

“Free” to Express: Media Rights and Broadcasting Policy in Canada and the United States

by

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Author's Declaration

I hereby declare that I am the sole author of this thesis.

This is a true copy of the thesis, including any final revisions,
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Abstract

Broadcasters occupy a unique space in Canadian and American societies. These actors are supposed to be able to inform, enlighten, and entertain Canadians and Americans alike. Moreover, both the Canadian *Charter of Rights and Freedoms* and the American Bill of Rights contain freedom of the press and freedom of expression provisions which appear as though they ought to protect broadcasters as well. In this thesis I explore how robust these protections are, and the extent to which Canadian and American appellate courts have been willing to empower these actors. To do this, I developed a typology for quantitatively evaluating the judicial empowerment of broadcasters in each country. What I found was that the United States Supreme Court has been more willing to empower broadcasters than the Canadian appellate courts have. This is evidenced by the rate at which American broadcasters have been empowered when compared with Canadian broadcasters. My quantitative findings are further supported by a content analysis of appellate level decisions in Canada and the United States. This thesis also seeks to draw a connection between the current understanding of media rights and the implications that understanding has for the new era of broadcasting in which digital and internet-based media have revolutionized broadcasting.

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To my family

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List of Abbreviations

1991 <i>Broadcasting Act</i>	The <i>Act</i>
<i>Bipartisan Campaign Reform Act</i>	<i>BCRA</i>
Chief Justice	C.J.
Canadian Broadcasting Corporation	CBC
<i>Canadian Charter of Rights and Freedoms</i>	the <i>Charter</i>
Canadian Radio-television and Communication Commission	CRTC
Corporation for Public Broadcasting	CPB
<i>Criminal Code of Canada</i>	<i>Criminal Code</i>
Federal Communications Commission	FCC
Justice	J.
Lesbian, Gay, Bisexual, Transgender or Questioning	LGBTQ
<i>McKinney v. the University of Guelph</i>	<i>McKinney</i>
National Public Radio	NPR
<i>New York Times Co. v. Sullivan</i>	<i>Sullivan</i>
<i>Ontario Educational Communication Authorities Act</i>	<i>OECAA</i>
Public Broadcasting Service	PBS
Section	S.
Télévision Française de l'Ontario	TFO
TVOntario	TVO

Chapter 1 Introduction

Broadcasting is of considerable importance to the lives of Canadians and Americans. Broadcasters disseminate content that is intended to inform, enlighten, and entertain. Broadcasters serve a critical function. For example, they hold governments to account and they produce politically satirical television shows. Canadians and Americans consume a variety of media ranging from newspapers to social media at staggering rates. In spite of their importance, the rights of broadcasters are not well understood.

Canadian and American citizens enjoy a number of freedoms including freedom of expression. Freedom of expression is “the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.¹ Freedom of expression is important because “in order to maximize the benefits a society can gain...it must permanently commit to restraining dominant groups from their natural inclination to demand conformity”.² The ability of private citizens to express themselves is therefore inscrutable.

Given that broadcasters also convey messages that are of considerable importance, the question is therefore not so much about the ability of Canadians and Americans to express themselves. Rather, the question is what ability do broadcasters have to disseminate a message without state interference. More specifically, how do the courts in Canada and the United States

¹ *Universal Declaration of Human Rights*, GA Res 217 (111), UNGAOR, 3rd Sess, Supp No 13, UN DOC A/810 (1948) 71 at 2. Note that free speech and free expression may be used interchangeably, with expression referring to the *means* of communication.

² Irene M. Ten Cate, “Speech, Truth and Freedom: An Examination of John Stuart Mill’s and Justice Oliver Wendell Holmes’s Free Speech Defenses” (2010) 22 *Yale Journal of Law & The Humanities* 35 at 52.

understand the rights of broadcasters? It is that broad question which informs this thesis. Two specific research questions guide this project:

(A) Empirically, how has jurisprudence in Canada and the United States defined the rights of broadcasters in those countries?

(B) Based on jurisprudential definitions of the rights of broadcasters in Canada and the United States, which country's broadcasters enjoy greater judicial empowerment?

I would hypothesize that the United States Supreme Court is more likely to empower broadcasters than the Canadian Supreme Court and provincial appellate courts. This hypothesis is based on the relatively greater value that Americans place on freedom of expression than Canadians do.³ If this hypothesis is correct, broadcasters as a uniform group of actors in the United States will enjoy markedly greater success in the rights dispute they are involved in their Canadian counterparts.⁴

The rights of broadcasters in Canada and the United States are important for several reasons. Scholars have addressed the rights of broadcasters in Canada and the United States individually.⁵ However, there is little comparative literature on the rights of broadcasters in Canada and the United States. The comparative aspect of media rights and broadcasting policy in Canada and the United States has not been addressed in any great detail since 1988.⁶ That research only narrowly addresses the freedom of expression issue. Additionally, other literature on the topic has only focused narrowly on broadcast licensing.⁷ My focus here is not solely on media rights, but also

³ I will explore this in greater detail in Chapter 4.

⁴ Markedly refers to a success rate differential of $\geq 10\%$.

⁵ See e.g. Owen M. Fiss, "Free Speech and Social Structure" (1986) 71 *Iowa Law Review*; Marc Raboy & Jeremy Shtern, eds, *Media Divides: Communication Rights and the Right to Communicate in Canada* (Vancouver: UBC Press, 2010); Richard Harding Davis, *The Press and American Politics: The New Mediator*, 3rd ed. (New Jersey: Prentice Hall, 2001).

⁶ Dorothy Zolf, "The Regulation of Broadcasting in Canada and the United States: Straws in the Wind" (1988) 13 *Canadian Journal of Communication* 2.

⁷ Corinne Schweizer et al, "Blast From the Past? A Comparative Analysis of Broadcast Licensing in the Digital Era", (2014) 4 *Journal of Information Policy*.

on broadcasting policy in Canada and the United States. This includes, for instance, the regulations that govern broadcasters and how that affects the purpose that broadcasters serve, namely to inform, enlighten, and entertain. As I will discuss below, comparative media rights and broadcasting policy is situated at the nexus of a number of disparate bodies of literature. I will discuss this literature in greater detail in the chapters that follow.

Second, Canada and the United States are similar in many respects. However, comparing the approaches that Canadian and American courts have taken to the rights of broadcasters can be instructive. Such an approach not only provides insights about the rights of broadcasters but also about each country's constitutional culture and the values of each society more broadly. For example, how do norms and values concerning the importance of free expression resonate in such a way that they influence, or have the potential to influence judicial perspectives on the rights of broadcasters?⁸

Third, irrespective of the media they employ, broadcasters exert a considerable amount of influence on the lives of Canadians and Americans.⁹ Whether that medium is a newspaper or an internet-based platform, broadcasting is rather pervasive.¹⁰ Accordingly, broadcasting is of great importance, both sociologically and economically to Canadians and Americans.

⁸ Since the adoption of the American Constitution, freedom of speech has been identified as a fundamental value in American society. This might help explain any discrepancies. See specifically, Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Kennikate Press, 1972) at 27.

⁹ Michael Oliveira, "Canadians Watch 30 Hours of TV but for Many Web Dominates Free Time", *The Toronto Star* (April 26, 2013) online: The Toronto Star <https://www.thestar.com/life/technology/2013/04/26/canadians_watch_30_hours_of_tv_but_for_many_web_dominates_free_time.html>; Jacqueline Howard, "Americans Devote More Than 10 Hours a Day to Screen Time, and Growing", *CNN* (July 29, 2016) online: CNN <<http://www.cnn.com/2016/06/30/health/americans-screen-time-nielsen/index.html>>; Michael B. Sawen, "Cultural Imperialism: A Media Effects Approach" (1991) 8 *Critical Studies in Media Communication* 1. This does not include the amount of time that Canadians and Americans spend on the internet.

¹⁰ Marshal McLuhan, *Understanding Media: The Extension of Man*, 2nd ed. (Toronto: Taylor Francis Ltd., 2001) at 9.

This research also has considerable implications, not only for broadcasters but also for other parties. When broadcasters are left without rights protections their ability to do their job becomes more difficult, and they begin to operate in a precarious space. For example, the professional wrestler Terry Bollea, more commonly known as Hulk Hogan successfully sued the website Gawker for defamation after they posted his sex tape.¹¹ Gawker was forced to file for bankruptcy.¹² While the post that led Gawker's downfall may have been salacious and morally dubious, that is beside the point. What is important is that unabated, the Gawker case has the potential to set a dangerous precedent for similar broadcasters in the future.

Conversely, how does broadcasting activity impact the rights of other groups? For example, what if it had been a more mainstream broadcaster such as Global Television in Canada or the National Broadcasting Corporation ("NBC") in the United States that had disseminated Bollea's tape?¹³ Or if that broadcaster had disseminated content that was even more offensive to the Lesbian, Gay, Bisexual, Transgender or Questioning ("LGBTQ") community?

In the following chapter, I will outline my methodological approach to this thesis. There, I will detail why judicial empowerment is an intuitive mechanism for assessing the effect that court decisions have on the scope of broadcasters' rights. I will also outline how I will evaluate judicial empowerment. Specifically, I will explain the typology I developed to quantitatively explore the effect of jurisprudence on the rights of broadcasters. I will also outline my approach to the analysis that will supplement my quantitative findings.

¹¹ *Bollea v. Gawker*, [2016] So. 3d 768.

¹² Tiffay Kary and Steven Church, "Gawker Founder in Bankruptcy After Losing Hulk Hogan Case", *Bloomberg Technology* (1 August 2016) online: Bloomberg < <https://www.bloomberg.com/news/articles/2016-08-01/gawker-media-founder-nick-denton-files-personal-bankruptcy>>.

¹³ The reason why this was not the case might have to do with the fact that Gawker was a gossip tabloid website, whereas larger broadcasters such as NBC or Global are not.

In Chapter Three, I will discuss how the Supreme Court of Canada and the Supreme Court of the United States have interpreted the scope of the Canadian *Charter of Rights and Freedoms* (“the *Charter*”) and the American Bill of Rights. I will also examine how scholars have interpreted these decisions. In terms of the *Charter*, I will argue that the Supreme Court’s interpretation of its scope is rather narrow. To that effect, I will discuss how there is an alternative framework that the Court has not yet applied and, in my view, it has erred in failing to do so. In terms of the Bill of Rights, I will argue that the scope of its application is considerably broader than the *Charter*. One area where this is especially noticeable is with the application of the Bill of Rights to the private sphere.

In Chapter Four, I will explore the leading jurisprudence on freedom of expression in Canada and the United States as well as the relevant academic theory. My focus there is twofold. First, I examine why Canada and the United States protect expression. I also look at the limits on expression in each country. My broad argument here is that Americans enjoy wider latitude in how they express themselves than do Canadians. In that sense, the United States Supreme Court’s interpretation of freedom of expression is markedly broader and more principled than the Supreme Court of Canada’s.

In Chapter Five, I assess the judicial empowerment of broadcasters in Canada. There, I look at the cases I selected quantitatively by plotting them in my typology. I also seek to explain these results by looking at the content of the decisions themselves to reveal the trends that exist, but also any anomalies. In that chapter, I argue that the Canadian understanding of the rights of broadcasters is rather limited and the *Charter* should apply to broadcasters on the basis of a novel public importance theory.

In Chapter Six, I discuss the judicial empowerment of broadcasters in the United States. These results show that the United States Supreme Court has been willing to empower broadcasters. It is important to note that in this data set, the Court has not addressed the rights of broadcasters since 1994. I argue that while this could mean that media rights are settled law in the United States, this fact also raises questions about the future of broadcasters' rights.

Finally, in Chapter Seven, I conclude the argument by comparing the judicial empowerment of broadcasters in Canada and the United States. There, I discuss the types of cases where the Canadian and American courts have offered differing approaches. I then explore why the Canadian and American approaches in those types of cases are different. Based on this analysis, I forward two arguments which are central to this thesis. First, the *Charter* and the American Bill of Rights ought to apply to broadcasters uniformly. Second, under that framework, the same standards that apply to private citizens in terms of freedom of expression and other rights ought to apply to broadcasters.

Chapter 2 Methodology

2.1 Introduction

In this chapter, I will outline my methodological approach to this thesis. This approach can be understood in terms three key components. First, this chapter will provide definitions for key terms in the research questions which are grounded in the literature. These terms are *judicial empowerment*, *broadcasters*, and *freedom of expression*. The second section of this chapter will explain how cases were selected for this thesis from Canadian and American courts. The final section of this chapter, building on the case selection methodology, will explain how the relationship between the jurisprudence and the judicial empowerment of broadcasters in Canada and the United States. There, this chapter will nominate a typology for quantitatively assessing judicial empowerment and explain the process by which this typology was conceived. In that section, I will also explain how I will supplement my quantitative findings.

2.2 Definitions

In this section, I will argue that judicial empowerment is an intuitive construct for exploring the relationship between judicial decisions and the rights of a given group. This section will also nominate definitions for the terms *broadcasters* and *freedom of expression*, both of which are also central to understanding this thesis.

2.2.1 Judicial Empowerment

Scholars have noted that one of the effects of codifying rights and encouraging judicial independence is imbuing courts with broad formal powers.¹ This phenomenon has been

¹ See generally, Heinz Klug, *Constituting Democracy: Law, Globalism, and South Africa's Political Reconstruction* (New York: Cambridge University Press, 2000); Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003) [New Democracies]; Tom Ginsburg, "The Global Spread of Constitutional Review" in Keith Whittington, Daniel Kelemen & Gregory

described as the judicialization of politics.² According to Ran Hirschl, the judicialization of politics is also referred to as judicial empowerment.³ Judicial empowerment broadly refers to the expansion of judicial powers and authority by the legislative and executive branches of government in light of constitutional entrenchment of rights and judicial independence. While judicial empowerment undoubtedly affects rights, it is more applicable to the formal legal processes by which elites empower the judiciary.⁴

For this thesis, then, judicial empowerment as I refer to it, *specifically* means the judicial empowerment of rights claimants by the courts.⁵ Here, a more narrowly tailored definition of judicial empowerment is necessary and appropriate. Ran Hirschl and Tom Ginsburg define judicial empowerment in this sense, as “the enhancement of the role of the judiciary in the political system and the extension of the jurisdiction of courts and legal adjudication into new areas of public policy”.⁶ This definition places a greater emphasis on the judicial empowerment of rights claimants than of the constitutional revolutions through which elites empower judiciaries.

While literature exists on judicial empowerment in new and emerging democracies, the literature has also focused on the judicial empowerment of rights in Canada and the United States in a variety of policy contexts, including, but not limited to LGBTQ and abortion rights.⁷

Caldeira, eds, *The Oxford Handbook on Law and Politics* (New York: Oxford University Press, 2008); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004) [Juristocracy]; Charles R. Epp, “Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms” (1996) 90 *American Political Science Review* 4.

² Neal C. Tate & Torbjorn Vallinder, *The Global Expansion of Judicial Politics* (New York: New York University Press, 1995).

³ Juristocracy, *supra* note 1.

⁴ Ran Hirschl describes this process as constitutional revolution. See generally, *Ibid.*

⁵ For a broader discussion of the theoretical explanations for constitutional revolutions, see generally, *Ibid.*

⁶ Ran Hirschl, “The Struggle for Hegemony: Understanding Judicial Empowerment Through Constitutionalization in Culturally Divided States” (2000) 36 *Stanford Journal of International Law* 73; New Democracies, *supra* note 1.

⁷ Miriam Smith, “Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada” (2005) 33 *Politics and Society* 2; Tom R. Tyler & Gregory Mitchell, “Legitimacy and the

Moreover, broadcasting is a species of public policy. Finally, judicial empowerment lends itself well to this thesis because of how it functions as a causal mechanism. Judicial empowerment helps explain the relationship between court decisions and changes in the scope of rights protections. Accordingly, judicial empowerment as defined above will be used to evaluate the rights of broadcasters in this thesis.

2.2.2 Broadcasters

In defining what a broadcaster is for this thesis, ss. 2(1)(2) of the 1991 *Broadcasting Act* (“the *Act*”) provide a starting point. The *Act* defines a broadcaster as “[one who transmits] programs...by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus”.⁸ Specifically, a network refers to “any operation where control over all or any part of the programs or program schedules of one or more broadcasting undertakings is delegated to another undertaking or person”⁹; a program refers to “sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain”¹⁰; and other means of telecommunication refers to “any wire, cable, radio, optical or other electromagnetic system, or any similar technical system”.¹¹ In my view, this definition is too narrow. Rather, I seek to include a broader range of broadcasting activities.

The first way in which I expanded upon the *Act*’s definition of a broadcaster is to include print media. David Riesman, Nathan Glazer and Reuel Denney define print media as

Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights” (1994) 43 *Duke Law Journal* 4.

⁸ *Broadcasting Act*, S.C. 1991, c.11, s. 2(1) [*Broadcasting Act*].

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.* at s. 2(2).

“transmit[ing] information via physical objects”.¹² Examples here include books, comics, magazines, newspapers or pamphlets. However, I have limited discussions of print media to books, magazines, and newspapers. Because these print media are identified in both the *Charter* and the Bill of Rights through freedom of the press provisions whereas other types of print media, such as pamphlets are not.

The second way in which I will expand on the *Act*'s definition of broadcasters is to include new media. According to Robert Logan, new media is “digital media that are interactive, incorporate two-way communication, and involve some form of computing”.¹³ Ultimately, he distinguishes new media from old media by suggesting that new media is merely the repurposing of old media using new technologies.¹⁴ Simply put, new media refers to content disseminated through the internet, for example. Viewed in this way, the most concrete example of new media are blogs and microblogging platforms such as Facebook and Twitter.¹⁵ Because the *Act* was enacted before the proliferation of new media, any definition provided therein could not have anticipated the rise of new media.

New media, because of its novelty, also presents the courts with intriguing questions concerning the rights status and obligations of those who disseminate content using new media. Moreover, scholars have noted that new media is capable of exerting a great deal of pressure on political processes domestically as well as transnationally.¹⁶ In sum, the scope of broadcasting

¹² David Riesman, Nathan Glazer & Reuel Denney, *The Lonely Crowd: A Study of the Changing American Character* (New Haven: Yale University Press, 1950) at 50.

¹³ Robert K. Logan, *Understanding New Media: Extending Marshall McLuhan* (New York: Peter Lang Publishing, 2010) at 4.

¹⁴ *Ibid.* at 7.

¹⁵ See generally, Clay Shirkey, “The Political Power of Social Media: Technology, the Public Sphere, and Political Change” (2011) 90 *Foreign Affairs* 1.

¹⁶ *Ibid.*

activities I am concerned with in this thesis are those covered by the *Act* as well as print and new media.

2.2.3 Freedom of Expression

Canada and the United States differ in the constitutional language used to describe the protection of expressive activity. For instance, s. 2(b) of the *Charter* refers to this right as freedom of expression, whereas the First Amendment to the U.S. constitution refers to the same right as freedom of speech.¹⁷ The most readily apparent distinction between the choice of verbiage is that expression encapsulates a broader range of activities than speech. Richard Moon notes that freedom of speech refers to *core* expressive activities, including but not limited to, political speech.¹⁸ Alternatively, freedom of expression includes the activities included in speech as well as fringe expressive activities which freedom of speech does not necessarily capture.¹⁹

Consider, for instance, the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*. In that case, the Court held, rather generally, that campaign finance generally and vis-à-vis advertising was analogous to free speech.²⁰ However, scholars have noted that while the Court used the language of free speech in *Citizens United*, corporations are not capable of speech as defined above.²¹ What the Court was *likely* referring to was the ability of corporations to *express* themselves, rather than *speak*.

¹⁷ *Canadian Charter of Rights and Freedoms*, s. 2, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 2(b) [2(b)]; U.S. Const. amend. I [First Amendment]. Particularly, s. 2(b) of the *Charter* provides that “[Everyone has the following fundamental freedoms:] freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. In contrast, the First Amendment provides that “Congress shall make no law respecting an establishment of religion, or of prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people to peacefully assemble, and to petition the government for a redress of grievances”. *Ibid.*

¹⁸ Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 16.

¹⁹ *Ibid.*

²⁰ [2010] 558 U.S. 310.

²¹ Tamara R. Piety, “Citizens United and the Threat to the Regulatory State” (2010) 109 *Michigan Law Review First Impressions* at 17.

A related line of inquiry concerns the distinction made in the *Charter* and the First Amendment between freedom of expression and freedom of the press. Melville Nimmer has argued that freedom of the press and freedom of expression are not redundant.²² Nimmer notes that for freedom of the press to be engaged, the material in question “must [be the result of] an act of copyright”.²³ Nimmer further concludes that the copyright standard can also be applied to visual materials.²⁴ The press also has legal protections and obligations which fall outside the scope of freedom of expression. This includes protecting the identity of their sources. I would, therefore, include freedom of the press in my definition of freedom of expression.

2.3 Data Selection

2.3.1 Canada

I selected Canadian cases from the Supreme Court of Canada as well as the provincial and territorial courts of appeal. Temporally, cases were selected following the advent of the *Charter* in 1982. In finding cases from these courts, five Boolean searches were conducted on the Canadian Legal Information Institute’s (“CanLII”) website. The search terms used were: “free expression” + “broadcaster” + “*Charter*”; “free expression” + “newspaper” + “*Charter*”; “free expression” + “blog” + “*Charter*”; “free expression” + “Twitter” + “*Charter*”; and “free expression” + “Facebook” + “*Charter*”. These five searches produced a combined 1,115 cases; 76 were considered and 24 selected for examination here.²⁵ Cases were selected based on the whether or not they met certain criteria, outlined below.

²² See generally, Melville B. Nimmer, “Introduction – Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?” (1975) 26 *Hastings Law Journal*.

²³ *Ibid.* at 652.

²⁴ *Ibid.* Nimmer concedes that the copyright standard is not the only standard, but is merely illustrative of which materials would be protected under freedom of the press and which would fall under freedom of speech. Nimmer’s discussion is concerned exclusively with the United States. Nonetheless, it is difficult to imagine that this discussion would not be applicable in the Canadian context. *Ibid.*

²⁵ A complete table of cases considered and selected can be found in Appendices I and II.

My first requirement for selecting cases from Canadian courts was that one of the parties to the dispute had to be a broadcaster as defined above. This is to say that in the cases selected, a broadcaster had to be making a rights claim, responding to a rights claim or intervening in a rights dispute.²⁶ Cases excluded at this stage fell into one of the three following groups: urban advertising, indirect broadcasting, and printed, distributable material.

The first group of cases that was rejected at this stage were cases dealing with urban advertising. There were three cases which fell into this category. *Vancouver (City) v. Zhang* dealt with a Chinese group, the Falun Gong who protested human rights abuses in China through a variety of means outside of the Chinese consulate in Vancouver, including a billboard.²⁷ Similarly, *Greater Vancouver Transportation Authority v. Canadian Federation of Students* dealt with the ability of a student organization to advertise on the sides of buses in order to encourage students to vote in a provincial election.²⁸ Finally, *R. v. Stevens* addressed defamatory and salacious posters which were displayed throughout the University of Manitoba campus.²⁹ The media used in these cases is not consistent with this thesis' definition of a broadcaster.

The second group of cases which I excluded during this stage of analysis were cases which generally concerned interviews given to the media. Arguably the most notable of the cases rejected here is *Hill v. Church of Scientology*. *Hill* dealt with the legal repercussions of a press conference that a lawyer held on the courthouse steps following a trial.³⁰ Similarly to *Hill*, *R. v. Kopyto* dealt with a lawyer who was found guilty of contempt for making disparaging remarks

²⁶ Intervener status is included here, because there is evidence of the effect of third party interventions on *Charter* litigation. See e.g. John Koch, "Making Room: New Directions in Third Party Intervention" (1990) 48 *University of Toronto Faculty Law Review* 1.

²⁷ (2010) 325 D.L.R. (4th) 313.

²⁸ [2009] 2 S.C.R. 295.

²⁹ 100 Man R (2d) 81.

³⁰ [1995] 2 S.C.R. 1130.

about the court to a media outlet following a trial.³¹ The final case excluded here was *R. v. Ahenakew*, wherein the respondent was accused and convicted of presenting anti-Semitic material at a conference as well as in subsequent interviews given to the media.³² The unifying feature in these cases is the fact that the broadcasters involved served as intermediaries to broadcasters rather than as broadcasters themselves.

The final group of cases excluded here concern small, printed, and distributable media. There are two cases of note here. *Saskatchewan (Human Rights Commission) v. Bell (c.o.b Chop Shop Motorcycle Parts)* addressed bumper stickers sold by a motorcycle store which displayed an image which was considered offensive by a number of ethnic minorities.³³ Similarly, *R. v. Harding* was an Ontario Court of Appeals decision which concerned pamphlets and telephone messages which targeted and were inflammatory towards Muslims.³⁴ This is not broadcasting as I have defined it.

The second exclusionary criteria concerned whether or not there was a live *Charter* dispute in the case at hand. Here, there were three specific reasons why cases were rejected. The first was cases that were governed by civil law.³⁵ There was also a case, which otherwise met all the inclusion criteria set out in this thesis except for the fact that the rights claim being made was

³¹ (1987) 47 D.L.R. (4th) 213.

³² (2008) 289 D.L.R. (4th) 59.

³³ (1994) 114 D.L.R. (4th) 370.

³⁴ (2001) 207 D.L.R. (4th) 686.

³⁵ See *Awan v. Levant*, 2016 ONCA 970 (CanLII); *St. Lewis v. Rancourt*, 2015 ONCA 513 (CanLII); *Bou Malhab v. Difussion Métromédia inc.*, [2011] 1 SCR 214; *Gilles E Néron Communication Marketing Inc. v. Chambres des Notaires du Québec*, [2004] 3 SCR 95; *Pressler v. Lethbridge and Westcom TV Ltd.* (2000) 86 BCLR (3d) 257; *Pierre v. Pacific Press Ltd.*, (1994) 113 D.L.R. (4th) 511; *WIC Radio Ltd. v. Simpson*, [2008] 2 SCR 420. Certain confidential source cases fell into this category as well because the Supreme Court has established that while s. 2(b) informs journalist-source privilege it does not flow from the *Charter*. See *1654776 Ontario Ltd. v. Stewart*, 2013 ONCA 184 (CanLII); *Canwest Publishing Inc. v. Wilson*, 2012 BCCA 181 (CanLII). Moreover, *Pridgen v. University of Calgary*. (2012) 350 D.L.R. (4th) 1; *R. v. Daly*. (2005) 256 D.L.R. (4th) 372; *Adbusters Media Foundation v. Canadian Broadcasting Corp.* (1997) 154 D.L.R. (4th) 404; and *Adbusters Media Foundation v. Canadian Broadcasting Corp.* (2009) 92 BCLR (4th) were rejected because the courts did not address *Charter* arguments.

one concerning freedom of religion, rather than freedom of expression.³⁶ Finally, one case was excluded at this stage because it was a reference case.³⁷ In practice, reference decisions have been accorded the same precedential value as cases in which there was a concrete, organic legal dispute. However, the legal disputes in reference cases are not *live*.

2.3.2 United States

In the United States, the Supreme Court is the eminent authority on the American bill of rights. Accordingly, American cases were selected from the United States Supreme Court. Scholars have routinely identified the Supreme Court's 1964 decision in *New York Times Co. v. Sullivan* as one of the most significant decisions in First Amendment jurisprudence.³⁸ I conducted five searches on LexisNexis using these parameters and employing the following terms: "free speech" + "broadcaster" + "bill of rights"; "free speech" + "newspaper" + "bill of rights"; "free speech" + "blog" + "bill of rights"; "free speech" + "Twitter" + "bill of rights"; and "free speech" + "Facebook" + "bill of rights".³⁹ These searches produced a combined 260 combined results with 99 cases being considered, and 29 being selected.⁴⁰

The first set of cases which I excluded were omitted because there was no broadcaster as I have defined it. For instance, *Underwager v. Channel 9 Australia* was a case which dealt with an interview given to a broadcaster, similarly to *Hill* in the Canadian context.⁴¹ Other cases

³⁶ *Owens v. Saskatchewan (Human Rights Commission)*. (2006) 267 D.L.R. (4th) 733.

³⁷ *Reference re Election Act (BC)*, 2012 BCCA 394 (CanLII).

³⁸ See e.g. Samuel R. Pierce Jr, "The Anatomy of an Historic Decision: *New York Times Co. v. Sullivan*" (1965) 43 *North Carolina Law Review*.

³⁹ Free speech was employed as a search term instead of free expression because the First Amendment employs the language of free speech as opposed to free expression. Moreover, analogous searches were conducted using the term "free expression" in lieu of "free speech" and there was virtually no change in the results produced.

⁴⁰ Complete tables of cases considered and selected have been reproduced in Appendices III and IV. Readers should note that the number of cases I found and considered includes circuit court of appeal decisions. The reason why I selected Supreme Court cases exclusively was that the number of cases would otherwise be disproportionate to the number of Canadian cases I selected. Including these cases would not have been feasible within the scope of this project for two reasons: First, the American Bill of Rights was enacted 191 years before the Canadian *Charter*. Second, the population of the United States is considerably greater than that of Canada.

