

THE ELEMENTS OF A FREE SOCIETY
- THE ROLE OF THE MEDIA IN THE LEGAL SYSTEM
By Chief Justice N.T. Nemetz
an Address to the Canadian Institute for the
Administration of Justice

October 16, 1987 - Montreal

I have now spent some 24 years as one of Her Majesty's justices. Before entering law school, I served as an editor of the university paper and later worked as a free lance journalist. In my practice of law I acted for the American Newspaper Guild, from which body I proudly hold an honorary card. For these reasons I believe that I have some qualifications to speak to you on the subject of The Role of the Media in the Legal System.

It is to England that we must go to examine the establishment of the foundations of our independent judiciary and our independent press. You know, of course, that both the concept of an independent judiciary and an independent press were not readily achieved. It was in 1701 that the Act of Settlement determined that judges would hold office during good behaviour and not at the King's pleasure.

I recount this history because, like other citizens, I am conscious of the frailty of political institutions and the lack of understanding of the attributes of our democratic

system. Reverting, therefore to the subject matter of this discourse I note that the struggle for the independence of the judiciary has proceeded in tandem with the struggle for a free press. The invention of moveable type created a problem for autocratic rulers. In Europe the printing press became a ready ally of propaganda especially for religious dissenters. In 1643, Parliament decided that no book be printed unless licensed. It was John Milton who, in 1644, attacked this infamous decree in his famous speech to the House of Commons entitled "Areopagitica - A Speech for the Liberty of Unlicensed Printing to the Parliament of England."

Milton's eloquent appeal went unheeded for almost 200 years. But finally in 1855 the last relevant restriction on the press in England was abolished. In the very first of their amendments to the American Constitution it was enacted that "Congress shall make no law . . . abridging [the] freedom of speech or of the press. . ."

In 1953 the British newspaper industry established a Press Council. Its objective was to maintain standards and consider complaints but only after the complainant had tried to obtain redress from the editor and provided that no legal proceedings were pending. However, the Council has no disciplinary powers and it has been criticised as being a whitewashing agency for the press. No such national agency

exists in Canada but the Globe and Mail - a nationally distributed Canadian paper - displays prominent corrections when errors are drawn to the editor's attention and the editor sometimes prints accompanying apologies.

Three Canadian legal decisions dealing with the press may be of interest to you: Pacific Press; Southam Press and R. v. Bierman (cartoonist case). I will speak only of the B.C. case in which I was involved.

Vander Zalm v. Times Publishers et al, ([1980] 4 W.W.R. 259 (BCCA)) was an unusual case since libel suits against cartoonists are rare indeed. Mr. Vander Zalm, the Minister of Human Resources (as he then was) had been denouncing welfare recipients. He was shown as a cruel man plucking wings from flies. He sued for libel and was awarded damages at trial. Our Court reversed, holding that whether or not the cartoon was defamatory, the three elements of the defence of fair comment were established. First, the communication in question must be recognizable as a comment upon facts, and not as a statement of a fact. This element was satisfied because ordinary and reasonable people are well acquainted with the allegorical nature of political cartoons, including the one in issue. Second, the matter commented upon must be of a public nature. This element was satisfied because the cartoon related a number of controversial statements made by the Minister in his public capacity.

Third, the comment must be fair, in the sense that it represented "an opinion however exaggerated, obstinate or prejudiced, was honestly held by the writer." On the cartoonist's unchallenged testimony, he honestly believed that the representation of the Minister as being cruel and thoughtless towards helpless members of society was accurate. In support, the defendants brought evidence of a number of the Minister's statements in that year. The test we said was not whether those facts could fairly lead to the imputation arising from the cartoon, as the trial judge found, but whether the comment made by the cartoon represented an honest and reasonable opinion of the cartoonist.

Manifestly, the media has an important role to play in our legal system. For example, there is very little use in judges writing about general deterrence in crime if in fact the media does not bring to public attention the judicial decisions involved. In my court our registrar, when asked, assists the reporters attached to the courthouse to better understand the effect of certain complex decisions or informs them of the dates of hearing of important appeals. Personally, I have always looked upon the press as an important ally of the courts in helping the public understand the workings and decisions of the judiciary. In Canada, with

the advent of the Canadian Charter of Rights and Freedoms, it is especially important for the public to know the import of the complex decisions affecting their liberties.

Do the press make mistakes? Of course they do. But error is not a private preserve of the press. We all contribute to the error agenda of the world. However, the relevant questions to be asked are these: Do we realize that we have made a mistake? Do we have in place means of remedying the effect of such mistakes? And finally is the press willing to assume some responsibility not only for exposing evil but considering the effect of exposure which may affect adversely the individual citizen over the state?

I am not one who believes that judges should merely render decisions in the abstract without considering the effect of their decision on the public mores. Likewise, I am not one who believes that journalists should merely report without considering the effect of their reporting on the welfare of the public at large. It is often said that the responsibility of the press relates only to the public's right to know. May I suggest that the responsibility goes further, namely, to report fair and impartial accounts in the interest of public welfare. I can remember as a cub reporter the editor telling me that I did not have a byline to express personal views. I note with a degree of concern that television reporting in Canada and in the United States appears to have created a new class of the byline opinion reporter to the virtual exclusion of straight factual

reporting. There is no doubt that in North America more and more people are getting their news from television - the lazy way of avoiding the more difficult art of reading. Whether this television approach to news reporting will ultimately subsume press reportage is hard to determine.

Manifestly, there exist some singularly literate and fine newspapers. It is difficult to find fault with the reporting found in some of the leading newspapers in the democratic world. The difficulties arise when some newspapers try to compete with television by employing shrieking headlines and controversial pictures and thus pander to growing illiteracy.

We live in a time of technological revolution. The essence of the dispute in the recent press strike in England was the introduction of machines that made the majority of the staff redundant. Automation, the grave problem of the modern industrial state, continues unabated. However, new technology has a positive side. The inexpensive printing presses made possible by computers and laser machines may reopen an era of small independent publishing. The effect of such a development is yet to be assessed.

Our society can only survive with the dissemination of unimpeachable information. Therefore, in my opinion, both journalists and judges, must fulfill their responsibilities to our fellow citizens in order to preserve our democratic way of life.