



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

Volume 58 (2012)

Article 6

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### Citation Information

Cameron, Jamie. "A Reflection on Section 2(b)'s Quixotic Journey, 1982-2012." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 58. (2012).

<https://digitalcommons.osgoode.yorku.ca/sclr/vol58/iss1/6>

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# A Reflection on Section 2(b)'s Quixotic Journey, 1982-2012

Jamie Cameron \*

## I. THE JOURNEY

The Charter's 30th anniversary has been a muted affair.<sup>1</sup> Against the outline of its early landmarks, the Charter has settled into the rhythm of Canadian life. The power to command, surprise, and shift the landscape may not have changed, but today the Charter is workmanlike, seeming to busy itself more at the margins than at the core of debate about rights. Anniversary years like 2012 pay homage to the erstwhile days of blockbuster decisions as reminders of the journey to this point and dramatic steps taken along the way. A consensus draws around vitalizing decisions that gave life to the rights of the accused, gender equality, gay rights and the rights of Aboriginal peoples, among others.<sup>2</sup> It is revealing that when the Charter's finest moments are on parade, freedom of expression and the press are scarcely mentioned, much less heralded. Why these entitlements have not fired passions in the same way as others is thought-provoking, and forms the backdrop to this reflection on section 2(b)'s journey from 1982 to 2012.

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\* Professor, Osgoode Hall Law School. This paper arises from Ryerson University's conference, "Press Freedom in Canada: A status report on the 30th anniversary of the Charter of Rights and Freedoms", and is published in S.C.L.R. with their permission. I owe thanks to Adam Dodek, for commenting on a draft of this paper, and Holden Sumner (J.D. 2013), my research assistant, for helping with my inventory of s. 2(b) cases. Freedom of the press, the rights of journalists, and open justice are key themes in this paper, and I would like to dedicate it to the memory of the late Tracey Tyler, justice reporter for *The Toronto Star*.

<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

<sup>2</sup> See, e.g., *Canada (Combinex Investigation Act, Director of Investigation and Research) v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.) [hereinafter "*Hunter v. Southam*"] (search and seizure); *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.) (Crown disclosure); *R. v. Askov*, [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199 (S.C.C.) (trial within a reasonable time); *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.) (abortion rights); *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493 (S.C.C.) (sexual orientation); and *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.) (Aboriginal rights under s. 35 of the *Constitution Act, 1982*).

Section 2(b) is a test of courage — the courage of a democracy, its communities and individuals.<sup>3</sup> It calls for fear and prejudice to be set aside in the name of freedom for all ideas, no matter how fiercely or strenuously they should be opposed. Tolerance for the intolerable means, unalterably, that those who are disgruntled, objectionable and mean-spirited will offend the vulnerable, the sensitive and the fearful. Yet it is a condition of this guarantee that expressive freedom can only thrive when judgment of its exercise is suspended. Rather than condemn society to a fate of unrequited conflict and darkness, this freedom is a mark of progress and a testament to democracy's essential humility.<sup>4</sup>

Though judgment must be suspended, freedom is not absolute, nor is judgment absolutely suspended. As a matter of judgment, freedom is subject to limits when it causes harm. Finding that point along the spectrum where judgment allows limits without compromising the principle of freedom is no easy task.

The Supreme Court of Canada is not comfortable with the Charter's logic of rights and freedoms. Under section 2(b), the logic is that freedom must prevail unless the section 1 evidence establishes that expressive activities are harmful and can justifiably be limited.<sup>5</sup> The Court is uneasy with that equation when there is a causal gap and the evidence of harm is inconclusive. Faced with that difficulty, the Court sought relief from the uncertainty of harm in an evaluative criterion. Specifically, it created a methodology known as the contextual approach, which revolves around the proposition that low-value expression is entitled to little or no protection under section 1.<sup>6</sup> With value as its proxy the Court upheld restrictions on expressive activities that were deemed marginal because they threaten mainstream sensibilities. In this way it devised a methodology of judgment to manage the risks inherent in the Charter's guarantee of expressive freedom.