⁴¹ 69 F.3d 361 (9th Cir. 1995).

excluded included but were not limited to those involving the posting of labour requirements, garbage collectors publishing editorials in a newspaper, erecting statues, school plays, wearing black armbands to school as a means of protesting the Vietnam war, and rap songs.⁴²

The second type of cases excluded here dealt with commercial advertising. For instance, in *Nike Inc. v. Kasky*, Nike, a corporation launched an advertising campaign to refute concerns about their labour practices.⁴³ Similarly, *Association of National Advertisers v. Lundgren* concerned the requirements for labelling products as environmentally friendly.⁴⁴ The remaining cases excluded here addressed attorney advertising, campaign finance, liquor advertising, and public transit advertising.⁴⁵

The second reason why I excluded cases was that there was no rights claim being made, or there was a rights claim but it did not concern freedom of expression or freedom of the press. Cases which fell into the first of these two categories were excluded from this study because the manner in which these cases were resolved was through the civil law.⁴⁶

Similarly, I rejected cases because although they dealt with rights claims, they did not address freedom of expression. In *Burwell v. Hobby Lobby Stores Inc.*, the United States Supreme Court struck down provisions associated with the *Affordable Care Act* requiring employers' insurance programs to cover contraceptives for female employees.⁴⁷ In *Burwell*, the claim centred around

⁴² *National Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013); *Board of Comm'rs, Wabaunsee Cty., v. Umbehr*, [1996] 518 U.S. 668; *Doe v. Small*, 934 F.2d 743 (7th Cir. 1991); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998); *Tinker v. Des Moines Independent Community School Dist.*, [1969] 393 U.S. 503.

⁴³ [2003] 539 U.S. 654.

⁴⁴ 44 F.3d 726 (Court of Appeals 1994).

⁴⁵ *Bates v. State Bar of Ariz.*, [1977] 433 U.S. 350; *Austin v. Michigan Chamber of Commerce*, [1990] 494 U.S. 652; *Liquormart, Inc. v. Rhode Island*, [1996] 517 U.S. 484; *Lamar Outdoor Advertising v. Miss. St. Tax Com'n*, 701 F.2d 314 (5th Cir. 1983); *Lehman v. Shaker Heights*, [1974] 418 U.S. 298; *Bell v. Itawamba County School Bd.*, 799 F.3d 379 (5th Cir. 2015).

⁴⁶ *Virgil v. Time, Inc.*, [1976] 425 U.S. 998; *McClellan v. Cablevision of Connecticut, Inc.*, 149 F.3d 161 (2d Cir. 1998); *Sosa v. DirecTV, Inc.*, 437 F.3d 923 (9th Cir. 2006); *Curtis Publishing Co. v. Butts*, [1967] 388 U.S. 130.

⁴⁷ [2014] 573 U.S.

freedom of religion, rather than freedom of expression. Similarly, *Adderley v. Florida* and *NLRB v. Fruit and Vegetable Packers & Warehousemen* both addressed freedom of association.⁴⁸ *Adderley* dealt with the right to protest outside prisons, whereas *NLRB* concerned the right to strike.

Finally, there was a third category of cases which were excluded because although there was a broadcaster who was involved in a rights dispute, the impugned activity in these cases was not *directly* connected with any broadcasting undertaking covered by this thesis. Here there are three types of cases. The first is cases in which a broadcaster is making a rights claim, although the claim is not connected with any broadcasting undertaking by the broadcaster. *Young v. American Mini Theatres, Inc.*, and *Basiardanes v. City of Galveston* both concern zoning ordinances which prevent theatres from showing adult films.⁴⁹ Similarly, *Leathers v. Medlock* dealt with a sales tax and *Cincinnati v. Discovery Network, Inc.* addressed the ability of a broadcaster to sell magazines through the use of news racks.⁵⁰ These cases were excluded specifically because the infringement on the broadcasters ability to broadcast does not present a proximate threat to a *specific* broadcast undertaking. Finally, there was one case, *Roaden v. Kentucky*, in which the rights claim being made concerned legal rights than freedom of expression.⁵¹

2.3.3 Differences in the Exclusionary Criteria

Finally, there are differences in the Canadian and American exclusions which are important to address. As I will discuss in Chapter Three, there are stark differences in the scope of the Canadian *Charter* and the American Bill of Rights. As a result, there are different types of cases in which the rights of broadcasters have been implicated in Canada and the United States. For

⁴⁸ [1966] 385 U.S. 39; [1964] 377 U.S. 58.

⁴⁹ [1976] 427 U.S. 50; 682 F.2d 1203 (5th Cir. 1982).

⁵⁰ [1991] 499 U.S. 439; [1993] 507 U.S. 410.

⁵¹ [1973] 413 U.S. 496.

example, the American Court has been willing to entertain that the Canadian Court has not. In light of these differences, it is not possible to apply the criteria from one country to the other.

2.4 Evaluating the Effect of Jurisprudence on the Judicial Empowerment of Broadcasters

2.4.1 A Typology for the Judicial Empowerment of Broadcasters

In this section, I will outline a quantitative means of evaluating the judicial empowerment of broadcasters and other rights claimants. Because of the empirical nature of my research questions, the most intuitive way of consolidating and evaluating case outcomes is through a typology. As I will discuss in greater detail below, there is one table for each country. Both tables are comprised of four axes: type of broadcaster, the broadcasters' role in the case, the court's decision, and the subject matter of the case.⁵² In the second part of this section, I will explain how I have how I will supplement my quantitative analysis by examining the substance of the decisions, themselves.

2.4.2 Axis I: Type of Broadcaster

The first inquiry with which I was concerned in developing this typology was whether the broadcaster(s) involved in the case were public or private.⁵³ In both the Canadian and American contexts, there are limits on the constitutional protections afforded to private actors. These will be discussed in the next chapter. However, in my view, exploring the effects of this distinction in both countries through the typology is important because it helps illustrate the extent of rights protection in each country. As I will discuss in chapters five through seven, there are discrepancies, both in the types of broadcasters that are represented in each country.

⁵² Complete tables for each country can be found in Appendices I and II

⁵³ Cases were coded according to whether or not the named appellant or respondent was a public or private broadcaster.

Additionally, public and private broadcasters are empowered to different extents. While this is mostly the case in Canadian jurisprudence, it is nevertheless important to note.

2.4.3 Axis II: Broadcaster's Role in the Case

The second axis of this typology deals with the role of the broadcaster in the case at hand. Here, there are four possibilities: the broadcaster is making a rights claim; the broadcaster is responding to a rights claim; the broadcaster is involved in a rights dispute where there are competing claims; and the broadcaster is serving as an intervener. These four categories cover the entire range of possible roles that a broadcaster might take on in a rights dispute. In particular, it broadens the focus of my research such that the emphasis is not on broadcasters alone, but is also on cases where broadcasters themselves come up against rights claims. In most of these cases, broadcasters are making rights claims or intervening in right disputes. However, there are also a few cases where broadcasters are responding to a rights claim or there are competing rights claims. As I will discuss in chapters five through seven, the broadcaster's role in a case occasionally influences the court's decision.

2.4.4 Axis III: Court's Decision

The third axis of my typology is concerned with the rights outcome in the cases at hand. Here, I sought to maximize the quantitative value that each decision had for the findings of this thesis without making this stage of inquiry too binary. It is important to assess the outcomes of cases where broadcasters are the rights claimants by coding whether or not the court's decision was in favour of, or against the broadcaster. However, based on case outcomes, having a table for both case outcomes and rights outcomes would be redundant. In the table for each country, the rights claimants I have identified are primarily broadcasters. Where broadcasters are responding a

rights claim or there are competing claims, the other party or parties making those claims are identified in the footnotes below each table.

2.4.5 Axis IV: Subject Matter

The fourth axis of my typology, subject matter, is perhaps where there is the most divergence between the two countries. This is simply because one cannot expect to find precisely the same types of cases in the two countries. However, in Chapter Seven, I have compared the same types of cases in each country. In the two tables utilized for Canadian jurisprudence, the cases fell into one of 12 specific categories: production orders, publication bans, confidential sources, open courts, open legislatures, broadcasting trial exhibits, trial fairness, election advertising, early dissemination of election results, and hate speech. These 12 categories of cases were grouped into three broader categories: press freedom, elections, and hate speech.⁵⁴ In the United States, the cases that were selected covered 17 different subjects. For this thesis' typology, these 17 categories were narrowed to four broader categories: press freedom, elections, defamation/hate speech/obscenity, and broadcaster advertising.

2.4.6 Content Analysis of Cases

While this typology provides an empirical perspective into the judicial empowerment of rights claimants, broadcasters or otherwise, I am also concerned with the substantive decisions in each of the cases selected. Accordingly, chapters five and six will explore the content of these decisions in conjunction with the empirical data and decisions in related, yet unselected cases to provide a fuller explanation of emergent trends. In particular, these chapters will explore, where appropriate, a courts' reasons for judgment and persuasive dissenting opinions in particular

⁵⁴ Press freedom includes production orders, publication bans, confidential sources, open courts, open legislatures, illegally disseminating election results, broadcasting trial exhibits, and trial fairness. Advertising includes election advertising, and advertising by broadcasters.

cases. These factors are especially important and merit close examination because there are cases within this set that have changed the law in a particular way. As an example, at the end of this thesis, I will use this qualitative analysis in large part to forward the argument that broadcasters should be granted rights protection and obligations in the same way that private citizens do.

2.5 Conclusion

In this chapter, I have explained the methodological underpinnings of this thesis. In particular, I focused on the three aspects of my methodology: definitions, case selection, and measurement. The first of these sections, definitions, explored competing approaches to evaluating the effect of judicial decisions on the scope of rights. There, I argued that judicial empowerment is an intuitive concept for understanding this relationship. This section also presented definitions for broadcasters which is based on the definition provided by the 1991 *Broadcasting Act* and expanded to include print and new media. Finally, this section defined freedom of expression in light of the textual differences between the *Charter* and the bill of rights, arguing that expression is broader than speech and ought to be used accordingly.

The second section of this chapter explained the manner in which cases were selected for this thesis, including a brief explanation of why certain categories of cases were omitted. In the final part of this chapter, I explained how I would evaluate the effect of jurisprudence on the rights of broadcasters. Here, I outlined the typology that I developed as a quantitative mechanism for exploring judicial empowerment, not only of broadcasters but also of rights claimants in cases involving broadcasters. This section also outlined the qualitative approach to evaluating judicial empowerment as a complement to the typology.

Chapter 3

The Scope of Rights Protection in Canada and the United States

3.1 Introduction

In this chapter, I will explore the application of the *Charter* and the American Bill of Rights. In particular, I will focus on how the courts have defined the scope of both documents through their decisions. In the first part of this chapter, I will discuss the *Charter*'s application generally, focusing on the Supreme Court of Canada's current understanding of the *Charter*'s scope. There, I will argue that the jurisprudence on the application of the *Charter* is complex, inconsistent, and there is a different approach that the Supreme Court has not yet considered. This approach would allow *Charter* application to matters of public importance. The second part of this chapter will focus on the application of the American Bill of Rights. There I will focus on the application of the Bill of Rights to the federal government and the states, before outlining how it applies to private disputes. Finally, I will contrast the approaches taken by the Canadian and American courts in defining the scope of application for bills of rights in both countries. There, I will argue that the American Bill of Rights is far more conducive to rights-based litigation in the private sphere than the *Charter*.

3.2 Application of the *Charter*

3.2.1 The *Charter*'s Scope

The scope of the *Charter*'s application has been the subject of debate since it was enacted in 1982. In regards to its application, s. 32(1) provides:

32(1) This *Charter* applies
(a) to the Parliament and government of Canada in respect to all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.¹

The Supreme Court has long attempted to define the scope of s. 32.² However, the Court has not yet coherently defined what “government” means for the purposes of s. 32.³ Thus far, the legal tests crafted by the Court for determining whether or not an entity is government within the meaning of s. 32 have been inconsistent.⁴ This is problematic because it provides lower courts with minimal guidance in applying the *Charter*.

The Court addressed the application of the *Charter*'s scope for the first time in *RWDSU v. Dolphin Delivery Ltd.*⁵ In that case, the Supreme Court was asked to consider whether the *Charter* applied to private entities. In particular, the dispute centred around whether or not the *Charter* applied to union members who were on strike and picketing against their employer, a private corporation.⁶ In *Dolphin Delivery*, the Court held that the *Charter* does not apply to cases involving private parties which is to say “litigation divorced completely from any connection with the government”.⁷ McIntyre J., writing for a unanimous Court stated:

It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation.⁸

While the *Dolphin Delivery* decision is wholly consistent with the plain meaning of s. 32, scholars have opined the Court's decision in that case. For instance, there is an argument that the *Charter* ought to apply to all private litigation because the judiciary is “government” for the

¹ *Canadian Charter of Rights and Freedoms*, s. 2, Part I of the *Constitution Act, 1982*, being schedule to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 32(1).

² See e.g. *RWDSU v. Dolphin Delivery*, [1986] 2 SCR 573 [*Dolphin Delivery*].

³ See e.g. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 [*Eldridge*].

⁴ See e.g. *Ibid.*

⁵ *Supra* note 2.

⁶ *Ibid.*

⁷ *Ibid.* at 593.

⁸ *Ibid.* at 598.

purposes of s. 32.⁹ Nevertheless, while the narrowness of the *Dolphin Delivery* decision rightly raises concerns, Patrick Monahan has argued against a universally broad interpretation of s. 32 which would encompass *all* private action. Monahan *specifically* contends that “it would...significantly constrain the jurisdiction of the legislature, since [the resulting expansion of judicial powers] would take precedence over ordinary statutes”.¹⁰

Three years after its decision in *Dolphin Delivery*, the Court revisited the *Charter*'s scope in *Slaight Communications*.¹¹ *Slaight* dealt with whether or not a statutorily created administrative body was subject to the *Charter*.¹² The Court answered that question in the affirmative, holding that an entity did not have to be government in the strict sense adopted in *Dolphin Delivery* in order to attract constitutional review.¹³ The Court reasoned that “[an] adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives *all* his powers from the statute”.¹⁴

Following *Slaight*, *McKinney v. The University of Guelph* attempted to provide a legal definition for “government”. In that case, professors from the University of Guelph argued that the University's mandatory retirement policy was unconstitutional.¹⁵ The Court rejected this argument, holding that universities are not “inherently governmental”.¹⁶ Looking to the meaning of s. 32, the Court concluded that the *Charter* is a tool for checking the power of government

⁹ See e.g. Allan C. Hutchinson & Andrew Petter, “Private Rights/Public Wrongs: The Liberal Lie of the *Charter*” (1988) 38 *University of Toronto Law Journal* 278; David Beatty, “Constitutional Conceits: The Coercive Authority of the Courts” 37 *University of Toronto Law Journal* 2; Brian Slattery, “The *Charter*'s Relevance to Private Litigation: Does Dolphin Deliver?” (1987) 32 *McGill Law Journal* 2.

¹⁰ Patrick J. Monahan, *Constitutional Law*, 3rd ed (Toronto: Irwin law, 2006) at 406 [Monahan].

¹¹ *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.* at 1077 (emphasis added).

¹⁵ *McKinney v. University of Guelph*, [1990] 3 SCR 229 [McKinney]; *Harrison v. University of British Columbia*, [1990] 3 SCR 451 [Harrison].

¹⁶ *Ibid.* at para. 36.

over individuals.¹⁷ While universities are statutory bodies subject to government regulations and rely on government funding, the majority reasoned that “universities are autonomous”; they control their own affairs, and their internal operations are independent of the government.¹⁸ The majority did concede, however, that universities *might* perform some functions that would be subject to *Charter* review.¹⁹ Accordingly, the Court adopted the rule that determining whether or not the *Charter* applied was a question of the degree of governmental control over a private entity’s specific activity.

McKinney was decided alongside three cases with similar fact patterns. For instance, in *Stoffman* and *Douglas College*, the Court split along the same lines as it did in *McKinney*.²⁰ The same majority held that the *Charter* applied to colleges while it did not apply to hospitals in *Douglas College* and *Stoffman* respectively.²¹ However, the Court distinguished *Douglas College* from *McKinney* by noting that “[i]n carrying out its functions, the college is performing acts of government, and I see no reason why this should not include its actions in dealing with

3.2.2 The “Control” Test

Following *McKinney* and *Douglas College*, *Lavigne* asked the Court to consider the *Charter*’s applicability to the Ontario Council of Regents (“the Council”) which was responsible for bargaining on behalf of college employees.²² The broader question in *Lavigne* was whether or not “a public body...performing a ‘private’ function...under the control of government” ought to be subject to the *Charter*.²³ The Court concluded that the provincial government vis-à-vis the

¹⁷ *Ibid.* at para. 191.

¹⁸ *Ibid.* at para. 372.

¹⁹ Craig Jones, “Immunizing Universities from *Charter* Review: Are We ‘Contracting Out’ Censorship?” (2003) 52 *University of New Brunswick Law Journal* 261 at 272.

²⁰ *Stoffman v. Vancouver General Hospital*, [1990] 3 SCR 483 [*Stoffman*]; *Douglas/Kwanten Faculty Assn. v. Douglas College*, [1990] 3 SCR 483 [*Douglas*].

²¹ *Ibid.*

²² *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 SCR 211 [*Lavigne*].

²³ Peter W. Hogg, *Constitutional Law of Canada Student Edition* (Toronto: Carswell, 2012) at 37-19 [Hogg].

Minister of Education fully controlled the Council's activities.²⁴ Further, the Court held that the Council was sufficiently *controlled* by the government and was, therefore, subject to the *Charter*.²⁵ In *Lavigne*, the Court crafted a novel legal test for determining *Charter* applicability to private entities. This test focused on whether or not the entity in question was subject to government control. The Court justified this "control" test on the grounds that "the majority in the [previous] cases relied solely on the element of control in determining what fell within the apparatus of government".²⁶

3.2.3 The "Government/Policy" Test

Whereas the *Lavigne* test inquired into government control, the Court took a slightly different approach in *Eldridge*. The Court's analysis in *Eldridge* dealt with the application of the *Charter* to policy decisions.²⁷ In that case, the *Charter* challenge dealt with a decision by British Columbia hospitals to refuse the provisions of sign interpreters to the deaf.²⁸ There, the Court maintained the "control" test. Additionally, the Court held that the *Charter* should apply in cases where the entity in question performs a traditional government function or one which amounts to the implementation of government policy pursuant to statutory authority.²⁹ The Court qualified this test by emphasizing that the *specific* activity in question must be governmental.³⁰ Accordingly, in *Eldridge*, the Court reasoned that by providing medically necessary services pursuant to a

²⁴ *Lavigne*, *supra* note 23 at para. 221.

²⁵ *Ibid.*

²⁶ *Ibid.* at para. 109.

²⁷ *Eldridge*, *supra* note 3.

²⁸ *Ibid.* at para. 35.

²⁹ *Ibid.* at para. 44.

³⁰ *Ibid.* at para. 90. However, certain other activities like purely internal hiring and firing employees are not considered government and would not be subject to the *Charter*.

provincial statute, hospitals perform a specific government objective and allowed the appeal on those grounds.³¹

3.2.4 Revisiting *McKinney*

“There is perhaps a faint argument that the *Charter* applies to the actions of all Canadian corporations, whether publicly or privately owned, and even if they engage only in commercial activity.”³² – Professor Peter Hogg

The above analysis indicates that the current law on the *Charter*'s scope is inconsistent, and more importantly provides lower courts with unclear guidance. For instance, the Court has held that the *Charter* applies to colleges but not universities.³³ This is in spite of the fact that colleges and universities serve virtually the same function, post-secondary education. In making this distinction, the Court noted that colleges are “Crown agenc[ies] established by the government to implement government policy”.³⁴ According to the Court, the government’s “direct and substantial” control over college governance extended to employment decisions including mandatory retirement policies.³⁵ For those reasons, then, the *Charter* was found to apply to colleges.

Conversely, in *McKinney*, the Court accepted the lower court’s analysis that “universities [are] essentially private institutions”.³⁶ This was based on the notion that while statutorily created and heavily subsidized by the government, universities nonetheless operated autonomously from the government.³⁷ As a result, La Forest J. concluded that a university’s

³¹ *Ibid.* at para 46. Peter Hogg, pre-*Eldridge* rejected the “policy test”. Hogg was in favour of the governmental control test. However, even on this point, Hogg maintained that that the central question should be “whether or not the government has assumed control of the function,” not just the degree of state control over the institution. Peter W. Hogg, *Constitutional Law of Canada*, 4th ed (Toronto: Carswell, 1997) at 849-50 (emphasis added).

³² Peter W. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 671.

³³ *McKinney*, *supra* note 15; *Douglas*, *supra* note 20.

³⁴ *Douglas*, *Ibid.* at 584.

³⁵ *Ibid.*

³⁶ *McKinney*, *supra* note 15 at 257.

³⁷ *Ibid.*

actions, including mandatory retirement policies were autonomous from government influence, and the *Charter* did not apply to universities on those grounds.³⁸

Beyond the fact that colleges and universities and colleges serve the same purpose, this decision is problematic. It has considerable rights implications. For example, students or faculty members that speak out critically against a university are unable to challenge that censure on rights grounds. As I will discuss in chapter five, there is evidence that in cases where students were critical of their university on Facebook, the court was forced to address that issue through administrative law, rather than under the *Charter*.

Similarly, the Court has also held that the *Charter* applies to hospitals through governmental policy vis-à-vis health care, whereas hospitals are not subject to the *Charter* where employment policy is concerned.³⁹ These decisions are evidence that the Court has not provided a clear standard in defining the scope of s. 32. Moreover, when the Court has analyzed s. 32, the legal tests it has crafted have been applied inconsistently.

Indeed, revisiting *McKinney* highlights a complementary approach to those enumerated above. In a persuasive dissenting opinion, Wilson J. opined that the definition of “government” set out by the Court was far too narrow.⁴⁰ Wilson proposed a different test for assessing whether or not an entity was “government” for the purposes of s. 32. This test set out three non-exhaustive questions whereby an affirmative answer to one or more would be strongly indicative that the entity in question was government and ought to be subject to the *Charter*

1. Does the legislative, executive or administrative branch of government exercise control over the entity?
2. Does the entity perform a traditional or modern government function [policy]?

³⁸ *Ibid.* at 273.

³⁹ *Eldridge*, *supra* note 3; *Stoffman*, *supra* note 20.

⁴⁰ *McKinney*, *supra* note 15 at para. 248.

3. Does the entity act pursuant to statutory authority specially granted to it by government for purposes that the government seeks ?⁴¹

Wilson developed this test *specifically* because she thought that the alternatives proposed by the majority were too rigid. In particular, she argued that the reason why the “[legal] tests designed to identify government inevitably fail is that they assume that government is static”.⁴² Wilson further argued for the adoption of the public importance test because the other legal tests “[could not] identify some of the more unusual bodies that government creates or becomes intricately involved with in the process of pursuing particular government objectives”.⁴³

Currently, the Wilson test has not been formally adopted by a majority of the Supreme Court. However, in light of the current law on the *Charter*’s scope, there are compelling reasons for the Court to adopt the public importance test. The current legal tests which inquire into whether or not an entity, its actions, or policy outcomes are subject to government control is an attempt by the Court to generalize what is government for the purposes of s. 32. In *McKinney*, Wilson was concerned that “the government/private action distinction may be difficult to make in some circumstances [although] the text of the *Charter* must be respected”.⁴⁴ Wilson further noted that “the nature of the relationship between the entity and government must be examined in order to decide whether when it acts it truly is government...The *Charter* should not be circumvented by the simple expedient of creating an entity and simply having it perform that role”.⁴⁵ By adopting the Wilson test, the Court would broaden the scope of the *Charter* in such a way that the *Charter*

⁴¹ *Ibid.*

⁴² *Ibid.* at 370.

⁴³ *Ibid.* at 369. Wilson J. was joined by L’Heureux-Dubé J. in her dissenting opinions in both *Stoffman* and *Douglas College*. Both advocated adoption of the Wilson test in *McKinney*.

⁴⁴ *Ibid.* at 240.

⁴⁵ *Ibid.*

could actually serve its intended purpose: to check the power of the government-like institutions over the people.

In sum, adoption of the Wilson test by the Supreme Court need not represent a radical departure from established case law concerning the *Charter*'s scope. Indeed, the first two prongs of this test make the same inquiries as the "government control" and "governmental policy" tests.⁴⁶ Rather, this test merely expands on the existing legal frameworks and would help resolve inconsistencies in the jurisprudence. For instance, under this test, post-secondary institutions would be subject to the *Charter*, as would hospitals which are constitutionally provided for under s. 92(7) of the *Constitution Act*, 1982.⁴⁷ In this regard, Peter Hogg has noted that were it the government which implemented mandatory retirement provisions in its employment contracts, rather than universities or hospitals; those provisions would undoubtedly be subject to *Charter* review.⁴⁸ Adopting the Wilson test would certainly go a long way towards clearing up this confusion.

3.3 The Bill of Rights and the Federal Government

Unlike the *Charter*, the American Bill of Rights is a series of constitutional amendments rather than a single document. In order to provide a coherent taxonomy of rights in the United States, scholars have theorized that rights can be categorized either as liberty rights or as equality rights.⁴⁹ Equality rights claims are typically made by "classes" of citizens whose rights, collectively, have been infringed.⁵⁰ Comparatively, equal rights are analogous to the protections

⁴⁶ *Supra* note 42.

⁴⁷ *Constitution Act*, 1982, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 92(7).

⁴⁸ Hogg, *supra* note 25 at 37-31.

⁴⁹ Thomas Lundmark, *Power & Rights in US Constitutional Law* (New York: Oxford University Press, 2008) at 110 [Lundmark].

⁵⁰ *Ibid.* Lundmark also notes that the distinction between liberty and equality rights is fluid. For instance, "[a] person claiming a liberty right can style herself a group of one, who is being "discriminated against" on the basis of some individual characteristic or behaviour". *Ibid.*

afforded under s. 15 of the *Charter*. In the following part of this section, I will discuss the application of the Bill of Rights to the federal government. I then turn to rights application to state and local governments. In particular, my analysis focuses on the due process clause of the Fourteenth Amendment. Finally, I conclude this section by looking at whether or not the Bill of Rights applies to private disputes. There, I explore the state action doctrine.

Unlike s. 32 of the *Charter*, the American Bill of Rights contains no provision explicitly detailing its scope.⁵¹ Rather, the dominant understanding of rights application in the U.S. has been developed through the common law.⁵² In a case concerning the rights application to cities, the Court held that “the Bill of Rights was a restriction of federal actions”.⁵³ Chief Justice John Marshall, writing for the majority specifically noted that “[t]he constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states [or local governments]”.⁵⁴

3.4 Applicability of Rights to the States

As noted above, the Supreme Court stressed that initially, the Bill of Rights applied exclusively to the federal government. However, subsequent constitutional amendments have extended the scope of rights protection within the public realm, to state and local governments. The process by which rights protections are extended to the states is referred to as incorporation. Rights are incorporated through the Fourteenth Amendment which provides as follows:

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person

⁵¹ The only mention of applicability appears in the 10th amendment which provides: “The powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the people”. U.S. Const. Amend. X.

⁵² *Barron v. Mayor of Baltimore*, [1833] 32 U.S. 243 [*Barron*].

⁵³ Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 2nd ed. (New York: Aspen Publishers, 2002) at 471 [Chemerinsky].

⁵⁴ *Barron*, *supra* note 53 at 247.

of life, liberty, or property, without *due process* of law; nor deny to any person within its jurisdiction the *equal protection* of the law.⁵⁵

In a 1908 decisions, a majority of the Court theorized that the Bill of Rights *might* apply to state and local governments through the due process and equal protections clauses of the 14th amendment.⁵⁶

3.4.1 Incorporation through Due Process

In the *Slaughter-House Cases*, the Court addressed in earnest for the first time whether or not rights claims could be made against state or local governments.⁵⁷ These cases concerned rights claims made by New Orleans butchers against a large-scale commercial slaughter house which had a monopoly on the local industry. In those cases, the Court actually rejected the notion that the first eight amendments applied to state and local governments, reasoning that the constitutional protections of United States citizens from incursions by the federal government ought not to be extended to actions by state or local governments.⁵⁸ However, the Court later overturned the *Slaughter-House* decisions, holding that the Fifth Amendment could be incorporated through the Fourteenth Amendment.⁵⁹

In *Gitlow v. New York*, the Court held for the first time that the First Amendment right to free speech applied to the states through incorporation into the fourteenth amendment.⁶⁰ In that case, Sanford J. concluded that “freedom of speech and of the press are among the fundamental

⁵⁵ US Const. Amend. XIV § 1.

⁵⁶ *Twining v. New Jersey*, [1908] 211 U.S. 78.

⁵⁷ [1873] 83 U.S. 36 [*Slaughter-House*].

⁵⁸ *Ibid.*

⁵⁹ *Chicago, Burling & Quincy Railroad Co. v. City of Chicago*, [1897] 166 U.S. 226.

⁶⁰ [1925] 268 U.S. 652.

personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States”.⁶¹

Nonetheless, incorporation of the Bill of Rights is not without controversy and is the subject of scholarly debate.⁶² There are two dominant schools of thought. On one end of the spectrum, there is an argument against incorporation on the grounds that the framers of the constitution never intended for the Bill of Rights to apply to the states. The primary concern for originalists is that applying the Bill of Rights to the states effectively subverts the division of powers in the United States by encroaching upon the autonomy of states.⁶³ Alternatively, selective incorporationists maintain that incorporation is necessary because there are certain rights which are of such a fundamental nature that they *must* apply to the states.⁶⁴ In spite of the fact that the Supreme Court has been more willing to incorporate rights, this debate is important. This is because the incorporation challenges the very individualistic nature of the United States. However, the Court has been more willing to incorporate rights than not.

3.5 The State Action Doctrine and Private Conduct

At first glance, it would seem as though the Bill of Rights does not apply to private disputes. Indeed, s. 1 of the Fourteenth Amendment makes *specific* reference to state action in regards to the scope of rights protection.⁶⁵ The state action doctrine comports with the dominant principle

⁶¹ *Ibid.* at 666 (emphasis added). Two years later the Court actually struck down a state law on the grounds that the First Amendment applied to the states through the Due Process Clause of the Fourteenth Amendment. *Fiske v. Kansas*, [1927] 274 U.S. 380.

