen*.[125]

In the *Oil, Chemical and Atomic Workers* case the law which was challenged was a section which had been added to the British Columbia Labour Relations Act[126] in 1961, which prohibited unions from using money obtained from a compulsory check-off system as contributions to a political party or candidate for political office. A majority of the Supreme Court of Canada held that the law was *intra vires* the province as being in relation to labour relations. In the opinion of the majority the law actually protected the right of an individual to contribute to the political party of his choice and although a person may be forced to belong to a particular union he should not be required to contribute to a particular party as well. The effect on elections was said to be incidental, and, using the words of Duff C.J.C. in *Re Alberta Legislation*, there was said to be no substantial interference with parliamentary institutions. The right of an individual to participate in the political process as he himself desired was protected. The minority of the court focused on the right of the union to participate in political affairs, and came to the conclusion that the law was in relation to political activities. The majority of the court might also have characterized the section as in relation to political activities and balanced the right of the union to participate in politics against the right of the individual, but by so doing the legislation would have been *ultra vires* with respect to Dominion politics. The regulation of unions and labour relations resides as a general rule with the provinces, and the majority did not consider that unions should be elevated to the importance of the individual in our political process, so the regulation in question was kept within the field of labour relations.

Once a law would be characterized as in relation to political activity or elections at the Dominion level it would follow that it would be *ultra vires* the province. Would it not also be true that a Dominion law in relation to political activity at the provincial level would be *ultra vires*? Mr. Justice Abbott considered this to be indeed true; he held that the legislation was in relation to the advancement of political views, in this case by financial means, rather than by vocal or written means, and

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[123] *See* B.N.A. Act, 1867 for Ontario and Quebec, and the Acts and Orders-in-Council creating the other provinces.

[124] [1963] S.C.R. 584; 41 D.L.R. (2d) 1; 45 W.W.R. 1.

[125] [1965] S.C.R. 798; 53 D.L.R. (2d) 532.

[126] R.S.B.C. 1960, c. 205, s. 9(6), am. 1961, c. 31.

once he had so characterized the legislation, it followed from his view in *Switzman* that such legislation was beyond the power of all legislatures.

In the other case, *McKay*, a city by-law attempted to regulate the placing of signs on property in the city and the accused was convicted under the by-law because he had an election sign on his property. The election campaign which was underway at the time the accused was charged and convicted was the Dominion general election of 1962. The majority of the Supreme Court of Canada characterized the law as being in relation to proceedings at a federal election and since in their view political activity in the Dominion arena could be prohibited only by Parliament the by-law had to be construed so as not to prohibit the sign in question. The subject matter of the by-law was on the surface signs on city property, which would fall within provincial and municipal jurisdiction as a law in relation to property, section 92(13) of the B.N.A. Act, but the nature of the sign caused a change in the characterization of the law. When the sign was an election sign the question the court had to face was whether the interest in the community in having neat and tidy neighbourhoods was greater than the interest in having a free exchange of views during an election campaign. The majority of the Supreme Court held that the latter interest was the greater and the by-law ceased to be in relation to property and became in relation to elections on the facts of the case.[127]

IX. BILL OF RIGHTS

Following the cases just considered it might have been considered that the enactment of the *Canadian Bill of Rights* would have amplified the trend in *Boucher, Saumur* and *Switzman*, but it seems that many of the judges on the Supreme Court may have thought that a use of the *Bill* in a manner similar to that used by the Supreme Court of the United States with respect to their Bill of Rights would in fact have been a major constitutional change within Canada, as the role which our courts have been given in our Constitution would run counter to any active use of the *Bill* by them, and the concept of parliamentary supremacy would have been met head on. Perhaps the most significant difference between the Court in the 1950's and that which considered the *Bill of Rights* was the absence of Mr. Justice Rand from the *Bill of Rights* cases. As an example, the court has defined "due process of law" in the *Bill* to mean "the law as it is", devoid of any limitation on the word law. This can be contrasted with Mr. Justice Rand's view as presented in an article he wrote following his retirement. He wrote:[128]

> 'Due Process' [in the United States] is . . . interpreted as a limitation on law which to a degree of unreasonableness affects personal liberties or property. Confining that limitation to the broadest sense of procedure is incompatible with the provisions of the