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<sup>3</sup> See *Whitney v. California*, 274 U.S. 357 (1927) (*per* Brandeis J., writing a famous concurrence which provides an eloquent paean to the First Amendment's roots in democratic courage).

<sup>4</sup> The hallmark of this humility is the power of self-government, with its expectation and aspiration that members of the community will participate, collectively and equally, in social and political decision-making, and its faith that democratic society will evolve through an open process of engagement and debate.

<sup>5</sup> See J. Cameron, "The Original Conception of Section 1 and its Demise: A Comment on *Irwin Toy v. Attorney General of Quebec*" (1989) 35 McGill L.J. 253 (discussing and defending that logic).

<sup>6</sup> *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326 (S.C.C.) [hereinafter "*Edmonton Journal*"] (introducing the contextual approach).

Meanwhile, section 2(b)'s other guarantee, of freedom of the press and media, has too often been overlooked.<sup>7</sup> Though the press and media are prominent in Charter litigation, their rights under section 2(b) remain unclear. To date, the Supreme Court has not decided whether the press clause is an independent entitlement, with distinctive content, or is subsumed in expressive freedom. While it has confirmed the link between democratic governance and a free press, the Court has been apprehensive of newsgathering, the core function of the press. Constitutionalizing that function would mean granting privileges to one class of claimants, and even before technology complicated the task of defining its members, the Court was reluctant to single the press out for special consideration under the Charter.<sup>8</sup> On issues concerning the press *qua* press the Court has been unwilling even to acknowledge a violation of section 2(b).<sup>9</sup>

The Court's reticence to enforce the freedom guarantees has not made section 2(b) an unvarnished disappointment. There is a crowning achievement in the jurisprudence, and that is the open justice principle.<sup>10</sup>

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<sup>7</sup> Section 2(b)'s text provides that "[e]veryone has the following fundamental freedoms: ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". *Supra*, note 1.

<sup>8</sup> See, e.g., *Canadian Broadcasting Corp. v. Lessard*, [1991] S.C.J. No. 87, [1991] 3 S.C.R. 421, at 436 (S.C.C.) [hereinafter "*Lessard*"] (*per* L'Heureux-Dubé J., concurring, who stated, in the context of a search warrant against the press, that "[i]mportant as the constitutional protection of the freedom of the press is, it does not go as far as guaranteeing the press special privileges which ordinary citizens ... would not enjoy").

<sup>9</sup> See *Lessard, id.*, and *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] S.C.J. No. 88, [1991] 3 S.C.R. 459 (S.C.C.) [hereinafter "*New Brunswick – search warrant*"] (the search warrant cases); *R. v. National Post*, [2010] S.C.J. No. 16, [2010] 1 S.C.R. 477 (S.C.C.) [hereinafter "*National Post*"]; and *The Globe and Mail v. Canada (Attorney General)*, [2010] S.C.J. No. 41, [2010] 2 S.C.R. 592 (S.C.C.) [hereinafter "*Globe and Mail*"] (the journalist-source privilege cases).

<sup>10</sup> See *Nova Scotia (Attorney General) v. MacIntyre*, [1982] S.C.J. No. 1, [1982] 1 S.C.R. 175 (S.C.C.) (pre-Charter, access to search warrants); *Edmonton Journal, supra*, note 6 (statutory publication ban); *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.) [hereinafter "*Dagenais*"] (judicial publication ban); *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] S.C.J. No. 38, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter "*CBC v. New Brunswick*"] (closed courtroom); *R. v. Mentuck*, [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442 (S.C.C.) [hereinafter "*Mentuck*"] and *R. v. E. (O.N.)*, [2001] S.C.J. No. 74, [2001] 3 S.C.R. 478 (S.C.C.) [hereinafter "*O.N.E.*"] (judicial publication bans); *Ruby v. Canada (Solicitor General)*, [2002] S.C.J. No. 73, [2002] 4 S.C.R. 3 (S.C.C.) [hereinafter "*Ruby*"] (*in camera* hearing); *Re Vancouver Sun*, [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332 (S.C.C.) (closed hearing); *Toronto Star Newspapers Ltd. v. Ontario*, [2005] S.C.J. No. 41, [2005] 2 S.C.R. 188 (S.C.C.) [hereinafter "*Toronto Star*"] (access to search warrants); and *Globe and Mail, id.* (judicial publication ban). Decisions in which the claim failed include *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] S.C.J. No. 67, [1988] 2 S.C.R. 122 (S.C.C.) [hereinafter "*Canadian Newspapers*"] (statutory publication ban); *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] S.C.J. No. 23, [1991] 1 S.C.R. 671 (S.C.C.) [hereinafter "*Vickery*"] (common law, access to evidence); *Sierra*