⁶² Chemerinsky, *supra* note 54 at 480.

⁶³ *Ibid.* at 481.

⁶⁴ *Ibid.*

⁶⁵ *Supra* note 56. The State Action doctrine is one of the most complex aspects of American constitutional law and has been the subject of vibrant debate. See e.g. Cass R. Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1998); Lilian BeVier & John Harrison, “The State Action Principle and its Critics” (2010) 96 *Virginia Law Review* 8. Mark Tushnet has also written extensively on the nuances of the state action doctrine, largely from a comparative perspective. See e.g. Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2009) [Tushnet].

underpinning American self-understanding: limited government and freedom from regulation.⁶⁶

In the American constitutional culture, private wrongs are thought to be sufficiently regulated by ordinary statutes and the common law irrespective of how egregious they are.⁶⁷

Is it possible then, for rights to apply to private conduct through state action? Answering this question requires the Court to evaluate the relationship between private actors or private actors and the government on a case-by-case basis. It also suggests a willingness on the part of the Court to entertain these claims. There are *at least* seven legal tests for assessing state action.

The most prominent of these tests is the Public Function Test. This test inquires into whether or not the entity in question performs an exclusively traditional governmental function.⁶⁸ For example, in *Marsh v. Alabama*, the Court was asked to answer the question of whether or not a private corporation which owned a town was beholden to the Bill of Rights.⁶⁹ In *Marsh*, the Court held that the corporation, by performing functions traditionally ascribed to municipal governments, could not prevent the Jehovah's Witnesses from distributing their pamphlets.⁷⁰ The Court, however, narrowly tailored the scope of the public function test. For instance, in *Jackson v. Metropolitan Edison Co.*, a rights claim was made against a private utility company on the grounds that traditionally, utilities had been the responsibility of government.⁷¹ The Supreme Court swiftly dismissed this argument, holding that private entities had provided utilities, and as a result, there was no state action.⁷²

⁶⁶ Lundmark, *supra* note 50 at 113.

⁶⁷ Chemerinsky, *supra* note 54 at 488. Exceptions here include, but are not limited to: *San Francisco Arts & Athletics v. United States Olympic Committee*, [1987] 483 U.S. 522; *Lebron v. National Railroad Passenger Corp.*, [1995] 513 U.S. 374.

⁶⁸ *Ibid.*

⁶⁹ [1946] 326 U.S. 501.

⁷⁰ *Ibid.*

⁷¹ [1974] 419 U.S. 345.

⁷² *Ibid.*

The second way in which private action can be considered state action for the purposes of constitutional review is if government is found to have exercised “coercive power” over the entity. This is referred to as the state compulsion test.⁷³ In addressing the justiciability of rights claims in a dispute between nursing home residents and the nursing home where they resided; the Court maintained that “[the] choice must in law be deemed to be that of the State”.⁷⁴ The state compulsion test applies when the state “coerces or encourages a private entity to engage in the challenged conduct”.⁷⁵ By examining the degree of state influence, the state compulsion test appears to be broader in scope than the public function test.

The third standard for assessing the presence of state action is whether or not there is a nexus between the state and the private entity in question. Julie Brown has identified six criteria set out by the Supreme Court for evaluating whether or not there is a “nexus”:

1) state regulation, no matter its extent; 2) public funding of a private group; 3) private use of public property; 4) minor presence of public officials on the board of a private entity; 5) the mere approval or acquiescence of the state in private activity; and 6) utilization of public services by private actors.⁷⁶

A related, yet more loosely crafted test, is the symbiotic relationship test.⁷⁷ This test requires a high degree of interdependence between the state and the entity in question for there to be a finding of state action. This test has been employed in the context of racially restrictive covenants for home ownership.⁷⁸ However, the Court has not employed this test since 1961.⁷⁹

⁷³ Julie K. Brown, “Less is More: Decluttering the State Action Doctrine” (2008) 73 *Missouri Law Review* 2 at 565 [Brown].

⁷⁴ *Blum v. Yaretsky*, [1982] 457 U.S. 991 at 1005.

⁷⁵ Paul C. McCaffrey, “Playing Fair: Why the United States Anti-Doping Agency’s Performance-Enhanced Adjudications Should be Treated as State Action” (2006) 22 *Washington University Journal of Law and Policy* 1 at 644.

⁷⁶ Brown, *supra* note 73 at 566. it is important to note that the presence of any of these criteria is not *indicia* of state action. Rather, a stronger indication of state action is if a combination of these factors are present in a given case. *Ibid.*

⁷⁷ *Ibid.* at 567. Erwin Chemerinsky has referred to this test as the entanglements exception. Chemerinsky, *supra* note 54 at 505.

⁷⁸ *Shelley v. Kraemer*, [1948] 334 U.S. 1.

⁷⁹ See *Burton v. Wilmington Parking Authority*, [1961] 365 U.S. 715.

The joint participation test represents an evolution of the symbiotic relationship test.⁸⁰ This test was first employed in a case which concerned a woman who was denied service at a restaurant and arrested for trespassing because “she was in the company of Negroes”.⁸¹ The Court found that police enforcement of the trespassing statute “cloaked [the establishment] with the authority of the state” such that there was state action.⁸²

The sixth test for assessing state action concerns whether or not the entity in question is an “agency of the state”.⁸³ *Pennsylvania v. Board of Directors* was a case which dealt with racist admissions policies to a school in Philadelphia. According to the Court, in that case, the state agency applies when the agency in question represents the state.⁸⁴

The final test conceived by the Court is the entwinement test. This test inquires into whether or not the state exerts sufficient influence on the entity, by examining the entity’s composition, for instance, its membership and board of directors for the significant presence of public officials.⁸⁵ Under the entwinement test, then, the government has to be “entwined with the private group’s management or control”.⁸⁶

In addition to the tests crafted by the Supreme Court, the Circuit Courts of Appeal have also attempted to define state action.⁸⁷ It is no wonder that Professor Charles Black referred to the

⁸⁰ Brown, *supra* note 73.

⁸¹ *Adickes v. S.H. Kress & Co.*, [1970] 398 U.S. 144 at 147-148.

⁸² Gregory D. Malaska, “American Manufacturers Mutual Insurance Company v. Sullivan: “Meta-Analysis” as a Tool to Navigate Through the Supreme Court’s “State Action” Maze” (2001) 17 *Journal of Contemporary Health Law and Policy* 2 at 630.

⁸³ *Brentwood Academy v. Tennessee Secondary School Athletic Association*, [2001] 531 U.S. 288 (quoting *Pennsylvania v. Board of Directors*, [1957] 353 U.S. 230) at 296 [*Brentwood Academy*].

⁸⁴ *Pennsylvania v. Board of Directors*, [1957] 353 U.S. 230. This is also an under-utilized test.

⁸⁵ See generally, *Brentwood Academy*, *supra* note 84. The dissenting justices in that case as well as legal commentators have opined that the majority did not clearly define what entwinement actually meant. See e.g. Josiah N. Drew, “The Sixth Circuit Dropped the Ball: An Analysis of *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n* in Light of the Supreme Court’s Recent Trends in State Action Jurisprudence” (2001) 1313 *BYU Law Review* 3.

⁸⁶ *Supra* note 79.

⁸⁷ Brown, *supra* note 73 at 568-572.

state action doctrine as a “conceptual disaster”.⁸⁸ The courts in the United States have yet to consolidate the myriad legal tests for state action, even though they recently have had the opportunity to do so.⁸⁹ The prominent explanation here is that “it is analytically possible to conceptualize any private infringement of constitutional values as a result of government inaction”.⁹⁰ In this regard, Mark Tushnet neatly describes state action as “[the] application of constitutional norms to...the background rules of law – property law, contract law, tort law”.⁹¹ While this describes the principles which inform the current state action analysis, the Court ought to operationalize Tushnet’s conceptualization by developing a singular, coherent test.

3.6 Scope of Rights in a Comparative Perspective

The above analysis reveals that current law on the application of the *Charter* and the American Bill of Rights is rather complicated. The Canadian Court, in particular, has been unable to define the precise scope of rights protection in any coherent manner. Nevertheless, there are two differences between the Canadian and American approaches which emerged from my analysis in the previous two sections which I will expand upon here. The first difference concerns the rights application to branches of government, and the second with the boundaries of rights protection in both countries.

As I noted, the Bill of Rights has been found to apply to private action.⁹² However, this is not the case with the Canadian Court’s understanding of the *Charter*’s scope.⁹³ Here, the American experience is instructive. Applying the *Charter* to the judiciary would not automatically result in rights claims being made in virtually every legal dispute. Moreover, because the *Charter* does

⁸⁸ Charles L. Black Jr, “The Supreme Court, 1966 – Foreword: “State Action,” Equal Protection, and California’s Proposition 14” (1967) 81 *Harvard Law Review* 69 at 95.

⁸⁹ See *Wickersham v. City of Columbia*, 481 F.3d 591 (8th Cir. 2007), *cert. denied*, [2007] 128 U.S. 387.

⁹⁰ Chemerinsky, *supra* note 54 at 490.

⁹¹ Tushnet, *supra* note 65 at 162-163.

⁹² See e.g. *New York Times Co. v. Sullivan*, [1964] 376 U.S. 254.

⁹³ *Supra* notes 8, 10.

not confer rights in absolute terms, legislatures would still be able to retain a degree of autonomy.

The second way in which the application of the *Charter* and the American Bill of Rights differ is in terms of the scope of rights protection in a broader sense. The jurisprudence in both countries on the scope of rights in both countries has been inconsistent. However, the approach taken by the United States Supreme Court has been more principled and predictable. Whereas there is asymmetry in the jurisprudence on the *Charter's* application to post-secondary institutions, the approach taken in the United States distinguishes between public and private, rather than the type of entity. This approach still allows for rights claims in private disputes through one of the tests outlined in the previous section.

Similarly, the willingness to entertain rights claims in private litigation also differs between Canada and the United States. The Supreme Court of Canada and the United States Supreme Court have not been keen to grant rights protection to private actors. Paradoxically, however, the United States Supreme Court has been more willing to extend rights protection to the private sphere than has the Supreme Court of Canada. Simply put, the current law on the *Charter's* scope is arguably more “conceptually disastrous” than that on state action in the United States. The comparison between Canada and the United States in this regard presents another compelling reason why the Supreme Court of Canada ought to adopt the Wilson test in *McKinney*.

3.7 Conclusion

In this chapter, I focused on the application of the *Canadian Charter of Rights and Freedoms* and the American Bill of Rights. The first part of my analysis dealt with the direct and indirect application of the *Charter*. There, I argued that the inconsistency of the jurisprudence on the

Charter's scope is problematic. Accordingly, I proposed a legal test derived from Wilson J's dissent in *McKinney* which I believe would resolve most inconsistencies. The second part of this chapter addressed the application of the Bill of Rights. My primary concern there was evaluating the state action doctrine and how it has been interpreted in such a way that it allows for rights claims in private disputes. Finally, I contrasted the approaches taken by the Canadian and American courts to argue that while both are not without their problems, the interpretation of the state action doctrine is more consistent and principled than the Supreme Court of Canada's approach to interpreting the scope of s. 32.

Chapter 4

Themes of Free Expression in the Literature

4.1 Introduction

In this chapter, I will discuss the Canadian and American approaches to freedom of expression. In the first part of this chapter, I will discuss why freedom of expression is not only protected in Canada and the United States but also why it is considered a fundamental right. There, I will discuss the three prominent justifications for protecting expression: its link to democracy, its utility in discovering truth, and its centrality to autonomy and self-realization. In the second part of this chapter, I will explore types of expression which are not protected in Canada and the United States, or enjoy limited protection. These are hate speech, obscenity, defamation, and commercial expression. In the final section of this chapter, I will compare the Canadian and American approaches. There, I will argue that the American Court has furnished a more liberal interpretation of expression than the Canadian Court has.

4.2 Rationale for Protecting Expression and the Press

It is established fact that freedom of expression is central to Canadian and American democratic self-understanding. In this section, I am therefore unconcerned with debates about *if* these freedoms ought to be protected. Rather, my focus here is *why* they are protected and the processes which brought about entrenchment of these rights.

The literature on freedom of expression in Canada and the United States identifies three prominent reasons why freedom of expression and freedom of the press are not only protected but also considered “fundamental”.¹ These explanations are democracy/self-governance, the

¹ This is an allusion to s. 2 of the *Charter* which is entitled fundamental freedoms; it is also a reference to the First Amendment to the U.S. Constitution which contains clauses addressing speech and the press. *Canadian Charter of Rights and Freedoms*, s. 2, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 2(b); U.S. Const. amend. I.

discovery of truth and knowledge, the protection and promotion of autonomy, self-realization, and tolerance.² Each of these explanations will be discussed in turn.

4.2.1 Democracy and Self-Governance

As I noted above, the ability of people to legally express themselves is a central feature of Canadian and American democracies. This is an idea which originated in the United States.³ Following the enactment of the Sedition Act, James Madison argued that the First Amendment was necessary because it would counteract the deleterious effects of the Sedition Act or similar attempts at censure. The Sedition Act prohibited political speech critical of the federal government by making such speech punishable by fines or imprisonment.⁴ Madison warned that the Sedition Act “produce[s] universal alarm; because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has even been justly deemed the *only* effectual guardian of every other right”.⁵

Drawing on Madison’s assertion that the First Amendment was crafted and intended to exclusively protect political speech, Alexander Meiklejohn has argued that free expression is fundamental to American democracy in the sense that public decisions must be informed by “universal suffrage”.⁶ Specifically, Meiklejohn posited that “[t]he principle of freedom of speech springs from the necessities of the program of self-government”.⁷ These accounts of freedom of

² Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 9-21 [Moon]; Thomas Lundmark, *Power & Rights in US Constitutional Law* (New York: Oxford University Press, 2008) at 128-29. The explanations fleshed out by both Moon and Lundmark are “frequently overlapping” rather than mutually exclusive. Moon at 9; Lundmark at 128-129.

³ Moon, *Ibid.* at 14. See also Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Kennikat Press, 1972) [Meiklejohn]; Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993) [Sunstein].

⁴ *Sedition Act*, ch. 74, 1 stat. 596 (1798).

⁵ James Madison, “Report of January 7, 1800” in David Mattern et al., eds *17 Papers of James Madison* (Charlottesville: University of Virginia Press, 1991) at 141.

⁶ Meiklejohn, *supra* note 3 at 27.

⁷ *Ibid.* at 26.

expression in the United States were undoubtedly compelling in the context of the enactment of the First Amendment. Currently, however, they are unsatisfying. Specifically, there are a variety of new ways in which people choose to express themselves which, based on a Madisonian interpretation, would not be protected. In that sense, it is a rather archaic conceptualization of free speech which does not comport with contemporary values.

On the latter point, Cass Sunstein suggests that limiting the scope of free speech protection to political speech is inconsistent with the values of the United States.⁸ Specifically, Sunstein maintains that “free speech values are likely to be plural and diverse” and that the “problem with unitary or monistic theories is that...[t]hey fail to perceive the multiple interests served by constitutional guarantees”.⁹ This is not in any way to suggest that James Madison and the other framers of the Bill of Rights should have endorsed universal protection of speech at the outset. Rather, it is to suggest that Meiklejohn’s interpretation of the First Amendment was too narrow.

In Canada, the discourse around protecting freedom of expression began at least 45 years before the adoption of the *Charter*. Alberta’s Social Credit government in the 1930s enacted a suite of legislation which included provisions through which the provincial government exerted direct control over what newspapers published and the sources they used.¹⁰ In turn, the Supreme Court was asked to provide an opinion on the constitutionality of the Social Credit provisions vis-à-vis the reference procedure. In regards to the provision limiting the press, Duff C.J. reasoned that while Canada had no concrete bill of rights at the time, there was an implied bill of rights based on the constitution of the United Kingdom.¹¹ The courts could, therefore, strike

⁸ Sunstein, *supra* note 3 at 124.

⁹ *Ibid.* at 125.

¹⁰ *Reference re Alberta Statutes*, [1938] SCR 100 [*Alberta Press*] at 142.

¹¹ *Ibid.* at 146.

down legislation that was seen to violate traditional human rights on that basis.¹² In regards to freedom of expression, Duff further noted that “free public discussion is...the breath of life for parliamentary institutions”.¹³

Ultimately, the Duff Doctrine laid the groundwork for more robust rights frameworks such as the Diefenbaker Bill of Rights and the *Charter*.¹⁴ Nevertheless, the Duff Doctrine was successfully employed to strike down legislation which prohibited the dissemination of literature by Jehovah’s Witnesses and alleged communists as *ultra vires* on freedom of expression grounds.¹⁵ At the core of the Duff Doctrine’s application in these cases is the relationship between political speech and freedom of expression which is integral to Canadian democracy.

4.2.2 Discovery of Truth and Self Knowledge

The second explanation for why Canada and the United States have codified protections for expression is that allowing a diversity of viewpoints helps flesh out the truth. John Stuart Mill argued that even if ideas are proven to be wrong, some aspect[s] of them may, in fact, be truthful.¹⁶ Furthermore, Mill posited that even if the state were capable of infallibly identifying false ideas, there would still be a negative effect on the search for truth.¹⁷

In Canada and the United States, the discovery of truth certainly influenced decisions to protect speech. As I discussed above, the adoption of the First Amendment was largely concerned with the threat of suppressed speech on American democracy. Scholars have noted

¹² *Ibid.*

¹³ *Ibid.* at 133. In this sense, the Alberta Press case built on a 1929 decision by the Judicial Committee of the Privy Council (“JCPC”) wherein the JCPC held, rather generally, that the Constitution ought to be interpreted in a broad and progressive manner. See *Edwards v. Canada (Attorney General)*, [1929] UKPC 86.

¹⁴ Ian Greene, *The Charter of Rights* (Toronto: Lorimer, 1989) at 20. Ian Greene has noted that the Duff Doctrine did not gain meaningful traction with the Supreme Court, otherwise “there might have been less public demand for a charter of rights and freedoms”. *Ibid.*

¹⁵ *Saumur v. Québec (City of)*, [1953] 2 SCR 299; *Switzman v. Elbling*, [1957] SCR 285.

¹⁶ John Stuart Mill, *On Liberty* (Harmondsworth: Penguin, [1859] 1982) [On Liberty] at 108.

¹⁷ *Ibid.* at 76. This is referred to as the “marketplace of ideas”. Although, Mill qualified his argument by advocating for censored expression if such expression caused harm. *Ibid.* at 97, 68.

that “[i]t is the enlightenment function which constitutes the foundation upon which the First Amendment edifice largely rests”.¹⁸ In this regard, Justice Oliver Wendell Holmes posited that “the best test of truth is the power of the thought to get itself accepted in the competition of the market [of ideas], and that the truth is the only ground upon which their wishes safely can be carried out”.¹⁹ More recently, the United States Supreme Court has interpreted the enlightenment function of the First Amendment to mean that “[f]ree trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts”.²⁰

Critics of this position maintain that the promotion of truth served by freedom of expression is problematic because it compels the “listener” to hear a message.²¹ My brief response to this criticism in the context of this thesis is that the entire purpose of the broadcasting industry and broadcasters more generally is to provide a diverse set of perspectives by disseminating content that is intended to “inform, enlighten, and entertain”.²² Therefore, the question is not so much about the ability of broadcasters to disseminate a message, but rather for the public to hear that message. Nevertheless, this should not confer upon broadcasters an absolute right to broadcast their message.²³

Mill’s argument concerning the discovery truth holds true in the Canadian context as well. In spite of the fact that it seems like an obvious proposition, the literature on freedom of expression

¹⁸ Melville B. Nimmer, *Nimmer on Freedom of Speech: A Treatise on the Theory of the First Amendment*, Student ed. (New York: Matthew Bender, 1984) at 1-7 [Nimmer].

¹⁹ *Abrams v. United States*, [1919] 250 U.S. 616 at 630.

²⁰ *Thomas v. Collins*, [1945] 323 U.S. 516 at 537. The Supreme Court has clarified this interpretation, noting that “[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public...” *Citizens Publishing Co. v. United States*, [1969] 394 U.S. 131 at 139-140.

²¹ Nimmer, *supra* note 18 at 1-20. Whether or not these criticisms are valid or correct is beyond the scope of this section. My purpose here is simply to explain the relationship between the truth-seeking function of free expression and the First Amendment. Rather, whether or not an audience ought to be constitutionally compelled to hear a message is an intriguing argument that I will explore in greater detail in chapters 4, 5, and 6.

²² *Broadcasting Act*, S.C. 1991, c.11, s. 2(1).

²³ The specific exceptions to constitutionally protected speech will be elaborated on in sections in the following two sections of this chapter.

in Canada neglects to discuss the discovery of self-truth as a driver for including freedom of expression in the *Charter*. Nevertheless, the Supreme Court's jurisprudence on freedom of expression does make specific reference to this ideal. For instance, in *R. v. Keegstra*, Dickson C.J., writing for a majority of the Court argued that "the state should not be the sole arbiter of truth".²⁴

Similarly, in a case dealing with restrictions on advertising to children by a toy company, Dickson, again writing for the majority outlined three specific principles which form the core of free expression in Canada. The presence of at least one of which would indicate that the expressive medium or content in question ought to be protected. These principles were:

“(1) seeking and attaining the truth...(2) participation in social and political decision-making...(3) the diversity in forms of individuals self-fulfillment and human flourishing ought to be cultivated, in an essentially tolerant, indeed welcoming environment...for the sake of those to whom it is conveyed”.²⁵

Based on Dickson's writings in these cases then, it is abundantly clear that one of the reasons the *Charter* protects freedom of expression is that it serves to encourage the marketplace of ideas.

4.2.3 Autonomy, Self-Realization and Tolerance

The final explanation for why freedom of expression is constitutionally protected is that "it protects individual autonomy".²⁶ According to this line of reasoning, not protecting expression or even censoring is an affront to autonomy and the potential for self-realization because censorship presupposes that people cannot properly or appropriately interpret messages that are conveyed to

²⁴ [1990] 3 SCR 697 at 762 [*Keegstra*].

²⁵ *Irwin Toy Ltd. v. Québec (Attorney General)*, [1990] 1 SCR 927 at 976-77 [*Irwin Toy*]. This decision reaffirmed the Court's earlier ruling in *Ford v. Québec*, [1988] 2 SCR 712. Interestingly, in *Irwin Toy*, the Court found that the impugned legislation did violate s. 2(b) of the *Charter*. However, it was saved under s.1 because *Irwin Toy* failed to show that the deleterious effects on speech went beyond minimal impairment.

²⁶ Moon, *supra* note 2 at 19.

them.²⁷ The corollary to this argument, presented by Ronald Dworkin, is that the state shows disregard for the speaker when they choose not to protect expression.²⁸

Unlike the previous two justifications for protecting expression, here there is no clear nexus between the present justification of protecting freedom of expression and debates concerning the entrenchment of that right in either Canada or the United States. Nevertheless, in the American context, Justice Thurgood Marshall alluded to this connection by noting that “[t]he First Amendment serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression”.²⁹

Alternatively, Robert Bork has criticized this position by arguing that “[autonomy and self-realization do] not distinguish speech from any other human activity”.³⁰ Bork further notes that “[o]ne cannot, on neutral grounds, choose to protect speech on this basis more than one protects any other claimed freedom”.³¹ Bork is certainly right to point out that there is no hierarchy of rights. For example, there is a long-standing debate concerning whether or not pornography warrants constitutional protection. This is because pornography poses the potential for harm.³² In this sense, the argument that expression may harm the listener, rather than promote autonomy and self-realization, is compelling. However, as I will discuss in the following sections of this

²⁷ Thomas Scanlon, “A Theory of Freedom of Expression” in Ronald Dworkin, ed, *The Philosophy of Law* (Oxford: Oxford University Press, 1977) at 162.

²⁸ Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985) at 386. Other versions of this theory focus on the relationship between freedom of expression, self-realization, and tolerance. My aim here is to provide an overview of this theory. For a more in depth discussion see e.g. Lorraine E. Weinrib, “Does Money Talk? Commercial Expression in the Canadian Constitutional Context” in David Schneiderman, ed, *Freedom of Expression and the Charter* (Toronto: Carswell, 1991); C. Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford: Oxford University Press, 1989); For a discussion of the connection between freedom of expression and tolerance, see Lee C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford: Oxford University Press, 1986).

²⁹ *Procurier v. Martinez*, [1974] 416 U.S. 396 at 427. Commentators have argued that autonomy and self-realization should be the dominant value of the First Amendment. Martin H. Redish, “The Value of Free Speech” (1982) 130 *University of Pennsylvania Law Review* 291.

³⁰ Robert Bork, “Neutral Principles and Some First Amendment Problems” (1971) 47 *Indiana Law Journal* 1 at 25.

³¹ *Ibid.*

³² See e.g. Catharine MacKinnon, *Feminism Unmodified* (Cambridge Mass.: Harvard University Press, 1988).

chapter, it is precisely because of the harmful effects of certain types of expression that there are limits on expression.

In Canada, there is limited discussion of autonomy and self-realization as being values of free expression in the jurisprudence. Scholars have nonetheless theorized that these values are accounted for in s. 2(b) of the *Charter*. For instance, Richard Moon suggests that freedom of expression be linguistically recast as a positive liberty, rather than simply “a right not to be interfered with”.³³ In that sense, Moon is explicitly advocating for a novel account of freedom of expression focusing on “the importance of communication and social interaction to individual development”.³⁴ More saliently, autonomy and self-realization are among the principles identified by the Supreme Court of Canada in *Irwin Toy*, one of the Court’s leading decisions on freedom of expression.³⁵

4.3 The Scope of Freedom of Expression

To this point, I have demonstrated the importance of protecting expression. The Canadian and American Courts have outlined areas where the scope of freedom of expression is limited or does not apply altogether. In the remainder of this section, I will focus on these exceptions. More specifically, I will focus on those types of expression which are consistent with the types of expression claims that are made in the cases I have selected. These areas are: hate speech, obscenity, defamation, commercial speech.³⁶

³³ Richard Moon, “The Scope of Freedom of Expression” (1985) 23 *Osgoode Hall Law Journal* 2 at 345.

³⁴ *Ibid.* For Moon, Rawls and Dworkin’s silence on this point is problematic.

³⁵ *Irwin Toy*, *supra* note 25.

³⁶ Readers will note that I have not included a discussion of internet speech here. This discussion is more relevant to my discussion of broadcasters in chapters five through seven than it is here. Additionally, the other types of limited or restricted speech discussed below are all issues which are central to evaluating the type and scope of rights protections afforded to broadcasters as well as their rights obligations. Moreover, internet speech, by definition is broadcasting.

4.3.1 Hate Speech in Canada

In Canada, hate speech is regulated by the *Criminal Code of Canada* (“*Criminal Code*”), at the federal level, and Human Rights provisions at the provincial and territorial levels.³⁷ *Keegstra* gave the Supreme Court its first opportunity to address whether or not the *Criminal Code* provision prohibiting “inciting harm towards a particular group” offended s. 2(b) of the *Charter*.³⁸ In that case, James Keegstra, a high school teacher, was accused of “unlawfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students”.³⁹ He “expected his students to reproduce his teachings in class and on exams. If they failed to do so, their marks suffered”.⁴⁰ The Court found that s. 319(2) of the *Criminal Code* violated s. 2(b) of the *Charter* because “hate propaganda can[not] be seen as threats of violence or analogous to such threats, so as to deny protection under s. 2(b)”.⁴¹

The analysis in *Keegstra* subsequently turned to whether or not s. 319 could be saved under s. 1 of the *Charter*. Dickson concluded that the impugned provision was a reasonable limit, noting in particular that hate propaganda cause “very real harm” “which is sufficiently substantial to warrant [pressing and substantial] concern”.⁴² Dickson further concluded that Parliament’s aim of limiting the harm associated with hate speech and that “s. 319(2) create[d] a

³⁷ *Criminal Code*, R.S.C 1985, c C-46, ss. 318-320 [*Criminal Code*]. S. 318 of the *Criminal Code* prohibits advocating genocide, s. 319 prohibits inciting harm towards a particular group, and s. 320 provides for the confiscation of materials which promote hateful propaganda. Interestingly, hate speech was also prohibited by s. 13 of the *Canadian Human Rights Act* which was repealed because it was seen as too restrictive and tantamount to censoring expression. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 13(1) [rep. 2013]; Bill C-304, *An Act to Amend the Canadian Human Rights Act (Protecting Freedom)*, 1st Sess, 41st Parl, 2013; Provincially, for example, s. 14(1)(b) of the *Saskatchewan Human Rights Code* explicitly prohibits publication of any kind which “exposes or tends to expose to hatred any person or class of persons on a prohibited ground”. *Saskatchewan Human Rights Code*, S.S. 1979, c. S-241, s. 14(1)(b).

³⁸ *Criminal Code*, *Ibid.* at s. 319; *Keegstra*, *supra* note 24.

³⁹ *Ibid.* at 713.

⁴⁰ *Ibid.*

⁴¹ *Ibid.* at 733. Dickson C.J. was very careful to uphold the interpretation of freedom of expression it developed in *Irwin Toy*. In particular, the Court noted that “*Irwin Toy* can be seen as...reaffirming and strengthening the large and liberal interpretation given the freedom in s. 2(b) by the Court in *Ford*”. *Ibid.* at 728.

⁴² *Keegstra*, *supra* note 24 at 746-47.

narrowly confined offence” and that the impairment on freedom of expression was minimal.⁴³ Accordingly, s. 319(2) was upheld under s. 1.

