UNESCO of the North

The Coming of Press Regulation in Canada

Margaret Laws

According to the political values we all grew up with, freedom of the press means freedom of the press from government regulation and control. But in recent years another theory has gained currency—the theory that true freedom of the press *requires* government regulation and control. If left to itself, according to this view, the press will be unfree. Newspapers will exploit monopoly status, publishers will tell editors and reporters what to write, and all concerned will ignore news from minority communities, trim their sails to placate capitalistic advertisers, and generally pay no heed to the public interest. The former theory posited that those who publish have a right to print; the latter shifts the focus to the right of *readers* to receive information, a right that publishers cannot invoke to defend misleading or biased output.

This latter view of freedom of the press is most often associated with the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and its proposed New World Information Order. There, Americans seem to consider it an exotic growth of third-world political systems with little democratic tradition. But it can be found much closer to home—in fact, right across the border in the very un-third-world country of Canada. The Canadian cabinet has approved and put before Parliament a proposed Daily Newspaper Act that would bring the country's newspapers under far-reaching government regulation. All Canadian newspaper proprietors oppose the bill; the Liberal party government of Prime Minister Pierre Trudeau, on the other hand, describes it as a way to ensure press freedom. The proposal has been watered down from previous extreme versions and, in its current form, may not excite public indignation. Still, the principles on which it is based represent a sharp departure from the tradition of English-speaking countries. And since it would for the first time give the official endorsement of the Canadian government to those principles, we may well see it as the thin end of the wedge of more ambitious regulatory efforts to come.

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The Background

Governmental concern about the role and performance of the media is not new in Canada. A particular kind of content regulation first appeared in the Broadcasting Act of 1968, which created what is now called the Canadian Radio-television and Telecommunications Commission (CRTC), Canada's equivalent of the U.S. Federal Communications Commission. Reaching beyond such technical matters as frequency allocation and station licensing, the act stated that the Canadian broadcasting system must

"safeguard, enrich, and strengthen the cultural, political, social, and economic fabric of Canada." Armed with this mandate, the CRTC moved in 1970 to require stiff quotas of Canadian content in the programming of all licensed broadcasters. Under current CRTC regulations, for example, television stations and networks must hold non-Canadian programming to 40 percent or less of broadcast time between the hours of 6 A.M. and midnight. And in AM broadcasting, 30 percent of the musical compositions presented by stations and networks during those same hours must be Canadian.

Whatever the pros and cons of regulating the electronic media, it is at least arguable that they do form a natural monopoly: the airwaves they use are finite, common property—thereby inviting some sort of public control. But that is not true of print media. There is no physical limit to the number of newspapers or magazines that may coexist in any market. When Parliament made further attempts in the mid-seventies to curtail the U.S. cultural presence in Canada, it ignored this vital distinction. It amended the Income Tax Act to forbid advertisers from deducting as a business expense ads published in non-Canadian newspapers and periodicals but aimed primarily at Canadian readers—as well as ads beamed into Canada by U.S. television and radio stations. The *Reader's Digest* successfully escaped the brunt of these regulations by setting up a Canadian subsidiary to produce a local edition. Other magazines, like *Time*, simply halved their advertising rates and survived magnificently, leaving much doubt that the new law would achieve its purpose.

Perhaps it is not coincidental that the rejected U.S. culture is widely caricatured in Canada as dominated by commercialism and free market ideology. Government utterances frequently show a deep-rooted suspicion of any involvement at all of private firms in the information businesses. As far back as 1970 a Trudeau-appointed special Senate Committee on Mass Media under Keith Davey, a key Liberal party organizer, reported that in Canada "the news . . . is controlled and manipulated by a small group of individuals and corporations whose view of What's Fit to Print . . . closely coincide[s] with What's Good for General Motors, or What's Good for Business, or What's Good for My Friends down at the Club." (Readers who have not lived in Canada can hardly imagine how ludicrous it really is to portray the Canadian press as ardently pro-business.) The report of the Davey committee charged ominously that the Canadian press had neglected its "responsibilities" to the public by not preparing its readers for forthcoming "social changes." Holding that "this country should no longer tolerate a situation where the public interest in so vital a field as information is dependent on the greed or goodwill of an extremely privileged group of businessmen," the committee recommended that concentration be stemmed and that a review board be created to look into ownership patterns in newspapers, weeklies, and periodicals.

The Davey report's recommendations languished unimplemented but not forgotten throughout the seventies, while the government concentrated its attention for the most part on finding ways to combat U.S. cultural influence. But there were isolated skirmishes over monopoly issues. In 1974, for example, Ottawa launched a prosecution under the Anti-Monopoly Act of K. C. Irving Co., which owns all four English-language dailies in New Brunswick. Two years later the Supreme Court held, on appeal, that the monopoly did not harm the public interest.