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[127] *See Re C.F.R.B. and A.G. Canada* [1973] 3 O.R. 819; 38 D.L.R. (3d) 335 (C.A.), application for leave to appeal to the Supreme Court of Canada was dismissed and in which the election power was not considered. The issue in the case was whether the Dominion could validly prohibit the dissemination of election information in a provincial election. Section 28(1) of the Dominion Broadcasting Act R.S.C. 1970, c. B-11, prohibited a broadcaster from broadcasting a partisan program or material on the day of an election or on the day before an election, and the Court concluded that the Dominion power over broadcasting extended to the content of the program being broadcast. It is interesting to note two points: first, by an amendment to section 28(1) the broadcast on the day of an election or the day before is prohibited "except as provided by any law in force in a province, an election of a member of the legislature of that province or the council of a municipal corporation in that province." (Election Expenses Act, S.C. 1973-74, c. 51, s. 17.); and second, section 3(c) of the Broadcasting Act states that "the right to freedom of expression . . ., subject only to generally applicable statutes and regulations, is unquestioned."

[128] Rand, *Except by Due Process of Law*, (1961), 2 Osg. H.L.J. 171 at 187.

> [Canadian] Bill of Rights. Section 2 deals with specific matters of that nature in such detail as virtually to exhaust the items of importance. If the inclusion were intended to imply that Parliament can, without repudiating the declarations of section 1, make any utterance a crime, that substantive law is not within the scope of due process, that the latter is restricted to whatever adjectival rules or jural constructs may lie beyond the enumeration of section 2 which, to adapt the language of Macbeth would 'keep the word of promise to the eyes and break it to the mind', then it could only be said that the declarations are of no significant value, wordy symbols signifying little.

A change with respect to the attitude of the courts to the *Bill of Rights* may be underway. Both Chief Justice Laskin and Mr. Justice Beetz have called the *Bill* quasi-constitutional,[129] indicating a move away from treating it merely as just another statute.[130]

There has been recent talk of placing a Bill of Rights in a written constitution, but whether we are left with an implied Bill of Rights or whether a Bill of Rights is expressly entrenched in a written constitution the courts will be left with the task of considering freedom of expression, and what is the most important task of defining the limits which will be allowed to restrict the freedom, in keeping with what is perceived to be the values held by the community.

X. CONCLUSION

What sort of conclusion can one reach concerning freedom of expression in our constitution? Perhaps the safest one to make is that at this time there is no firm conclusion which can be reached. This in itself would be illuminating. But it cannot be doubted that it exists as a principle, although non-legal, and there is authority that freedom of expression can be a legally significant matter for constitutional purposes. If a court should characterize a law as in relation to freedom of expression it would be *ultra vires* the province, and most importantly there is a legacy from the Supreme Court of Canada in the 1950's, under the leadership of Mr. Justice Rand, that it would also be *ultra vires* the Dominion.

No doubt the concept needs to be filled out and given meaning as the courts frame new jural conclusions to fit our present concept of government. The Supreme Court in *Boucher, Saumur,* and *Switzman* laid the ground work for a constitutional provision guaranteeing freedom of expression, and it remains for judges to build on it. But there is a reluctance on the part of judges and lawyers to deal with fundamental freedoms, possibly from a fear that once freedom of expression is recognized as a constitutional limitation on legislative power it will be difficult to draw a line as to what is or is not capable of being protected. There is probably a thought that once the lid is off one will hear arguments to the effect that topless dancing is a form of expression which comes within the constitutional protection. The importance of freedom of expression to Canadians demands the extremely difficult task of responding to the arguments which are made. I believe that it needs no demonstration that the vast majority of Canadians consider that freedom of expression does exist in Canada, and the existence

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[129] Laskin C.J.C. in *Hogan* v. *The Queen* (1974) 48 D.L.R. (3d) 427; 26 C.R.N.S. 207; and Beetz J. in *A.G. Canada* v. *Canard* (1975) 52 D.L.R. (3d) 548.

[130] An interesting point is that if there is an implied Bill of Rights than an argument could be made that the allowance of an express declaration that the Bill, and consequently the rights as set out in it, is suspended in *ultra vires* the Parliament of Canada.

of a constitutional protection does not mean a complete upheaval, but it does require a solid analysis of the facts as presented to the court.