The second landmark decision in which the Supreme Court addressed hate speech was *R. v. Zundel*. In that case, Ernst Zundel, a Holocaust denier was charged with “spreading false news” under s. 181 of the *Criminal Code* for publishing and distributing a pamphlet alleging that the Holocaust never happened.⁴⁴ The Court’s discussion of freedom of expression in that case closely followed its decision in *Keegstra*. McLachlin J. concluded that “a law which forbids expression of a minority or “false” view on pain of criminal prosecution or imprisonment, on its face, offends the purpose of the guarantee of free expression”.⁴⁵ McLachlin noted in particular that material which is unpopular or controversial “is most in need of protection under the guarantee of free speech”.⁴⁶

Where *Zundel* differs from *Keegstra*, however, is in terms of the Court’s s. 1 analysis. In *Zundel*, McLachlin posited that “[when it enacted s. 181] Parliament has identified no social problem, much less one of pressing concern”.⁴⁷ In this sense, McLachlin distinguished *Zundel* from *Keegstra* because the legislative intent of the impugned provisions in the latter case was abundantly clear and narrowly tailored. S. 181 was struck down on those grounds.⁴⁸

⁴³ *Ibid.* at 771, 786-88.

⁴⁴ [1992] 2 S.C.R. 731 [*Zundel*]; Peter Hogg has noted that Zundel was charged under the false news provision rather than the hate propaganda provision of the *Criminal Code* because an offence under s. 319(2) “require[d] the consent of the Attorney General [of Ontario]...[who] refused his consent, presumably because he was unsure whether denying the Holocaust constituted an offence under s. 319(2)”. Peter Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Carswell, 2012) at 43-30, note 169.

⁴⁵ *Zundel, Ibid.* at 753.

⁴⁶ *Ibid.* This is referred to as “content neutrality”.

⁴⁷ *Ibid.* at 764.

⁴⁸ More recently, the Court has addressed hate speech in *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467 [*Whatcott*]. In that case, the Court held that while the s. 14(1)(b) of the *Saskatchewan Human Rights Code* violated s. 2(b) of the *Charter*, it was nonetheless saved by s. 1.

4.3.2 Hate Speech in the United States

The United States Supreme Court has been relatively silent on hate speech as a distinct concept. For instance, in 1942, Murphy J. noted that “there are certain well-defined classes of speech...the lewd and obscene, the profane, the libelous and the insulting or ‘fighting words’ – those which by their very utterances inflict injury or tend to incite an immediate breach of the peace”.⁴⁹ Murphy did not, however, enumerate a distinct category for hate speech.

Ten years after the Court’s first discussion of hate speech in *Chaplinsky*, the Court was once again asked to address “hate speech”. On that issue, the Court held that “[a state could] punish the same utterance directed at a defined group”.⁵⁰ Accordingly, the Court upheld the impugned legislation.⁵¹ However, since that decision, scholars have questioned whether or not *Beauharnais* is still good law.⁵² This is because the impugned speech in *Beauharnais* was political in nature and would likely be protected on that basis.⁵³

More recently, the Court addressed the issue of hate speech in *R.A.V. v. City of St. Paul*.⁵⁴ In that case, the accused burned a cross on the front lawn of an African American family’s home.⁵⁵ The accused was subsequently charged under a municipal provision prohibiting such action.⁵⁶ Scalia J., writing for a unanimous Court, struck down the municipal provision on the basis that the municipal ordinance “is facially unconstitutional in that it prohibits otherwise permitted

⁴⁹ *Chaplinsky v. New Hampshire*, [1942] 315 U.S. 568 at 572.

⁵⁰ *Beauharnais v. Illinois*, [1952] 343 U.S. 250 at 258.

⁵¹ *Ibid.*

⁵² Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 2nd ed. (New York: Aspen Publishers, 2002) at 978 [Chemerinsky]. Additionally, various circuit courts of appeal have echoed this sentiment. See e.g. *American Booksellers Association v. Hudnut*, 771 F.2d 323 (7th Cir. 1985); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

⁵³ Chemerinsky, *Ibid.*

⁵⁴ [1992] 505 U.S. 377 [*R.A.V.*].

⁵⁵ *Ibid.* at 380.

⁵⁶ *Ibid.*

speech on the basis of the subjects the speech addresses”.⁵⁷ The *Beauharnais* decision strongly suggests that the Supreme Court has been sympathetic to First Amendment claims, even those which are hateful towards an identifiable group.

4.3.3 Obscenity in Canada

As is the case with hate speech, obscenity is problematic in two ways. First, by its very nature, it is “degrading, dehumanizing, and inimical to other *Charter* values, especially the equality of women”.⁵⁸ It also presents courts with the task of crafting extremely specific parameters that distinguish material that has artistic value from obscene material which depicts or advocates violence or otherwise results in harm.

The Supreme Court of Canada was first presented with the issue of obscenity in *R. v. Butler*.⁵⁹ In that case, Donald Butler was charged with “selling obscene material...possessing obscene material for the purposes of distribution...possessing obscene material for the purposes of sale...[and] exposing obscene material to public view”.⁶⁰ In *Butler*, a majority of the Court rejected the argument that pornography could not be protected expression because it is “purely physical and does not convey or attempt to convey meaning”.⁶¹ Sopinka J. writing for the majority noted that “[t]he subject matter of the materials in this case is clearly “physical”, but

⁵⁷ *Ibid.* at 381. Similarly, the Supreme Court held in 2011 that the homophobic content of placards carried by members of the Westboro Baptist Church at the memorial service of an openly homosexual soldier was protected speech because “[First Amendment] protection cannot be overcome by a jury finding that the picketing was outrageous”. *Snyder v. Phelps*, [2011] 562 U.S. 443 at 1219. Justice Alito authored a scathing dissent in which he wrote “[o]ur profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case”. *Ibid.* at 1222 (emphasis added).

⁵⁸ Robert J. Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 5th ed. (Toronto: Irwin Law, 2013) at 174 [Sharpe & Roach].

⁵⁹ [1992] 1 S.C.R. 452 [*Butler*].

⁶⁰ *Ibid.* at 461.

⁶¹ *Ibid.* at 486-87.

this does not mean that the materials convey or attempt to convey meaning such that they are without expressive content”.⁶²

Sopinka then explored when sexually explicit material should be considered obscene. Sopinka reasoned that this distinction should be made on the basis of whether or not the material in question offended community standards. He noted specifically that this meant “what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure”.⁶³ Based on the community standards test, Sopinka outlined three classifications of pornographic material:

1. Sex coupled with violence will always constitute the undue exploitation of sex.
2. Explicit sex which is dehumanizing or degrading may be undue if the risk of harm is substantial.
3. Explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated...unless it employs children in its production.⁶⁴

Accordingly, Sopinka “found that it was possible to interpret an offence originally intended to protect a certain view of sexual morality as having evolved to the point where it now protects against sexual violence and the denial of equality of women”.⁶⁵

Ultimately, the Court held that because of the creative decisions central to the creation of pornography, restricting pornography violated s. 2(b) of the *Charter*.⁶⁶ However, as was the case with its hate speech jurisprudence, the Sopinka held that the prohibitions on obscenity could be

⁶² *Ibid.* at 487. In this sense, the decision in *Butler* reverses, to a certain extent the scope of protected expression detailed in *Irwin Toy*.

⁶³ *Ibid.* at 485.

⁶⁴ *Ibid.* Note that this harm test was clarified in *R. v. Labaye*. There, the Court set out a two-part test for assessing harm. First, the nature of the harm had to (1) interfere with individual autonomy or liberty, (2) “predispose others to antisocial behaviour”, and (3) result in physical or psychological harm. Second, “the harm or potential harm” had to interfere with the “proper functioning of society”. [2005] 3 SCR 728 at para. 62.

⁶⁵ Sharpe and Roach, *supra* note 58 at 175. While the classifications Sopinka derives are coherent and well defined, the community standards test problematic because it is far too subjective. Sopinka did not clearly define what the requirement is for offending the community. For example, an individual might be tolerant of pornography which is violent and degrading and be willing to subject their neighbour to such material. Conversely, someone else might take great exception to any kind of pornography.

⁶⁶ *Butler*, *supra* note 59 at 489-90.

saved under s. 1. There, he rejected the moral basis of the obscenity laws, while maintaining that Parliament could “legislate on the basis of some fundamental conception of morality”.⁶⁷

The second landmark decision in which the Court addressed obscenity was *Little Sisters*.⁶⁸ That case dealt with gay and lesbian materials which were being shipped to a Vancouver store and were confiscated by customs officials.⁶⁹ In that case, Binnie J. writing for the majority found that the confiscation of the imported materials constituted a justifiable violation of s. 2(b).⁷⁰ Binnie further concluded that requiring customs officials to take measures to protect *Charter* rights “would be unnecessarily rigid”.⁷¹ *Butler* and *Little Sisters* makes clear that the Court’s understanding of obscenity is consistent with its treatment of hate speech to the extent that obscene material has the potential to cause harm. While the Court did uphold the impugned provisions in these cases, it nonetheless clearly signalled to the government that morality based restrictions on obscenity would not pass s. 2(b) scrutiny, although they would likely be saved under s. 1.

4.3.4 Obscenity in the United States

In the United States, the first decision addressing obscenity was *Roth v. United States*.⁷² In that case, Samuel Roth had been charged under a federal statute with mailing “obscene, lewd, lascivious or filthy” material in the form of a pornographic magazine.⁷³ Brennan J. writing for the majority noted that “obscenity [is] utterly without redeeming social importance”.⁷⁴ Brennan

⁶⁷ *Ibid.* at 493. For a more recent decision on obscenity with a similar result see *R. v. Sharpe*, [2001] 1 S.C.R. 45.

⁶⁸ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 SCR 1120 [*Little Sisters*].

⁶⁹ *Ibid.* at para. 5.

⁷⁰ *Ibid.*

⁷¹ *Ibid.* at para. 137.

⁷² [1957] 354 U.S. 476 [*Roth*].

⁷³ *Ibid.* at 480.

⁷⁴ *Ibid.* at 484.

concluded based on this analysis that “obscenity is not within the area of constitutionally protected speech or press”.⁷⁵ This decision was subsequently upheld on a number of occasions.⁷⁶

In 1973, the Court clarified the definition of obscenity which it provided in *Roth*.⁷⁷ To determine whether or not material should be considered obscene, the Court developed a three-part test. The first part of that test inquires into whether or not the material in question “appeals to prurient interests” based on community standards.⁷⁸ The second part of the *Miller* test asks “whether the work depicts or describes sexual conduct or excretory functions specifically defined by applicable state law”.⁷⁹ The final part of this test inquires into “whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value”.⁸⁰

Nonetheless, critics of the Supreme Court’s exclusion of obscenity from First Amendment protection argue that “the government should not be able to decide what is moral and suppress speech that does not advance that conception”.⁸¹ Further, scholars have noted that “other forms of speech produce physical reactions. [For example, a] movie or a book is not deprived First Amendment protection because it provokes tears”.⁸² In fact, the Supreme Court has struck down a prohibition on a play simply because it “portrays acts of sexual immorality [as] desirable, acceptable or proper patterns of behavior”.⁸³ The Court further noted that “[what the government] has done, [is] to prevent the exhibition of a motion picture because that picture advocates an idea – that adultery under certain circumstances may be proper behaviour”.⁸⁴

⁷⁵ *Ibid.* at 485.

⁷⁶ See specifically, *Alexander v. United States*, [1993] 509 U.S. 544; *Paris Adult Theatre I v. Slaton*, [1973] 413 U.S. 49.

⁷⁷ *Miller v. United States*, [1973] 413 U.S. 15 [*Miller*] at 23.

⁷⁸ *Ibid.* at 25.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Chemerinsky, *supra* note 52 at 983.

⁸² *Ibid.* at 984.

⁸³ *Kingsley International Pictures Corp. v. Regents*, [1959] 360 U.S. 684 at 699.

⁸⁴ *Ibid.* at 688.

The important point to note here is the emphasis on morality which is wholly subjective as opposed to a more concrete standard such as harm. Morality is therefore a far broader restriction on expression. Presumably, a morality based assessment would exclude speech which offends community standards but might still be considered art, for instance. An alternative approach might be for the Court to distinguish between obscenity and pornography on the grounds that the latter form of expression has greater potential to cause harm.⁸⁵ As I will argue in greater detail below, this analysis suggests that there is no readily available, satisfactory approach to obscenity within the American constitutional framework.

4.3.5 Defamation in Canada

Defamation in both Canada and the United States is primarily addressed through the law of torts.⁸⁶ The Supreme Court has, however, been asked for opinions on two occasions as to whether or not the *Charter* can apply in purely private defamation disputes. In the first of these cases, *Hill v. Church of Scientology*, the Church of Scientology made allegations against a Crown attorney, Casey Hill, which resulted in contempt of court proceedings.⁸⁷ The claims made by Scientology proved false, and Hill brought a libel suit in which he was successful.⁸⁸ On appeal to the Supreme Court, the Church of Scientology argued that the statements that were made about Casey Hill ought to be protected under s. 2(b) of the *Charter*.⁸⁹ Cory J. writing for the majority swiftly rejected this argument. Cory concluded that Hill's status as a Crown attorney

⁸⁵ See e.g. Catharine McKinnon, *Only Words* (Cambridge M.A.: Harvard University Press, 1993); Catharine MacKinnon, "Pornography, Civil Rights and Speech" (1985) 20 *Harvard Civil Rights and Civil Liberties Law Review* 1.

⁸⁶ Defamation refers to libel and slander.

⁸⁷ [1995] 2 SCR 1130 at para. 1 [*Hill*].

⁸⁸ *Ibid.* at para. 2.

⁸⁹ *Ibid.* at para. 65. According to this novel argument, Hill was "government" within the meaning of s. 32 because he worked for the Crown. *Ibid.*

provided an insufficient basis for the *Charter* to apply.⁹⁰ Furthermore, Cory noted that libel was beyond the scope of s. 2(b).⁹¹

In 2009, the Court was once again confronted with the question of whether defamation was protected under the *Charter*.⁹² In *Grant*, the appellant, Peter Grant brought suit against the Toronto Star based on an article the newspaper ran in which it was alleged that Grant's connections to provincial politics enabled him to expand the golf course on his property.⁹³ McLachlin C.J. writing for the majority decried the Court's decision in *Hill* as being too limiting on the "value of free expression".⁹⁴ As a result, McLachlin ordered a new trial based on errors in the application of the law.⁹⁵

4.3.6 Defamation in the United States

As I discussed briefly in chapter two, *New York Times Co. v. Sullivan* represents a landmark decision in American jurisprudence.⁹⁶ In that case, L.B. Sullivan, a police commissioner in Montgomery Alabama, sued and subsequently won a judgment against the New York Times as a result of an advertisement that was published which was critical of that police departments' treatment of civil rights protesters.⁹⁷ The New York Times challenged the jury verdict on the grounds that it violated its First Amendment Rights. In a unanimous decision, the Court held that

⁹⁰ *Ibid.* at para. 65.

⁹¹ *Ibid.* at para. 120.

⁹² *Grant v. Torstar Corp.*, [2009] 3 SCR 640 [*Grant*].

⁹³ *Ibid.* at para. 16.

⁹⁴ *Ibid.* at paras. 57, 62. It is important to note that while McLachlin did attach greater weight to the *Charter* value of free expression in defamation cases, she did not go so far as to allow *Charter* claims to be made in these cases. It is important to note here that McLachlin's analysis *does not* lead her to the conclusion that *Charter* claims ought to be available to defendants in defamation cases. Rather, she merely provided these defendants with the defence of "responsible communication on matters of public interest" which is informed by *Charter* values. *Ibid.* at para. 97.

⁹⁵ *Ibid.* at paras. 140-41.

⁹⁶ *New York Times Co. v. Sullivan*, [1964] 376 U.S. 254 [*Sullivan*].

⁹⁷ *Ibid.* at 257.

the advertisement at issue was protected speech under the First Amendment because it was critical of a public official, rather than a private citizen.⁹⁸

However, the Court has identified two exceptions to the public official standard developed in *Sullivan*. In *Gertz* and *Milkovich*, the Court has set out a requirement that defamatory statements made about public officials which is merely an *opinion* are the only types of statements which are protected by the *New York Times* standard.⁹⁹ Instead, the Court in *Milkovich* held that “a statement on matters of public concern must be provable as false before there can be liability under...defamation law”.¹⁰⁰ The second exception crafted to *New York Times* centres around whether or not there is actual malice, and more specifically whether or not that malice is provable.¹⁰¹ Here, the individual(s) making the defamatory statements have to have done so “[with] a high degree of awareness of their probable falsity”.¹⁰² Additionally, the falsity of the statements must be “deliberate or reckless” and whoever made them must “in fact [have] entertained serious doubts as to the truth of [the] publication”.¹⁰³

⁹⁸ *Ibid.* at 265. Following *Sullivan*, the Court has attempted to clarify what a public official is for the purposes of the First Amendment. In *Rosenblatt v. Baer*, public officials were defined thus: “those among the hierarchy of government employees who have, or appear to the public to have substantial responsibility for the control of government affairs”. Additionally, their positions must be “[of such] apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it”. [1966] 383 U.S. 75 at 85-86. This definition, however leaves some ambiguity as to what a public official is.

⁹⁹ *Gertz v. Robert Welch Inc.*, [1974] 418 U.S. 323; *Milkovich v. Lorraine Journal Co.*, [1990] 427 U.S. 1.

¹⁰⁰ *Milkovich*, *Ibid.* at 19-20.

¹⁰¹ *Garrison v. Louisiana*, [1964] 379 U.S. 64.

¹⁰² *Ibid.* at 74.

¹⁰³ *Masson v. New Yorker Magazine, Inc.*, [1991] 501 U.S. 496 at 499; *St. Amant v. Thompson*, [1968] 390 U.S. 727 at 731. Interestingly, the Supreme Court has suggested that the term public figure be employed instead of public official for the purposes of the *Sullivan* requirement. See specifically, *Curtis Publishing Co. v. Butts*; *Associated Press v. Walker*, [1967] 388 U.S. 130. Additionally, the Court has attempted to expand the meaning of *Sullivan* to capture matters of public interest, although this position has not been formally adopted. See *Rosenbloom v. Metromedia, Inc.*, [1971] 403 U.S. 29. Commentators have argued, however, that the Court has not yet clarified a coherent requirement in order for an individual to be classified as a public figure. Chemerinsky, *supra* note 52 at 1018.

4.3.7 Commercial Expression in Canada

As I discussed earlier in this chapter, in *Irwin Toy* the Supreme Court was given its first opportunity to address whether or not commercial speech ought to be afforded s. 2(b) protection. That case specifically dealt with a toy company seeking *Charter* protection of “television advertis[ements] directed at persons under thirteen years of age”.¹⁰⁴ The Court found that the impugned provisions violated s. 2(b) since those provisions “prohibit particular content of expression in the name of protecting children”.¹⁰⁵

However, the impugned consumer protection laws were upheld as being a reasonable limit under s. 1.¹⁰⁶ The Court’s finding in *Irwin Toy* has been criticized for the deference it appears to provide legislators in regards to deciding what constitutes minimal impairment for the purposes of s. 1 analyses.¹⁰⁷ On this point, Robert Sharpe and Kent Roach have argued that the only justification for protecting commercial speech is that it contributes to the marketplace of ideas, rather than contributing to democratic discourse or promoting individual autonomy and self-realization.¹⁰⁸

The Court has also dealt with commercial advertising in the context of tobacco advertising.¹⁰⁹ In that case, the Attorney General for Canada declined the opportunity to mount a defence of the impugned provisions against the 2(b) challenge.¹¹⁰ In light of this, McLachlin J. writing for the majority focused her analysis on whether the legislative scheme could be saved under s. 1. In rejecting the notion that a total ban was the least drastic means of regulating tobacco advertising,

¹⁰⁴ *Irwin Toy*, *supra* note 25 at 938.

¹⁰⁵ *Ibid.* at 979.

¹⁰⁶ *Ibid.* at 1000. Interestingly, the Court patently rejected *Irwin Toy*’s argument that they were harmed by the consumer protection provisions. Readers will note that in the companion case to *Irwin Toy*, *Ford*, the Court struck down the Québec law because it failed to meet the reasonable limit aspect of the s. 1 analysis. *Ford*, *supra* note 25.

¹⁰⁷ Sharpe & Roach, *supra* note 58 at 161.

¹⁰⁸ *Ibid.* at 162.

¹⁰⁹ *RJR-MacDonald v. Canada (Attorney General)*, [1995] 3 S.C.R 199 [*RJR-MacDonald*].

¹¹⁰ *Ibid.* at para. 58.

McLachlin noted that “the government present[ed] no evidence justifying its choice of a total ban”.¹¹¹ This was in spite of the fact that the government had commissioned a study for the express purpose of proposing less intrusive means of regulating tobacco advertising.¹¹²

However, *RJR-MacDonald* does not represent a significant departure from *Irwin Toy*. There is clear evidence of this in the subsequent tobacco advertising challenge, *Canada (Attorney General) v. JTI-MacDonald Corp.*¹¹³ In that case, the amended tobacco advertising restrictions were upheld because they represented “a genuine attempt by Parliament to craft controls on advertising and promotion that would meet its objectives as well as the concerns expressed by the majority of this Court in *RJR*”.¹¹⁴ There, the public health argument prevailed over the commercial expression.¹¹⁵ These cases indicate that the Court has been cautious in terms of allowing 2(b) challenges to succeed in commercial expression cases.¹¹⁶

4.3.8 Commercial Expression in the United States

On several occasions, the Supreme Court of the United States has held that commercial expression is protected by the First Amendment.¹¹⁷ Subsequent jurisprudence on commercial expression provided the unsatisfying clarification that “[commercial] expression [is] solely related to the economic interests of the speaker and its audience”.¹¹⁸ That definition has subsequently been interpreted as containing three core features: (1) there is some type of

¹¹¹ *Ibid.* at para. 167.

¹¹² *Ibid.* at para. 166.

¹¹³ [2007] 2 S.C.R. 610.

¹¹⁴ *Ibid.* at para. 7.

¹¹⁵ *Ibid.* at paras. 68, 94, 115; Hogg, *supra* note 44 at 43-25.

¹¹⁶ One exception to this trend might be *Rocket v. Royal College of Dental Surgeons of Ontario* where the Court struck down prohibitions on advertising by dentists. [1990] 2 S.C.R. 232.

¹¹⁷ See e.g. *Bigelow v. Virginia*, [1975] 421 U.S. 809; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, [1976] 425 U.S. 748. This, however, excludes promotion of illegal activity, and false advertisements. *Virginia Board of Pharmacy* at 771-72.

¹¹⁸ *Central Hudson Gas & Electric Corp. v. Public Service Commission*, [1980] 447 U.S. 557 at 561 [*Central Hudson*].

advertisement, (2) the advertisement makes specific reference to a product, and (3) the expression is economically motivated.¹¹⁹ Moreover, in deciding whether or not governments can restrict commercial speech, the Court in *Central Hudson* set out a four-part test:

1. The activity must be lawful and not misleading.
2. The government objective in regulating speech must be substantial.
3. Whether the regulation *directly* advances the stated government interests.
4. The regulation is not more extensive than is necessary to meet its objective.¹²⁰

Later decisions, however, have held that this least restrictive test is too onerous on governments because it “impose[s an] unnecessarily heavy burden on the state”.¹²¹ Although Scalia J. did qualify this by stating that “[governments must use] a means narrowly tailored to the desired objective”.¹²² Subsequent decisions have affirmed the latter analysis.¹²³ While the Court’s approach to commercial advertising is still restrictive, it is comparatively less restrictive than that employed Canada.

4.4 Freedom of Expression in a Comparative Context

In general terms, the First Amendment has been interpreted in a more liberal manner than s. 2(b) of the *Charter* has. Whereas *Charter* rights always have the potential to be limited, this is not the case in the United States. However, the United States Supreme Court has established three “levels of scrutiny” for weighing rights against government interest.¹²⁴ Freedom of speech cases are most commonly adjudicated under the two more stringent requirements, intermediate

¹¹⁹ Chemerinsky, *supra* note 52 at 1048 citing *Bolger v. Youngs Drug Products Corp.*, [1983] 463 U.S. 60.

¹²⁰ *Central Hudson*, *supra* note 136 at 566. This test appears to be very similar to the *Oakes* test crafted by the Supreme Court of Canada for determining what constitutes a reasonable limit on rights.

¹²¹ See *Board of Trustees for the State University of New York v. Fox*, [1989] 492 U.S. 469 at 477.

¹²² *Ibid.* at 480.

¹²³ *Greater New Orleans Broadcasting Association v. United States*, [1999] 572 U.S. 173. Exceptions to the First Amendment protection afforded commercial advertising include, but are not limited to: advertising for illegal activity, false advertising, and advertising in relation to alcohol products. See Chemerinsky, *supra* note 52 at 1053-1068 for a broader discussion of these exceptions.

¹²⁴ Chemerinsky, *supra* note 52 at 517-20. The other level of scrutiny is rational basis which requires that the law is “rationally related to a legitimate government purpose” in order to be upheld. *Ibid.* at 517.

and strict scrutiny.¹²⁵ Intermediate scrutiny is employed in cases where the speech in question is content neutral.¹²⁶ Under intermediate scrutiny, impugned legislation will be upheld if “it is substantially related to an important government objective”.¹²⁷ Strict scrutiny is applied in cases where the restriction on speech is content-based.¹²⁸ Under a strict scrutiny analysis the onus is on the government to prove that its legislative objective is “compelling...[and] necessary”, a heavy burden.¹²⁹

Strict scrutiny is effectively the same as the Supreme Court of Canada’s “pressing and substantial” component of the *Oakes* test. However, there is an important distinction to draw here. In terms of strict scrutiny, American constitutional scholars have pointed out that strict scrutiny is “strict in theory and fatal in fact”.¹³⁰ Conversely, the Supreme Court of Canada has adopted a looser interpretation as to what constitutes a pressing and substantial objective. If legislation in Canada is struck down, it is typically at other stages of the reasonable limits analysis.¹³¹ The Supreme Court of Canada has been rather generous to governments in accepting pressing and substantial reasons for taking legislative actions.¹³²

Additionally, “freedom of expression fits awkwardly within the two-step adjudicative model [of] the *Charter*”.¹³³ This analysis helps explain why freedom of expression claims are so commonly saved under s. 1. Of the leading freedom of expression jurisprudence in Canada, there

¹²⁵ *Ibid.* at 519-20.

¹²⁶ See e.g. *United States v. Playboy Entertainment Group*, [2000] 529 U.S. 803.

¹²⁷ *Supra* note 123.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ Gerald Gunther, “Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection” (1972) 86 *Harvard Law Review* 1 at 8.

¹³¹ Dwight Newman, “The Limitations of Rights: A Comparative Evolution and Ideology of the *Oakes* and *Sparrow* Tests” (1999) 62 *Saskatchewan Law Review* at 553.

¹³² Richard Moon, “Justified Limits on Free Expression: The Collapse of the General Approach to the Limits on *Charter* Rights” (2002) *Osgoode Hall Law Journal* 40.

¹³³ *Ibid.* at 365.

were three cases where the impugned legislation was struck down, and it was only done so because the impugned legislation was far too broad, even by the loosened pressing and substantial standard: *Zundel*, *Rocket*, and *RJR-MacDonald*.¹³⁴ Against this backdrop, I will provide a brief comparison of the Canadian and American approaches to the four types of limited or excluded expression discussed above: hate speech, obscenity, defamation, and commercial speech.

In terms of hate speech and obscenity, the Supreme Court of Canada has taken a very conservative approach by routinely upholding hate speech laws.¹³⁵ The Court has taken a similar tack in regards to obscenity.¹³⁶ In both types of cases, the Court has opted for a harms-based approach. Comparatively, the United States Supreme Court has granted these types of expression broader protection.¹³⁷ Here, the difference is largely due to the architecture of rights documents in both countries. In Canada, for example, the impugned legislative provisions generally fail to withstand s. 2(b) analysis, but are frequently upheld on the subsequent s. 1 analysis.

However, where freedom of expression claims tend to fail is that the onus is on the rights claimant to prove the government action is an unreasonable limit on freedom of rights which, in these cases, has proven to be a heavy burden.¹³⁸ Comparatively, in the United States, the onus is largely on the government to prove the importance of the law.¹³⁹ Additionally, rights are conferred absolutely. This helps explain why the rights claim succeeded in *R.A.V.* while it did not in *Keegstra*, for example.

¹³⁴ *Zundel*, *supra* note 44; *Rocket*, *supra* note 116; *RJR-Macdonald*, *supra* note 100.

¹³⁵ See *Keegstra*, *supra* note 24; *Whatcott*, *supra* note 48.

¹³⁶ *Butler*, *supra* note 59; *Little Sisters*, *supra* note 68.

¹³⁷ *Supra* notes 48, 61.

¹³⁸ See e.g. *Supra* note 61.

¹³⁹ *Supra* note 54.

Moreover, in *Miller*, the United States Supreme Court suggested that speech which has artistic value is protected.¹⁴⁰ However, this is inconsistent with the morality-based approach taken by the Court in hate speech and obscenity cases. For example, the subjectivity of morality means that what might be artistic for one person might be obscene to another. As such, the potential exists that artistic material which may be obscene could be left unprotected by the First Amendment even though this would not be the case by any other standard. Therefore, I argue that the Court needs to draw a clearer distinction between obscenity and pornography, for instance, and transition to a standard of review based on harm rather than one based on morality.