On this issue the Court has shown that it can be fearless as well as principled in protecting expressive and press freedoms. Despite or because of those contributions, which are singular as well as laudatory, this jurisprudence confuses. Setting it alongside the Court's other decisions makes a muddle of section 2(b) and poses the question whether there is a way to understand the guarantee's journey that spares it from incoherence. Exploring the underlying assumptions of the Court's conception of freedom and asking whether the open justice principle is based on core differences might provide answers.

The 30th anniversary is a checkpoint, a moment for taking stock of section 2(b)'s strengths as well as its weaknesses, with a view to building through existing strength to the future. On the positive side, the Court's conception of open justice can be described as "thick" because it is supported by a methodology of principle that sets evidence-based requirements for justifiable limits. By comparison, its lack of resolve on matters of principle under the freedom guarantees is dispiriting. There, the Court's conception of entitlement is "thin" because principle is easily expended under section 1, or deflected away from section 2(b), as happened with press claims. For section 2(b) to meet its destiny as a call to courage the roadblocks must be cleared and a pathway for alternative solutions opened up. This can be done by building on the foundations that are already in place and treating the open justice model as a template for section 2(b) decision-making.

The synergy between section 2(b)'s expression and press entitlements is a key feature of this reflection. The Court's decisions on expressive freedom are foundational, and the discussion begins with a brief but pointed analysis of the juxtaposition of principle and judgment in the Court's treatment of content-based restrictions on expressive activities. The section that follows isolates section 2(b)'s press and media clause by examining its newsgathering decisions. From there the discussion turns to open justice, which is an amalgam of free expression and press interests. After explaining what makes that branch of section 2(b)

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*Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42, [2002] 2 S.C.R. 522 (S.C.C.) [hereinafter "Sierra Club"] (confidentiality order); *Named Person v. Vancouver Sun*, [2007] S.C.J. No. 43, [2007] 3 S.C.R. 253 (S.C.C.) (*in camera* proceedings and informer privilege); *Toronto Star Newspapers Ltd. v. Canada*, [2010] S.C.J. No. 21, [2010] 1 S.C.R. 721 (S.C.C.) [hereinafter "*Toronto Star v. Canada*"] (statutory publication ban); *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 2, [2011] 1 S.C.R. 19 (access to courthouse premises); and *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 3, [2011] 1 S.C.R. 65 (S.C.C.) (access to evidence).

exemplary and why it provides a model for emulation, this reflection closes with some thoughts about the journey ahead.

## II. FREEDOM OF EXPRESSION: PRINCIPLE, JUDGMENT AND A CONTRADICTION IN TERMS

Freedom of expression claims landmarks of its own in the first 30 years.<sup>11</sup> The Supreme Court invalidated high-stakes policy limits on commercial expression in two of its more notable decisions, *Ford v. Quebec (Attorney General)* and *RJR-MacDonald v. Canada (Attorney General)*, and then followed up each time with careful steps back at the next opportunity.<sup>12</sup> It held the state to section 1's requirement that limits be demonstrably justified in *Rocket v. Royal College of Dental Surgeons of Ontario* and *Thomson Newspapers v. Canada (Attorney General)*, but rather than describe a pattern these decisions look more like exceptions.<sup>13</sup> Elsewhere, if few predicted that the Court would invalidate the false news provision of the *Criminal Code*,<sup>14</sup> *R. v. Zundel*<sup>15</sup> was still an outlier. And when *Libman v. Quebec (Attorney General)*<sup>16</sup> struck down Quebec's scheme for political participation in referendum campaigns it was a

