

Extra, extra! Protecting the “free” press in Canada

“2. Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, **including freedom of the press and other media of communication;**”[\[1\]](#)

In Canada, freedom of the press is expressly recognized and constitutionally protected in section 2(b) of the *Charter of Rights and Freedoms*.[\[2\]](#) In practice, the protection of a free press and media in the *Charter* can act as both a sword and a shield, allowing the press to uncover the secrecy of sealed government documents as well as to seek to protect their sources from being exposed.[\[3\]](#)

Why is a free press important?

The media informs the public about what is going on in Canada.[\[4\]](#) It also acts as a watchdog that informs the public about emerging and often controversial issues from a variety of perspectives.[\[5\]](#) The role and responsibilities of the media directly support democracy because individuals cannot form their opinions or become well-informed citizens unless they have sufficient and proper knowledge of what is going on in their communities.[\[6\]](#)

The Supreme Court of Canada has described the powerful role of the media in this respect: “It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being.”[\[7\]](#) Members of the press have the important task of sharing news, supporting the public’s right to know about everything from current events to the actions of all levels of government to what is happening in the courts, on a daily, and sometimes even hourly, basis.[\[8\]](#) The news sharing function of the press is critical because it is often the *only* means by which citizens, members of the public, receive information.[\[9\]](#)

How is freedom of the press protected in Canada?

“Freedom of the press and other media of communication” are protected within the same section as freedom of expression in the *Charter of Rights and Freedoms*. Because freedom of the press is included in the *Charter*, the protection is constitutionally ‘entrenched’ – meaning that all provincial or federal laws as well as government actions have to respect this freedom.[\[10\]](#) Laws or government actions that infringe on the freedom of the press can be struck down by a court or lead to other remedies.

The courts have given meaning to the scope of the free press in the *Charter*, specifically how it works and how it can or should be protected. [\[11\]](#) When deciding on cases involving

freedom of the press, the court must perform a balancing act to ensure their protection of one right does not come at the cost of another. One effect of this balancing exercise is that decisions are quite fact-dependent, and the outcomes in different cases can be quite distinct because of differing contexts or because there are different rights or values engaged in addition to freedom of the press. Cases that have come before the courts show that the *Charter*-protected freedom of the press can be used as both a shield and a sword.[\[12\]](#)

A shield

Section 2(b) of the *Charter* can be used as a shield [when members of the press try to protect the identity of their sources](#). Journalists rely on section 2(b) to defend against the disclosure of source materials or source identity. The courts will assess such applications on a case-by-case basis.[\[13\]](#) Currently, the court will only protect the identity of a source if there is a confidentiality agreement between the journalist and source, and if it is in the public interest for their identity to be kept secret rather than revealed.[\[14\]](#)

A sword

More commonly, freedom of the press is used as a sword when journalists use the *Charter* to fight for access to information that is banned from the media and the public.[\[15\]](#) For example, the media relies on the constitutional protections of a free press to try to gain access to sealed documents from police investigations.[\[16\]](#) Sealing orders otherwise prevent the media and members of the public from finding out details of investigations.[\[17\]](#)

Toronto Star News Ltd v Ontario is an example of a media organization fighting a sealing order on investigative materials.[\[18\]](#) In this case, the Ontario Ministry of Natural Resources began the investigation of a privately-owned meat packing plant.[\[19\]](#) This investigation became the subject of widespread media reports when public concern about the quality of the company's meat for consumption grew.[\[20\]](#) After the criminal investigation started, the Crown successfully applied to have the search warrant materials sealed for 90 days.

Members of the media, including the Toronto Star, appealed, arguing that their section 2(b) rights were infringed by the document sealing order.[\[21\]](#) The Star was successful at the Ontario Superior Court, Court of Appeal, and eventually at the Supreme Court, where Justice Fish noted that: "a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a general assertion were sufficient to support a sealing order, the [open court] presumption would favour secrecy rather than openness, a plainly unacceptable result."[\[22\]](#)

Section 2(b) has also been used as a sword when the press asserts its ability to share information from court proceedings. In the landmark case *CBC v Dagenais*,[\[23\]](#) the Supreme Court recognized that one *Charter* right cannot trump another - that is, the right to a fair trial cannot supersede freedom of the press.[\[24\]](#)