In terms of defamation, the Canadian approach has long been that this was strictly a matter of tort law. This likely has to do with the Court's understanding of the *Charter's* scope. As I discussed in the previous chapter, the Supreme Court of Canada has taken a very restrictive approach in this regard. Because of the Court's unwillingness to expand the *Charter's* scope to include, for instance, matters of public interest, it follows that there are considerable barriers that rights claimants in defamation cases must overcome in order for *Charter* claims to be adjudicated. They either have to prove that they are government, they are performing a modern or traditional government function, or they are implementing a government policy.¹⁴¹ In the United States, however, rights claimants in defamation cases simply must prove that the other party is a public figure, a more reasonable standard. It is for this reason, in part, that in chapter three, I argued that the Supreme Court of Canada ought to adopt the Wilson test from *McKinney* which would allow *Charter* disputes in cases involving matters of significant public interest.¹⁴² For example, under this framework, the *Charter* claims made in *Grant*, and perhaps *Hill* would

¹⁴⁰ *Supra* note 77.

¹⁴¹ *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 SCR 211; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624.

¹⁴² *McKinney v. University of Guelph*, [1990] 3 SCR 229[*McKinney*] at 248.

have been allowed to proceed and likely have been successful. I am not, however, advocating for universal application of the *Charter*. Rather, *Charter* application should be limited to matters of considerable public interest.

4.5 Conclusion

In this chapter I examined the current legal status of freedom of expression in Canada and the United States as well as the relevant academic literature. First, I discussed why Canadian and Americans protect speech, identifying three prominent explanations in the literature: democracy and the connection to self-government, its contribution to the discovery of truth, and finally the importance to autonomy and self-realization. My analysis then turned to types of expression which lack or enjoy minimal protection in both countries, focusing in particular on: hate speech, obscenity, defamation, and commercial speech. Comparing the Canadian and American approaches, I concluded that there are aspects of both approaches which are problematic. In particular, I argued that the Canadian approaches to defamation and commercial speech are too restrictive, while the American approaches to obscenity and hate speech are too arbitrary. Against the backdrop provided by this and the previous chapters, I will turn my analysis to the rights of broadcasters in Canada.

Chapter 5

The Judicial Empowerment of Broadcasters in Canada

5.1 Introduction

In this chapter, I will explore the judicial empowerment of broadcasters in Canada and the implications thereof. In the first part of this chapter, I will explore judicial empowerment quantitatively. There I will argue that Canadian courts have been reluctant to expand the scope of rights protection afforded to broadcasters. In the second part of this chapter, I will explore these results qualitatively, looking at the reasons for judgment, persuasive dissenting opinions, and decisions which changed the law. There, I will argue that these results confirm the empirical findings but also present powerful evidence that the scope of rights protection afforded to broadcasters ought to be broadened considerably. In the final part of this chapter, I will argue that recognition and adoption of the Wilson test in *McKinney* would further the judicial empowerment of broadcasters.

5.2 The Judicial Empowerment of Broadcasters in Canada: The Empirical Context

In this section, I will explore the judicial empowerment of broadcasters in the cases I have selected, quantitatively. These results are displayed in Table 1 below. My analysis of these results will focus on two specific perspectives. First I will discuss the judicial empowerment of public, as opposed to private, broadcasters. Second, I will explore these results thematically in terms of the types of cases in which broadcasters are making (or coming up against) rights claims.

Table 1: Rights Outcomes in Canadian Jurisprudence

				Type of Broadcaster									
				Public					Private				
				Broadcasters Role									
				Making a Claim	Responding to a Claim	Competing Claim	Intervener/ Applicant	Making a Claim	Responding to a Claim	Competing Claim	Intervener/ Applicant	Subtot	
Court's Decision	Against Rights Claimant	Subject Matter	3	0	0	0	0	1	0	0	0	1	
			2	0	0	0	1	3	0	0	11	15	
			1	6	0	0	1	12	0	0	1	20	
	Public & Private Total												46
	For Rights Claimant	Subject Matter	3	0	0	0	0	0	0	0	0	0	0
			2	0	0	0	0	7	0	0	0	7	
			1	1	0	8 ¹	1	3	0	10 ²	3	23	
	Public & Private Total												20
	Subtotals			7	0	8	3	26	0	10	15		

Table 1 Classifies rights claimant(s) involved in Canadian cases based on whether or not the court ruled in favour of the rights claimant(s). Canadian cases fell into one of three broad categories which correspond to the number under the subject matter heading: (1) Press Freedom, (2) Elections and (3) Hate Speech.³ Rights claimants refers to broadcasters unless otherwise noted in the footnotes below.

5.2.1 The Underrepresentation of Public Broadcasters in Rights Disputes

The CBC, the only public broadcaster to make a rights claim in these cases was only successful on two of the 18 occasions that it made such claims. This translates to a success rate of 11.1%. Similarly, private broadcasters made rights claims on 51 occasions, succeeding in 13 of these. The success rate of private broadcasters is approximately 25.5%, approximately 5%

¹ *Toronto Star Newspapers Ltd. v. Canada*, [2010] 1 S.C.R 721 [*Toronto Star*]. In that case, the CBC came up against the collective s. 11 claims of seven individuals; *R. v. White*, [2008] ABCA 294 [*White*]. In that case the CBC came up against the s. 11(d) claim of one individual.

² *Toronto Star, Ibid*. In this context, there were six private broadcasters who came up against s. 11 claims; *A.B. v. Bragg Communications Inc.*, [2012] 2 S.C.R 567 [*Bragg*]. In that case, the Court found that the appellant's right to privacy was entrenched in the *Charter* under ss. 7 & 8 and superseded the private broadcasters s. 2(b) right; *White, Ibid*. There, four private broadcasters made rights claims; *Flahiff v. Cour du Québec*, [1998] QCCA [*Flahiff*], where the appellants s. 11(d) right to a fair trial was found to supersede the private broadcasters right to publication of a search warrant and supporting affidavit. It is important to note that broadcasters in this category where counted in the "Against Rights Claimant" total.

³ Cases that fell into the enumerated categories above dealt with the following subject matter: (1) Production Orders, Publication Bans, Confidential Sources, Open Courts, Open Legislatures, Broadcasting Trial Exhibits, and Trial Fairness; (2) Election Advertising, Early Dissemination of Election Results; (3) Hate Speech.

lower than public broadcasters. However, in most of these cases, the CBC and private broadcaster(s) were equally involved.⁴ Nonetheless, in four of the five cases where the CBC was the sole broadcaster, they were successful once.⁵ I will explore why this is the case in the following section. There is also the question of why the CBC is the only public broadcaster involved in rights disputes. The CBC is not the only public broadcaster in Canada. This list includes, but is not limited to TVOntario (“TVO”) and Télé-Québec which provide educational programming in Ontario and Québec respectively; and Télévision Française de l’Ontario (“TFO”) which provides French language programming in Ontario.⁶

The CBC is a crown corporation, created by the *Broadcasting Act* and is, to a large extent, publicly funded.⁷ The *Act* confirmed CBC’s position as a national broadcaster, strengthened restrictions on foreign ownership, required that Canadian programming is created by mainly Canadian talent, and confirmed the idea, through objectives, that the broadcasting system should strengthen Canada’s cultural, social and economic structures.⁸ Furthermore, the *Act* explicitly delegated implementation of its “broadcasting policy for Canada” to the Canadian Radio-television and Communication Commission (“CRTC”), a new regulatory agency.⁹ The CRTC, in

⁴ Readers will note that the number of occasions on which the CBC made a rights claim is also considerably lower than those on which private broadcasters made rights claims. This means that the CBC’s success rate does not necessarily provide an accurate representation of the judicial empowerment of public broadcasters.

⁵ *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480.

⁶ In addition to the public broadcasters I have enumerated above, there are a number of publicly funded radio stations including those which are student-run, university or college stations.

⁷ *Broadcasting Act*, S.C. 1991, c.11, s. 47 [*Broadcasting Act*].

⁸ CRTC Origins, online: CRTC

<<http://web.archive.org/web/20131220212044/http://www.crtc.gc.ca/eng/backgrnd/brochures/b19903.htm> > [Origins].

⁹ John Aird, *Report of the Royal Commission on Radio Broadcasting* (Ottawa: King’s Printer, 1932).

turn, regulates broadcasters with a view to this policy.¹⁰ The CBC, through the CRTC, reports to Parliament through the Minister of Canadian Heritage.¹¹

TVO is a public broadcaster created by the *Ontario Educational Communications Authority Act* (“OECAA”) and licensed as such under the *Broadcasting Act*.¹² TVO’s mandate is to “initiate, acquire, produce, distribute, exhibit or otherwise deal in programs and materials in the educational broadcasting and communications fields”.¹³ TVO reports to the Ontario government through the Minister of Education and is a Crown Corporation.¹⁴ In this sense, TVO is governed in much the same fashion as the CBC. Similarly, until 2008 TFO was governed under the *OECAA* as a subsidiary of TVO.¹⁵ At that point, the provincial government enacted legislation analogous to the *OECAA* for the express purpose of governing TFO.¹⁶ In Québec, the provincial public broadcaster, Télé-Québec operates under a similar governance structure to TVO and TFO in Ontario.¹⁷

As I described above, the prominent public broadcasters in Canada operate under virtually identical governance structures. Thus, governance structures alone do not explain why public broadcasters (apart from the CBC) have not been involved in rights disputes. Additionally, because these are all, to varying degrees, publicly funded entities, it is unlikely that the lack of *Charter* claims made by public broadcasters is a funding issue. This means that the likely

¹⁰ Origins, *supra* note 8.

¹¹ *Ibid.* In spite of this, it is interesting to note that three-decade-old case law has held that the CBC is private and not subject to the *Charter*. See e.g. *Elliott v. Canadian Broadcasting Corporation*. (1995) 125 D.L.R. (4th) 534 (Ont. C.A.). See also, *Trieger v. Canadian Broadcasting Corp.*, (1988) 54 D.L.R. (4th) 143 (Ont. C.A.).

¹² *Broadcasting Act*, *supra* note 7; *Ontario Educational Communications Authority Act*, R.S.O. 1990, c. O.12 [OECAA].

¹³ *OECAA*, *Ibid.* at s. 3(a).

¹⁴ *Ibid.* at s. 10.

¹⁵ *Ibid.* (as amended 2008).

¹⁶ *Ontario French-language Educational Communications Authority Act*, S.O. 2008, c. 10.

¹⁷ *Loi Sur La Société de Télédiffusion du Québec*, S.Q. 1996, c S-12.01.

explanation for why other public broadcasters have not been involved in rights disputes is quite simply because they have not had to.

Operating under the assumption that public broadcasters have not made rights claims because they have not had to, there are two implications. First, this means that the s. 2(b) rights of one or more of these broadcasters have not been infringed upon. Part of this might be a function of the fact that the broadcasters I enumerated above were created largely for the purpose of producing and disseminating educational content. Therefore, there is little reason for them to seek to overturn publication bans, for instance. Second, it likely means that those broadcasters have not infringed on the rights of others.

5.2.2 Thematic Discrepancies in the Judicial Empowerment of Broadcasters

Of the three “types” of cases that comprise my data set, a disproportionate amount of these cases were cases where the broadcasters made rights claims in the context of trial proceedings, as well as the ability of broadcasters to cover courtroom proceedings and provincial legislatures. I will expand on this trend in greater detail in the following section. However, broadcasters in these cases did not enjoy much success, regardless of whether they were public or private. For example, broadcasters making claims in these cases were successful in eight out of 46 occasions or 17.40% of the time. In terms of rights challenges that broadcasters made to election legislation, they enjoyed a notably higher success rate. In those cases, broadcasters were successful on seven of 22 occasions or 31.8%. Notably, however, the seven broadcasters that were successful were private rather than public. Finally, there was only one case dealing with hate speech, *R. v. Andrews*, where the decision went against the rights claimant. In the following section, I will elaborate on these results and provide explanations for these trends using the actual decisions themselves as well as drawing on cases that were not included in this data set.

5.3 The Judicial Empowerment of Broadcasters in Canada: The Qualitative Context

In the previous section of this chapter, I was concerned with furnishing an empirical assessment of the judicial empowerment of broadcasters in Canada. In this section, my attention turns to *why* the courts have interpreted the rights of broadcasters in the manner that they have. To do this, I will explore the cases I have selected thematically. I will also discuss cases which I did not select that helps explain those trends and cases which fall into categories not at all represented in my typology: broadcaster advertising, and new media.

5.3.1 Judicial Empowerment in “Press Freedom” Cases

The largest set of cases which appear in my data set are those in which broadcasters challenge provisions or decisions which prohibit them from covering trials, courtrooms or legislatures. In these cases, irrespective of whether or not there is a concrete competing claim, the tension in these disputes is largely between the broadcaster(s) who are claiming a s. 2(b) right, and criminal defendants, Crown Attorneys, or provincial legislatures who assert that allowing broadcasters to have greater access would compromise privacy or procedural rights. In the subsections that follow, I will explore three types of cases: those dealing with publication bans and open courts; those dealing with search warrants and production orders; and finally, those concerned with open legislatures.

5.3.1.A Publication Bans, Open Courts, and Open Legislatures

There are two distinct eras in cases dealing with publication bans and open courts: those cases which were decided before *Dagenais* and those cases which came after *Dagenais*.¹⁸ In the earlier cases, the courts acknowledged that prohibiting broadcasters from covering court proceedings violated their rights to freedom of expression and freedom of the press. For example, in *Re*

¹⁸ *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R 835 [*Dagenais*].

Global Communications Ltd., the Ontario Court of Appeals conceded that mandatory publication bans infringed upon “freedom of the press and other media of communication”.¹⁹ However, the court in that case held that the mandatory ban was a justifiable limit on s. 2(b). The majority reasoned that striking down the impugned provisions would have had an effect on trial fairness in that trial fairness “[would be] quite capable of being shattered by the kind of publicity that can attend...hearing[s] and, once shattered, it may...be quite impossible to put together again”.²⁰

Similarly, in *Toronto Sun* the appellant broadcaster challenged a statutorily created ban which was altered at the discretion of the trial judge.²¹ As was the case in *Global Communications*, the Alberta Court of Appeals in *Toronto Sun* upheld the publication ban.²² The court did note, however, that the scope of the trial judge’s order went too far and allowed the appeal on those grounds rather than striking down the impugned provisions.²³

Three years after *Toronto Sun*, the Canadian Newspapers company mounted a challenge to a provision of the *Criminal Code* which mandated publication bans in sexual assault trials.²⁴ In this case, the s. 2(b) claim was swiftly rejected because mandatory bans were necessary because they encouraged victims of sexual assault to come forward.²⁵ The purpose of the impugned provisions was, and ought to have been, seen to be of considerable importance to the administration of justice. Because of the importance and scope of this object, the Court rejected case-by-case or contextual approaches to deciding these types of cases to protect the identity of sexual assault victims.²⁶

¹⁹ *Re Global Communications Ltd. and Attorney-General for Canada*. (1984) 5 D.L.R. (4th) 634 (Ont. C.A.) at 18.

²⁰ *Ibid.* at 23.

²¹ *Toronto Sun Publishing Corp. v. Alberta (Attorney General)*. 39 Alta. L.R. (2d) 97 (Alta. C.A.) [*Toronto Sun*].

²² *Ibid.* at para. 22.

²³ *Ibid.* at para. 23.

²⁴ *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122 [*Canadian Newspapers*].

²⁵ *Ibid.* at para. 15.

²⁶ *Ibid.* at para. 19. The reasoning in this line of cases was subsequently upheld in *R. v. Squires*. (1992) 11 O.R. (3d) 385 (Ont. C.A.); *R. v. D.M.*, [1993] NSCA.

Where the Court did depart from this trend of protecting the administration of justice was in *Edmonton Journal*.²⁷ In that case, the *Charter* challenge was to provincial legislative provisions which required publication bans in divorce proceedings.²⁸ Cory J. writing for a narrow majority reasoned that such bans could not be saved under s. 1 of the *Charter* because “there is no requisite proportionality between the overly restrictive provisions of s. 30(1) and the important right to report freely upon trial proceedings”.²⁹ Based on this logic, Cory J. distinguished *Edmonton Journal* from *Canadian Newspapers* by noting that the mandatory publication ban, in that case, applied *specifically* to sexual assault cases and as such was considerably narrower in scope than the impugned Alberta ban.³⁰ Moreover, Cory maintained that upholding the publication ban would “[prohibit] the publication of...documents that might have a wide public interest and would prevent the public from knowing about a great many issues in which discussion should be fostered”.³¹

In a spirited dissent, however, La Forest J. viewed s. 30(1) as protecting “the most private aspects of [peoples] lives”.³² La Forest largely followed the Ontario Court of Appeals decision in *Global Communications* and *Canadian Newspapers*. Ultimately, Justice La Forest concluded that s. 30(1) was not crafted as the broad sweeping prohibition that the majority interpreted it to be.³³ I argue that the dissenters went too far. Justice La Forest was effectively advocating for equal rights to privacy for divorce litigants and sexual assault victims. This logic is tenuous insofar as one cannot equate divorce proceedings with sexual assaults. Upholding statutory publication bans in virtually any context severely limits the ability of broadcasters to perform their jobs, but

²⁷ *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1386 [*Edmonton Journal*].

²⁸ *Ibid.* at 1334.

²⁹ *Ibid.* at 1346.

³⁰ *Ibid.* at 1347.

³¹ *Ibid.* at 1348.

³² *Ibid.* at 1370.

³³ *Ibid.* at 1374.

it also would severely limit a fundamental freedom. While limits on the rights of broadcasters might be appropriate in certain situations, they should not be restricted altogether as *La Forest* seems to suggest.

While *Dagenais*, which I will discuss below did change the law on publication bans and open courts, there have nevertheless been subsequent decisions which have addressed statutory bans.³⁴ In those cases, the courts have routinely upheld the publication bans. One of the broader trends which emerged, however, is that the ability of broadcasters to film courtrooms “can [no longer] be [seen] as an absolute freedom without restrictions or control”.³⁵ Similarly, in *R. v. White*, the Alberta court of appeals held that deferring publication of bail hearing proceedings was a reasonable limit on the rights of broadcasters.³⁶ Finally, the Supreme Court upheld, though altered a publication ban in a case in which a teenage girl was the victim of cyberbullying through a fake Facebook account.³⁷ I do not take issue with any of these decisions for two reasons. First, the courts acknowledged that the *Charter* applied and engaged in the analysis that followed. Second, it is not my position in this thesis that *Charter* protections, particularly freedom of expression should be conferred absolutely; instead, my argument is simply that the *Charter* ought to apply to broadcasters and the *Charter* standards which apply to all Canadians in terms of freedom of expression ought to apply to broadcasters as well.

Nevertheless, as I noted above, the law on publication bans changed beginning with the Supreme Court’s decision in *Dagenais*. That case addressed discretionary publication bans.³⁸ *Dagenais* represented a bifurcation in the approaches that courts take when addressing

³⁴ *Société Radio-Canada c. Québec (Procureur Générale)*. 62 C.R. (6th) 99 [*Radio-Canada*]; *White*, *supra* note 1; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 19; *Bragg*, *supra* note 2.

³⁵ *Radio-Canada*, *Ibid.* at para. 21.

³⁶ *White*, *supra* note 1.

³⁷ *Bragg*, *supra* note 2.

³⁸ *Dagenais*, *supra* note 18.

discretionary publication bans. Lamer C.J. writing for the majority affirmed the notion that the previous jurisprudence on publication bans “emphasized the right to a fair trial over the right to freedom of expression”.³⁹ Consequently, the Court established a new common law rule for deciding whether or not to issue a publication ban. The Court crafted this test with a view to incorporating the substance of the *Oakes* test as a means of importing “*Charter* values” into the common law.⁴⁰ The two-part test provides:

- 1.) Such a ban is necessary when such an order is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
- 2.) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.⁴¹

This test represents a significant hurdle for obtaining a publication ban. It also provides for different approaches to cases dealing with discretionary bans as opposed to those dealing with statutorily created publication which are dealt with under the *Charter*. However, it is symptomatic of a larger problem which is that while it imbues the common law with *Charter* values, it also creates an asymmetry between broadcasters and private citizens. This asymmetry is evidenced in the current understanding of the *Charter*’s scope and in judicial understandings of freedom of expression and other rights as they pertain to broadcasters. Based in part on this analysis, I will argue that the *Charter* ought to apply to broadcasters based on public importance in the final part of this chapter.

³⁹ *Ibid.* at 877.

⁴⁰ *Ibid.* at 878.

⁴¹ *Ibid.*

The *Dagenais* test was reformulated a decade later in *R. v. Mentuck*, a case dealing with the trial of an individual who was arrested as a result of a “Mr. Big” police sting operation.⁴² In that case, a unanimous Court restated the *Dagenais* test as follows:

- 1.) Such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably available alternatives will not prevent the risk; and
- 2.) The salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effect on the right to freedom of expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.⁴³

While the *Dagenais/Mentuck* test does make explicit reference to freedom of expression, in my view it does not change the fact that in cases dealing with discretionary publication bans, broadcasters are still unable to make explicit *Charter* claims. Specifically, the Supreme Court has stated that the *Dagenais/Mentuck* test applies “where the rights of the media are engaged”.⁴⁴ However, there is no reference to *Charter* protections or responsibilities for broadcasters. In this sense, then, the *Dagenais/Mentuck* test *might* be an acknowledgement that the *Charter* does not apply to private broadcasters or even the CBC in certain instances. Nonetheless, this test has been affirmed by the Supreme Court and various provincial courts of appeal on numerous occasions and is established law.⁴⁵

A related area where the Court has decided the rights of broadcasters in a similar fashion has been the ability to film provincial legislatures. In *Donahoe*, a narrow majority of the Nova Scotia Court of Appeals held that the *Charter* applies to *actions* taken by legislative assemblies at both

⁴² [2001] 3 S.C.R. 442 [*Mentuck*]. For an in-depth discussion of the Mr. Big technique, see e.g. Timothy E. Moore & Kouri Keenan, “What is Voluntary? On the Reliability of Admissions Arising from Mr. Big Undercover Operations” (2013) 5 *Investigative Interviewing: Research & Practice* 1.

⁴³ *Mentuck*, *Ibid.* at para. 32.

⁴⁴ *Toronto Star Ltd. v. Ontario*, [2005] 2 S.C.R. 188 at para. 7 [*Toronto Star*]; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 19 at para. 13.

⁴⁵ See specifically, *Toronto Star*, *Ibid.*; *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332; *CTV Television Inc. v. R. et al.* (2006) 208 Man. R. (2d) 244.

the provincial and federal levels and that a prohibition on filming the provincial legislature could not be justified on the basis that it was designed to preserve decorum.⁴⁶ The dissenting justices argued that “the guarantee of free expression does not provide a right to access to all government property for the purpose of exercising that right”.⁴⁷

However, on appeal, the Supreme Court took a different view. The Court overturned the decision because the *Charter* did not apply to legislative assemblies.⁴⁸ Specifically, the Court theorized that Parliamentary privilege which extended to legislative assemblies was analogous to judicial independence and that the *Charter* should not apply on those grounds.⁴⁹ Cory J., however, reached a different conclusion. Looking to the meaning s. 32(1), Cory reasoned that the “constitutional power of privilege is not entrenched in the Constitution of Canada and the *Charter* must apply to exercise of that parliamentary privilege”.⁵⁰ The tension here centres around whether or not the Court’s holding in *Operation Dismantle v. The Queen*, where the Court held that the *Charter* did apply to a federal Cabinet decision to allow the United States to test cruise missiles.⁵¹ The broad argument, in that case, was that allowing the Americans to test cruise missiles would lead to nuclear conflict.⁵²

Equating the *Operation Dismantle* precedent with filming provincial legislatures is problematic. Fundamentally, these are two very different issues, and the arguments made in *Operation Dismantle* were rather farfetched. In addition to his conclusion in *New Brunswick Broadcasting Co.* that the *Charter* should apply, Cory J. posited that if the objective was merely to limit the number of cameras in the provincial legislature, that objective could be justified

⁴⁶ *Donahoe v. Canadian Broadcasting Corporation*. (1991) 102 N.S.R. (2d) 271 [*Donahoe*].

⁴⁷ *Ibid.* at 51.

⁴⁸ *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House Assembly)*, [1993] 1 S.C.R. 319.

⁴⁹ *Ibid.* at 354 [*New Brunswick Broadcasting Co.*].

⁵⁰ *Ibid.* at 405.

⁵¹ [1985] 1 S.C.R. 441.

⁵² *Ibid.*

under s. 1, whereas a total ban could not.⁵³ In my view, the Court erred in this case by incorrectly interpreting the *Charter* as it relates to the rights of broadcasters.

5.3.2.B Search Warrants and Production Orders

A related area where broadcasters have enjoyed relatively little success is in regards to search warrants and production orders. *Canadian Broadcasting Corp. v. Lessard* is the landmark decision in that area. In *Lessard*, the CBC launched a *Charter* challenge in response to search warrants that had been issued for their offices.⁵⁴ In finding that the search was constitutionally valid, a majority of the Supreme Court found the argument that the warrant had a chilling effect on freedom of the press unpersuasive.⁵⁵ This was a moot point, however, because the search warrant was upheld under s. 8 of the *Charter* which prohibits unreasonable search and seizures.⁵⁶ This analysis rested in large part on the fact that the material which was covered by the warrant had previously been disseminated.⁵⁷

In her dissent, McLachlin J. rejected that notion, noting in particular that “[f]reedom of the press under the *Charter* must be interpreted in a generous and liberal fashion”.⁵⁸ In outlining her reasons for why this particular search could not be saved under s. 1, McLachlin outline three specific conditions under which a warrant could be issued: “when there are no alternative sources; the importance of the search outweighs the deleterious effects; [and] there is a minimal impairment on freedom of the press”.⁵⁹ McLachlin’s analysis rejects the majority’s view that whether a search warrant violates a broadcasters s. 2(b) rights is a direct result of whether or not

⁵³ *New Brunswick Broadcasting Co.*, *supra* note 49 at 413-414.

⁵⁴ [1991] 3 S.C.R. 421 [*Lessard*]. Note that in this case, the CBC challenged the search warrant under ss. 2(b) and 8 of the *Charter*.

⁵⁵ *Ibid.* at 432.

⁵⁶ *Ibid.* at 447; *Canadian Charter of Rights and Freedoms*, s. 2, Part I of the *Constitution Act, 1982*, being schedule to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 8.

⁵⁷ *Lessard*, *Ibid.* at 446-47.

⁵⁸ *Ibid.* at 450.

⁵⁹ *Ibid.* at 455.

it violates their s. 8 rights. Instead, I would argue that these are two separate issues. A search warrant might be upheld on a s. 8 analysis, but the court should nevertheless explore, as McLachlin did, whether or not it also violates s. 2(b). Furthermore, with search warrants, the distinct possibility exists that they could unveil sources and methods which would likely mean that the confidential sources that broadcasters rely on would not come forward, thus imposing a chilling effect on the fourth estate.⁶⁰

Similarly, in 1997, the Nova Scotia court of appeal unanimously held that journalists could be subpoenaed.⁶¹ The court dismissed both the freedom of the press claim and the freedom of expression claim, noting that both of the CBC's claims were "baseless".⁶² These statements, however, constitute a gross oversimplification of the issues. While the court was correct in noting that a subpoena is less intrusive than a search warrant, they glossed over the fact that it is nonetheless intrusive.⁶³ Regardless of degree, intrusion strikes at the core of *both* freedoms of the press and expression. This line of reasoning has permeated subsequent decisions.

For example, in *National Post*, one of the most important decisions in this area, the Supreme Court conceded that "protection of confidential sources should be treated as if it were an enumerated *Charter* right".⁶⁴ However, the Court rejected the *Charter* claim reasoning that:

"to throw a constitutional immunity around such a heterogeneous and ill-defined group of writers and speakers and whichever 'sources' and on whatever terms they may choose to offer it...would blow a giant hole in law enforcement and other constitutionally recognized values such as privacy".⁶⁵

⁶⁰ This is a point that I will argue in greater detail at the end of this section. Note also that the Court reached a similar conclusion in the companion case, *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459.

⁶¹ *Canadian Broadcasting Corporation v. Batiot*. (1997) 144 D.L.R. (4th) 444.

⁶² *Ibid.* at 8.

⁶³ *Ibid.*

⁶⁴ *R. v. National Post*, [2010] 1 S.C.R. 477 at para. 38 [*National Post*].

⁶⁵ *Ibid.* at 40.

This argument broadens the concerns I raised in regards to the *Batiot* decision. The assertion that there ought to be limits on who broadcasters seek out as “sources” is certainly valid. However, the broader contention that this would be detrimental to law enforcement efforts is problematic.

As an example, the Canadian Association of Journalists (“CAJ”) outlines specific guidelines for using confidential sources. The guidelines make it explicitly clear that “[w]e only promise anonymity when the material is of high public interest and it cannot be obtained any other way”.⁶⁶ The guidelines further note that there are instances where journalists are not, nor should not be willing to go to jail to protect a source and the source should be made aware of this at the outset of the relationship. Finally, the guidelines make clear that “the deal [between the journalist and the source] is off if the source lies or misleads us”.⁶⁷ Presumably, these are practices which most journalists adhere to.

While these are only guidelines and do not necessarily reflect the actual practices of every journalist, they directly contradict some of the assertions made by the Court in *National Post*. For example, the guidelines refute the notion that journalists do not select and vet sources carefully.⁶⁸ Moreover, there are occasions where journalists are willing to cooperate in police investigations at the expense of confidentiality.⁶⁹ The problem, however, arises in cases where the story at issue is of considerable importance such as one which pits freedoms of the press and expression against national security. Finally, the Court in *National Post* raised a concern that allowing more robust protections for the journalist-source relationship would mean that those protections would extend beyond the traditional media and into the realm of new media. While

⁶⁶ Canadian Association of Journalists Ethics Guidelines, online: Canadian Association of Journalists <<http://caj.ca/content.php?page=ethics-guidelines>>.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.* For instance, as I will discuss in greater detail below there is a case currently working its way through the courts in which a journalist engaged an accused terrorist for a story. *R. v. Vice Media Canada Inc.*, [2017] ONCA 231 [*Vice*].

this may well be the case, traditional broadcasters, as well as citizen journalists who use new media, should be afforded the same protections. Using a novel platform to disseminate a message should not preclude one from rights protections and obligations.