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<sup>11</sup> This part does not discuss the open justice jurisprudence or the decisions on access to public property under s. 2(b). The access cases include *Canada v. Committee for the Commonwealth (Canada)*, [1991] S.C.J. No. 3, [1991] 1 S.C.R. 139 (S.C.C.) (invalidating airport prohibitions on expressive activity); *Ramsden v. Peterborough (City)*, [1993] S.C.J. No. 87, [1993] 2 S.C.R. 1084 (S.C.C.) (invalidating a ban on postering); *Montréal (City) v. 2952-1366 Quebec Inc.*, [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141 (S.C.C.) [hereinafter "*Montréal (City)*"] (upholding a noise by-law); and *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, [2009] S.C.J. No. 31, [2009] 2 S.C.R. 295 (S.C.C.) [hereinafter "*Translink*"] (invalidating regulations that prohibited political advertising on buses).

<sup>12</sup> See *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.) [hereinafter "*Ford*"] (invalidating Bill 101's outdoor sign provision which prohibited the use of other languages and made French mandatory), and *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.) [hereinafter "*Irwin Toy*"] (upholding Quebec's children's advertising law a few months later under a different s. 1 standard). See also *RJR-MacDonald v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.) [hereinafter "*RJR-MacDonald*"] (invalidating Parliament's tobacco advertising law) and *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] S.C.J. No. 30, [2007] 2 S.C.R. 610 (S.C.C.) [hereinafter "*JTI-Macdonald*"] (upholding the next federal anti-tobacco law).

<sup>13</sup> *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] S.C.J. No. 65, [1990] 2 S.C.R. 232 (S.C.C.) [hereinafter "*Rocket*"] (invalidating legislative restrictions on professional advertising); *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.) (invalidating a 72-hour opinion poll blackout at the end of federal election campaigns).

<sup>14</sup> R.S.C. 1985, c. C-46.

<sup>15</sup> [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.).

<sup>16</sup> [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.) (invalidating restrictions on third party participation under Quebec's referendum law).

section 2(b) victory in name only. Other markers on the rights-protective side of the ledger include the Court's support for the section 2(b) rights of labour unions,<sup>17</sup> its invalidation of regulatory instruments,<sup>18</sup> and its recent modifications to the common law of defamation.<sup>19</sup>

An inventory would show that decisions upholding reasonable limits outstrip those protecting expressive freedom by a margin of about two to one.<sup>20</sup> Whether that ratio is out of step in comparison to other Charter guarantees, what stands out is the Court's willingness to confer its blessing on content-based restrictions. Not only did the criminalization of expressive activity survive the Charter in all cases but *R. v. Zundel*, the Court left limits intact under human rights codes, election laws and regulatory statutes, anti-tobacco legislation, defamation law and municipal by-laws.<sup>21</sup>

<sup>17</sup> *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] S.C.J. No. 44, [1999] 2 S.C.R. 1083 (S.C.C.) (protecting secondary leafleting during a labour strike); *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada*, [2002] S.C.J. No. 7, [2002] 1 S.C.R. 156 (S.C.C.) (extending Charter protection to secondary picketing).

<sup>18</sup> *R. v. Guignard*, [2002] S.C.J. No. 16, [2002] 1 S.C.R. 472 (S.C.C.) [hereinafter "*Guignard*"] (invalidating a municipal sign by-law); *Translink*, *supra*, note 11.

