



## The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 54 (2011)

Article 7

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### Citation Information

Chan, Gerald. "Transparency Confined to the Courthouse: A Critical Analysis of Criminal Lawyer's Assn., C.B.C. and National Post." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 54. (2011).  
<http://digitalcommons.osgoode.yorku.ca/sclr/vol54/iss1/7>

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# Transparency Confined to the Courthouse: A Critical Analysis of *Criminal Lawyers' Assn., C.B.C. and National Post*

Gerald Chan\*

## I. INTRODUCTION

In 1989, the Supreme Court of Canada decided *Edmonton Journal v. Alberta (Attorney General)*,<sup>1</sup> in which it constitutionalized the open court principle under section 2(b) of the *Canadian Charter of Rights and Freedoms*.<sup>2</sup> This decision was groundbreaking, however, not because of the constitutional holding it reached, but because of the path it took to get there.

While it has since been inextricably woven into the fabric of section 2(b), the constitutionality of the open court principle is not immediately apparent from the text of that provision, which guarantees the “freedom of thought, belief, opinion and expression” and “freedom of the press”. Rather, the Court in *Edmonton Journal* premised the incorporation of the open court principle into section 2(b) on three fundamental propositions, which collectively bridge the gap between text and principle:

- (1) The courts play an important role in our democratic society and, therefore, it is important for the public to be informed about the courts;

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\* Partner, Ruby Shiller Chan. I would like to thank Professors Jamie Cameron and Nathalie Des Rosiers for their very helpful feedback on earlier drafts of this paper. They are not responsible for my failure to heed all of their advice.

<sup>1</sup> [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326 (S.C.C.) [hereinafter “*Edmonton Journal*”].

<sup>2</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “*Charter*”].

- (2) Freedom of expression protects listeners (*i.e.*, the right to receive information and opinions) as well as speakers (*i.e.*, the right to disseminate information and opinions); and
- (3) It is only through the press that most individuals can really learn of what is transpiring in the courts.

Taken together, these three propositions suggest a broad vision of section 2(b) of the Charter that protects not only the simple act of expression, but also the acts necessary to make that expression meaningful (*e.g.*, access to information, reliance on the ability of the press to gather information, *etc.*).

More significantly, while they were developed by the Court in order to explain why section 2(b) encompasses the open court principle, these propositions are not inherently limited to the courts. The judiciary is not the only branch of government that plays an important role in our democratic society and about which it is important for the public to be informed — the same can be said of provincial legislatures and Parliament, as well as of the executive. Nor do members of the public have any greater ability to access such institutions than they do the courts. Thus, the decision of the Supreme Court in *Edmonton Journal* suggested a muscular conception of section 2(b) and evoked an image of the constitutional right as the primary guarantor of transparency in our democracy. The question was whether the Supreme Court would follow through on this course and extend the growth of section 2(b) to its natural limits, or search for other ways of limiting the broad conception of section 2(b) to the specific context in which it arose.

Fifteen years later, we have our answer thanks to three judgments released by the Court in its 2010-2011 term: *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*,<sup>3</sup> *Canadian Broadcasting Corp. v. Canada (Attorney General)*<sup>4</sup> and *R. v. National Post*.<sup>5</sup> These judgments collectively reveal that the robust vision of section 2(b) for which the foundation was laid in *Edmonton Journal* would ultimately be confined to the four walls of the courthouse. Within the courthouse, the Supreme Court re-affirmed and perhaps even extended the presumption of openness and the related right of the press to gather news under section 2(b)

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<sup>3</sup> [2010] S.C.J. No. 23, [2010] 1 S.C.R. 815 (S.C.C.) [hereinafter "*Criminal Lawyers' Assn.*"].

<sup>4</sup> [2011] S.C.J. No. 2, [2011] 1 S.C.R. 19 (S.C.C.) [hereinafter "*C.B.C. v. Canada (A.G.)*"].

<sup>5</sup> [2010] S.C.J. No. 16, [2010] 1 S.C.R. 477 (S.C.C.) [hereinafter "*National Post*"].

of the Charter in *C.B.C. v. Canada (A.G.)*. Outside of the courthouse, however, the Court put the brakes on. In *Criminal Lawyers' Assn.*, the Court held that the presumption of openness afforded to the courts does not apply to other public institutions. And in *National Post*, the Court held that section 2(b) does not provide a general protection for all methods of newsgathering or even a method as tested as that of relying on confidential sources.

The courthouse is, of course, familiar territory. Judges go to work in courthouses every day and are well aware of the effects of publicity on their operational efficacy. Judges are also keenly appreciative of the critical link between the openness of courts and their own legitimacy as unelected decision-makers. This awareness expresses itself every time a judge cites the well-worn aphorism that justice must not only be done, but must also be seen to be done. Thus, it did not require a great leap of imagination for the Supreme Court of Canada to expand the scope of section 2(b) to encompass the openness of courts. The true test of the Court's boldness came when it was presented with the opportunity to extend the same guarantee of transparency to other public institutions. When that time came, the Court balked. Once the principles underlying the expansion of section 2(b) became unhinged from the safe, traditional context in which they were born, they proved to be too overwhelming for today's cautious Court to fully embrace.

This paper reviews the Supreme Court of Canada's section 2(b) analyses in each of *Criminal Lawyers' Assn.*, *C.B.C. v. Canada (A.G.)*, and *National Post* against the backdrop of the robust vision of section 2(b) that once seemed within reach. This paper concludes by observing that the constraints placed by the Court on access to information and newsgathering in *Criminal Lawyers' Assn.* and *National Post*, respectively, have severely restricted the ability of section 2(b) to achieve openness in any area other than the courthouse. The notion of transparent government, which once seemed to be on the horizon as section 2(b)'s chief concern, has been reduced to just one factor among many in the section 2(b) calculus.

## II. PROPOSITIONS UNDERLYING THE CONSTITUTIONALIZATION OF THE OPEN COURT PRINCIPLE

The open court principle pre-dates the Charter. As the Supreme Court of Canada has repeatedly observed, the open court principle has “long been recognized as a cornerstone of the common law”<sup>6</sup> and can be traced in the common law as far back as the House of Lords decision in 1913 in *Scott v. Scott*.<sup>7</sup> To go back even further, one of the most oft-cited passages in support of the open court principle is that of the 18th-century philosopher, Jeremy Bentham:

In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. ... Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.<sup>8</sup>

The Supreme Court of Canada has expanded upon Bentham’s sentiments, albeit in less dramatic fashion, in a number of seminal decisions.<sup>9</sup> Most notably, Wilson J. articulated five distinct benefits that flow from the requirement that the courts operate in full view of the public in her concurring opinion in *Edmonton Journal*: (i) it maintains an effective evidentiary process (*i.e.*, the open examination of witnesses in the presence of the public is more conducive to the search for truth); (ii) it ensures a judiciary and juries that behave fairly and that are sensitive to the values espoused by society; (iii) it ensures that justice is not only done, but is seen to be done so as to maintain public confidence in the administration of justice; (iv) it provides an ongoing opportunity for the community to learn how the justice system operates and how the law

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<sup>6</sup> *Re Vancouver Sun*, [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332, at para. 24 (S.C.C.) [hereinafter “*Vancouver Sun*”]; *Named Person v. Vancouver Sun*, [2007] S.C.J. No. 43, [2007] 3 S.C.R. 253, at para. 31 (S.C.C.) [hereinafter “*Named Person*”].

<sup>7</sup> [1913] A.C. 417 (H.L.).