Then, in 1980, Canada's two largest newspaper chains, Southam Inc. and Thomson Newspapers Ltd., implemented a series of deals that brought down on them and the industry the full wrath of the federal government. Thomson closed its Ottawa *Journal* and Southam simultaneously closed its Winnipeg *Tribune*, thereby eliminating two loss-makers and leaving each chain with a monopoly—Thomson in Winnipeg and Southam in Ottawa. Moreover, Thomson, which had recently merged two papers in Victoria into the *Times Colonist*, withdrew from the Montreal and Vancouver markets to hand Southam control of the Montreal *Gazette* and the Vancouver *Sun* and *Province*. The government leapt into action. It charged the two companies with conspiring to reduce competition in violation of the Anti-Monopoly Act, and the case, which came to trial in September, is expected to be lengthy. Earlier this year, government agents conducted raids on both Thomson's and Southam's offices to seize material that could be used as evidence. The

federal courts have subsequently ruled the raids unconstitutional, a decision the government says it will appeal to the Supreme Court.

Not content with simply using legal recourses against possible antitrust violations, the federal government also appointed a Royal Commission on Newspapers in 1980 to conduct a full inquiry into the state of the newspaper business in Canada. To chair the panel it chose Tom Kent, a journalist and veteran political insider who is credited with being a prime architect of Canada's welfare state.

UNESCO of the North: The Kent Commission's Report

When the Kent commission reported in mid-1981, its recommendations stunned even the most apprehensive. In the opening lines of its report, the commission defined its terms: "Freedom of the press is not a property right of owners. It is a right of the people. It is part of their right to free expression, inseparable from their right to inform themselves." It commented approvingly on

> recent international declarations of human rights [that] have departed entirely from traditional usage: neither freedom of speech nor freedom of the press is mentioned as such. Their definitions are broader, they deal with the free flow and exchange of information, insisting explicitly on the necessity of keeping the avenues of communication open.

The report then went on to quote various UN statements, concluding with the claim of the 1980 International Commission for the Study of Communications Problems—the Sean MacBride commission—that "it is this right of the public to know that is the essence of media freedom, of which the professional journalist, writer and producer are only custodians."

The commission noted regretfully that government had not been able to get in on the ground floor in regulating newspapers as it had with radio and television, which had been under some sort of government control since their inception. One possible solution to many of these problems that the Kent commission considered was a government-owned national newspaper—a "print CBC"—to go along with the government-owned Canadian Broadcasting Corporation. It eschewed this recommendation, however, as politically impractical.

Rather than set up a publicly owned newspaper, the commission proposed drastic restrictions on existing ones. Three of these stand out. First, it said that no single owner should be permitted to own newspapers whose combined circulation exceeds 5 percent of all daily newspaper circulation or to acquire a paper that is published within 500 kilometers of any other paper under the same ownership. Second, certain chains, notably (surprise!) the K. C. Irving Group and Thomson, should be forced to divest themselves of certain of their daily papers. Third, any newspaper proprietor having other interests of greater value than the newspaper in question should be required to set up an advisory committee comprised of two members named by the proprietor, two elected by the staff, and three from—believe it or not—the "community." (Two of these three should be chosen by the in-house members—with an "appropriate" reviewer, such as the head of the Human Rights Commission of the province in which the newspaper is published, to adjudicate in the event of an impasse. These two community members would themselves choose a third to chair the committee.) Any comments the committee or its members wished to make would be published by the newspaper. The committee would receive and comment on the editor's annual reports, and would provide the minutes of its meetings to a national Press Rights Panel to be established within the Canadian Human Rights Commission. (The latter is a relatively new quasi-judicial body with vague authority that, although untested, appears to exceed that of the U.S. Civil Rights Commission.)

The Press Rights Panel's mandate was to have been broad. It would have had the powers of a superior court of record, including the powers to rule on newspaper acquisitions and, in some cases, to prevent intended closings. If a proprietor that wished to cease publishing failed to arrange a satisfactory sale to a going concern, the Press Rights Panel would determine whether any offer available for the business would be at least as remunerative to the proprietor as selling the physical assets and, if so, would prohibit the latter. It would also have been charged to "observe the performance of newspapers in Canada" and to publish an an-

nual review with "any comment and advice to newspapers or [federal or provincial] government it deems appropriate."