<sup>19</sup> *WIC Radio Ltd. v. Simpson*, [2008] S.C.J. No. 41, [2008] 2 S.C.R. 420 (S.C.C.) [hereinafter "*WIC Radio*"] (modifying the fair comment doctrine); *Grant v. Torstar Corp.*, [2009] S.C.J. No. 61, [2009] 3 S.C.R. 640 (S.C.C.) (creating a new defence of "public interest responsible communication"); and *Crookes v. Newton*, [2011] S.C.J. No. 47, [2011] 3 S.C.R. 269 (S.C.C.) (concluding that hyperlinking is not publication); see also *Bou Malhab v. Diffusion Métromédia CMR Inc.*, [2011] S.C.J. No. 9, [2011] 1 S.C.R. 214 (S.C.C.) [hereinafter "*Bou Malhab*"] (dismissing a claim for group defamation under Quebec civil law).

<sup>20</sup> Though the numbers can change, depending on how companion cases and claims which were summarily dismissed are counted, my rough inventory shows that the s. 2(b) claim failed in 45 or more cases and only succeeded about 25 times.

<sup>21</sup> On the criminal law and s. 2(b) of the Charter, see *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.) [hereinafter "*Solicitation Reference*"]; *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.) [hereinafter "*Keegstra*"]; *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 (S.C.C.); *R. v. Lucas*, [1998] S.C.J. No. 28, [1998] 1 S.C.R. 439 (S.C.C.); and *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45 (upholding solicitation, hate propaganda, obscenity, defamatory libel and child pornography provisions). Under human rights legislation the Court limited expressive freedom in *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892 (S.C.C.); *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 (S.C.C.); and *Ross v. New Brunswick School District No. 15*, [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825 (S.C.C.). The claim failed on election and legislative issues in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] S.C.J. No. 2, [1993] 1 S.C.R. 319 (S.C.C.); *Haig v. Canada*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.); *Native Women's Assn. of Canada v. Canada*, [1994] S.C.J. No. 93, [1994] 3 S.C.R. 627 (S.C.C.); *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 (S.C.C.) [hereinafter "*Harper*"]; and *R. v. Bryan*, [2007] S.C.J. No. 12, [2007] 1 S.C.R. 55 (S.C.C.) [hereinafter "*Bryan*"]. On customs regulation, see *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120 (S.C.C.) (finding a violation but not striking the legislation); on tobacco reform see *JTI-Macdonald*, *supra*, note 12; and on municipal by-laws see *Montréal (City)*, *supra*, note 11.

This branch of the section 2(b) jurisprudence is grounded in a contradiction between the scope of the guarantee and section 1's concept of reasonable limits. That dynamic is encouraged and reinforced by the text's formal separation of breach and justification. At least initially, the separation of function seemed advantageous to section 2(b) and its guarantee of expressive freedom. In answer to those who supported definitional limits, *Ford* relied on the Charter's text and structure to explain why section 2(b) protects commercial expression. The panel maintained, as a matter of interpretation, that the scope of entitlement should be generously interpreted because the question of limits was specifically assigned by the text to section 1.<sup>22</sup>

A few months later, *Irwin Toy* followed *Ford*'s lead on that point and mapped out a framework for expressive freedom.<sup>23</sup> There, the Court resisted the impulse to exclude offensive and objectionable material from the Charter and declared that section 2(b) protects all content of expression. Much to their credit, Dickson C.J.C., together with Wilson and Lamer JJ., saw that assessing the relative value of messages is incompatible with a guarantee of expressive freedom.<sup>24</sup> They realized that the Charter's protection cannot depend on consensus views about content's value and that it is necessary, instead, to suspend judgment of expression's merits under section 2(b).<sup>25</sup> In the face of support for a prescriptive definition of expressive freedom, *Irwin Toy*'s unflinching endorsement of content neutrality was unexpected, if not radical.

Though its two-step test is awkward, *Irwin Toy*'s core principle of content neutrality is sound.<sup>26</sup> That "freedom principle" rests on an

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<sup>22</sup> *Ford*, *supra*, note 12, at para. 57 (stating that the scope of protection and the permissibility of limits are "two distinct questions and call for two distinct analytical processes", and concluding that in most instances any weighing of competing values will take place in s. 1, rather than at the earlier stage of defining the scope of the right).

<sup>23</sup> *Irwin Toy*, *supra*, note 12.