<sup>8</sup> *Nova Scotia (Attorney General) v. MacIntyre*, [1982] S.C.J. No. 1, [1982] 1 S.C.R. 175, at 183 (S.C.C.); *Canadian Broadcasting Co. v. New Brunswick (Attorney General) (Re R. v. Carson)*, [1996] S.C.J. No. 38, [1996] 3 S.C.R. 480, at para. 21 (S.C.C.) [hereinafter “*C.B.C. (Re R. v. Carson)*”]; *C.B.C. v. Canada (A.G.)*, *supra*, note 4, at para. 28; *Named Person*, *supra*, note 6, at para. 31. See Burger C.J.’s plurality opinion in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) [hereinafter “*Richmond Newspapers*”], for an especially detailed summary of the historical origins of the open court principle.

<sup>9</sup> *Named Person*, *supra*, note 6, at para. 32; *Vancouver Sun*, *supra*, note 6, at para. 25; *Edmonton Journal*, *supra*, note 1, at para. 3, *per* Cory J., and paras. 61-62, *per* Wilson J.

applies daily (*i.e.*, it has an educational function); and (v) it provides litigants the satisfaction of having their interests vindicated by a public airing of the injustices they feel they have suffered.<sup>10</sup>

With the advent of the Charter, the open court principle acquired additional significance. In a series of cases beginning with *Edmonton Journal*, the Supreme Court of Canada constitutionalized the open court principle. Interestingly, the Court did not opt for the narrower approach of doing so under the rubric of the principles of fundamental justice in section 7 of the Charter, which would have restricted the operation of the principle to instances in which a person's life, liberty or security of the person was at stake. One might have expected the Court to have pursued this route given that the various rationales that had been advanced for the open court principle appear, at first blush, to have more to do with the proper administration of justice than with freedom of expression.<sup>11</sup> Indeed, the pre-Charter case law on the open court principle is perhaps most notable for the *absence* of discussion of freedom of expression and freedom of the press as underlying values for the openness of courts.<sup>12</sup>

The Supreme Court did not, however, adopt a narrow approach. Instead, the Court followed the lead set by its American counterpart in *Richmond Newspapers* and made the open court principle part and parcel of the freedoms of expression and the press guaranteed by section 2(b) of the Charter.<sup>13</sup> For many, this was a welcome acknowledgment of the reality that the free expression rationale underlies all of the other rationales for openness. As M. David Lepofsky wrote in his book, *Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings*:

If the openness of criminal proceedings ensures judicial honesty and fair treatment for accuseds, this is so only because the public can freely discuss what transpires in the courtroom. Similarly, public confidence

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<sup>10</sup> *Edmonton Journal*, *supra*, note 1, at paras. 61-62, *per* Wilson J.

<sup>11</sup> *Id.*, at para. 4, *per* Cory J., and paras. 61-62, *per* Wilson J.

<sup>12</sup> M. David Lepofsky, *Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings* (Toronto: Butterworths, 1985), at 48 [hereinafter "Lepofsky"].

<sup>13</sup> In *Richmond Newspapers*, *supra*, note 8, Burger C.J. authored a plurality opinion holding that the right of the public and the press to attend criminal trials is constitutionally guaranteed by the First Amendment. Justices Stevens, White, Brennan, Stewart and Blackmun each filed concurring opinions. Only Rehnquist J. dissented. For explicit statements linking the open court principle to s. 2(b) of the Charter, see *Vancouver Sun*, *supra*, note 6, at para. 26; *Toronto Star Newspapers Ltd. v. Ontario*, [2005] S.C.J. No. 41, [2005] 2 S.C.R. 188, at para. 29 (S.C.C.); and *Named Person*, *supra*, note 6, at para. 33.

in the administration of justice cannot be promoted by the requirement of openness unless the events occurring in the courtroom can form the basis of unfettered public dialogue and debate.<sup>14</sup>

Thus, where parties have sought to rely on statutes placing limitations on the openness of courts, the Supreme Court has held that such limitations infringe section 2(b) and required them to be justified under section 1 of the Charter.<sup>15</sup> Similarly, where parties have had resort to a statutory or common law rule that confers discretion on the courts to limit openness, the Court has held that such discretion must be exercised in accordance with what has now come to be known as the *Dagenais/Mentuck* test, which was designed to mirror the justificatory *Oakes* analysis.<sup>16</sup> This approach has been applied to publication bans,<sup>17</sup> sealing orders<sup>18</sup> and orders to close the courtroom.<sup>19</sup> It has been applied to both trial and pre-trial proceedings, and to both the proceedings themselves and any documents or records filed in such proceedings.<sup>20</sup> It has even been applied to proceedings in civil, and not only criminal, litigation.<sup>21</sup>

<sup>14</sup> Lepofsky, *supra*, note 12, at 48-49.

<sup>15</sup> In *Toronto Star Newspapers Ltd. v. Canada*, [2010] S.C.J. No. 21, [2010] 1 S.C.R. 721 (S.C.C.), the Supreme Court upheld the mandatory publication ban for bail hearings provided by s. 517(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, after conducting a formal s. 1 *Oakes* [*R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.)] [hereinafter "*Oakes*"] analysis. Similarly, in *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] S.C.J. No. 67, [1988] 2 S.C.R. 122 (S.C.C.), the Court upheld the mandatory publication ban for the identity of a sexual assault complainant provided by s. 442(3) of the *Criminal Code* after finding the provision justified under s. 1 of the Charter. In contrast, the Court struck down s. 30 of the *Judicature Act*, R.S.A. 1980, c. J-1, in *Edmonton Journal*, *supra*, note 1, which imposed a mandatory publication ban on certain details related to matrimonial proceedings after finding that the ban could not be justified under the *Oakes* test.

<sup>16</sup> *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at 878 (S.C.C.) [hereinafter "*Dagenais*"]; *R. v. Mentuck*, [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442, at para. 23 (S.C.C.) [hereinafter "*Mentuck*"]; *Oakes, id.* The test requires that the party seeking an order to limit the openness of the courts satisfy two steps: (i) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and (ii) the salutary effects of the order outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

<sup>17</sup> *Dagenais, id.*; *Mentuck, id.*

<sup>18</sup> *Toronto Star Newspapers Ltd. v. Ontario*, *supra*, note 13.

<sup>19</sup> *C.B.C. (Re R. v. Carson)*, *supra*, note 8.

<sup>20</sup> See *Nova Scotia (Attorney General) v. MacIntyre*, *supra*, note 8 and *Toronto Star Newspapers Ltd. v. Ontario*, *supra*, note 13, for the application of the open court principle to documents and records filed in pre-trial proceedings.

<sup>21</sup> *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42, [2002] 2 S.C.R. 522 (S.C.C.).

All of these cases have been subject to a presumption of openness applied under section 2(b) of the Charter.

While it has become a “fixed star in our constitutional constellation” (to borrow a phrase from Jackson J.),<sup>22</sup> the notion that s. 2(b) of the Charter requires the courts and their processes to be presumptively open is not immediately apparent from the text of the provision. Section 2(b) provides that: “Everyone has the following fundamental freedoms: ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” A strict reading of the text might suggest, for instance, that section 2(b) would be infringed by a publication ban, but not by an order excluding the public from the courtroom. The former proscribes an act of expression, whereas the latter proscribes the act of accessing the information upon which the expression is based. While the latter may be thought of as a necessary precondition to ensuring that the former is meaningful, it finds no direct textual anchor in section 2(b). This begs the question of how the open court principle became incorporated into freedom of expression.