Content and Concentration

After the Kent commission finished its work (at a cost of $3.5 million), the government instructed the minister of media and multiculturalism to draft appropriate legislation. The result was the proposed Daily Newspaper Act, which looks mild compared with its parent but draws on the same questionable principles. The bill's main provisions would:

- Prohibit newspaper chains with 20 percent or more of Canadian circulation from expanding by acquiring papers, starting new ones, or converting nondaily papers into dailies. Two chains, Southam and Thomson Newspapers, currently exceed the 20 percent limit.
- Authorize the Restrictive Trade Practices Commission (Canada's version of the U.S. Federal Trade Commission) to look into cases where nonmedia corporations have acquired newspapers and, if the newspapers do not have editorial independence, to "recommend remedies" to the government as yet unspecified but likely to include divestiture.
- Establish a Daily Newspaper Advisory Council of fifty members who would make up five regional councils of ten members each. Three of the ten would be selected by newspaper publishers in the region and three by journalists; these six would choose the four public members. The council, financed through a government endowment of up to $20 million, would monitor the industry and report annually to the public.
- Authorize the government to make grants to newspapers of up to $150,000 to help them set up regional or international news bureaus.

Despite differences in particulars between the Kent recommendations and the daily newspaper bill, the two proposals share two main themes—regulation of who may own what in the newspaper industry and creation of a government-funded watchdog agency to monitor not just ownership patterns but also certain aspects of editorial performance. In the current Canadian government's mind, there is a link between commercialism and bigness on the one hand and bias or inadequacy in news content on the other. As the Kent report posed the question, "If . . . financial independence helps bring a newspaper closer to the ideal of social responsibility, can it be said that the opposite, concentration, causes the paper to move away from this ideal?" One might have expected the report to follow up this rhetorical question with an impressive string of shocking examples of editorial irresponsibility from the pages of Canada's chain newspapers. But the commission offered no such practical critique, aside from berating papers for not putting enough of their profits into such editorial investments as news bureaus and foreign correspondents. Instead, it rested its case on vague academic theory, quoting from (among others) Henry Mintzberg of McGill University:

> The very management control systems that chains tend to use, which separate the social from the economic goals in principle, in fact give rise to tendencies . . . which can inhibit social responsiveness in many cases, and in some cases, can even lead to social irresponsibility.

Since it sees the problem as a systematic one of management, the government is proposing to attack it on every level—with arbitrary ownership ceilings and, should these be insufficient, with content control, however muted, in the form of press councils.

At any rate, it is interesting to speculate whether real, out-and-out competition would produce the sort of newspaper quality that government commissions prefer. For example, the furious competition between Hearst's New York *Journal* and Pulitzer's New York *World* in 1895 gave rise to the phrase "yellow journalism" and—some say—played a major role in starting the Spanish-American War. Perhaps a bit of a monopoly cushion frees newspapers to print the sort of prestige-enhancing material beloved by governments and avoided by readers.

All official Canadian discussion of the newspaper industry assumes that the growth of newspaper chains is a result of market failure. The Kent commission bemoaned the fact that the independent newspapers' share of English-language circulation had dropped from 40 percent in 1970 to 26 percent in 1980. What it did not stress was that the market share of the two

largest chains, Thomson and Southam, increased only from 54 percent to 57 percent in that decade. Moreover, the drop in the independents' share was partly due to the emergence of new and highly competitive chains.

In fact, the chains are the very ones with the expertise and resources needed to launch competitive publications in current monopolized markets. For example, who is better equipped than Southam or Thomson to break Irving's monopoly in New Brunswick? To take another example, when the Sterling Newspaper Company converted four of its community newspapers into dailies and launched another new daily, it increased competition as well as concentration in the industry. Finally, the Toronto Sun Publishing Corporation began life in 1971 as a shoestring operation run by out-of-work journalists shipwrecked by the closing of the Toronto *Telegram*. It did so well that it was able to float a public stock issue, rescue a Calgary paper from the brink of bankruptcy, and open a third paper in Edmonton. The three papers accounted for 8.3 percent of national daily circulation in 1980. The success of these new chains in difficult business times, when other independents were closing their doors, hardly signifies that competition is dead—or that it would serve the public well to protect existing large chains by preventing anyone from organizing new ones. The opening salvos being fired against newspaper ownership by nonmedia companies—something the Kent report proposed to ban—will be equally counterproductive, scaring off another large set of potential competitors.

A government that was serious about wanting to increase competition would encourage entry, not get in its way. It might, for example, heed the suggestion of Canadian journalist Robert Perry for tax changes designed both to stimulate competition and to improve editorial content. In Canada as elsewhere, newspapers are heavily subsidized by advertisers. If readers provided a larger share of revenues, newspapers would almost certainly put more effort into attracting subscribers and less into attracting advertisers. If the government freed circulation profits from tax, reasons Perry, new or existing second-place newspapers could compete on their editorial quality alone, even if they could not break the leading newspaper's dominance in advertising. Once a quality competitor had established itself this way, of course, advertisers might switch their loyalties too.