In *Vice*, the case discussed above, the Ontario Court of Appeal held, rather generally, that the *Charter* claim being made by Vice Media journalist Ben Makuch was not justiciable.⁷⁰ Even though this case deals in large part with national security concerns, the scope of rights afforded to broadcasters are such that Makuch faces imprisonment pending the outcome of a potential appeal to the Supreme Court. This case, in particular, reinforces my argument in this chapter that the *Charter* should apply to broadcasters. Were this the case, the courts would have to engage in a sincere analysis of whether the production order at issue constituted a “reasonable limit” on Makuch’s rights as a journalist. Part of this inquiry would likely focus on whether or not the communications between Makuch and the presumed terrorist contained information about an imminent threat to national security. An imminent threat ought to be the threshold for infringing on the rights of a broadcaster because anything shorter would give the courts wider latitude to encroach upon these rights.⁷¹

Currently, the only legal framework crafted to protect journalists in this area is the *Wigmore* criteria. That test sets out four requirements for what relationships are deserving of privilege:

- 1.) The communications must originate in confidence that they will not be disclosed.
- 2.) The element of the confidentiality must be essential to the full satisfactory maintenance of the relation between the parties.
- 3.) The relation must be one which in the opinion of the community ought to be sedulously fostered.

⁷⁰ *Ibid.*

⁷¹ What constitutes an “imminent threat” is rather subjective. Courts would have to establish specific parameters to define a threat as imminent.

- 4.) The injury that would inure to the relation by disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.⁷²

These requirements are grounded in the common law, and the Court in *National Post* went so far as to assert that confidential sources did not enjoy *Charter* protection.⁷³

What these decisions make clear is that the courts have been reluctant to acknowledge the rights of broadcasters as it relates to the journalist-source relationship. As I noted above in regards to publication bans, these decisions have a significant chilling effect on the constitutional protections afforded to broadcasters under s. 2(b) of the *Charter*. Recently, however, the Senate of Canada has proposed legislation, Bill S-231 which would give journalists the right to not divulge either sources or the content of communications with those sources.⁷⁴ Additionally, S-231 would amend the *Criminal Code* in such a way that securing a search warrant for a broadcaster's office or work product would be considerably more difficult.⁷⁵

This legislation was proposed in part out of concern for incidents' in Québec where journalists were being investigated by Québec provincial police, the Sûreté du Québec.⁷⁶ However, in the Parliamentary debate on Bill S-231, there was explicit reference on more than one occasion to the situation concerning Mr. Makuch.⁷⁷ Adopting this legislation would be an important step towards broadening protections afforded to broadcasters, however, it does not confer upon broadcasters the level of protection afforded by the robust *Charter* protections. This

⁷² *R. v. Gruenke*, [1991] 3 S.C.R. 363 at 310.

⁷³ *National Post*, *supra* note 64 at para. 64.

⁷⁴ Bill S-231, *An Act to amend the Canada Evidence Act and the Criminal Code (Protection of Journalistic Sources)*, 1st Sess, 42nd Parl, 2017 (as passed by the Senate 11 April 2017).

⁷⁵ *Ibid.*

⁷⁶ Allan Woods, "Police Spying Inquiry Hears of Another Targeted Quebec Journalist", *The Toronto Star* (April 10, 2017) online: The Toronto Star <<https://www.thestar.com/news/canada/2017/04/10/police-spying-revelations-led-to-urgent-reforms-in-quebec-inquiry-hears.html>>.

⁷⁷ Canada, House of Commons Debates, 9th June 2017 (Brigitte Sansoucy) online: Open Parliament <<https://openparliament.ca/debates/2017/6/9/brigitte-sansoucy-3/>>; Canada, House of Commons Debates, 11 May 2017 (Matthew Dubé) online: Open Parliament <<https://openparliament.ca/debates/2017/5/11/matthew-dube-9/>>.

is especially true in terms of keeping the identity of sources confidential, which is central to the journalistic process.

5.3.3 Election Advertising and Publication Bans on Polls and Results

In regards to cases dealing with elections, there are two contexts within which the courts have addressed the rights of broadcasters. These are cases dealing with campaign advertising either by political parties or third parties, and cases addressing the dissemination of opinion polls and election results.⁷⁸ I will address these two types of cases in turn.

Rather generally, in terms of rights claims, the jurisprudence dealing with election advertising has tended to go against broadcasters. In the first of these cases, *Reform Party of Canada v. Canada (Attorney General)*, a majority of the Alberta court of appeal upheld limits on campaign advertising and airtime quotas which favoured established parties.⁷⁹ In deciding that case, the court reasoned that while the impugned provisions were discriminatory towards fringe parties, the objective of the law was to provide those parties that had a reasonable chance at forming government greater access to the airwaves.⁸⁰ The argument that the airtime formula ought to favour parties which are objectively capable of contending to form government is a reasonable one. However, the dissent, in this case, focused on the fact that fringe parties nevertheless play an important role in raising issues in elections for contending parties and the public to consider.⁸¹ While fringe parties might play an important role in framing the issues, this does not necessarily mean that they should be given the same amount of access to the airwaves as contending parties. I share the majority's view here that this is an issue which arbitrators can help mitigate.

⁷⁸ Note that because the actions for which they seek rights protection, the political parties and third parties involved are broadcasters as I defined them in chapter 1.

⁷⁹ [1995] 123 D.L.R. (4th) 366.

⁸⁰ *Ibid.* at paras. 61-62. Part of this decision was based on the fact that the legislative scheme did provide for an arbiter to resolve disputes between emerging and established parties. *Ibid.*

⁸¹ *Ibid.* at para. 155.

Similarly, in *Harper*, the Supreme Court noted that in cases dealing with election advertising and campaign finance, courts ought to take a deferential approach to Parliament and upheld the limits on those grounds.⁸² The minority argued, unpersuasively in my view, that the concern over disproportionate election spending was merely theoretical and there was no evidence that it actually had an effect on the outcome of elections.⁸³

One case in which broadcasters were successful, however, was in regards to a prohibition on election advertising between the dropping of the writ and 29 days before the election.⁸⁴ In that case, the provisions failed the *Oakes* requirement that the government action be pressing and substantial on the grounds that “[t]here can be no need to suppress input [on elections] merely because it might have an impact on elections”.⁸⁵ This is certainly a valid conclusion, the impugned prohibition was far too broad.

The second type of cases where election laws conflict with the rights of broadcasters are cases in which the courts addressed the dissemination of poll results and the early dissemination of election results. As with *Somerville, Thomson Newspapers* dealt with legislation which banned the publication of poll results in a three-day period leading up to an election.⁸⁶ Bastarache J. writing for the majority found that the exact purpose of the prohibition was unclear and was unconvinced by the Attorney General’s argument that it was pressing and substantial because

⁸² *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 at para. 88.

⁸³ *Ibid.* at para. 34. It is important to note that at the time of this decision, the United States Supreme Court had already dealt with the issue, holding that provisions within the *Bipartisan Campaign Reform Act* (“BCRA”) addressing campaign finance and election advertising were necessary inasmuch as those provisions close loopholes which would otherwise have been exploited by large corporations. *McConnell v. Federal Election Commission*, [2003] 540 U.S. 93 at 118. I will discuss this case in greater detail in the following chapter.

⁸⁴ *Canada (Attorney General) v. Somerville*. (1996) 136 D.L.R. (4th) 239.

⁸⁵ *Ibid.* at paras. 77, 68.

⁸⁶ *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877.

publishing such polls would supersede other values that Canadians’ take into account when voting.⁸⁷

In *Bryan*, however, the Supreme Court upheld the conviction of a broadcaster who had disseminated election results from the Maritimes before polling closed in other parts of the country.⁸⁸ Abella J. mounted a persuasive argument that “the right of the media...to publish election results...is an essential part of the democratic process, clear and convincing evidence is required to justify limiting the availability of this information”.⁸⁹ Additionally, the majority’s conclusion that disseminating results early would privilege Canadians in the Western Provinces is tenuous at best.⁹⁰ In *Bryan*, there was no clear link established between disseminating results from Atlantic Canada and changes in voter behaviour in the Western provinces and territories.⁹¹ As a result, the majority’s concerns are largely speculative.

5.3.4 Hate Speech

The only case in my data set addressing hate speech was *R. v. Andrews*, the companion case to *Keegstra*.⁹² In that case, the Court upheld the conviction and in doing so, echoed its reasons from *Keegstra* which I discussed at length in the previous chapter. One case which I rejected because the *Charter* was not addressed, was *Lund v. Boissin*. There, the broadcaster published a homophobic editorial.⁹³ The *Boissin* case certainly raises some questions. For example, in that case, there was no competing s. 15 claim from the LGBTQ community in response to the freedom of expression claim. If there were a case in which a freedom of expression claim was in competition with an equality claim by the LGBTQ community, how would a court decide that

⁸⁷ *Ibid.* at paras. 101-102.

⁸⁸ *R. v. Bryan*, [2007] 1 S.C.R. 527.

⁸⁹ *Ibid.* at para. 110.

⁹⁰ *Ibid.* at para. 27.

⁹¹ *Ibid.* at 117-18.

⁹² [1990] 3 S.C.R. 870.

⁹³ (2012) 365 D.L.R. (4th) 459.

issue in the future? On several occasions, the Supreme Court has listed sexual orientation as an analogous ground under s. 15.⁹⁴ Based on this, I argue that were such a conflict to arise, the equality right would likely supersede the right to freedom of expression.

5.3.5 Broadcaster Advertising

Adbusters Media Foundation is a radical media organization whose primary goal is to raise awareness about the negative effects of North American consumerism.⁹⁵ In 2003, Adbusters requested that Global and the CBC broadcast ten videos which were critical of consumer advertising.⁹⁶ Those requests were rejected, and Adbusters brought suit alleging this violated their freedom of expression.⁹⁷ The British Columbia Supreme Court dismissed this application, holding that the issue was not justiciable, largely because the *Charter* did not apply.⁹⁸ On appeal, the B.C. court of appeals found that whether or not the *Charter* applied was something on which “reasonable persons might differ” and that the trial court was incorrect in dismissing the case outright, ordering a new trial.⁹⁹ However, as of July 2017, Adbusters has not yet pursued a new trial. The importance of the ability of Adbusters to not only express themselves but also to have their message heard is something I will discuss in greater detail in the following section.

⁹⁴ See *Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3; *Little Sisters Book and Arts Emporium*, [2000] 2 S.C.R. 1120.

⁹⁵ See especially, Kalle Lasn, *Culture Jam: How to Reverse America's Suicidal Consumer Binge – And Why We Must* (Toronto: Harper Paperbacks, 2000) [Lasn]. Note also that Adbusters is credited with initiating the recent “Occupy” movement.

⁹⁶ *Adbusters Media Foundation v. Canadian Broadcasting Corp.*, 2008 BCSC 71, (2008) Carswell BC 286 (*Adbusters I*).

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Adbusters Media Foundation v. Canadian Broadcasting Corporation*. (2009) 92 B.C.L.R. (4th) at para. 15 [*Adbusters II*].

5.3.6 New Media

As yet, Canadian courts have not yet acknowledged the *Charter* in cases dealing with new media, although there have been broadcasters that have made *Charter* claims.¹⁰⁰ Courts have held that these cases are best addressed through civil or administrative law.¹⁰¹ Nevertheless, this is an important area to explore because new media is at the nexus of the other issues discussed not only in this chapter but this entire thesis more broadly.

However, as broadcasting evolves, broadcasters still encounter issues similar to those encountered by traditional media. Consider for example, a citizen journalist who “tweets” their thoughts in a well-researched, well-articulated manner and uses confidential sources in accordance with the guidelines set out by the CJA rather than writing a traditional article. Should that citizen journalist be distinguished from a conventional broadcaster? I would argue that the two are indistinguishable. Instead, I argue that broadcasters who decide to disseminate messages that are intended to “inform, enlighten, and entertain” should not be viewed any differently than newspapers or television stations. One problem with this approach, however, is that in the internet age, it is much more difficult to discern who constitutes such a broadcaster from those who do not follow the same practices. Currently, the Court has refused to apply the *Charter* in cases dealing with new media. However, I argue that adding a layer to any analysis by requiring a court to determine whether the person or entity in question is a broadcaster is a more preferable approach. The reasons set out in the following section provide a compelling explanation for why presuming that the *Charter* does not apply in new media cases is too arbitrary and myopic.

¹⁰⁰ *Pridgen v. University of Calgary*. (2012) 350 D.L.R. (4th) 1 [*Pridgen*]; *St. Lewis v. Rancourt*, [2015] CarswellOnt 10241; *Taylor-Baptiste v. Ontario Public Service Employees Union*. (2015) 126 O.R. (3d) 481 [*Taylor-Baptiste*]; *Awan v. Levant*, [2016] ONCA 970 [*Levant*].

¹⁰¹ See e.g. *Pridgen*, *Taylor-Baptiste*, and *Levant*, *Ibid*.

5.4 The Public Importance of Broadcasting

As I have argued throughout this chapter, one of the most compelling reasons why the Supreme Court of Canada ought to adopt the Wilson test from *McKinney* is that broadcasting is of considerable public importance. In this regard, the *Broadcasting Act* explicitly states that the Canadian broadcasting system is “a public service essential to the maintenance and enhancement of national identity and cultural sovereignty”.¹⁰² Moreover, the government has acknowledged the importance of broadcasting by subjecting it to a unique regulator, the CRTC.

Furthermore, broadcasting serves an important public function not only because it is recognized as such by the government, but also because of its power to shape the lives of Canadians. Recent statistics show that Canadian adults watch an average of 30 hours per week of television.¹⁰³ Because of the amount of time that Canadians devote to television consumption, it is difficult to argue that broadcasting does not play an important role in Canada. In fact, Marshal McLuhan theorized that the “medium (television) is the message” because it is the “medium that shapes and controls the scale and form of human association and action”.¹⁰⁴ McLuhan argued that television had a profound impact on society. His theory held that all technology is a form of media, and that all media is an extension of human faculties in the same way that a car is an extension of a human foot.¹⁰⁵ The more pervasive a medium is, the more it symbolizes an extension of all human culture. McLuhan argued that as far as media is concerned, television is

¹⁰² *Broadcasting Act*, *supra* note 7 at s. 3(1)(b).

¹⁰³ Michael Oliveira, “Canadians Watch 30 Hours of TV but for Many Web Dominates Free Time”, *The Toronto Star* (April 26, 2013) online: The Toronto Star <https://www.thestar.com/life/technology/2013/04/26/canadians_watch_30_hours_of_tv_but_for_many_web_dominates_free_time.html>. It is important to note as well that much of this media consumption is shifting to the internet-based broadcasting services. These statistics do not include the time that Canadians spend using new media such as Twitter.

¹⁰⁴ Marshal McLuhan, *Understanding Media: The Extension of Man*, 2nd ed. (Toronto: Taylor Francist Ltd., 2001) at 9.

¹⁰⁵ *Ibid.*

about as pervasive as it gets.¹⁰⁶ In interpreting this theory, scholarship posits that since television programming is decided by so few, it is invariably represented by homogeneous values.¹⁰⁷ Thus, what Canadians get to see on television and on the internet should of great public interest both sociologically and economically. For these reasons, then, on the basis of its undeniable public importance, the *Charter ought* to apply to broadcasters through the Wilson test in *McKinney*.

5.5 Criticisms of the Public Importance Argument

Critics of my argument that the *Charter* ought to apply to broadcasters on the basis of public importance would argue that the purpose of the *Charter* is to limit government action that encroaches on civil liberties and that regulating private conduct is the responsibility of government rather than the courts.¹⁰⁸ It follows that the ability of legislatures to regulate private conduct “makes it unnecessary...to extend the *Charter*’s reach to matters outside the fluid boundaries set by governmental action”.¹⁰⁹

Throughout this thesis, I have argued that the *Charter* should apply to matters of considerable public importance. As I have shown, there is a strong argument for such a definition to include broadcasting. The concern that expanding the *Charter*’s scope in this way would complicate the law is overstated. I have noted elsewhere in this thesis that the effect would be an added layer to rights litigation. In that sense, it would make *Charter* litigation more consistent with the American approach where rights disputes emerge organically from private disputes. An additional issue with this approach might be with the text of s. 1. Professor Hogg has noted that

¹⁰⁶ *Ibid.* It stands to reason that this undoubtedly applies to new media as well.

¹⁰⁷ Mark Federman, “What is the Meaning of the Medium is the Message?” online: The University of Toronto <http://individual.utoronto.ca/markfederman/article_mediumisthemessage.htm>.

¹⁰⁸ Peter W. Hogg, *Constitutional Law of Canada Student Edition* (Toronto: Carswell, 2012) at 37-30 [Hogg].

¹⁰⁹ *Ibid.* at 37-33. Professor Peter Hogg argues that extending the *Charter* to the private sphere would unnecessarily complicate private bodies of law, including but not limited to, family law and tort law. *Ibid.* Similarly, Patrick Monahan has argued that expanding the *Charter*’s scope would replace the statutory law with the *Charter* and encroach upon legislative autonomy. See Patrick J. Monahan, *Constitutional Law*, 3rd ed (Toronto: Irwin law, 2006) at 406.

private disputes cannot result in limits that are “prescribed by law” which would result in contradictions within *Charter* interpretation.¹¹⁰ In my view, this does not present a considerable barrier. It would simply require the Court to re-interpret that aspect of s. 1. Additionally, expanding the *Charter*’s scope to include matters of great public importance need not represent a radical departure from the Court’s current understanding. Indeed, the Court’s decisions concerning the scope of s. 32 indicate that the Court has been reticent to interpret s. 32 in a broad and liberal manner.¹¹¹

Substantively, there might also be an argument that I am arguing for the Supreme Court of Canada to adopt a less restrictive approach to its reasonable limits analysis in cases involving broadcasters. This is not the case. Part of my broad argument in this thesis is that freedom of expression and freedom of press cases involving broadcasters ought to be adjudicated in the same manner as freedom of expression claims involving private citizens or other actors. This argument should not be construed to suggest that the Supreme Court of Canada needs to change its approach to freedom of expression or reasonable limits.

5.6 Conclusion

In this chapter, I explored the judicial empowerment of broadcasters both empirically and qualitatively. These results indicate that Canadian courts have not afforded broadcasters robust rights protections. In my view, this is problematic. I argued in this chapter that the scope of the *Charter*’s application *ought* to be construed in such a way that it applies to broadcasters.

Interpreting s. 32(1) of the *Charter* in this way would make it more difficult for government

¹¹⁰ Hogg, *Ibid.* There is precedent for this. As an example, the Court found a municipal transit authority’s policy regulating advertising on the sides of buses to be “prescribed by law”. *Greater Vancouver Transit Authority v. Canadian Federation of Students*, [2009] 2 S.C.R. 295.

¹¹¹ See e.g. *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

actors to violate the rights of broadcasters. The importance of conferring broader rights protection to broadcasters is evidenced in particular in the realm of new media where these rights are rendered even more tenuous than the rights of traditional broadcasters, *specifically* because of the current body of jurisprudence dealing with the rights of broadcasters.

Chapter 6

The Judicial Empowerment of Broadcasters in the United States

6.1 Introduction

In this chapter, I will examine the judicial empowerment of broadcasters in the United States. In the first part of this chapter, I will explore the judicial empowerment of broadcasters quantitatively. There, I will argue that in almost half the cases involving broadcasters, the Court has empowered those actors. In the second part of this chapter, I will look at the content of the decisions to explain why the Court has been as willing as it has to empower broadcasters. In the final part of this chapter, I will argue that norms and values have emerged in the United States concerning the importance of freedoms of speech and freedom of the press. Similarly, in these cases, there is evidence to suggest that the Court is bound by past precedent.

6.2 The Judicial Empowerment of Broadcasters in the United States: The Quantitative Context

In this section, I will present a quantitative perspective of the judicial empowerment of broadcasters in the United States. These results are displayed in Table 2. There are two broad trends which emerge from this analysis that I will discuss in greater detail. First is the considerable overrepresentation of private broadcasters within this set of cases. The second trend is the thematic parity in terms of the success that broadcasters enjoy in different types of cases.

Table 2 Rights Outcomes in American Jurisprudence

				Type of Broadcaster									
				Public					Private				
				Broadcasters Role									
				Making a Claim	Responding to a Claim	Competing Claim	Intervener /Applicant	Making a Claim	Responding to a Claim	Competing Claim	Intervener /Applicant	Row Subtotals	
Court's Decision	Against Rights Claimant	Subject Matter	4	0	0	0	0	1	0	0	0	1	
			3	0	0	0	0	2	0	0	0	2	
			2	0	0	0	0	1	0	0	0	1	
			1	0	0	0	0	11	1	0	5	17	
	Public & Private Total												22
	For Rights Claimant	Subject Matter	4	0	0	0	0	1	0	0	0	1	
			3	0	0	0	0	5	0	0	1	6	
			2	0	0	0	0	1	0	0	0	1	
			1	1	0	0	1	10	0	1 ¹	1	14	
	Public & Private Total												21
Column Subtotals			1	0	0	1	32	1	1	7			

Table 2 Classifies rights claimant(s) involved in American cases based on whether or not the court ruled in favour of the rights claimant(s). American cases fell into one of five broad categories which correspond to the number under the subject matter heading: (1) Press Freedom, (2) Elections, (3) Defamation/Hate Speech/Obscenity, (4) Broadcaster Advertising.² Unless otherwise indicated in the footnotes below, rights claimants refers to broadcasters in this table

6.2.1 The Underrepresentation of Public Broadcasters

In this data set, private broadcasters were successful on 19 of 41 occasions or 46.34% of the time. What these results indicate is that the American Court has been rather willing to entertain and allow the rights claims made by private broadcasters. There are two explanations for this trend. First, rights in the United States are conferred without limits, and rather generally, without

¹ *Nebraska Press Association v. Stuart*, [1976] 427 U.S. 539 [*Nebraska Press*]. In that case, freedom of the press was in competition with the right to a fair trial. The Supreme Court decided in favour of the broadcaster. It is important to note that broadcasters in this category were counted in the “Against Rights Claimant” total.

² The four categories outlined above include cases dealing with the following topics: (1) Editorials, the Fairness Doctrine, Publishing Classified Documents, Subpoenas, Access to Prisons, Equal Access, Publication Bans, Search Warrants, Student Newspapers; (2) Election Advertising and Campaign Finance; (3) Defamation, Hate Speech, Obscenity; (4) Broadcaster Advertising.

qualifications. Second, as I will discuss in the following section, the Court has set out considerable barriers to justify violating freedoms of expression and the press. Conversely, there was only one case where public broadcasters were involved.³ While there have also been cases at the federal circuit appellate level involving public broadcasters, these cases are the exception rather than the rule.⁴ As I will discuss below, this issue goes beyond whether or not public broadcasters enjoy First Amendment protections and obligations, but whether or not these broadcasters are and will continue to be viable and sustainable actors.

The current system of public broadcasting in the United States was established in 1967 with the adoption of the *Public Broadcasting Act*.⁵ That legislation created a central body responsible for governing public broadcasting in the United States, known as the Corporation for Public Broadcasting (“CPB”).⁶ The legislative objective in creating the CPB was to “facilitate the full development of public telecommunications in which programs of high quality, diversity, creativity, excellence, and innovation...will be made available to the public”.⁷ The *Act* provided for the creation of a national television broadcaster, the Public Broadcasting Service (“PBS”) as well a national radio broadcaster, the National Public Radio (“NPR”) and various State-level public broadcasters.⁸

³ in that case, the Supreme Court struck down FCC prohibitions on editorializing as being overbroad. *Federal Communications Commission v. League of Women Voters*, [1984] 468 U.S. 364 [*League of Voters*].

⁴ This applies within this data set. See e.g. *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982) [*Muir*]. Given the absence of public broadcasters, there are no readily identifiable quantifiable trends in terms of public broadcasters.

⁵ *Public Broadcasting Act*, 47 U.S.C. § 396 (1967) [*Public Broadcasting Act*].

⁶ *Ibid.*

⁷ *Ibid.* at (g)(1)(A).

⁸ *Ibid.* at (6)(A); (4); (2)(A). It is important to note that PBS and NPR are umbrella organizations which create content for their local subsidiaries.

In addition to the CPB, public broadcasters in the United States are also subject to regulation by the Federal Communications Commission (“FCC”), a statutorily created federal regulator.⁹ The FCC’s mandate is to “regulat[e]...communication...by wire or radio so as to make available...a rapid, efficient, Nation-wide, and world-wide wire and radio communications service”.¹⁰ The FCC grants licenses to both public and private broadcasters with a view to this policy.¹¹ Therefore, public broadcasters in the United States report to the President and Congress through the CPB and the FCC.¹²

The *Public Broadcasting Act* also allocates federal funding for the CPB which is intended to support American public broadcasters to an extent.¹³ Recently, the level of funding allocated to public broadcasting in the United States has been approximately \$400 million although this figure has remained fairly stagnant.¹⁴ This means that public funds make up approximately 15% of public broadcasters’ operating budgets.¹⁵ Adding to the precarity of public broadcasting in the United States is the fact that past administrations have routinely threatened and attempted to defund the CPB.¹⁶ Further complicating the matter is the fact that the *Public Broadcasting Act* explicitly prohibits public broadcasters to raise revenues through commercial advertising.¹⁷

⁹ *Communications Act*, 47 U.S.C. § 151 (1934) [*Communications Act*]. The *Communications Act* was amended in 1996 with the adoption of the *Telecommunications Act*, 47 U.S.C. (1996) (as amended). The dominant purpose of the *Telecommunications Act* was to account for the advent of the internet and loosen restrictions on who could own a broadcasting station.

¹⁰ The Public and Broadcasting, online: FCC <<https://www.fcc.gov/media/radio/public-and-broadcasting#PROGRAMMING>>. [Public and Broadcasting]

¹¹ *Ibid.*

¹² *Public Broadcasting Act*, *supra* note 5 at i; *Communications Act*, *supra* note 9 at 4(k).

¹³ *Public Broadcasting Act*, *Ibid.* at k(1).

¹⁴ Robert K. Avery, “The Public Broadcasting Act of 1967: Looking Ahead by Looking Back” (2007) 24 *Critical Studies in Media Communication* 4 at 362 [Avery]. Note that this does reflect the funding that is provided to public broadcasters at the state level.

¹⁵ *Ibid.* at 361.

¹⁶ See generally, James Ledbetter, *Made Possible By...The Death of Public Broadcasting in the United States* (New York: Verso, 1997). For example, former Speaker of the House of Representatives, New Gingrich asserted that “[he] would not recognize any proposal that will appropriate money for the CPB”. *Ibid.* at 3. Similarly, Presidents Richard Nixon and George W. Bush sought to take action which would cripple the CPB. Avery, *supra* note 14 at 360.

¹⁷ *Public Broadcasting Act*, *supra* note 5 at s. 399(b).

Consequently, public broadcasters in the United States rely on donations in order fund their operating budget.¹⁸

As such, public broadcasters in the United States do not have the resources to pursue rights claims. However, there is another explanation for why public broadcasters are significantly underrepresented in this data set. The FCC has rather strict guidelines for the types of programming that broadcasters can disseminate. For example, FCC regulations explicitly prohibit “objectionable programming” which includes, but is not limited to “[p]rogramming inciting lawless action” and “[o]bscene, [i]ndecent, or [p]ropane [p]rogramming”.¹⁹ When viewed in light of their sources of funding, these restrictions have arguably dissuaded public broadcasters from producing and disseminating content that is salacious or inflammatory and from which a rights claim might emerge.

6.2.2 Thematic Trends in the Judicial Empowerment of Broadcasters

The broadest category of cases in the United States are those in which I have referred to as “press freedom” cases.²⁰ In these case, broadcasters succeeded in 14 of 29 occasions, or 48.2%. This figure is significant. It confirms my earlier assertion that the data supports a finding that the Supreme Court of the United States has empowered broadcasters through its jurisprudence. This trend is amplified in cases dealing with defamation, hate speech, and obscenity. In those cases, broadcasters were successful on five of seven occasions, or 71.4%. The Court’s treatment of defamation, hate speech, and obscenity indicates that it has interpreted the First Amendment rather liberally. In the cases I have selected, the number of cases in which the Supreme Court addressed rights claims in the context of election law or broadcaster advertising is not significant

¹⁸ *Supra* note 15.

¹⁹ Public and Broadcasting, *supra* note 10.

²⁰ For a complete list of the cases in this category, see note 2 above.

enough to draw out truly meaningful trends. In the following section, I will draw on the substance of these cases to explain these trends.

6.3 Judicial Empowerment of Broadcasters in the United States: The Qualitative Context

In the previous section, I provided a quantitative perspective of the judicial empowerment in the United States. In particular, I noted two trends: that there was a dearth of public broadcasters involved in rights disputes; and that in the cases I selected, the Supreme Court of the United States has been willing to expand the scope of the First Amendment as it relates to broadcasters. This raises the question of why are broadcasters as successful as they are in rights cases in the United States? To answer this question, I will evaluate the substantive reasons for judgment in these cases.