The Court first dipped its toes in these doctrinal waters in *Edmonton Journal*. At issue in that case was a statutory provision that prescribed a mandatory publication ban on details related to matrimonial proceedings.<sup>23</sup> Thus, it was not strictly necessary for the Court to rely on an expansive view of section 2(b) in order to find an infringement of freedom of expression. The Court could have simply rooted the violation in the fact that individuals — particularly, members of the press — were prohibited from expressing themselves through the medium of publication. But the Court went beyond that. In a majority opinion written by Cory J., the Court was driven to the section 2(b) violation by the cumulative force of three propositions:

- (1) The courts play an important role in a democratic society and, therefore, it is important for the public to be informed about the courts,<sup>24</sup>

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<sup>22</sup> In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, at 642 (1942), Jackson J. famously wrote: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.”

<sup>23</sup> *Edmonton Journal*, *supra*, note 1, at para. 2.

<sup>24</sup> *Id.*, at para. 5; *C.B.C. (Re R. v. Carson)*, *supra*, note 8, at para. 20.



- (2) Freedom of expression protects listeners (*i.e.*, the right to receive information and opinions) as well as speakers (*i.e.*, the right to disseminate information and opinions);<sup>25</sup>
- (3) It is only through the press that most individuals can really learn of what is transpiring in the courts.<sup>26</sup>

These propositions were innovative not only for their incorporation of the open court principle into section 2(b) of the Charter, but also for what they said about section 2(b) in general. Adopting the purposive approach to constitutional interpretation espoused by Dickson C.J.C. in *Hunter v. Southam Inc.*,<sup>27</sup> Cory J. suggested a muscular conception of section 2(b) as a guarantee of the freedom to engage not only in acts of expression, but also in acts necessary to make expression meaningful, such as accessing information about public institutions and relying on the press' ability to gather information about such institutions. As the U.S. Supreme Court observed in the parallel case of *Richmond Newspapers* (which Cory J. cited), the right of the public and the press to attend a trial and to communicate their observations concerning that trial can be described as both a "right of access" and a "right to gather information".<sup>28</sup>

The Supreme Court of Canada developed these principles further in the subsequent case of *C.B.C. (Re R. v. Carson)*. In that case, the decision under appeal was an order restricting public access to the courtroom.<sup>29</sup> Thus, unlike in *Edmonton Journal*, the question of whether section 2(b) protects more than mere acts of expression was directly engaged. In a unanimous opinion authored by La Forest J., the Court reinforced the reasoning in *Edmonton Journal*. Justice La Forest repeatedly emphasized that expression can only be meaningful if informed, and information can only be acquired through access. While "the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b)", La Forest J. wrote, "so too is the right of members of the public to obtain information about the courts in the first place".<sup>30</sup> This right of the public to information about the courts, in turn, "depend[s] on the freedom of the press to transmit this informa-

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<sup>25</sup> *Edmonton Journal, id.*, at para. 10; *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at 767 (S.C.C.); *C.B.C. (Re R. v. Carson), id.*, at para. 23.

<sup>26</sup> *Edmonton Journal, id.*, at para. 10.

<sup>27</sup> [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 155 (S.C.C.).

<sup>28</sup> *Richmond Newspapers, supra*, note 8, at 576.

<sup>29</sup> *C.B.C. (Re R. v. Carson), supra*, note 8, at para. 2.

<sup>30</sup> *Id.*, at para. 23.

tion”.<sup>31</sup> The freedom of the press “not only encompass[s] the right to transmit news and other information, but also the right to gather this information”.<sup>32</sup>

The last sentence in the above paragraph is particularly interesting because it incorporates a view of the law that La Forest J. first expressed in his sole concurring opinion in *Canadian Broadcasting Corp. v. Lessard*<sup>33</sup> — namely, that section 2(b) protects the general freedom of the press to “gather news”,<sup>34</sup> which is ostensibly broader than the freedom to access public institutions and their documents. The latter is merely one means of achieving the former. In *C.B.C. (Re R. v. Carson)*, a unanimous Supreme Court signed on to the view that section 2(b) encompasses both.

However, just as La Forest J. appeared to broaden section 2(b), he also circumscribed its scope by adding an important caveat. Justice La Forest emphasized that he was not holding that section 2(b) provided for the right of public access to all public institutions or even the right of access to all areas of the courthouse (*e.g.*, jury rooms, judges’ chambers, conference rooms, *etc.*). Courtrooms are different, La Forest J. held, because they “have, since time immemorial, been public arenas”.<sup>35</sup> What La Forest J. did not explain was why the traditional openness or lack thereof of the public institution to which access is sought should matter under section 2(b) — as opposed to section 1 — if the institution is nonetheless an important one in our democracy and information about that institution is therefore necessary in order to make freedom of expression meaningful.

Justice La Forest’s simultaneous expansion and contraction of the Court’s previous opinion in *Edmonton Journal* raised several questions about the precise scope of section 2(b). Is there *any* right of access to information about public institutions other than the courts and, if so, how much? How broad is the right of access and the right to gather news outside of the courtroom but within the courthouse? And, finally, does the right to gather news encompass any and all means of gathering news or is it simply limited to the right of access?

Fifteen years later, we have our answers. In the 2010-2011 term, the Supreme Court of Canada released three judgments that respectively

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*, at para. 24.

<sup>33</sup> [1991] S.C.J. No. 87, [1991] 3 S.C.R. 421 (S.C.C.) [hereinafter “*Lessard*”].

<sup>34</sup> *Id.*, at para. 2, *per* La Forest J.

<sup>35</sup> *C.B.C. (Re R. v. Carson)*, *supra*, note 8, at para. 28.

addressed each of these three questions: *Criminal Lawyers' Assn., C.B.C. v. Canada (A.G.)* and *National Post*. The presumption of openness under section 2(b) applies not only within the courtroom, but to all public areas of the courthouse (*e.g.*, hallways), the Court held. Access to information outside of the courthouse, however, is governed by substantially stricter standards. Claimants must show, among other things, that the information sought is “necessary for meaningful public commentary” before they can even get their foot into the section 2(b) door. And the press cannot count on section 2(b) guaranteeing them the right to gather news by means other than the right of access (*e.g.*, by relying on confidential sources free from state interference).

Each of these three judgments is discussed in more detail below.