Similarly, the Kent report's complaint that newspapers spend too little on editorial resources takes no account of the fact that it is the larger newspaper groups that can achieve the economies of scale that let them spend a lot on news bureaus and foreign correspondents. The current bill, while making the bureau situation worse by limiting chains, then tries to undo the damage by subsidizing new bureaus. Needless to say, most reporters would think twice before leveling a critical barrage against the government that pays the rent on their Ottawa offices.

Possible Constitutional Challenges

The government's effort to restructure the Canadian newspaper industry raises at least two constitutional questions. The first concerns freedom of the press. In the United States, with its solidly entrenched Bill of Rights and tradition of strong judicial review, the courts would (at present) instantly strike down anything resembling the proposed Daily Newspaper Act. The Canadian case is far different, and murkier —essentially because of the inherent difficulty of reconciling entrenched rights with the doctrine of parliamentary supremacy.

Section 2 of the new Canadian Constitution adopted in 1982 does state, "Everyone has the following fundamental freedoms: . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication. . . ." On the other hand, section 33 of the new Constitution provides—and this will seem so incredible to U.S. readers that it had better be quoted in full—that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." In other words, Parliament can set aside virtually at will the protections listed in section 2 (the one entitled "Fundamental Freedoms," which includes freedom of speech), along with various rights enumerated in other sections (including rules on search-and-seizure, habeas corpus, and cruel and unusual punishment). The only restriction

is that any set-aside will last for only five years, unless renewed by Parliament.

Moreover, the Charter of Rights, of which section 2 is a part, specifies that it guarantees the rights and freedoms set out in it "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This raises the prospect that even if Parliament did not include a provision setting aside section 2 in the Daily Newspaper Act, the Supreme Court of Canada might still let the law go through on the grounds that its provisions were "reasonable" and had been "demonstrably justified." Also, the act's proponents would be sure to claim that controlling newspapers *is* the way to achieve true press freedom, properly understood.

The ownership restrictions in the proposed law raise another kind of legal issue. In Canada, property rights remain under provincial jurisdiction. Under the proposed law, it would be illegal for anyone to take over either Thomson or Southam because to do so would instantly put the acquirer over the 20 percent limit. The founding families that control both companies would thus find their shares less marketable, and worth less accordingly. It is possible that either set of owners could challenge the bill on the grounds that depriving them of their property is a privilege reserved to the provinces.

A Right to Whose Information?

The new interpretation of freedom of the press that underlies the proposed Daily Newspaper Act—replacing the right to print anything that is not libelous with "the right of the public to information"—is an important one, and one whose origin is worth probing. It first came to prominence in the seventies, in connection with complaints by third-world countries that the Western press was not reporting on them fairly and that the countries themselves were not being well served by the news agencies upon which they were dependent for information.

Throughout most of the decade, there was a tacit but generally recognized bargain that so long as the developed countries came forth with practical demonstrations of their concern for rectifying global communications inequality (that is, money), the South would not push its proposal for a New World Information Order. By the 1980 UNESCO meeting in Belgrade, however, this tacit accord had broken down, and an International Program for the Development of Communications was soon established. Among other things, it said that individual states had a right to control the flow of information to and from their countries. This right was to be ensured by giving countries rights of reply and rectification and by establishing procedures for the protection of journalists (read: licensing). The United States, trying to head off such barriers to press freedom, has threatened to cut its contribution to UNESCO, and the agency has somewhat toned down its policies.

All this is hardly to suggest the manifestation of some international conspiracy in Canada. But both the UNESCO and the Canadian examples suggest that government leaders are showing increasing sophistication in couching their demands for more power in humane terms that deflect objection—not to say thought itself. After all, if the public has a right to information, someone will have to define exactly what information it has a right to—given that information is infinite and a newspaper's space is limited. And who better to decide the content of rights than a government?

It is premature to charge that the raison d'être of the proposed act is to ensure that Canadian newspapers become forums for information deemed appropriate by the Daily Newspaper Advisory Council and its five regional subdivisions. But it is abundantly clear that these councils would become targets for all manner of pressure groups. And given the prevailing political winds in Canada, one wonders if they would take up their cudgels as vociferously on the part of, say, citizen's groups who claim the press does not sufficiently cover the case against foreign aid, as they would on the part of, say, women's groups who claim book reviewers give insufficient attention to feminist authors. After all, the government has made it quite clear, by imposing quotas of Canadian content on broadcasters, that it is willing to override the preferences of the Canadian public.

Perhaps it was inevitable that the statist principles that have been applied to every other type of market and industry would eventually be applied to the business of newspapers and, even more important, to the market of ideas itself. In Canada and indeed everywhere, nothing is any longer "off limits" to the regulatory imagination. ■