6.3.1.A Freedom of the Press Cases

Within the American cases I selected for this thesis, there were nine cases which I have termed “freedom of the press” cases.²¹ The earliest of these cases, *Mills v. Alabama*, dealt with the issue of political editorials.²² In that case, the editor of the Birmingham Post-Herald wrote an editorial “strongly urg[ing] the people to adopt the mayor-council form of government”.²³ The editor was charged under the *Alabama Corrupt Practices Act* (“*ACPA*”) which, in part, prohibited “the editor of a daily newspaper [from] writ[ing] and publish[ing] an editorial on election day urging people to vote a certain way”.²⁴ In a rather strong opinion, a majority of the Supreme Court held that the *ACPA* was far too restrictive.²⁵ Black J. writing for the majority

²¹ Here, freedom of the press refers to a narrow conception of that concept rather the broader characterization of freedom of the press presented by the First Amendment and the myriad, related legal issues which arise from that constitutional provision. Rather, my conception of freedom of the press cases in this subsection refers to five specific types of cases dealing with the following issues: editorials, the fairness doctrine, publishing classified documents, equal access, and student newspapers.

²² *Mills v. Alabama*, [1966] 384 U.S. 214 [*Mills*].

²³ *Ibid.* at 215.

²⁴ *Ibid.*

²⁵ *Ibid.* at 220.

reasoned that as far as the *ACPA* was concerned “it [would be] difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press”.²⁶

Black argued, rather persuasively, that on those grounds “no test of reasonableness can save a state law from invalidation as a violation of the First Amendment” where the law in question prevents newspapers from encouraging voters to adopt a particular position.²⁷

The Court’s decision in *Mills* is entirely uncontroversial. In terms of First Amendment violations, the type of prohibition on newspaper activity at issue in *Mills* is about as egregious as it gets. In subsequent cases dealing with editorials and editorializing on public access television, the Supreme Court has empowered broadcasters, although for different reasons. In *Pickering v. Board of Education*, an Illinois high school teacher was dismissed for directly contributing to articles which were critical of how the local school board handled its fundraising efforts for new schools.²⁸ Marshall J. noted that “[t]he question of whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration...cannot...be taken to be exclusive”.²⁹ The Court concluded that the school board’s interest in limiting the ability of its teachers to comment on public issues did not outweigh the teachers right to criticize the school board on matters of public concern.³⁰

Similarly, a majority of the Supreme Court has held that restricting the ability of public broadcasters to present editorial opinions; the Court noted in particular that it “far exceed[ed] what was necessary to protect against the risk of governmental interference or to prevent the public from assuming that editorial opinions by public broadcasting stations represent the official

²⁶ *Ibid.* at 219.

²⁷ *Supra* note 25.

²⁸ [1968] 391 U.S. 563 [*Pickering*].

²⁹ *Ibid.* at 572.

³⁰ *Ibid.* at 573.

view of the government”.³¹ In that case, Brennan J. posited that government restrictions on broadcasting “have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial government interest”.³² That standard is a recurring theme in these cases and helps explain why the Court has empowered broadcasters to the extent that it has. Nevertheless, it is difficult to argue broadcasters should not be allowed to comment on public issues.³³

However, a related area where broadcasters have not benefited from the Court’s decisions is in terms of cases dealing with equal access to air and radio waves. In 1967, the Court was asked to consider whether the “Fairness Doctrine”, an FCC rule that broadcasters present each side of a given issue, violated the First Amendment.³⁴ In upholding the Fairness Doctrine, a majority of the Court noted that the First Amendment burden on the government was not overly onerous.³⁵ This was because “[t]he right to free speech of a broadcaster... does not embrace a right to snuff out the free speech of others”.³⁶ In the context of broadcast television, the Court re-affirmed its decision that equal access requirements were constitutional in *Turner*.³⁷ Nevertheless, it is important to note that in between *Red Lion* and *Turner*, the Court issued a decision wherein it rejected the equal access argument on First Amendment grounds.³⁸ In that case, the Democratic National Committee sought paid access to the airwaves to broadcast an advertisement concerning

³¹ *League of Voters*, *supra* note 3 at 395.

³² *Ibid.* at 381. (emphasis added)

³³ This is an argument that the dissenters in *League of Women Voters* attempted to make. Specifically, they contended that “Congress has rationally determined that the bulk of taxpayers... would prefer not to see the management of local educational stations promulgate its own private views on the air at taxpayer expense”. *Ibid.* at 405.

³⁴ *Red Lion Broadcasting Co. v. Federal Communications Commission*, [1969] 395 U.S. 367 [*Red Lion*].

³⁵ *Ibid.* at 401.

³⁶ *Ibid.* at 387

³⁷ *Turner Broadcasting Systems Inc. v. Federal Communications Commission*, [1997] 520 U.S. 180 [*Turner*].

³⁸ *Columbia Broadcasting Systems Inc. v. Democratic National Committee*, [1973] 412 U.S. 94 [*CBS*].

the Vietnam War. In terms of newspapers, the Supreme Court has held that compelling newspapers to give political candidates equal access violated the First Amendment.³⁹

There are two important points here. First, requiring broadcasters to present a range of perspectives on a given issue of public importance invariably contributes to the marketplace of ideas. Thus, while doing so may restrict the rights of broadcasters in the narrow sense that it limits the scope of their editorial judgment, it also expands the ability of other actors. This includes other broadcasters to disseminate perspectives and views which contribute to, and have the potential to enhance public discourse and understanding on a given topic.

Second, it is important to note that in this era, the amount of airtime on television and the radio was limited. This was a fact that largely informed the Court's equal access decisions.⁴⁰ However, recent technological developments have mitigated the importance of equal access. For example, the advent of satellite television, radio, and the internet have significantly loosened the time and space restrictions on broadcasters.⁴¹

Similarly, the Supreme Court has also decided cases dealing with the publication of classified documents and student newspapers.⁴² In *New York Times Co. v. United States*, the New York Times published the contents of a classified United States Department of Defense study revealing the true scope of its bombing activities in Vietnam, commonly referred to as the "Pentagon Papers". Then President Richard Nixon sought to prohibit the publication of the Pentagon Papers as well as other classified documents on the basis of executive privilege.⁴³ In a scathing opinion, Black and Douglas JJ. opined that "every moment's continuance of the

³⁹ *Miami Herald Publishing Co. v. Tornillo*, [1974] 418 U.S. 241.

⁴⁰ *Red Lion*, *supra* note 34 at 383; *CBS*, *supra* note 38 at 102; *Turner*, *supra* note 37 at 188.

⁴¹ Readers should note that in the cases within this data set, the Supreme Court has not addressed the issue of equal access since its 1994 decision in *Turner*.

⁴² *New York Times Co. v. United States*, [1971] 403 U.S. 713 [*New York Times Co.*]; *Hazelwood School District v. Kuhlmeier*, [1988] 484 U.S. 260 [*Kuhlmeier*].

⁴³ *New York Times*, *Ibid.*

injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment”.⁴⁴ While there is an argument to made for prohibiting the publication of classified government documents, allowing the President of the United States to do so on the basis of executive privilege would result in a considerable chilling effect on the rights of broadcasters.

6.3.1.B Subpoenas, Access to Prisons, Publication Bans, and Search Warrants

The second set of cases dealing with freedom of the press address subpoenas, access to prisons, publication bans, and search warrants. Each of these types of cases will be discussed in turn. In this data set, *Branzburg v. Hayes* is the only case dealing with subpoenas.⁴⁵ In *Branzburg*, the Court found that requiring a journalist to answer to a grand jury subpoena and identify confidential sources was justifiable under the First Amendment.⁴⁶ White J. posited that the chilling effect on journalists as an argument for exempting journalists from answering subpoenas was unpersuasive.⁴⁷ There was, however, no substantial analysis in the majority opinion to support that particular conclusion. Douglas J. pointed this out in his dissent, noting that “[u]nless [a journalist] has a privilege to withhold the identity of his source, he will be the victim of government intrigue or aggression”.⁴⁸ As I discussed in the previous chapter, compelling journalists to reveal their sources, through whatever means, is likely to result in a considerable chilling effect.

On two occasions, broadcasters sought access to prisons for the purposes of interviewing inmates and were denied, resulting in First Amendment claims.⁴⁹ In the first of these decisions,

⁴⁴ *Ibid.* at 715.

⁴⁵ [1972] 408 U.S. 665 [*Branzburg*].

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* at 691.

⁴⁸ *Ibid.* at 722.

⁴⁹ *Pell v. Procunier*, [1974] 417 U.S. 817 [*Pell*]; *Houchins v. KQED Inc.*, [1978] 438 U.S. 1 [*Houchins*].

Pell, the Court held that in-person interviews were not the only means by which broadcasters could conduct interviews.⁵⁰ However, this was a major point of tension in the Court’s decision. For example, Powell J. maintained that the ban “impermissibly restrains the ability of the press to perform its constitutionally established function of informing people of the conduct of their government”.⁵¹ Indeed, while it may be appropriate to limit media access to prisons in specific contexts for reasons including, for instance, safety concerns, a total ban, as Powell rightly noted, is rather difficult to justify. Four years later, this decision was upheld in *Houchins*.⁵² In that case, the Court expanded on its decision in *Pell*, identifying access to prisons as a policy issue rather than a rights issue.⁵³ While that may be correct in a narrow, technical sense, this line of reasoning is tenuous. Primarily because policy issues can, and frequently do become rights issues. *Pell* and *Houchins* four decades later continue to stand.⁵⁴

In terms of publication bans and open courts, the Court has routinely empowered broadcasters to cover criminal trials as well as judicial inquiry and review board proceedings.⁵⁵ A broad theme in these cases is the Court’s repeated assertion in *Nebraska Press Association* that “it is far from clear that prior restraint [on publication] would have protected [trial fairness]”.⁵⁶ Similarly, in *Landmark Communications*, Burger C.J. noted that “the publication Virginia seeks to punish...lies near the core of the First Amendment”.⁵⁷ Moreover, in *Richmond Newspapers*,

⁵⁰ *Pell*, *Ibid.* at 824.

⁵¹ *Ibid.* at 835.

⁵² *Houchins*, *supra* note 48.

⁵³ *Ibid.* at 9.

⁵⁴ Adrian Shirk, “Why Don’t You Ever See Inmates on TV?”, *the Atlantic* (July 14, 2014) online: The Atlantic <<https://www.theatlantic.com/politics/archive/2014/07/why-dont-you-ever-see-tv-interviews-with-inmates/374447/>>.

⁵⁵ *Nebraska Press*, *supra* note 1; *Landmark Communications Inc. v. Virginia*, [1978] 435 U.S. 829 [*Landmark Communications*]; *Richmond Newspapers Inc. v. Virginia*, [1980] 448 U.S. 555 [*Richmond Newspapers*]; *El Vocero v. Puerto Rico*, [1993] 508 U.S. 147 [*El Vocero*].

⁵⁶ *Nebraska Press*, *Ibid.* at 567.

⁵⁷ *Landmark Communications*, *supra* note 55 at 838.

arguably the landmark decision in regards to open courts, Chief Justice Burger was apoplectic about the prospect of journalists being prevented from attending and reporting on criminal trials. Burger maintained that such a prohibition would “eviscerate” freedom of the press and freedom of expression.⁵⁸

The final case in this area deals with search warrants.⁵⁹ The Stanford Daily Newspaper was alleged to have evidence of criminal conduct which occurred during a protest and it had published in a special edition. As a result, local police obtained a search warrant for the newspaper’s premises.⁶⁰ In upholding the warrant, White J. reasoned that “it is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of a crime and is subject to arrest”.⁶¹ White refuted the notion that search warrants had a chilling effect by citing the rarity with which search warrants had been issued against broadcasters premises.⁶² However, as I discussed in the previous chapter, that proposition is problematic. Search warrants have the very real potential to reveal sources and methods which can cripple a journalist or broadcasters’ ability to do their job. This is a fact that was not lost on the dissenters in *Zurcher*.⁶³ As such, the Court did not properly consider the effect on freedom of the press or expression.

6.3.2 Election Advertising and Campaign Finance

In *McConnell v. Federal Elections Commission*, the Court was asked to consider whether campaign finance legislation, the *Bipartisan Campaign Reform Act* (“BCRA”) violated the First Amendment insofar as it prohibited the use of “soft money” to fund, amongst other things,

⁵⁸ *Richmond Newspapers*, *supra* note 55 at 580.

⁵⁹ *Zurcher v. Stanford Daily*, [1978] 436 U.S. 547 [*Zurcher*].

⁶⁰ *Ibid.* at 550-52.

⁶¹ *Ibid.* at 559.

⁶² *Ibid.* at 566.

⁶³ *Ibid.* at 572.

campaign advertisements.⁶⁴ In deciding this case, the Court was alerted to the potential dangers that soft money would have on elections, including the connection between soft money and corruption.⁶⁵ Accordingly, a majority of the Court was unpersuaded by the contention that the *BCRA* was vague and overbroad.⁶⁶ The Court upheld the *BCRA* because it had a marginal effect on freedom of speech.⁶⁷ The dissenters in this cases, however, highlighted two areas of concern: there were less restrictive means available to Congress in reforming campaign laws, and that the majority applied the incorrect standard of review in regards to the First Amendment question. On the latter point, Thomas J. referred to the majority opinion as “an assault on the free exchange of ideas”.⁶⁸

In 2010, the Court was given the opportunity to revisit the *BCRA*, where the *McConnell* dissenters prevailed.⁶⁹ In that case, the Court bypassed its decision in *McConnell* by equating corporations with human beings.⁷⁰ The majority reasoned that a corporations’ ability to spend its resources as it chooses is a means of expressing itself.⁷¹ Given that corporations are legal persons, and that money is analogous to speech, the inference is that in the context of elections, corporations are allowed to express themselves through expenditures. This line of reasoning is questionable. While it has inevitably allowed corporations and political parties alike as broadcasters to make considerable investments in campaign advertising, this phenomenon is troubling. While I do not take issue with the expansion of corporations’ ability to broadcast

⁶⁴ [2003] 540 U.S. 93. Soft money refers to indirect donations or those that are intended to fund state and local, rather than federal election campaigns. *Ibid.* at 123.

⁶⁵ *Ibid.* at 153.

⁶⁶ *Ibid.* at 224.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* at 265.

⁶⁹ *Citizens United v. Federal Election Commission*, [2010] 558 U.S. 310.

⁷⁰ *Ibid.* at 955.

⁷¹ *Ibid.* At 904.

advertisements per se, the fact that those same corporations can use their considerable resources to influence elections is concerning. However, that point is beyond the scope of my focus here.

6.3.3 Defamation

The Court has also addressed the rights of broadcasters in the context of defamation, hate speech, and obscenity cases. I will explore these three types of cases in turn. Unlike the Canadian courts, the Supreme Court of the United States has, on several occasions, entertained claims made by broadcasters emerging from civil defamation cases. *New York Times Co. v. Sullivan* is arguably the landmark decision in that area.⁷² In that case, a police commissioner, L.B. Sullivan from Alabama successfully sued the New York Times for libel. Sullivan took exception to advertisements published by the Times in support of the Civil Rights movement which were critical of police conduct. Although the advertisements did not personally name Sullivan, he felt that they did impugn his character.⁷³ On appeal, the New York Times argued that the jury award and the lawsuit more generally violated the First Amendment's freedom of the press clause.

In its decision, a majority of the Supreme Court held that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct".⁷⁴ In reaching that conclusion, Brennan J. established the rule that public officials could not sue broadcasters for defamation unless the defamatory statements were made with "actual malice", or "with knowledge that it was false" or that it was made "with reckless disregard of whether it was false or not".⁷⁵ The actual malice and known falsity standards are laudable because of the considerable barriers that they present for public officials to overcome in

⁷² [1964] 376 U.S. 265 [*Sullivan*]. See also Samuel R. Pierce Jr, "The Anatomy of an Historic Decision: *New York Times Co. v. Sullivan*" (1965) 43 *North Carolina Law Review*.

⁷³ *Sullivan*, *Ibid.* at 255-58.

⁷⁴ *Ibid.* at 284.

⁷⁵ *Ibid.* at 279-80.

order to be able to sue broadcasters for libel. However, the Court did not clearly define the limits of who ought to be considered a public official for the purposes of Constitutional analysis. It is that definition that the Court grappled with in its subsequent defamation cases.

Indeed, in *Rosenblatt v. Baer*, the Court had to decide whether the *Sullivan* standard applied to a public recreation area manager who sued a New Hampshire newspaper for defamation.⁷⁶ In that case, Brennan, again writing for the majority, maintained that there was insufficient evidence to decide that issue, referring the case back to the trial level for that point to be argued in greater detail.⁷⁷ However, in its decision, the Court noted that in libel cases involving public officials, *Sullivan* was indeed the relevant authority.⁷⁸ Implicit in that analysis is the tacit suggestion that the recreation area manager was *likely* a public official and could not recover damages on those grounds. Indeed, this is a point that Black and Douglas JJ. explicitly argued in their dissent.⁷⁹ However, as in *Sullivan*, the Court neglected to define “how far down into the ranks of government employees the ‘public official’ designation [should] extend”.⁸⁰

Time Inc. v. Hill addressed whether a New York court’s interpretation of a State civil rights statute in a defamation case was consistent with *Sullivan*.⁸¹ The Court conceded that requiring journalists to make sure that the facts of every story they wrote were correct would “saddle [them] with an impossible burden”.⁸² In spite of this concession, the Court nevertheless rejected the rights claim on the grounds that the narrow interpretation of the statute by the lower courts was appropriate.⁸³ In *Time Inc.*, the Court’s narrow interpretation of *Sullivan* is problematic

⁷⁶ [1966] 383 U.S. 75.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* at 86.

⁷⁹ *Ibid.* at 89.

⁸⁰ *Ibid.* at 85.

⁸¹ *Time Inc. v. Hill*, [1967] 385 U.S. 374.

⁸² *Ibid.* at 389.

⁸³ *Ibid.* at 398.

insofar as the very purpose of the *Sullivan* decision was to imbue freedom of the press with a broad, liberal interpretation.

In 1971, the Court once again was presented with the opportunity to address the scope of *Sullivan*'s public official requirement.⁸⁴ In *Rosenbloom*, a plurality of the Court held that the *Sullivan* standard applied to purely private disputes as well.⁸⁵ Brennan J. noted in particular that "if a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved".⁸⁶ In deciding what expression was constitutionally protected as opposed to that which was defamatory and subject to jury awards, Brennan simply reaffirmed the Court's knowing falsity requirement.⁸⁷ In *Rosenbloom*, however, there were five different opinions written with none receiving more than three votes. While I agree with the prevailing justices in that case in regards to the scope of broadcasters' rights, the considerable lack of consensus in that case subverts Justice Brennan's overall conclusion.

In the final defamation cases in this data set, the Court attempted to reign in its decision in *Rosenbloom*. For example, in *Gertz v. Robert Welch Inc.*, a case that dealt with a broadcaster that spread conspiracy theories, the Court refuted the *Rosenbloom* plurality's expansion of *Sullivan*.⁸⁸ Specifically, Powell J. maintained that "the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private person".⁸⁹ Similarly, in *Herbert v. Lando*, White J. contended that "accord[ing] an absolute privilege to the editorial process of a media defendant in a libel case... would substantially

⁸⁴ *Rosenbloom v. Metromedia Inc.*, [1971] 403 U.S. 29.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* at 43. Brennan also contended that "[d]rawing a distinction between 'public' and 'private' figures makes no sense in terms of the constitutional guarantees". *Ibid.* at 45-46.

⁸⁷ *Ibid.* at 52.

⁸⁸ [1974] 418 U.S. 323.

⁸⁹ *Ibid.* at 346.

enhance the burden of proving actual malice, contrary to the expectations of *New York Times*".⁹⁰ While these cases represented a reformulation, rather than a restatement of the law, what is particularly concerning is that in *Lando*, the Court was unwilling to extend the First Amendment privilege to the editorial process.⁹¹

6.3.4 Hate Speech

In this set of cases, *Brandenburg v. Ohio* is the only case that deals with hate or inflammatory expression.⁹² In that case, a leader of the Ku Klux Klan ("KKK") transmitted a broadcast of a rally by inviting a journalist to film the rally.⁹³ The KKK member was charged and convicted under a State law which prohibited "advocate[ing]...sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform".⁹⁴ In striking down the Criminal Syndicalism law, the Supreme Court reasoned that in terms of hate or inflammatory expression, the threshold ought to be "advocacy [of the use of force] is directed to inciting or producing imminent lawless action and is likely to incite or produce such action".⁹⁵ There are two issues here. First, the standard set by the Court in this case is rather high. In terms of hate speech, the rhetoric conveyed by the KKK is perhaps the clearest example of expression that is flagrantly and egregiously hateful. More technically, in this particular case the facts are difficult to reconcile with the outcome. It is inconceivable how the KKK's activities do not meet the threshold of "imminent lawless action". The entire *raison d'être* of that organization is to incite lawless action.

⁹⁰ [1979] 441 U.S. 153.

⁹¹ *Ibid.* at 171.

⁹² [1969] 395 U.S. 444.

⁹³ *Ibid.* at 445.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.* at 448.

6.3.4 Obscenity

As was the case with hate speech, the Court has addressed obscenity in the context of broadcasting on only one occasion. In *Papish v. Board of Curators of the University of Missouri*, the Court was faced with the question of whether obscene expression in a student newspaper merited First Amendment protection.⁹⁶ In a unanimous decision, the Court flatly rejected the argument that constitutionally, universities could censor student newspapers. The Court noted in particular that “the mere dissemination of ideas...on a state university campus may not be shut off in the name of ‘conventions of decency’”.⁹⁷ This is in spite of the fact that the content at issue in that case included a reprinted cartoon of “policemen raping the Statue of Liberty”.⁹⁸ Even still, the Court was correct here. The newspaper’s content that the university took exception to, while highly controversial, is nonetheless political speech, which is central to the First Amendment. While the editors of the newspaper could have shown greater restraint in how they chose to convey their message, that is nonetheless an editorial decision in which the government vis-à-vis a state university should have no influence.

6.3.5 Broadcaster Advertising

The remaining cases in this set deal with the ability of newspapers to print objectionable or salacious advertisements.⁹⁹ At issue in *Pittsburgh Press* was the newspapers decision to use sex-designated employment columns.¹⁰⁰ In that case, the Court held that “[d]iscrimination in employment [advertisements] is not only commercial activity, it is [also] illegal commercial activity”.¹⁰¹ This decision, however, is a by-product of its era. Presently, it is inconceivable and it

⁹⁶ [1973] 410 U.S. 667.

⁹⁷ *Ibid.* at 670.

⁹⁸ *Ibid.* at 668.

⁹⁹ *Pittsburgh Press Co. v. Pittsburgh Committee on Human Relations*, [1973] 413 U.S. 376 [*Pittsburgh Press*]; *Bigelow v. Virginia*, [1975] 421 U.S. 809 [*Bigelow*].

¹⁰⁰ *Pittsburgh Press*, *Ibid.* at 378.

¹⁰¹ *Ibid.* at 388.

would be unconscionable if a newspaper made such a controversial distinction in its “help-wanted” section. Nevertheless, in *Bigelow*, the Court held that advertising abortions was constitutionally protected expression.¹⁰² While taboo in the 1970s, abortions are a routinely performed medical procedure. Thus, a prohibition on advertising abortion services is problematic and stifles the expression of the service provider, who by advertising their services is a broadcaster.

6.3.5 New Media

The American courts have not addressed rights claims arising from new media posts in any meaningful way. One explanation for this could be that in terms of the rights of broadcasters, the Court’s decisions discussed above are matters of settled law. This likely means that until such a case arises, the Court’s current First Amendment framework will govern new media as well. Even if such a case were to find a way to the federal appellate courts in the United States, it is difficult to conceive of a scenario where an impugned post would not be afforded First Amendment protection.¹⁰³

6.4 Public Importance, Stare Decisis, and Consistency in First Amendment Jurisprudence

My analysis in this chapter reveals that the Court has been rather willing to empower broadcasters that make rights claims. Part of my broad argument in this thesis is that broadcasters ought to enjoy rights protections and be subject to rights obligations. The rationale for this, as I argued in the previous chapter, is that broadcasting is of considerable public importance.¹⁰⁴ Indeed, as I discussed in regards to specific cases above, this is a principle that the Supreme

¹⁰² *Bigelow*, *supra* note 99 at 825.

¹⁰³ The exceptions here would be a post issuing a call to action for violence, a post that is or an obscene post which is degrading or inhumane, for example.

¹⁰⁴ For a discussion of this point and its emergence in the United States, see Owen M. Fiss, “Free Speech and Social Structure” (1986) 71 *Iowa Law Review*.

Court has recognized and offered as a rationale for empowering broadcasters on many occasions. As a result, in those cases, the rights standards that were applied to broadcasters were analogous to those applied to private citizens. What explains this phenomenon?

In my view, there are two likely explanations. The broader explanation is that norms and values have emerged in the United States concerning the importance of freedom of speech to the United States' democratic self-understanding. As I discussed at length in chapter 3, this explains why freedoms of speech and the press were included in the Bill of Rights. However, that is only a partial explanation. Scholars have noted that cultural norms concerning the importance of freedom of expression emerged at the beginning of the 20th century and resonated to the extent that the importance of freedom of speech in American society is significant enough that it has buttressed the First Amendment protections.¹⁰⁵ Sociologically, this argument provides a persuasive explanation for the weight attached to free speech in the United States.

The second explanation has to do with the nature of appellate review in the United States. One of themes in the cases I examined, particularly in terms of issues such as publication bans and open courts, is that the Supreme Court has been steadfast in acknowledging the rights of broadcasters and empowering those actors. This indicates that in regards to publication bans and open courts, the Court has been bound by precedent.

There is, however, a debate in the literature concerning the extent to which justices on the United States Supreme Court feel bound by precedent. James Fowler and Sangick Jeon examined every majority decision handed down by the Supreme Court. Their analysis reveals that the norm of *stare decisis* greatly influences the Court's decisions.¹⁰⁶ Indeed, Fowler and Jeon found that

¹⁰⁵ See specifically G. Edward White, "The First Amendment Comes of Ages: The Emergence of Free Speech in Twentieth-Century America" (1996) 95 *Michigan Law Review* 2.

¹⁰⁶ James H. Fowler & Sangick Jeon, "The Authority of Supreme Court Precedent" (2008) *Social Networks* 30.

even when the Court overturns precedent, the members of the Court take great care to ground those decisions in precedent and those decisions tend to be more authoritative than the decisions they overturned.¹⁰⁷

Conversely, other scholars argue that *stare decisis* does not play a significant role in the Court's decision-making process. Jeffrey Seagal and Harold Spaeth looked at the substance of the Court's decisions in a simple random sampling of landmark decisions.¹⁰⁸ What they found was that Supreme Court justices were not as bound by precedent as earlier scholarship on the topic would suggest.¹⁰⁹ However, reaching the conclusion that they did on the basis of a random sample is suspect. They do not marshal any evidence to quell the notion that the results would have differed in a different set of cases. Accordingly, Fowler and Jeon's analysis, as well as the cases I have selected, lend strong support to the notion that Supreme Court justices are, to a large extent, bound by the norm of *stare decisis*.

However, there are two important, related caveats to note here. First, aside from its decisions on campaign finance and election advertising, the Supreme Court has not addressed the rights of broadcasters since 1994. Critics will note that this does not include circuit court of appeals decisions. However, the courts at that level only addressed the rights of broadcasters on two occasions since 2000. The more salient of the two cases dealt with blog posts, although the rights claim was made by a Canadian business against an American blogger, and the 5th Circuit Court

¹⁰⁷ *Ibid.* at 25. It is important to note that between 1946 and 1992 only 115 precedents have been overruled, and this period includes the rather "activist" Warren Court. Saul Brenner & Harold J. Spaeth, *Stare Indecisus: The Alteration of Precedent on The Supreme Court, 1946-1992* (Cambridge: Cambridge University Press, 1995) at 23.

¹⁰⁸ Jeffrey Seagal & Harold J. Spaeth, "The Influence of Stare Decisis on the Votes of United States Supreme Court Justices" (1996) 40 *American Journal of Political Science* 4.

¹⁰⁹ *Ibid.* at 984.

of Appeals rejected the claim on those grounds, rather than addressing the rights issue.¹¹⁰ The other case dealt with eavesdropping.¹¹¹

The second caveat is how the Supreme Court would address the rights of broadcasters should it be given the opportunity. Presumably, such a case would most likely involve a television, radio, or new media broadcaster. What is important here is that the time and space restrictions that dictated many of the Court's earlier decisions would not necessarily apply here. I would hypothesize that, barring any of the restricted types of expression I noted above, the Court would likely find in favour of the broadcaster.

6.5 Conclusion

In this chapter, I explored the judicial empowerment of broadcasters in the United States. I quantitatively explored the cases I selected by plotting them in my typology. That analysis revealed that the Supreme Court has been willing, and routinely has, empowered broadcasters. I confirmed these results by looking to the reasons for judgment in these cases. Ultimately, I argued that this is a by-product of the values and norms concerning the First Amendment in the United States as well as the norm of *stare decisis* which weighs on Supreme Court Justices in deciding cases.

¹¹⁰ *Trout Point Lodge v. Handshoe*, 729 F.3d 481 (5th Cir. 2013).

¹¹¹ *American Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).

Chapter 7

Judicial Empowerment in Canada and the United States Compared

7.1 Introduction

In this chapter, I will compare Canadian and American courts in terms of their willingness to empower broadcasters. In the first part of this chapter, I will explore the judicial empowerment of broadcasters quantitatively. In the second part of this chapter, I will look at the Canadian and American jurisprudence and identify types of cases where courts in both countries have taken different approaches. In the third part of this chapter, I will explore why Canadian and American courts differ on the points of law that they do. There, I will argue that structural differences in the Canadian and American constitutions has greatly altered the judicial empowerment of broadcasters. Finally, I will argue that based on this analysis, broadcasters in both countries should be afforded the same rights. I will further argue that according broadcasters' full rights protections and obligations would allow the courts to apply the same legal standards to broadcasters that apply to private citizens, no more, no less.