### III. *CRIMINAL LAWYERS' ASSN.* — ACCESS TO GOVERNMENT INFORMATION

*Criminal Lawyers' Assn.* arose from the murder of Domenic Racco and the trial of two accused for this murder: Graham Rodney Court and Peter Dennis Monaghan. The Crown alleged that Court and Monaghan were hired to kill Racco. Both were convicted after a jury trial in 1991, only to have the Court of Appeal order new trials for both on the basis of fresh evidence (in relation to Monaghan) and inadequate jury instructions (in relation to both Court and Monaghan).<sup>36</sup>

At the new trial, the two men applied for and obtained a stay of proceedings on the ground that their Charter rights under sections 7, 11(b) and 11(d) had been violated. More specifically, the trial judge found numerous instances of abusive conduct by state officials, including “deliberate non-disclosure”, “deliberate editing of useful information”, a “negligent breach of the duty to maintain original evidence”, and “improper cross-examination and jury addresses” during the first trial. The trial judge’s vociferous rebuke of the state resulted in an investigation by the Ontario Provincial Police (“OPP”) into the conduct of the local police forces and the Crown Attorney in the case. In a terse press release, the OPP exonerated the police on the grounds that there was “no evidence that the officers attempted to obstruct justice by destroying or withholding a vital piece of evidence” and “no evidence that information

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<sup>36</sup> *Criminal Lawyers' Assn.*, *supra*, note 3, at paras. 8-9.

withheld from defence was done deliberately and with the intent to obstruct justice”. The OPP offered no explanation for its conclusions.<sup>37</sup>

The stark gap between the findings of the trial judge on the stay application and the OPP’s conclusions prompted the Criminal Lawyers’ Association to make a request under section 10 of the *Freedom of Information and Protection of Privacy Act*<sup>38</sup> to the Minister of the Solicitor General and Correctional Services for disclosure of certain records relating to the OPP’s investigation — namely, a 318-page police report detailing the results of the OPP’s investigation; a memorandum from a Crown Attorney to the Regional Director of Crown Operations containing legal advice with respect to the police report; and a letter from the Regional Director of Crown Operations to a police official also containing legal advice on the OPP investigation. The Minister refused to disclose any of the requested records, claiming several exemptions under FIPPA including section 14 (law enforcement), section 19 (solicitor-client privilege), section 20 (danger to health and safety) and section 21 (personal privacy).<sup>39</sup>

The Minister’s decision was reviewed by the Assistant Information and Privacy Commissioner (the “Commissioner”), at which stage the state withdrew its reliance on the exemption under section 20 (danger to health and safety). The Commissioner found that the public interest in disclosure “clearly outweigh[ed]” the purpose of the exemption in section 21 (personal privacy) and stated that he would, therefore, have applied the public interest override found in section 23 of FIPPA. However, the Commissioner nevertheless upheld the Minister’s refusal to disclose because he held that the other exemptions — namely, section 14 (law enforcement) and section 19 (solicitor-client privilege) — are not subject to the public interest override in section 23 as a matter of statutory construction. The Commissioner further concluded that the statutory scheme in FIPPA did not violate the Criminal Lawyers’ Association right to freedom of expression under section 2(b) of the Charter.<sup>40</sup>

The Divisional Court upheld the Commissioner’s decision on appeal. On further appeal, however, the Ontario Court of Appeal split 2-1. The majority, in an opinion written by LaForme J.A., allowed the appeal and held that the exemption scheme in FIPPA infringed section 2(b) of the

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<sup>37</sup> *Id.*, at paras. 10-11.

<sup>38</sup> R.S.O. 1990, c. F.31 (“FIPPA”).

<sup>39</sup> *Criminal Lawyers’ Assn.*, *supra*, note 3, at paras. 12-13.

<sup>40</sup> *Id.*, at para. 15.

Charter. Justice Juriensz dissented and questioned whether section 2(b) was even engaged.<sup>41</sup> The stage was thus set for the Supreme Court of Canada to resolve the issue.

In a unanimous opinion co-authored by McLachlin C.J.C. and Abella J., the Court restored the Commissioner's decision confirming the constitutionality of the exemption scheme in FIPPA. The Court framed the primary question — and the only question in the case with which this paper is concerned — as whether section 2(b) of the Charter protects access to information and, if so, in what circumstances.<sup>42</sup> In answering this question, the Court drew on the methodology that it had developed in its earlier decisions of *Irwin Toy Ltd. v. Québec (Attorney General)*<sup>43</sup> and *Montréal (City) v. 2952-1366 Québec Inc.*<sup>44</sup> for determining whether a particular expressive *activity* is protected by section 2(b). That methodology requires an examination of the following three questions:

- (1) Does the activity in question have expressive content, thereby bringing it within the reach of section 2(b)?
- (2) Is there something in the *method* or *location* of that expression that would remove that protection? With respect to location, the question is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which section 2(b) is intended to serve — namely, (a) democratic discourse; (b) truth finding; and (c) self-fulfilment. To answer this question, one is to consider the historical or actual function of the place as well as any other aspects of the place which suggest that expression within it would undermine the values underlying free expression.
- (3) If the activity is protected, does the state action infringe that protection, either in purpose or effect?<sup>45</sup>

The Court held that these principles — developed in the context of section 2(b) claims based on expressive activities — apply equally to section 2(b) claims based on access to government information with two refinements. First, in order to show that there is expressive content in the

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<sup>41</sup> *Id.*, at para. 17.

<sup>42</sup> *Id.*, at para. 30.

<sup>43</sup> [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 967-68 (S.C.C.) [hereinafter "*Irwin Toy*"].

<sup>44</sup> [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141, at para. 56 (S.C.C.) [hereinafter "*Montréal (City)*"].

<sup>45</sup> *Criminal Lawyers' Assn.*, *supra*, note 3, at para. 32; *Montréal (City)*, *id.*, at paras. 56, 74.

act of accessing information, a Charter claimant must show that the denial of such access “effectively precludes meaningful commentary”. Second, while it is the method or location of the expression that can remove the protection of section 2(b) in an “expressive activities” case, it is the nature of the information sought (or the nature of the government institution about which information is sought) that can do the same in an “access to information” case.<sup>46</sup>

On the specific facts of *Criminal Lawyers’ Assn.*, the Court held that the Association had failed to demonstrate that a meaningful public discussion of the handling of the investigation into the Racco murder and the prosecution of Court and Monaghan could not take place under the statutory regime in FIPPA. The reasons for this conclusion were sparse. The Court simply noted that the record supporting the trial judge’s conclusions on the stay application about state misconduct was already in the public domain and stated in a conclusory manner that the Criminal Lawyers’ Association had not established that the additional disclosure of the police report was necessary for a meaningful public discussion on the subject.<sup>47</sup>

In addition, the Court concluded that even if the Criminal Lawyers’ Association had been able to satisfy the “necessity for meaningful commentary” test, the nature of the documents covered by the section 14 (law enforcement) and section 19 (solicitor-client privilege) exemptions would remove them from the protection of section 2(b) of the Charter. The production of the documents would “impinge on privileges” and “impair the proper functioning of relevant government institutions”.<sup>48</sup> The analysis never reached section 1.

The purpose of this paper, of course, is not to engage in a detailed examination of the merits of the Court’s judgment. Rather, it is to examine the extent to which the Court’s judgment lived up to, expanded upon, or reined in the muscular conception of section 2(b) of the Charter that it hinted at in its earlier open court decisions of *Edmonton Journal* and *C.B.C. (Re R. v. Carson)*. In this regard, a few observations are in order.

First, while the Court recognized a limited right of access to government information for the first time, the Court nevertheless affirmed La

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<sup>46</sup> *Criminal Lawyers’ Assn.*, *id.*, at paras. 32-33.

<sup>47</sup> *Id.*, at para. 59.

<sup>48</sup> *Id.*, at para. 60.