<sup>24</sup> *Irwin Toy*, *id.*, was decided by a panel of five judges, which is quorum under the *Supreme Court Act*, R.S.C. 1985, c. S-26. Justices LeDain and Estey heard the case but did not participate in the decision, and the Court was at risk of losing quorum in these extremely important cases — *Irwin Toy* and *Ford*, *supra*, note 12, the Bill 101 case — because Beetz J. also became ill in the interim between the hearing and release of the Court's judgment. For a discussion of the challenges the Court faced in deciding these crucial cases, see J. Cameron, "To the Rescue: Antonio Lamer and the Section 2(b) Cases from Quebec", in A. Dodek & D. Jutras, eds., *The Sacred Fire: The Legacy of Antonio Lamer* (Markham, ON: LexisNexis Canada, 2009) 237.

<sup>25</sup> *Irwin Toy*, *id.*, at 968 (stating that "[f]reedom of expression was entrenched ... so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream").

<sup>26</sup> *Id.*, at 969 (stating that "[w]e cannot exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed"). *Irwin Toy* proposed a two-step test under s. 2(b): step one asks whether the activity is expressive, as a matter of definition; and



egalitarian conception that extends section 2(b)'s protection to "any attempt to convey meaning".<sup>27</sup> Though it required courage for the Court to conclude, consistently and in a variety of settings, that the Charter protects all content without discrimination, the "any meaning" test has been applied virtually without exception over the years.<sup>28</sup> By sinking it firmly into section 2(b)'s foundation and embedding it in the jurisprudence, the Court appeared to make an unconditional commitment to *Irwin Toy*'s freedom principle.

Under the Charter's structural plan, the rest of the narrative unfolds under section 1. By the time *Irwin Toy* arrived the Court also realized that its framework for Charter analysis was not sustainable, because a generous approach to the question of entitlement could not realistically be paired with the strict standard of justification prescribed by *R. v. Oakes*.<sup>29</sup> Few legislative enactments could survive the combination, and that forced the Court to look for ways to relieve against the lopsided structure of rights protection it had created. The relationship between breach and justification is a constant in Charter interpretation and a challenge for other provisions such as sections 7 and 15. In section 2(b)'s case the relationship between concepts foundered on the section 1 branch of the analysis. There, the text's logic led to the illogical spectacle of unqualified content neutrality under section 2(b) and unguarded content discrimination under section 1.

After opening up the guarantee, *Irwin Toy* planted the first seeds of contradiction by proposing a dichotomized approach to section 1 which reserved a strict standard of justification for some Charter violations and assigned a more deferential test to others.<sup>30</sup> This modification was

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step two applies the "purpose-effect" distinction to determine whether there is an infringement requiring justification under s. 1. *Id.*, at 978-79 (summarizing that test).

<sup>27</sup> *Id.* (stating that "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee").

<sup>28</sup> The purpose-effect test quickly subsided and has rarely been applied to limit the scope of s. 2(b). For a recent discussion, see R. Elliot, "Back to Basics: A Critical Look at the *Irwin Toy* Framework for Freedom of Expression" (2011) 15:2 Rev. Const. Stud. 205.

<sup>29</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.) (proposing a generous approach to the Charter's rights), and *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"] (introducing a strict and structured framework for s. 1 analysis).

<sup>30</sup> Under this view, stricter scrutiny would apply to claims arising under the Charter's legal rights from ss. 7 to 14, because the state acts as the "singular antagonist" of the individual and the Court can assess the justifiability of the violation with some certainty. The Court said the same is not true when the government's infringement protects vulnerable groups or otherwise strikes a balance between the claims of competing groups; in such circumstances, s. 1 will be satisfied where the

designed to spare statutory provisions on matters of public policy, such as Quebec's prohibition on children's advertising. Adjusting the section 1 test downward allowed the Court to uphold legislation that would not have been justifiable under the terms of *Oakes*.<sup>31</sup>