7.2 Quantitative Differences in Judicial Empowerment in Canada and the United States

Below, I have reproduced tables 1 and 2 for a side-by-side quantitative comparison of the judicial empowerment of broadcasters in Canada and the United States. In this section, I will argue that these results confirm my hypothesis that American broadcasters have enjoyed greater judicial empowerment than their Canadian counterparts.

Table 1: Rights Outcomes in Canadian Jurisprudence

				Type of Broadcaster								Subtot	
				Public				Private					
				Broadcasters Role									
				Making a Claim	Responding to a Claim	Competing Claim	Intervener/ Applicant	Making a Claim	Responding to a Claim	Competing Claim	Intervener/ Applicant		
Court's Decision	Against Rights Claimant	Subject Matter	3	0	0	0	0	1	0	0	0	1	
			2	0	0	0	1	3	0	0	11	15	
			1	6	0	0	1	12	0	0	1	20	
	Public & Private Total											46	
	For Rights Claimant	Subject Matter	3	0	0	0	0	0	0	0	0	0	0
			2	0	0	0	0	7	0	0	0	7	
			1	1	0	8 ¹	1	3	0	10 ²	3	23	
	Public & Private Total											20	
	Subtotals			7	0	8	3	26	0	10	15		

Table 1 Classifies rights claimant(s) involved in Canadian cases based on whether or not the court ruled in favour of the rights claimant(s). Canadian cases fell into one of three broad categories which correspond to the number under the subject matter heading: (1) Press Freedom, (2) Elections and (3) Hate Speech.³ Rights claimants refers to broadcasters unless otherwise noted in the footnotes below.

¹ *Toronto Star Newspapers Ltd. v. Canada*, [2010] 1 S.C.R 721 [*Toronto Star*]. In that case, the CBC came up against the collective s. 11 claims of seven individuals; *R. v. White*, [2008] ABCA 294 [*White*]. In that case the CBC came up against the s. 11(d) claim of one individual.

² *Toronto Star, Ibid*. In this context, there were six private broadcasters who came up against s. 11 claims; *A.B. v. Bragg Communications Inc.*, [2012] 2 S.C.R 567 [*Bragg*]. In that case, the Court found that the appellant's right to privacy was entrenched in the *Charter* under ss. 7 & 8 and superseded the private broadcasters s. 2(b) right; *White, Ibid*. There, four private broadcasters made rights claims; *Flahiff v. Cour du Québec*, [1998] QCCA [*Flahiff*], where the appellants s. 11(d) right to a fair trial was found to supersede the private broadcasters right to publication of a search warrant and supporting affidavit. It is important to note that broadcasters in this category where counted in the "Against Rights Claimant" total.

³ Cases that fell into the enumerated categories above dealt with the following subject matter: (1) Production Orders, Publication Bans, Confidential Sources, Open Courts, Open Legislatures, Broadcasting Trial Exhibits, and Trial Fairness; (2) Election Advertising, Early Dissemination of Election Results; (3) Hate Speech.

Table 2: Rights Outcomes in American Jurisprudence

				Type of Broadcaster									
				Public					Private				
				Broadcasters Role									
				Making a Claim	Responding to a Claim	Competing Claim	Intervener /Applicant	Making a Claim	Responding to a Claim	Competing Claim	Intervener /Applicant	Row Subtotals	
Court's Decision	Against Rights Claimant	Subject Matter	4	0	0	0	0	1	0	0	0	1	
			3	0	0	0	0	2	0	0	0	2	
			2	0	0	0	0	1	0	0	0	1	
			1	0	0	0	0	11	1	0	5	17	
	Public & Private Total											22	
	For Rights Claimant	Subject Matter	4	0	0	0	0	1	0	0	0	1	
			3	0	0	0	0	5	0	0	1	6	
			2	0	0	0	0	1	0	0	0	1	
			1	1	0	0	1	10	0	1 ⁴	1	14	
	Public & Private Total											21	
Column Subtotals		1	0	0	1	32	1	1	7				

Table 2 Classifies rights claimant(s) involved in American cases based on whether or not the court ruled in favour of the rights claimant(s). American cases fell into one of five broad categories which correspond to the number under the subject matter heading: (1) Press Freedom, (2) Elections, (3) Defamation/Hate Speech/Obscenity, (4) Broadcaster Advertising.⁵ Unless otherwise indicated in the footnotes below, rights claimants refers to broadcasters in this table

In these tables, the most important aspect is the public and private totals in the “for rights claimant” and “against rights claimant” sections. As I noted in Chapter 2, interveners play an important role in rights litigation in both countries.⁶ Likewise, cases where broadcasters are responding to a claim or where there are competing claims are equally as important as cases

⁴ *Nebraska Press Association v. Stuart*, [1976] 427 U.S. 539 [*Nebraska Press*]. In that case, freedom of the press was in competition with the right to a fair trial. The Supreme Court decided in favour of the broadcaster. It is important to note that broadcasters in this category where counted in the “Against Rights Claimant” total.

⁵ The four categories outlined above include cases dealing with the following topics: (1) Editorials, the Fairness Doctrine, Publishing Classified Documents, Subpoenas, Access to Prisons, Equal Access, Publication Bans, Search Warrants, Student Newspapers; (2) Election Advertising and Campaign Finance; (3) Defamation, Hate Speech, Obscenity; (4) Broadcaster Advertising.

⁶ See e.g. John Koch, “Making Room: New Directions in Third Party Intervention” (1990) 48 *University of Toronto Faculty Law Review* 1.

where broadcasters are making a claim. This is because the emphasis in these tables is on rights outcomes, rather than on the outcomes purely from the broadcasters' perspective.

Similarly, it is important to note the different rates at which public and private broadcasters are involved in rights disputes, as I have done in Chapters Five and Six. However, for the purposes of quantitative analysis, it is important to analyze whether broadcasters generally are empowered, rather than focusing on the public/private distinction.

These quantitative results confirm my initial hypothesis that the United States Supreme Court has been more willing to empower broadcasters than the Canadian appellate courts. In Canada, cases involving broadcasters were decided in favour of the broadcaster(s) on 20 out of 66 occasions or 30.3% of the time. In the United States these cases were decided in favour of broadcasters on 21 out of 43 occasions or 48.8% of the time. This means that in this data set, cases had been decided in favour of American broadcasters 15.5% more often than Canadian broadcasters had.

7.3 Qualitative Differences in Judicial Empowerment in Canada and the United States

In this section, I will qualitatively explore the differences in the jurisprudence dealing with the rights of broadcasters in Canada and the United States. I will examine these differences in five distinct areas. In the first part of this section, I will look at publication bans, open courts, and open legislatures. In the second part of this section, I will discuss search warrants, subpoenas, and production orders. In the third part of this section, I will examine cases dealing with defamation, hate speech, and obscenity. In the fourth part of this section, I will look at broadcaster advertising. Finally, I will explore the treatment of new media in both countries.

7.3.1 Publication Bans, Open Courts, Open Legislatures, and Prisoner Interviews

In Canada, there are two distinct eras in the case law dealing with publication bans and open courts. Prior to the Supreme Court's decision in *Dagenais*, the Court routinely protected trial fairness at the expense of the rights of broadcasters.⁷ Following *Dagenais*, however, the Court moved decisions concerning discretionary publication bans into the common law sphere. That being said, however, there were cases in the latter era dealing with statutorily created publication bans that were dealt with under the *Charter*.⁸ In that sense, the Court has restricted the cases in which the publication bans can be challenged on *Charter* grounds.

In the United States, however, it is antithetical to the First Amendment that broadcasters might be prohibited from covering legal proceedings. In those cases, the Supreme Court has consistently maintained that the ability to attend and cover trials is inextricably linked to the First Amendment. On that basis, the Court has generally rejected these bans on the grounds that prior restraint violates the First Amendment.⁹

The approaches taken by Canadian and American courts in regards to publication bans is similar to the approaches taken to open courts, open legislatures, and prisoner interviews. In Canada, the Supreme Court has not recognized a right to film provincial legislatures. Similarly, in the United States, the Court has rejected the argument that prohibiting broadcasters from interviewing inmates violates the First Amendment.¹⁰

7.3.2 Search Warrants, Subpoenas, and Production Orders

⁷ *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835.

⁸ See specifically, *Société Radio-Canada c. Québec (Procureur Générale)*, 62 C.R. (6th) 99; *R. v. White*, [2008] ABCA 294; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 19; *A.B. v. Bragg Communications Inc.*, [2012] 2 S.C.R. 567.

⁹ *Nebraska Press Association v. Stuart*, [1976] 427 U.S. 539; *Landmark Communications Inc. v. Virginia*, [1978] 435 U.S. 829; *Richmond Newspapers Inc. v. Virginia*, [1980] 448 U.S. 555; *El Vocero v. Puerto Rico*, [1993] 508 U.S. 147.

¹⁰ *Donahoe v. Canadian Broadcasting Corporation*, (1991) 102 N.S.R. (2d) 271; *Pell v. Procunier*, [1974] 417 U.S. 817; *Houchins v. KQED Inc.*, [1978] 438 U.S. 1.

In terms of search warrants and subpoenas, and production orders, courts in Canada and the United States have taken very similar approaches. In Canada, the courts have dealt with search warrants under s. 8 of the *Charter* which protects against unreasonable search and seizure, rather than addressing them on freedom of the press or expression grounds.¹¹ In any event, Canadian courts have been reluctant to strike down search warrants on *Charter* grounds. Similarly, in the one case in my data set which dealt with search warrants, the United States Supreme Court rejected the associated rights claim.¹² Likewise, both the Nova Scotia court of appeals and the United States Supreme Court have held that journalists can be subpoenaed.¹³ Additionally, the Supreme Court of Canada has decided that production orders ought to be addressed through the common law, rather than the *Charter*. In the United States, the Supreme Court has addressed production orders through its case law on subpoenas. While the American Court is willing to consider the rights issue, it has been less inclined to allow journalists to avoid testimony, particularly where confidential sources are involved.¹⁴

7.3.3 Campaign Finance and Election Advertising

Canadian and American courts have taken vastly different approaches in terms of campaign finance and election advertising. The Supreme Court of Canada has largely upheld limits on campaign spending and election advertising.¹⁵ The American Court, in *Citizens United*, has adopted the rule that spending money is analogous to expression, and therefore limiting how

¹¹ *Canadian Charter of Rights and Freedoms*, s. 2, Part I of the *Constitution Act, 1982*, being schedule to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 8.

¹² Interestingly, *Zurher* informed the Canadian jurisprudence on the topic. See specifically *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421.

¹³ *Canadian Broadcasting Corporation v. Batiot*. (1997) 144 D.L.R. (4th) 444; *Branzburg v. Hayes*, [1972] 408 U.S. 665.

¹⁴ *Branzburg v. Hayes*, [1972] 408 U.S. 665.

¹⁵ See e.g. *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827.

much someone can donate to a campaign or pay for campaign advertisements is a violation of their First Amendment rights.¹⁶

7.3.4 Defamation, Hate Speech, and Obscenity

As I noted in chapter five, there was only one case which dealt with hate speech and none that dealt with defamation or obscenity, rejecting the rights claim.¹⁷ At least in terms of defamation, this is primarily because that these are civil law matters.¹⁸ However, in *Brandenburg v. Ohio*, the United States Supreme Court has held that hate speech was protected under the First Amendment.¹⁹ The Court has allowed for the possibility that private defamation disputes involving broadcasters could be subjected to rights analysis. In that sense, the law on defamation in the United States lacks clarity in terms of defining the standard set out in *New York Times Co. v. Sullivan*.²⁰ Likewise, the Supreme Court has made it clear that in terms of hate speech and obscenity, the First Amendment standard is rather high.²¹

7.3.5 Broadcaster Advertising

Broadcaster advertising is another area where the Supreme Court of Canada has not yet recognized or entertained rights arguments. Conversely, however, the American Court has dealt with this issue on two occasions. In *Pittsburgh Press*, the Court found that the impugned advertisements were commercial expression, and therefore rejected the rights claim.²² However,

¹⁶ *Citizens United v. Federal Election Commission*, [2010] 558 U.S. 310. Note that in the American cases I selected, there are no analogs to Canadian cases, such as *Bryan* which deal with issues such as the early dissemination of poll results.

¹⁷ *R. v. Andrews*, [1990] 3 S.C.R. 870.

¹⁸ See e.g. *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 [*Hill*]; *Grant v. Torstar Corp.*, [2009] 3 SCR 640 [*Grant*].

¹⁹ *Brandenburg v. Ohio*, [1969] 395 U.S. 444.

²⁰ [1964] 376 U.S. 265 [*Sullivan*].

²¹ *Supra* note 13; *Papish v. Board of Curators of Univ. of Mo.*, [1973] 410 U.S. 667.

²² *Pittsburgh Press Co. v. Pittsburgh Committee on Human Relations*, [1973] 413 U.S. 376.

the Court later found that advertising abortions merited protection.²³ Therefore, it is unclear how the Court will decide similar and analogous cases in the future.

7.3.6 New Media

Neither Canadian nor American courts have dealt with rights claims arising from new media posts. In Canada, these cases have been addressed through the civil law or administrative law, even though broadcasters have made rights claims.²⁴ As I noted in chapter six, the same is true in the United States.²⁵

7.4 Explaining the Discrepancies in the Judicial Empowerment of Broadcasters

Comparing the Canadian and American approaches to the judicial empowerment of broadcasters reveals asymmetric results. In these results, there are two broad trends that are therefore worth exploring. The first trend is the different approaches taken by the Canadian courts and the Supreme Court of the United States in six particular types of cases. Those are cases dealing with: publication bans, campaign finance and election advertising, defamation, hate speech, obscenity, and broadcaster advertising. The second trend is the types of broadcasters that are making rights claims in each country and the extent to which courts in both countries have been willing to empower public and private broadcasters. In this section, I will explain those trends.

7.4.1 The Asymmetric Nature of Rights Review in Canada and the United States

In a technical sense, rights are conferred broadly and absolutely in the United States. The Bill of Rights applies broadly in the sense that it applies to federal and state government actions, but also, in certain situations to private conduct. Rights are conferred absolutely in the sense that one

²³ *Bigelow v. Virginia*, [1975] 421 U.S. 809.

²⁴ *Awan v. Levant*, 2016 ONCA 970 (CanLII); *Pridgen v. University of Calgary*. (2012) 350 D.L.R. (4th) 1.

²⁵ *Trout Point Lodge v. Handshoe*, 729 F.3d 481 (5th Cir. 2013).

need simply prove that a rights violation occurred in order for a court to craft some remedy. A perfect example of the true scope of rights conferred in the United States or the potential, thereof is the Court's decision in *Rosenbloom* that the First Amendment applied in purely private libel cases.²⁶

In terms of the rights of broadcasters, the structure of the American Bill of Rights has given the Court wider latitude to employ rights-based analyses in a multitude of contexts in cases involving broadcasters. Here, cases dealing with publication bans and defamation are especially salient. As I noted above in regards to defamation, the Court has demonstrated a willingness to subject defamation awards to First Amendment review. Even if the Court declined to go that far and uphold *Rosenbloom*, the default precedent in that area is *Sullivan*, wherein the Court held that under the First Amendment, public officials could not win jury awards in libel cases.²⁷

Similarly, it is settled law in the United States that barring journalists or broadcasters from covering judicial proceedings violates the First Amendment. The Court has long held, in this regard that protecting the rights of journalists to attend trials and publish the substance of trial proceedings is precisely the purpose of the First Amendment.²⁸ Superficially, it might appear as though this reasoning does not take into account trial fairness, and the legal rights of defendants in criminal cases. However, the rights claims made by broadcasters in these cases have succeeded because the First Amendment explicitly prohibits government censorship of broadcasters.

In Canada, rights adjudication is a three-step process. First, the court has to determine whether a particular case can be adjudicated under the *Charter*. In many instances, this is a

²⁶ *Rosenbloom v. Metromedia Inc.*, [1971] 403 U.S. 29.

²⁷ *Supra* note 6.

²⁸ *Landmark Communications Inc. v. Virginia*, [1978] 435 U.S. 829; *Richmond Newspapers Inc. v. Virginia*, [1980] 448 U.S. 555.

given. However, there are a few cases where the court must still make this determination. Having accepted that the *Charter* applies, the court must then turn to whether or not there is a rights violation. In an overwhelming majority of the cases I explored, the courts found that broadcasters' s. 2(b) rights had been violated. Finally, the court must then decide whether or not the impugned legislation or action is a reasonable limit on freedom of expression. In the cases I explored, the impugned government action was frequently saved at this last stage.

As I have argued throughout this thesis, the biggest problem with the Canadian approach occurs at the first step of this analysis. The Supreme Court of Canada has not yet recognized a framework under which the *Charter* applies to broadcasters in a uniform manner. This is rather peculiar considering that s. 2(b) also contains a distinct clause providing for “freedom of the press”.²⁹

There are four distinct examples of how and why this is problematic. In terms of broadcaster advertising, the courts have held that the *Charter* does not apply to cases dealing with broadcaster advertising.³⁰ In my view, that is unprincipled. In the United States, for example, the Supreme Court has distinguished between advertising that is “commercial expression” and that which is not. Advertisements that are merely intended to inform, enlighten, and entertain should be protected under the *Charter*. This would also include political advertising or issue advocacy for example.

Similarly, unlike the United States, the *Charter* does not currently apply in defamation cases, although broadcasters have tried to make rights claims in that context.³¹ The Gawker case is

²⁹ *Canadian Charter of Rights and Freedoms*, s. 2, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 2(b). This particular clause does confer rights and obligations which are distinct from freedom of expression. In that sense, the Canadian Court's approach to broadcasters' rights runs contrary to the free press clause.

³⁰ *Adbusters Media Foundation v. Canadian Broadcasting Corporation*. 92 BCLR (4th).

³¹ *Hill*, *supra* note 12.

instructive here. Terry Bollea, also known as the wrestler Hulk Hogan, successfully sued and bankrupted the website Gawker after they posted his sex tape.³² Whether it is the United States or Canada, broadcasters should still be able to make rights claims, under the *Charter* or the First Amendment in those cases. This should be the case irrespective of how salacious the message is. Essentially, the calculus is the value of reputation versus the rights to free expression. The Supreme Court of Canada's decisions suggest that in defamation cases, greater value ought to be attached to the former. Allowing *Charter* challenges in these cases would not preclude defamation plaintiffs from recuperating damages, it would simply mean that the courts would be able to conduct additional analysis to determine whether those damages were compliant with the *Charter*.

Finally, by moving the analysis on production orders and discretionary publication bans into the realm of the common law, the Supreme Court of Canada has acknowledged that the *Charter* does not apply to broadcasters in those areas. This is troubling. As I discussed in chapter five, there is the distinct possibility that a journalist, Ben Makuch, will end up in jail simply for protecting his sources.³³ That development is problematic as it sets a dangerous precedent for similar cases in the future, and also runs contrary to s. 2(b)'s freedom of the press clause.

7.5 The Future of Media Rights and Broadcasting Policy

My analysis throughout this thesis has unveiled discrepancies in how Canada and the United States have approached the United States. Broadcasting is of considerable public importance, a fact that Canadian and American governments are certainly aware of, and have conceded through their policies. For example, in both countries, broadcasters are subject to unique regulators and

³² *Bollea v. Gawker*, [2016] So. 3d 768.

³³ *R. v. Vice Media Canada Inc.*, [2017] ONCA 231 [*Vice*].

report to the federal government. And yet, in spite of their importance, broadcasters are not recognized as publicly important entities.

In Canada, it is clear that the Supreme Court's current understanding of the *Charter* is that its application to broadcasters is limited. Similarly, in the United States while the application of the Bill of Rights to broadcasters is broader although not uniform. This is concerning. There ought to be a uniform standard in each country through which broadcasters are allowed to make coherent rights claims. This type of framework would enable the courts to consider whether the party making a rights claim is a broadcaster, rather than requiring those parties to convince the courts that the constitution applies to them at all. Anything less than this standard fundamentally undermines the ability of broadcasters to "inform, enlighten, and entertain". Furthermore, imbuing broadcasters with rights obligations would presumably help reinforce confer broadcasters with greater legitimacy and force them to attain a higher level of integrity. Finally, the rapid technological advancements that have benefited broadcasters, including, for instance, new media, as a result of the current legal understanding of the rights of broadcasters, also results in considerable uncertainty as to what rights broadcasters actually have.

A related benefit of conferring uniform rights protection and obligations upon broadcasters is the standards under which courts could review their rights claims. For example, in terms of defamation, hate speech, or obscenity, a court would be able to adjudicate rights claims made by broadcasters using the same requirements that exist in cases brought by private citizens.

7.6 Criticisms of the Public Importance Argument

As I discussed in chapter five, there are two likely criticisms of my argument that the *Charter* should apply to broadcasters on the basis of public importance. First, there is an argument that in defining the *Charter*'s scope, the Canadian Court has interpreted s. 32 of the *Charter* with a view

to limiting government action exclusively.³⁴ The concern that *Charter* law would replace statutory law is *prima facie* compelling.³⁵ However, it overlooks the established view that the *Charter* should be interpreted in a broad and liberal fashion.³⁶ Other sections of the *Charter* have been interpreted progressively, why should s. 32 be any different?³⁷

Moreover, I am not advocating a radical departure from the current understanding of the *Charter*'s scope. Rather my argument is that the *Charter* should apply to matters of public importance. There is a compelling argument that this should include broadcasters. Beyond such an interpretation, however, it is also my view that the Court should, and would, likely limit the scope of the "public importance" under s. 32.

To some readers, it might appear as though I am advocating for the Supreme Court of Canada to adopt a more liberal interpretation of free expression. It follows, according to this argument, that I overlook the role, purpose, and importance of the *Charter*'s reasonable limits clause. I do not. My normative argument is that first and foremost, the *Charter* should apply to broadcasters. If the Court adopted such an approach, it would allow it to adjudicate rights claims made by broadcasters in the same way that it deals with rights claims made by private citizens. In such cases, the Court should continue to define the *Charter*'s freedom of expression and reasonable limits clauses as it has.

³⁴ Peter W. Hogg, *Constitutional Law of Canada Student Edition* (Toronto: Carswell, 2012) at 37-30; Patrick J. Monahan, *Constitutional Law*, 3rd ed (Toronto: Irwin law, 2006) at 406 [Monahan].

³⁵ Monahan, *Ibid.*

³⁶ *Edwards v. Canada (Attorney General)*, [1929] UKPC 86.

³⁷ For example, equality rights under s. 15 have been interpreted rather liberally so as to include sexual orientation as an analogous ground. See specifically, *Canadian Charter of Rights and Freedoms*, s. 2, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 15(1); *Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3.

7.7 Explaining Discrepancies in the Types of Broadcasters Making Rights Claims

As I discussed above, there are thematic differences in the rights afforded to broadcasters in Canada and the United States. There are also differences in the types of broadcasters making rights claims in these countries. In Canada and the United States, the overwhelming majority of rights claims are made by private broadcasters. However, there are different explanations for why this is the case.

Public broadcasters in Canada are created by, and report to, the government. They are also heavily subsidized by the government. Nonetheless, Canadian public broadcasters, particularly the CBC, are required to make up the balance of their budget through commercial advertising. In Canada then, the most likely explanation for the underrepresentation of public broadcasters in rights litigation is the fact these broadcasters simply have no occasion to be involved in rights disputes. In the United States, public broadcasters are also subsidized by the government. However, unlike their Canadian counterparts, American public broadcasters are not allowed to advertise. Also, American public broadcasters are created for the express purpose of educational broadcasting.

7.8 Conclusion

In this chapter, I have compared the rights of broadcasters in Canada and the United States. This analysis reveals that in both countries there are areas where courts have not recognized the rights of broadcasters. This approach, however, is problematic. The current rights frameworks have considerable implications for broadcasters. These implications are further compounded by the proliferation of digital and new media. For these reasons, then, courts in Canada and the United States should consider a uniform framework for protecting the rights of broadcasters.

Chapter 8 Conclusion

Broadcasters are important actors in Canada and the United States. They serve three primary functions: to inform, to enlighten, and to entertain. They inform and enlighten by covering the news. This is not restricted to relaying current events. It also includes investigative journalism through which, broadcasters hold governments to account. In this sense, the type of information conveyed by broadcasters might be unpopular, but is nonetheless informative. Broadcasters also entertain. For example, they produce and disseminate content that might at once be satire, but also have a strong political message.¹ Their ability to do their job hinges in large part on the constitutional protections they are afforded.

In this thesis, I focused on the rights of broadcasters in Canada and the United States. Previous work on media rights and broadcasting policy has been largely restricted to each country. Media rights and broadcasting policy in Canada and the United States has not been addressed in a comparative context since 1988.² The research that has been done in this area is limited to the freedom of expression issue. Other work on the topic has focused exclusively on broadcasting policy vis-à-vis broadcast licensing.³ In this thesis, I sought to fill that gap in the literature by using jurisprudence as a mechanism for evaluating media rights and broadcasting policy in Canada and the United States.

I also approached this topic from a comparative perspective. At the most basic level, a comparative analysis highlights differences between two systems. Comparing the rights of

¹ This would include the HBO show “Last Week Tonight”, for example.

² Dorothy Zolf, “The Regulation of Broadcasting in Canada and the United States: Straws in the Wind” (1988) 13 *Canadian Journal of Communication* 2 [Dolf].

³ Corinne Schweizer et al, “Blast From the Past? A Comparative Analysis of Broadcast Licensing in the Digital Era”, (2014) 4 *Journal of Information Policy* [Schweizer].

broadcasters in Canada and the United States has helped reinforce the importance of those actors. It has also helped reveal the true scope of rights protections afforded to broadcasters in each country, and how the courts should deal with broadcasters in the future. In this sense, a comparative analysis helps provide a more nuanced understanding of how the courts interact with broadcasters, but also of how societal values and norms inform those decisions.

My aims in conducting this research were twofold. First, I sought to understand how the courts in Canada and the United States have defined the rights of broadcasters. Second, based on these understandings, which country's courts have been more willing to empower broadcasters. To understand the relationship between the courts and broadcasters, I looked at cases in which courts had been asked to address the rights broadcasters. I evaluated these results quantitatively by plotting them in a typology I developed to provide a snapshot of broadcasters' rights. I also looked at the substance of the court's decisions in those cases to understand why the courts had interpreted the rights of broadcasters as they did.

At the outset of this thesis, I hypothesized that the United States Supreme Court would be considerably more willing to empower broadcasters than Canadian appellate courts would. My quantitative findings indicate that within my data set, the American Court empowered broadcasters 15% more often than Canadian courts. This finding is supported by the substance of the decisions themselves. This is largely a result of the structure and scope of rights protections in each country. In the United States, rights are conferred absolutely, whereas in Canada, they are subject to reasonable limits. I also found a discrepancy in the types of broadcasters making rights claims. In both countries, public broadcasters were underrepresented in rights disputes. In Canada, what I found was that public broadcasters other than the CBC simply had not had occasion to make rights claims. In the United States, this was largely due to a lack of funding for

public broadcasters, a prohibition on commercial advertising, and the fact that public broadcasters in the United States are designed to educate.

Based on this analysis, I advanced two broad arguments. First, the scope of rights in each country should be interpreted in such a way that broadcasters are afforded uniform rights protections and responsibilities. Substantively, I argued that the courts should interpret the rights of broadcasters in the same fashion that they interpret the rights of private citizens. In Canada, for example, I argued that the *Charter* should apply to broadcasters on the basis of public importance. There are two prominent responses to this argument. First, that the *Charter* was only intended to apply to government action. In response, I noted that this is a rather myopic view and misunderstands the evolution of jurisprudence in Canadian constitutional law. Second, critics might note that I am advocating for an American approach to freedom of expression under the *Charter*. My response here is simply that freedom of expression and other *Charter* rights conferred upon broadcasters should be interpreted in the same way as those conferred upon private citizens.

This research has two broad implications which ought to guide future research. Inevitably courts will be presented with cases similar to Gawker's where a fringe broadcaster can be bankrupted for content that they disseminate. However, this issue is not necessarily limited to defamation. For example, a citizen journalist or a niche broadcaster that does not have considerable resources might be served with a production order. Suppose that broadcaster chooses not to respond, is charged, and is saddled with insurmountable legal fees and might also be forced out of operation. These types of issues lie at the core of not only freedom of the press, but also freedom of expression. Inevitably, these or similar issues will present themselves, and

the courts will be asked to decide what rights, and the scope of those rights that these broadcasters ought to be afforded.

The second issue pertains to the digitalization of broadcasting. The advent of the internet and digitalization have provided broadcasters with increasing space to disseminate content and considerably widened the range of types of parties that consider themselves broadcasters. For example, it is not uncommon that social movements are organized through, and broadcast online. Moreover, internet or digital-based expression is at the nexus of everything I have discussed in this thesis. And yet, in the internet era, Canadian and American courts have not really addressed the resultant rights implications in any meaningful way. As such, future research ought to focus on how the courts do deal with rights claims emerging from internet-based expression. I would hypothesize that in the digital age, broadcasters are going to occupy a more precarious space than they currently do.

This thesis is not without its limitations. The first limitation concerns the cases I selected. There might well be other cases that fit my parameters that did not necessarily turn up in my searches. I would argue, however, that any discernable trends from the cases I selected, however, are more broadly applicable. This is due to the number of cases selected and the manner in which they were selected. Rather generally, courts do depart from past precedent for various reasons. However, in both Canada and the United States, reversed decisions would not necessarily alter my findings in any considerable fashion. The second limitation relates to the typology. This typology cannot be used to classify whole cases. Rather, it is most effective for examining the role that specific actors play in cases and how that relates to the outcome. Nonetheless, complex cases involving broadcasters on both sides of the dispute complicates the analysis to an extent. It might be also complicated in cases where the nature of the appeal is complex.

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