Forest J.'s caveat in *C.B.C. (Re R. v. Carson)* that access to the courts cannot be equated with access to other public institutions under section 2(b). Moreover, the Court provided a principled basis for this distinction by adopting the methodology developed in *Montréal (City)*. Just as the protection for expressive activities under section 2(b) depends on the method or location of those activities, the protection for access to information under section 2(b) depends on the nature of the government information sought (or the nature of the institution about which information is sought). By way of illustration, the Court wrote:

It may also be that a particular government function is incompatible with access to certain documents. For example, it might be argued that while the open court principle requires that court hearings and judgments be open and available for public scrutiny and comment, memos and notes leading to a judicial decision are not subject to public access. This would impair the proper functioning of the court by preventing full and frank deliberation and discussion at the pre-judgment stage. The principle of Cabinet confidence for internal government discussions offers another example. The historic function of a particular institution may assist in determining the bounds of institutional confidentiality, as discussed in *Montréal (City)*, at para. 22. In that case, this Court acknowledged that certain government functions and activities require privacy (para. 76). This applies to demands for access to information in government hands. Certain types of documents may remain exempt from disclosure because disclosure would impact the proper functioning of affected institutions.<sup>49</sup>

This methodology has been persuasively criticized for importing what are, in essence, section 1 justification concerns into the section 2(b) analysis and thereby creating constitutional “dead zones” in which no expression is allowed rather than allowing for a more fact-specific, contextual analysis.<sup>50</sup> A similar critique could probably be levelled at the adaptation of this methodology to the access to government information context, although such an analysis is beyond the scope of this paper.

But leaving aside the wisdom of the criteria chosen by the Court, the incorporation of the *Montréal (City)* test into the “access to information” context at least has the virtue of providing a set of criteria upon which to

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<sup>49</sup> *Id.*, at para. 40.

<sup>50</sup> See Brian Slattery, “Freedom of Expression and Location: Are There Constitutional Dead Zones?” in J. Cameron & B. Ryder, eds. (2010) 51 S.C.L.R. (2d) 245 [hereinafter “Cameron & Ryder”].

distinguish a claim for access to information about the courts from a claim for access to information about other government institutions. The courts have traditionally operated in the open and this openness does not impede their operational efficacy, nor is it incompatible with the values underlying section 2(b). Accordingly, access to the courts is granted more readily than it would be to other public institutions. The adoption of this distinguishing criteria provided a principled basis for La Forest J.'s caveat in *C.B.C. (Re R. v. Carson)* and, thus, reinforced the one restrictive aspect of that judgment.

The expansive portions of *C.B.C. (Re R. v. Carson)* (and *Edmonton Journal* before it), meanwhile, were curtailed. While the Court recognized a constitutional right of access to government information for the first time,<sup>51</sup> the Court imposed a precondition to the exercise of this right that is inconsistent with its broad pronouncements on the scope of section 2(b) in its early open court cases — namely, the requirement that claimants in an “access to information” case show that the access sought is “necessary for the meaningful exercise of free expression on matters of public or political interest”. Ironically, the Court cited none other than La Forest J.'s opinion in *C.B.C. (Re R. v. Carson)* in support of this requirement, in which La Forest J. wrote: “The ‘open courts’ principle is ‘inextricably tied to the rights guaranteed by s. 2(b)’ because it ‘permits the public to discuss and put forward opinions and criticisms of court practices and proceedings’.”<sup>52</sup>

What the Court skated over, however, is the fact that La Forest J. was articulating the *rationale* for the open court principle and not a *requirement* for its application. That is, the rule that the courts must be presumptively open exists because, as a general matter, it is important for individuals to be informed about the courts’ practices in order to engage in a meaningful debate about the courts. But it is not necessary for individuals to demonstrate on a case-by-case basis that they need access to the courts in order to engage in meaningful debate on a given subject before they are permitted to do so.

The biggest problem with such a requirement is that it is easily manipulable. The entire analysis depends on the level of generality with

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<sup>51</sup> See Ryder L. Gilliland, “Supreme Court Recognizes (a Derivative) Right to Access Information” in Cameron & Ryder, *id.*, 233, and Daniel Guttman, “*Criminal Lawyers’ Assn. v. Ontario: A Limited Right to Government Information under Section 2(b) of the Charter*” in Cameron & Ryder, *id.*, 199, for some analysis in this regard.

<sup>52</sup> *Criminal Lawyers’ Assn.*, *supra*, note 3, at para. 36.



which one defines the subject matter to be debated. For instance, in *Criminal Lawyers' Assn.*, the Court held that it was not necessary for the Criminal Lawyers' Association to have access to the OPP's investigatory report to debate "the handling of the investigation into the murder of Domenic Racco" since it already had the access to the court record upon which the trial judge made his findings of misconduct in the stay application.<sup>53</sup> If, however, the Court had defined the subject matter to be debated as "the reasons why no state officials were held personally accountable for the mishandling of the investigation into the murder of Domenic Racco", then surely access to the OPP's investigatory report would have been necessary for a meaningful discussion to have occurred, especially given the OPP's complete lack of an explanation in its press release for its refusal to lay charges.<sup>54</sup> Indeed, this latter characterization is arguably more consistent with the intent of the Criminal Lawyers' Association in bringing its request for disclosure in the first place.<sup>55</sup>

More significantly for the purposes of this paper, there appears to be no principled basis for distinguishing between "access to court" cases and "access to government information" cases with respect to the "necessity for meaningful public commentary" criterion. The distinction between the two categories of institutions — namely, the transparency with which they have traditionally operated and the harmony between such transparency and their function — is already reflected in the second stage of the adapted *Montréal (City)* test, which looks at the *nature* of the institution about which the information is sought. There is no apparent additional distinction between the two categories of institutions that would justify imposing the "necessity for meaningful commentary" requirement for access to one and not for access to the other.

Therefore, the Court's judgment in *Criminal Lawyers' Assn.* represents a significant retreat from the propositions underlying the incorporation of the open court principle into section 2(b) of the Charter. The Court was not only unwilling to extend the same level of presumptive openness that it had granted to the courts under section 2(b) to other public or government institutions, but also felt compelled to impose an additional barrier to section 2(b) in the case of the latter. This additional

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<sup>53</sup> *Id.*, at para. 59.

<sup>54</sup> *Id.*, at para. 11.

<sup>55</sup> The Court itself noted that the Criminal Lawyers' Association made its request under FIPPA because it was "(c)oncerned about the disparity between the findings of Glithero J. and the conclusions reached by the OPP": *id.*, at para. 12.

requirement cannot be easily explained by reference to any unique qualities possessed by the courts in contrast to other public institutions or vice versa.

In principle, therefore, *Criminal Lawyers' Assn.* also raised the prospect of a significant curtailment of the open court principle. Was the Court now saying that a Charter claimant who seeks access to information has to show that the information is necessary for a meaningful debate, even where the information pertains strictly to the courts? If not — that is, if the courts are truly *sui generis* — is that true of the courthouse as a whole or simply the courtroom and the documents filed therein? These questions would be answered seven months later in *C.B.C. v. Canada (A.G.)*.

#### IV. *C.B.C. v. CANADA (A.G.)* — *SUI GENERIS* NATURE OF THE COURTS

In January 2011, the Supreme Court released a pair of judgments on the open court principle as applied in two different scenarios. First, in *C.B.C. v. Canada (A.G.)*,<sup>56</sup> the Court examined the constitutionality of court rules restricting the areas of the courthouse in which the press are allowed to conduct interviews and use cameras and prohibiting the broadcasting of any recordings of court hearings. Second, in *Société Radio-Canada v. Canada*,<sup>57</sup> the Court considered the issue of the proper test to be applied to a determination of whether to grant the public access to a videotaped witness statement that was filed as an exhibit at trial. The latter judgment did not break any new section 2(b) ground as the Court simply applied the well-established jurisprudence on public access to documentary court exhibits, which holds that the *Dagenais/Mentuck* test is applicable.<sup>58</sup> Accordingly, the discussion to follow will focus exclusively on *C.B.C. v. Canada (A.G.)*.