It did not take long for *Irwin Toy*'s section 1 dichotomy to be sidelined by an alternative approach that placed the focus on "context" as the key variable under section 1.<sup>32</sup> Once introduced, the concept of a contextual approach quickly took hold and became the basis for a methodology of judgment. Under the aegis of context, the Court held, first in *Keegstra* and then in a line of decisions, that the Charter's protection depends on the merits of expressive activity.<sup>33</sup> In specific terms this approach measured expressive activity against section 2(b)'s abstract "core values" to determine whether its content is compatible with the guarantee's aspirational objectives.<sup>34</sup> Framing the analysis that way made it a foregone conclusion that disagreeable expression would fail the standard in every case. Under this approach the Court consistently found that content that fell short of section 2(b)'s aspirations had low or lower value, and saved limits under a relaxed standard of justification.<sup>35</sup> The

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legislature made a "reasonable assessment" in deciding how to achieve its policy objectives or had a reasonable basis for infringing expressive freedom. *Irwin Toy*, *supra*, note 12, at 993-94.

<sup>31</sup> *Irwin Toy*, *id.*, applied the deferential test to uphold the advertising law, over a dissent by McIntyre J., who was joined by Beetz J.

<sup>32</sup> Justice Wilson introduced the concept of a contextual approach in her sole concurring opinion in *Edmonton Journal*, *supra*, note 6.

<sup>33</sup> Before *Keegstra*, *supra*, note 21, the Court adopted and developed the concept of context in *Rocket*, *supra*, note 13. The Court's majority opinion in *Keegstra* was the first to link the contextual approach to s. 2(b)'s underlying values and to use those values to attenuate the standard of justification under s. 1 and uphold limits on low-value expression. That approach would be followed in a number of cases including *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 (S.C.C.), and *Canada (Human Rights Commission) v. Taylor*, the *Solicitation Reference*, *R. v. Butler*, *Ross v. New Brunswick School District No. 15* and *R. v. Lucas*, all *supra*, note 21. See also *R. v. Zundel* (dissenting opinion), *supra*, note 15 and *RJR-MacDonald* (dissenting opinion), *supra*, note 12.

<sup>34</sup> Chief Justice Dickson's majority opinion in *Keegstra*, *id.*, provided the model. First he stated that "[o]ne must ask whether the expression [in question] is tenuously connected to the values underlying s. 2(b) so as to make the restriction 'easier to justify'", and added that the expression targeted by the hate propaganda provision "is of limited importance when measured against free expression values". *Id.*, at 761-62. He concluded that the expression "contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged". *Id.*, at 766.

<sup>35</sup> As Cory J. put it, "the level of protection to which expression may be entitled will vary with the nature of the expression" and "[t]he further that expression is from the core values of this right the greater will be the ability to justify the state's restrictive action". *Lucas*, *supra*, note 21, at para. 34. That analysis led him to conclude that the "negligible value of defamatory expression" significantly reduces the burden to justify its criminalization. *Id.*, at para. 57.

focus on “context” served admirably as a methodology of judgment because restrictions were routinely upheld whenever the Court took a dim view of the expression’s content.

Albeit in modified form, the contextual approach even supported restrictions on high value, or core, expression.<sup>36</sup> Whether the evidence could show a link between expressive activity and an identifiable harm mattered less because context provided a reliable source of rationales for limiting expression. In the process, section 1’s calculus of harm was subordinated to the Court’s conception of value. This methodology, with its mantra of judgment, cemented the contradiction: while the freedom principle proclaimed that section 2(b) is content and value neutral in determining the scope of protection, the value of expression’s content was determinative under section 1. Under this analytical framework there was a shift from a focus on principle under section 2(b) to an exercise in judgment — and a distortion of principle — under section 1.