Publication bans are imposed by a court when the situation meets two criteria: (1) that the ban is necessary for the administration of justice, and (2) that the positive effects of the

publication ban outweigh the negative effects to the parties involved and the public (such as effects on right to free expression, including the free press, and right of accused to fair and public trial).[25] When the court is asked for a publication ban, the party requesting the ban must show evidence that without it, there would be serious threats to the administration of justice.[26]

For example, in May 2017, journalists in Prince Edward Island challenged a publication ban request on a video presented in court during the early stages of a high-profile murder trial.[27] In that case, the Crown's request for a publication ban was denied.[28] The Court was not convinced by the evidence presented that without a publication ban there would be a serious risk to the administration of justice.[29]

Threats to the Canadian free press

Despite the constitutional protections provided to the press, a few recent incidents show how the free press in Canada may be under threat.

You used to track me on my cellphone

- In October 2016, news leaked that police and RCMP were monitoring the phone records of journalists for the purpose of identifying their sources. Eleven journalists had their phones tracked by either the Montreal or provincial police.[30].[31] In response, the Government of Quebec announced a public inquiry amid reports that the “monitoring of some journalists’ cellphones lasted as long as five years and targeted an ever-growing list of reporters.”[32] This action by the police seems to be a blatant breach of freedom of the press. It will be interesting to learn whether the purpose of police monitoring is deemed so necessary to the administration of justice that this type of breach of freedom of the press can be justified.

Journalists: not above the law, even for a story on the evening news

- A journalist in Newfoundland is facing up to 10 years in prison for his coverage of protests against a hydroelectric project in Labrador.[33] Justin Brake entered the Muskrat Falls site in October 2016 to report on a group protest. He was mostly sitting away from the protestors, observing, to write and to take photos and videos of the protest. In order to effectively observe the protest, Brake had to enter the site on which a court injunction had been issued against trespassers.[34] Brake was arrested and subjected to the same charges as the protesters: disobeying a court injunction and mischief over \$5,000.[35] His charges were

denounced because they could cause a “chill in reporting on controversies over resource-development projects and Indigenous-led protests”.[\[36\]](#) But law enforcement officials felt the breach of a law superseded the importance of his need to report on the conflict. Officials stated that although Brake may have felt he needed “to stay in the action to get the story, it’s no excuse if laws are actually being broken.”[\[37\]](#) Although there are justifiable limits on a free press, critics question whether this example takes those limits too far.

Censorship: hear no evil, speak no evil.

- In 2006, then-Prime Minister Harper and his government imposed a media ban on reporting about the remains of deceased soldiers returning from Afghanistan.[\[38\]](#) Although the government alleged this ban was out of respect for the deceased soldiers’ families, several parties including politicians, the families in question, and the public questioned what the government was trying to hide or what story they were trying to suppress.[\[39\]](#) This type of censorship, which deals with what the media can report on, creates a feeling of suspicion about the motivations for it.
- Upon his entrance in Ottawa, Harper began to shut out the media; he locked down who could attend press conferences, refused to answer questions when put on the spot, and demanded questions in advance. [\[40\]](#) The press could only obtain a specific amount of information and it was tightly controlled by the Prime Minister’s office. These actions that restricted media from accessing information that should be public is a form of subtle censorship.

Censorship of the press can also have a “chilling” effect on individual expression by encouraging “self-censorship”, meaning that individuals will choose not to discuss controversial topics or opinions.[\[41\]](#) If the press cannot discuss a story, idea or opinion, the public will be less likely to discuss that “taboo” subject matter as well. For example, even though some members of the public may know about a certain controversial issue, they would not speak about it because it was not being talked about by the media and public at large. In the words of Justice La Forest, “debate in the public domain is predicated on an informed public, which is in turn reliant on a free and vigorous press.”[\[42\]](#)

Ultimately, the Charter is used as a shield against threats such as being forced to reveal sources, police surveillance, and censorship by the government. It is a shield to those threats. The press also needs to use the Charter as a sword to fight for access to information that is being withheld from the public. Threats to the free press, such as neglecting to respect the confidentiality of press sources or charging journalists with the same crimes as

those they are reporting on, can result in censorship becoming commonplace in our society, a troubling proposition. The press must be willing and able to tell difficult, risky, controversial stories so that we as Canadians can better understand and discuss, the society that we live in and the effectiveness of our elected representatives. In this way, the free press is fundamental to our democracy.