In *C.B.C. v. Canada (A.G.)*, the C.B.C. challenged the constitutionality of Rules 38.1 and 38.2 in the *Rules of Practice of the Superior Court of the Province of Québec, Criminal Division, 2002*,<sup>59</sup> which provide:

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<sup>56</sup> *Supra*, note 4.

<sup>57</sup> [2011] S.C.J. No. 3, [2011] 1 S.C.R. 65 (S.C.C.).

<sup>58</sup> *Id.*, at paras. 8, 12, 13.

<sup>59</sup> SI/2002-46, am. SI/2005-19.

38.1 In order to ensure the fair administration of justice, the serenity of judicial hearings and the respect of the rights of litigants and witnesses, interviews and the use of cameras in a courthouse shall only be permitted in the areas designated for such purposes by directives of the chief justice.

38.2 Any broadcasting of a recording of a hearing is prohibited.<sup>60</sup>

Rule 38.1 is more interesting for the purposes of this paper as it aims to proscribe a particular means of gathering news and information, whereas Rule 38.2 is targeted more directly at an act of expression. The Court's inquiry into the constitutionality of Rule 38.1 is more telling of the precise boundaries of section 2(b).

The Court conducted its analysis in this regard by applying the three-part *Montréal (City)* test that it had just refined months earlier in *Criminal Lawyers' Assn.*: (1) Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of section 2(b) protection? (2) Is the activity excluded from that protection as a result of either the location or the method of expression? (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action?<sup>61</sup>

Interestingly, Deschamps J. (writing for a unanimous Court), quickly skipped over the first stage of this test without any discussion of the "necessity for meaningful commentary" criterion that the Court had innovated in *Criminal Lawyers' Assn.* Justice Deschamps dealt with this first stage summarily by observing that "[b]oth the Superior Court and the Court of Appeal concluded that filming, taking photographs and conducting interviews outside courtrooms are activities that have the necessary expressive content," and "[t]he respondents do not dispute this conclusion, with which I agree."<sup>62</sup>

All of the section 2(b) action took place at the second stage of the *Montréal (City)* test. Justice Deschamps noted that the *method* for engaging in the expressive activities — the use of equipment to film, take photographs and record voices — was not the issue as this method of expression had been authorized by the court rules for a long time and continued to be expressly authorized in designated areas. Rather, the issue was whether the protection of section 2(b) attached to the *location*

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<sup>60</sup> *C.B.C. v. Canada (A.G.)*, *supra*, note 4, at para. 5.

<sup>61</sup> *Id.*, at para. 38.

<sup>62</sup> *Id.*, at para. 41.

of the expressive activities which was the subject of the impugned rule — namely, the public areas of courthouses.<sup>63</sup>

Justice Deschamps concluded that there is nothing about the public areas of a courthouse that render the expressive activities conducted therein incompatible with the values protected by section 2(b). Rather, Deschamps J. concluded that the presence of journalists in the public areas of a courthouse has not only been “historically ... authorized” but is “essential” to the “public’s ability to understand our justice system”. Justice Deschamps observed that “for journalists, the public areas serve not only as spaces they pass through to enter courtrooms, but also as places where they can gather information that may enhance the public’s understanding of trials.”<sup>64</sup> The purpose of Rule 38.1 is to limit the expressive activities at this location and, therefore, section 2(b) is engaged.<sup>65</sup>

Thus, Deschamps judgment confirmed one important thing about section 2(b) of the Charter and, in doing so, alleviated some of the concerns that free speech advocates and the press may have had after the release of *Criminal Lawyers’ Assn.*: the open court principle remains unshaken and its scope — at least under section 2(b) — is as broad as ever. The hurdles that the Court had erected against the application of section 2(b) to claims of access to information about other public institutions would have no effect on claims of access to information about the courts. This is true not only of the courtroom, but of all public areas of the courthouse. The courts as a whole are *sui generis*.

Justice Deschamps’ opinion, of course, is far from a resounding battle cry for openness as Deschamps J. upheld the constitutionality of Rule 38.1 under section 1 of the Charter. But a substantive discussion of the Court’s recent section 1 analyses in open court principle cases will have to be left for another commentator and another day.<sup>66</sup> For the purposes of this paper, it is sufficient to note that *C.B.C. v. Canada (A.G.)* confirmed that the presumption of openness applied to the courts by section 2(b) of the Charter has not withered.

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<sup>63</sup> *Id.*, at para. 44.

<sup>64</sup> *Id.*, at para. 45.

<sup>65</sup> *Id.*, at para. 46.

<sup>66</sup> Of course, such a discussion would have to include an analysis of the Court’s recent decision in *Toronto Star Newspapers Ltd. v. Canada*, *supra*, note 15.

V. *NATIONAL POST* — FREEDOM OF THE PRESS TO  
GATHER INFORMATION

*Criminal Lawyers' Assn. and C.B.C. v. Canada (A.G.)* together established that *subject matter* about which information is sought is relevant in determining what level of section 2(b) protection applies. But what about the *means* of obtaining such information? We will recall that in *C.B.C. (Re R. v. Carson)*, La Forest J. repeated what he had earlier said in a sole concurring opinion in *Lessard* — namely, that section 2(b) protects the freedom of the press to “gather news”.<sup>67</sup> Fifteen years later, in *National Post*, the Court clarified that this does not entail the freedom to engage in any and all methods of newsgathering free from state interference, or even a newsgathering method with as strong a track record as that of using confidential sources.

*National Post* involved a direct clash between the state's interest in investigating crime and the freedom of the press to gather news. A journalist employed by the *National Post* (“National Post”) named Andrew McIntosh had taken an interest in then Prime Minister Jean Chrétien's involvement with the Grand-Mère Golf Club located in Mr. Chrétien's home riding of St-Maurice, Quebec. Based on information received from a confidential source, Mr. McIntosh reported in the *National Post* that Mr. Chrétien had called the president of the Business Development Bank of Canada (“BDBC”) and urged approval of a bank loan to the hotel located next to the Grand-Mère Golf Club.<sup>68</sup> This story had become known in the media as “Shawinigate”.

Subsequently, Mr. McIntosh received a sealed plain brown envelope containing a document that appeared to be a copy of the BDBC internal loan authorization for a \$615,000 mortgage to the hotel, which listed an outstanding debt of \$23,040 to Mr. Chrétien's family investment company. Mr. McIntosh concluded that if the document were genuine, it would represent a major escalation in the Shawinigate story. Mr. McIntosh faxed copies of the document to the BDBC, the Prime Minister's office and the Prime Minister's lawyer in order to check its authenticity. All three said that the document was a forgery. Because it was unable to confirm the document's authenticity, the *National Post* hesi-

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<sup>67</sup> *C.B.C. (Re R. v. Carson)*, *supra*, note 8, at para. 24; *Lessard*, *supra*, note 33, at para. 2, *per* La Forest J.