In a case involving the expression of opinions, or facts, by words or acts, we should be alert to the possibility of an infringement of freedom of expression. Does the law involved focus on the expression or on an undesirable or evil conclusion resulting from the use of the expression? How is the expression being regulated? Is the regulation reasonably necessary for the purpose of the law?[131] What is the interest that is being asserted which would have the effect of restricting the expression of ideas or facts? It is possible that we can regulate the when, where, and how of expression, as long as through this procedural regulation we do not in fact regulate the substantive content. Regulations may be called for concerning parks or streets, loudspeakers,[132] and public safety (through fire regulations), and so on. Sometimes it will be very difficult to know when legitimate use is being made of the regulation of procedure, and if we are to err it should be for no procedural restrictions in a particular case, rather than allow the restriction of expression.

The value of what is being expressed cannot be a factor since we should not concern ourselves with the opinion, but rather with its effect on the listeners, or readers, or viewers. But the expression must be truly an expression of ideas or facts, which would exclude the old chestnut about crying "fire" in a crowded theatre. We must also be on the alert for insecurity which breeds restrictions on opinions which oppose the values of the powerful, and of great ideals which can trod on minorities and their views.

Clearly a major issue is the extent to which the community can regulate the where, when, and how of expression; but before this can be undertaken the existence of freedom of expression as a limitation on legislative authority must be established. At a minimum, expression involving political opinions or facts must be protected, and then the protection could be expanded to coincide with further interests of Canadian society in the expression of opinion on matters of public interest in general.

The title "Freedom of Expression—the First Step" has been used because the first step must be the constitutionalizing of the concept, whether that means recognizing that the concept exists in our "unwritten" constitution, or in our "written" constitution. When that step has been taken it is then time to get down to some hard thought about the extent of the concept, as for example, whether a distinction between "public" and "private" use of expression is a valid distinction, and what can be classified as "public" and what as "private"; also a decision as to what is a reasonable regulation of the "where", "when", and "how" of expression is needed.

A great deal more remains to be thought out and articulated regarding freedom fo expression, and the decision in a case involving the freedom will be complicated and difficult, but as the breath of life for a nation it must be attempted. One must wonder whether the cases decided in the 1950's were unique or whether they were breaking new ground which remains to be cultivated. Are *Boucher, Saumur, Switzman,*

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[131] The Supreme Court of Canada has expressed a willingness to engage in this type of analysis; see the judgment of Beetz J. in *A.G. Canada* v. *Canard* (1975) 52 D.L.R. (3d) 548 at 575.

[132] *See Francis* v. *Chief of Police* [1973] 2 W.L.R. 505 (P.C.).

to name just three considered in this paper, to be allowed to slip away? Were they simply a product of their time and nothing more, perhaps a reaction to McCarthyism in the United States, or a result of the aftermath of World War II? The early decisions on freedom of expression turned to the preamble to the B.N.A. Act for the source of freedom of expression and the other fundamental freedoms, but we all know that the preamble has no enacting force. It is significant that the preamble has in fact been used.[133]

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[133] I have omitted a discussion of freedom of expression as an original freedom. Mr. Justice Rand in *Saumur* said: Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self expression of human beings and the primary conditions of their community life within a legal order (at 670 D.L.R.). In my opinion all that Mr. Justice Rand meant was that one need not point to a legal rule by which to justify his assertion of a right to freedom of expression. The right to freedom of expression exists and positive law which contains the tort of defamation, and the crimes of sedition, blasphemy, and dealing with obscene matter, attaches to results which the exercise of freedom of expression may bring about. It is possible to take a different view of the phrase "original freedoms". Mr. Justice Casey in *Chabot* v. *School Commissioners of Lamorandiere and A.G. for Quebec* (1957) 12 D.L.R. (2d) 796 set out the quotation from *Saumur* by Rand J. and then added: . . . the rights of which we have been speaking find their source in natural law . . . if these rights find their source in positive law they can be taken away. But if, as they do, they find their existence in the very nature of man, then they cannot be taken away and they must prevail should they conflict with the provisions of positive law. *See also* the statement by Hughes D.C.J. in *Daylight Theatre Co. Ltd.* v. *The Queen* (1973) 48 D.L.R. (3d) 390 at 397.