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 2(b).

[2] *Ibid.*

[3] Paul Schabas & Ryder Gilliland, "The Media, Open Courts, and Sealing Orders: Recent Developments" (2005) 17 NJCL 105 at 115.

[4] Benjamin Oliphant, "Freedom of the Press as a Discrete Constitutional Guarantee" (2013) 59:2 McGill LJ 283 at 287.

[5] *Ibid.*

[6] *Ibid.*

[7] *Canadian Broadcasting Corp v New Brunswick (AG)*, [1991] 3 SCR 459 at 475.

[8] Oliphant, *supra* note 4 at 287.

[9] Oliphant, *supra* note 4 at 287.

[10] Peter W Hogg, *Constitutional Law of Canada*, vol 1, 5th ed (Scarborough: Thomson, 2007) (loose-leaf 2010 supplement) at 36.3.

[11] *Ibid* at 36.4(b).

[12] Schabas & Gilliland, *supra* note 3 at 115.

[13] *R v National Post*, 2010 SCC 16 at paras 53-64.

[14] *Ibid.*

[15] Schabas & Gilliland, *supra* note 3 at 115.

[16] *Ibid.*

[17] *Ibid* at 116.

[18] *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41 .

[19] *Ibid* at 11.

[20] *Ibid* at 11.

[21] *Ibid* at 11.

[22] *Ibid* at 9.

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

[24] *Ibid* at 839.

[25] Peter Jacobsen, "The Problems with Publication Bans", *Canadian Journal of Free Expression Review 2014-2015* (29 May 2015) at 22.

[26] *R v Mentuck*, 2001 SCC 76 at paras 38-39.

[27] Ryan Ross, "Guardian, CBC fighting publication ban in murder trial of Joel Clow", *The Guardian* (18 May 2017), online: <www.theguardian.pe.ca/news/local/2017/5/18/media-fighting-publication-ban-in-murder-trial-of-joel-clow.html>.

[28] *R v Clow*, 2017 PESC 9 at para 25.

[29] *Ibid* at paras 21-24.

[30] Ingrid Peretz, "Quebec to hold public inquiry into police surveillance of journalists", *The Globe and Mail* (3 November 2016), online: <www.theglobeandmail.com/news/national/quebec-to-hold-public-inquiry-into-surveillance-of-journalists/article32657198/>.

[31] *Ibid*.

[32] *Ibid*.

[33] Geoff Bartlett, "Independent editor Justin Brake vows to fight despite Crown softening charges", *CBC News* (29 March 2017), online: <www.cbc.ca/news/canada/newfoundland-labrador/justin-brake-charges-crown-1.4045298>.

[34] Jacob Barker, "Reporter's right to cover story at heart of court case involving Muskrat Falls protest", *CBC News* (2017 February 14), online: <www.cbc.ca/news/canada/newfoundland-labrador/justin-brake-in-court-1.3982167>.

[35] *Ibid*.

[36] The Canadian Press, "Press freedom groups condemn charges against N.L. journalist over Muskrat Falls protest", *CBC News* (10 March 2017), online: <www.cbc.ca/news/canada/newfoundland-labrador/justin-brake-muskrat-falls-charges-1.4018965>.

[37] *Ibid*.

[38] “Harper on defensive over media ban on return of dead soldiers”, *CBC News* (25 April 2006), online: <www.cbc.ca/news/canada/harper-on-defensive-over-media-ban-on-return-of-dead-soldiers-1.598979>.

[39] *Ibid.*

[40] Les Whittington, “Government by photo op’: How Stephen Harper froze out Ottawa’s press corps”, *The Toronto Star* (21 June 2015), online: <www.thestar.com/news/insight/2015/06/21/government-by-photo-op-how-stephen-harper-freeze-out-ottawas-press-corps.html>.

[41] “Censorship”, *supra* note 38.

[42] *Canadian Broadcasting Corp v New Brunswick (AG)*, [1996] 3 SCR 480 at para 23.