<sup>68</sup> *National Post*, *supra*, note 5, at paras. 8-11.

tated to publish the allegations. Other news organizations, however, had also obtained the document (not through the National Post) and published details about it. Eventually, the National Post picked up the story.<sup>69</sup>

Sometime during the week after the receipt of the document, a person known as X sought a meeting with Mr. McIntosh. At the meeting, X confirmed that it was he/she who had sent the envelope and asked that it be destroyed. X feared that the envelope might link him/her to the bank document now alleged to be a forgery. X explained that he/she had received the document in the mail and had passed it on to Mr. McIntosh in the belief that it was genuine. Mr. McIntosh told X that he could not destroy the document because that would be both improper and highly unethical given the serious allegation that it had been forged. However, Mr. McIntosh told X that so long as he believed the document had not been provided by X to deliberately mislead him, he would undertake to keep X's identity confidential. Mr. McIntosh added that should irrefutable evidence to the contrary emerge, the agreement of confidentiality would become null and void. X agreed to these terms.<sup>70</sup>

A police investigation was launched into the alleged forgery. The RCMP met with Mr. McIntosh, the editor-in-chief of the National Post and its legal counsel, and requested the production of the allegedly forged document. The National Post refused production and advised that the document and the envelope had been placed in a secure location not on National Post premises. Mr. McIntosh declined to identify the source.<sup>71</sup>

This prompted the RCMP to apply for a search warrant and an assistance order compelling the National Post to assist in locating the document and the envelope, and to make them available to the RCMP. The application was based on the belief that the document and the envelope formed part of the *actus reus* of the offences in question and the RCMP indicated that it intended to submit the document and envelope for forensic testing to determine if they had “fingerprints and other identifying markings [including saliva] which might assist in identifying the source of the document”. Justice Khawly of the Ontario Court of Justice issued the search warrant and assistance order without written reasons. Mr. McIntosh, the editor-in-chief and the National Post then applied to

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<sup>69</sup> *Id.*, at paras. 12-15.

<sup>70</sup> *Id.*, at paras. 16-18.

<sup>71</sup> *Id.*, at paras. 20-21.

quash the warrant and assistance order and the matter came before Benotto J. of the Superior Court of Justice.<sup>72</sup>

Justice Benotto set aside the search warrant and assistance order on the basis of, among other things, the issuing judge's failure to consider the section 2(b) interests at stake. Justice Benotto cited La Forest J.'s concurring opinion in *Lessard* for the proposition that section 2(b) encompasses the right of the media to "gather news and information without undue governmental interference".<sup>73</sup> She then reviewed the evidence on all of the major stories that had been broken by the media due to confidential sources (including Watergate, the Airbus scandal, and the fall of Nortel Networks)<sup>74</sup> and concluded that "[t]o compel a journalist to break a promise of confidentiality would do serious harm to the constitutionally entrenched right of the media to gather and disseminate information."<sup>75</sup>

Justice Benotto's judgment was reversed by the Ontario Court of Appeal in reasons jointly authored by Laskin and Simmons J.J.A. On the point of interest in this paper, the Court of Appeal held that while "the gathering and dissemination of news and information without undue state interference is an integral component of the respondents' constitutional right of freedom of the press," this does not mean that journalists have "an automatic right to protect the confidentiality of their sources".<sup>76</sup> Thus, the Court held that section 2(b) was not directly engaged on the facts of the case. Rather, it was sufficient to incorporate Charter values into the four-step, common law Wigmore analysis in determining whether case-by-case privilege had been made out for the confidentiality of Mr. McIntosh's source.<sup>77</sup>

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<sup>72</sup> *Id.*, at paras. 21-24.

<sup>73</sup> *National Post v. Canada*, [2004] O.J. No. 178, 69 O.R. (3d) 427, at para. 43 (Ont. S.C.J.), rev'd on appeal [2008] O.J. No. 744, 89 O.R. (3d) 1 (Ont. C.A.), aff'd on appeal [2010] S.C.J. No. 16, [2010] 1 S.C.R. 477 (S.C.C.).

<sup>74</sup> *Id.*, at para. 47 (S.C.J.).

<sup>75</sup> *Id.*, at para. 51 (S.C.J.).

<sup>76</sup> *National Post v. Canada*, *supra*, note 73, at para. 75 (C.A.).

<sup>77</sup> *Id.*, at paras. 79-80 (C.A.). See Jamie Cameron, "Does Section 2(b) Really Make A Difference? Part 1: Freedom of Expression, Defamation Law and the Journalist-Source Privilege" in Cameron & Ryder, *supra*, note 50, 133, for an insightful discussion on the "Charter values" approach versus the more formal s. 1 justification analysis that is required when s. 2(b) is directly engaged.

In an opinion written by Binnie J., a majority of the Supreme Court essentially upheld the Court of Appeal's analysis.<sup>78</sup> Justice Binnie began his analysis by reviewing the Court's prior decision in *Lessard*. Justice Binnie agreed that the freedom of the press to publish news under section 2(b) "necessarily involves a freedom to gather news".<sup>79</sup> Justice Binnie then stated that the Court should recognize "the further step that an important element in the news gathering function (especially in the area of investigative journalism) is the ability of the media to make use of confidential sources".<sup>80</sup> Justice Binnie based this conclusion on the fact that:

The appellants and their expert witnesses make a convincing case that unless the media can offer anonymity in situations where sources would otherwise dry-up, freedom of expression in debate on matters of public interest would be badly compromised. Important stories will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment.<sup>81</sup>

Justice Binnie's reasons then took a surprising turn. After acknowledging that special status should be assigned to the journalistic method of relying on confidential sources given its proven track record, Binnie J. refused to bring it fully under the section 2(b) umbrella; instead, he agreed with the Court of Appeal that its role should be limited to that of informing the traditional Wigmore analysis for determining whether case-by-case privilege has been made out at common law. That is, it is relevant to the development of the common law in accordance with Charter values, but nothing more. Strangely, Binnie J.'s primary reason for refusing direct section 2(b) protection is premised on the same homogeneous view of newsgathering techniques that he appeared to reject only paragraphs earlier:

News gathering, while not specifically mentioned in the text of s. 2(b) is implicit in news publication, but there are many techniques of news gathering and it carries the argument too far, in my view, to suggest that each of those news gathering techniques (including reliance on secret sources) should itself be regarded as entrenched in the

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<sup>78</sup> Interestingly, Abella J. was the sole dissenter in *National Post*, *supra*, note 5, as she was in *Toronto Star Newspapers Ltd. v. Canada*, *supra*, note 15. Justice Abella appears to be the Court's strongest advocate of freedom of the press at the moment.

<sup>79</sup> *National Post*, *supra*, note 5, at para. 33.

<sup>80</sup> *Id.*, at para. 33.

<sup>81</sup> *Id.*



Constitution. Chequebook journalism is also a routine method of gathering the news, but few would suggest that this too should be constitutionalized. Journalists are quick to use long-range microphones, telephoto lenses or electronic means to hear and see what is intended to be kept private (as in the case of then Finance Minister Marc Lalonde whose budget had to be amended because a cameraman captured parts of what were intended to be secret budget documents on Mr. Lalonde's desk). Such techniques may be important for journalists (who, unlike prosecutors, have to get along without the power of subpoena), but this is not to say that just because they are important that news gathering techniques as such are entrenched in the Constitution.<sup>82</sup>

No jurist can make slippery slope arguments sound as compelling as Binnie J.<sup>83</sup> The objection that can be set against this view, however, is that as Binnie J. himself noted earlier in his judgment, the evidence showed that the use of confidential sources has proven time and time again to be necessary to unearth important public controversies<sup>84</sup> and that freedom of expression would be "badly compromised" unless the media can offer anonymity to its sources.<sup>85</sup> Indeed, the evidence was that the following controversies were revealed *only* because of secret sources (often internal whistle-blowers):

- (1) The tainted tuna scandal that led to the resignation of the Minister of Fisheries in Canada.
- (2) The story that Airbus Industrie paid secret commissions in the sale of Airbus aircraft.
- (3) The book *For Services Rendered*, about the search for a suspected KGB mole in the RCMP Security Service, and CBC's *The Fifth Estate* program on that mole, code-named "Long Knife".

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<sup>82</sup> *Id.*, at para. 38.

<sup>83</sup> See, for example, Binnie J.'s judgment in *R. v. Patrick*, [2009] S.C.J. No. 17, [2009] 1 S.C.R. 579, at para. 54 (S.C.C.):

There was some discussion at the bar that a privacy interest does not cease until garbage becomes "anonymous", but as Conrad J.A. noted, much garbage never becomes anonymous, e.g. addressed envelopes, personal letters and so on. In this case, the garbage included invoices for the purchase of chemicals used in the preparation of the drug Ecstasy. The idea that s. 8 protects an individual's privacy in garbage until the last unpaid bill rots into dust, or the incriminating letters turn into muck and are no longer decipherable, is to my mind too extravagant to contemplate. It would require the entire municipal disposal system to be regarded as an extension, in terms of privacy, of the dwelling-house.

<sup>84</sup> *National Post*, *supra*, note 5, at para. 28.

<sup>85</sup> *Id.*, at para. 33.

- (4) Stories dealing with the City of Toronto's health inspection system for restaurants.
- (5) A story describing the operation of an illegal slaughterhouse for restaurants.
- (6) Stories about the fall of Nortel Networks that contrasted optimistic public forecasts by Nortel executives with internal Nortel discussions warning of a potential devastating market downturn.
- (7) A story about wrongdoing by members of the RCMP security service in early 1977, including a break-in to obtain documents from a left-wing news agency in Montreal, Agence Presse Libre du Québec, illegal wiretaps in Vancouver and pen-registers.<sup>86</sup>

Moreover, there was precedent for the view that freedom of the press under section 2(b) of the Charter includes the freedom to rely on confidential sources. Justice La Forest emphasized the importance of this method of newsgathering nearly 20 years earlier in his concurring opinion in *Lessard* (which opinion he later cited approvingly on behalf of the unanimous Court in *C.B.C. (Re R. v. Carson)*):<sup>87</sup>

Like Cory J., I take it as a given that freedom of the press and other media is vital to a free society. There can be no doubt, of course, that it comprises the right to disseminate news, information and beliefs. This was the manner in which the right was originally expressed, in the first draft of s. 2(b) of the Canadian Charter of Rights and Freedoms before its expansion to its present form. However, the freedom to disseminate information would be of little value if the freedom under s. 2(b) did not also encompass the right to gather news and other information without undue governmental interference.

I have little doubt, too, that the gathering of information could in many circumstances be seriously inhibited if government had too ready access to information in the hands of the media. That someone might be deterred from providing information to a journalist because his or her identity could be revealed seems to me to be self-evident. As Stewart J. (dissenting) stated in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), at p. 572:

It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that

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<sup>86</sup> *Id.*, at para. 28.

<sup>87</sup> *C.B.C. (Re R. v. Carson)*, *supra*, note 8, at para. 24.

information if he knows that, despite the journalist's assurance, his identity may in fact be disclosed.<sup>88</sup>

Given these judicial pronouncements and the impressive evidence in the record about the utility (and often necessity) of relying on confidential sources to further the democratic discourse, it would not have been a huge leap for the Court to have brought journalist-source confidentiality within the direct protection of freedom of the press under section 2(b) of the Charter. The Court's refusal to do so begs the question of what newsgathering techniques, if any, are protected directly by section 2(b) other than the mere right of access (*e.g.*, sitting in a courtroom, requesting copies of court documents, and setting up cameras in the courthouse halls). If nothing else is protected, then the constitutional right of the press to "gather news" as originally articulated by La Forest J. in *Lessard* and then in *C.B.C. (Re R. v. Carson)* will be nothing more than a euphemism for the right of access. As illustrated by *C.B.C. v. Canada (A.G.)* and *Criminal Lawyers' Assn.*, respectively, such a right may be easy to make out when access is sought to information about the courts; but it will be significantly more challenging when access is sought to information about any other public or government institution.

## VI. CONCLUSION

The incorporation of the open court principle into section 2(b) of the Charter was once a cause for celebration for free speech advocates and the press. Not only did it constitutionalize the openness of the courts and their processes, but it also held out great promise for section 2(b) more generally. One can read Cory J.'s opinion in *Edmonton Journal* and envision a robust constitutional right that would act as the primary guarantor of transparent government in our democracy. Not only would it protect acts of expression, but also those acts necessary to make expression meaningful — such as the right to access information about government institutions, and the right of the press to gather news uninhibited

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<sup>88</sup> *Lessard*, *supra*, note 33, at paras. 2-3, *per* La Forest J. In *Lessard*, La Forest J. cited and relied on Stewart J.'s dissenting opinion in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), in which the U.S. Supreme Court addressed searches of media premises. Justice Stewart had also dissented in *Branzburg v. Hayes*, 408 U.S. 665 (1972), in which the U.S. Supreme Court dealt with the exact issue before the Supreme Court of Canada in *National Post*. Instead of citing and relying on Stewart J.'s dissent, however, Binnie J. drew support from the majority's opinion denying First Amendment protection to the confidentiality of journalist sources: see *National Post*, *supra*, note 5, at para. 47.

by state interference. It was the perfect example of a bold, purposive interpretation of the Charter.

But the Supreme Court of Canada never allowed this conception of section 2(b) to fully break out of the gates (or courtroom doors). While it justified the open court principle on the basis that the public needs access to information about the courts in order to properly express themselves about the courts' operations, it refused to extend the same logic to all government or public institutions. Rather, it has now held that a Charter claimant seeking access to non-judicial government information under section 2(b) must show, *inter alia*, that such information is "necessary for meaningful commentary". Only then will he or she be granted the right of access. Moreover, the Court refused to extend section 2(b) protection to journalist-source confidentiality and, in doing so, effectively suggested that the right of access might be all there is to the right of the press to "gather news". Despite La Forest J.'s earlier comments in *Lessard* to the contrary, the Court held that the freedom of the press to "gather news" does not entail Charter protection for one of the most effective and proven journalistic methods — reliance on confidential sources.

The only success story for transparency in the trilogy of cases to consider the limits of section 2(b) in 2010-2011 — and it is a mild one — is *C.B.C. v. Canada (A.G.)*. In that case, the Court found that the limits on the press' ability to gather in the public areas of the courthouse infringed section 2(b) (although the Court went on to uphold those limits under section 1). The factual basis of this case returned the Court to familiar territory: the courthouse. It was only in this context that the Court revisited some of the rhetoric of its earlier decisions in *Edmonton Journal* and *C.B.C. (Re R. v. Carson)*.<sup>89</sup> Within the courthouse, the value of transparency still retains its primacy in the section 2(b) analysis. The same is not true once one leaves the courthouse doors.

Accordingly, *Criminal Lawyers' Assn.*, *C.B.C. v. Canada (A.G.)*, and *National Post* signal a move away from the bold, purposive interpretation of section 2(b) adopted by the Court in the Charter's earlier years. Rather than take the underlying propositions of the open court principle under section 2(b) to their logical end, the Court imposed additional restrictions to the operation of section 2(b) in non-judicial contexts. In doing so, the Court dashed the hopes of those who once envisioned section 2(b) as the primary guarantor of transparency in Canadian

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<sup>89</sup> *C.B.C. v. Canada (A.G.)*, *supra*, note 4, at para. 45.

democracy. For the time being, at least, the goal of transparency will have to be achieved largely through other means.