The contextual approach undermined section 2(b)’s freedom principle because it transparently and unapologetically invited the Court to pass judgment on the content of expression. Of foremost concern with this methodology is its misapprehension of the guarantee itself. The purpose of section 2(b) is not to protect the content of expression or to constitutionalize a process for validating some views and invalidating others. The key to section 2(b) is the freedom principle: that what the Charter protects is the freedom to express a view — any view — without being judged, censored or stopped by the state. That freedom is subject to judgment under section 1, but only when expressive activity crosses a requisite threshold of harm that is grounded in evidence.<sup>37</sup> The contextual approach made judgments about value a substitute for the evidence that is required to justify limits on principle. It is insidious because it misapprehended the freedom principle and re-purposed section 2(b)’s underlying values under section 1. In doing so, it created a section 2(b) ghetto and populated it with “low value” expression.<sup>38</sup> It is difficult to overstate the damage caused by the contextual approach: this methodology failed,

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<sup>36</sup> See *Harper and Bryan, supra*, note 21 (upholding limits on third party spending in election campaigns and a prohibition on the unauthorized release of election results).

<sup>37</sup> Defining harm for purposes of limits on expressive activity raises fundamental issues at the intersection of philosophy, constitutional theory, and s. 2(b) doctrine. That issue is beyond the scope of this reflection, which focuses on the flaws of a methodology that conflates value and harm.

<sup>38</sup> Expressive activities that have been assigned to the ghetto include hate propaganda, obscenity, discriminatory expression, tobacco advertising and commercial expression more generally, defamation, and defamatory libel. For an earlier critique see J. Cameron, “The Past, Present and Future of Expressive Freedom under the *Charter*” (1997) 35 O.H.L.J. 1.

colossally, to grasp the essence of expressive freedom and embedded a fatal flaw in the jurisprudence.

The Court has now stepped back from the most objectionable element of this approach and no longer asks point blank whether the content of expression is valuable enough to be protected by the Charter. Still, it has not invalidated a statutory provision under section 2(b) since *Thomson Newspapers* was decided in 1998.<sup>39</sup> Nor has it rejected this methodology of judgment, admitted that the contextual approach is unsound, or indicated a willingness to adopt an evidence-based approach to the question of harm. It will be difficult for freedom of expression to flourish while these doctrinal missteps remain in place.

The legacy of this jurisprudence is a quixotic mix of principle and judgment. The freedom principle is sound but never counted for much because it was simply abandoned under section 1. There, the Court's methodology of judgment rested on a formalistic separation of breach and justification which thinned the freedom principle out to the point of disappearance. That separation could not disguise the incoherence of a framework based on assumptions that are fundamentally at war under sections 2(b) and 1.

Expressive freedom requires a thick conception of principle, under section 1 as well as under section 2(b). A principled approach would bring an end to judgment-based decisions that uphold limits on the pretext that the expressive activity is unworthy. It would permit limits that are based on evidence of harm, and disallow unmediated judgments of value. And it would clarify that freedom prevails, as a matter of principle, when the evidence is not strong enough to permit limits. All that said, ameliorating section 2(b) is a relatively simple matter of reconfiguring the section 1 analysis. It can be done by drawing the principle of content neutrality into section 1 — as the presumption that must be rebutted with evidence of justifiable limits — and returning to the *Oakes* test as originally conceived, in the case of content-based violations of expressive freedom.

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<sup>39</sup> But see *Guignard, supra*, note 18 (invalidating a municipal by-law) and *Translink, supra*, note 11 (invalidating transit authorities' advertising policies).

### III. “[I]NCLUDING ... FREEDOM OF THE PRESS AND OTHER MEDIA OF COMMUNICATION”

It could be expected, given section 2(b)’s explicit guarantee, that the press and media would play a lively role in the evolution of the jurisprudence. Here as well the Supreme Court jurisprudence is quixotic. Despite leading the way and securing unequalled protection for openness under section 2(b), the press has been unable to convince the Court that newsgathering *per se* is protected by the Charter. After 30 years, the threshold question of whether freedom of the press and media is subsumed in freedom of expression or protects an independent right has not been squarely answered. Partly this is because the Court focuses on expressive freedom when section 2(b)’s entitlements overlap, as occurs in the law of defamation and on open justice issues.<sup>40</sup> On issues exclusive to the press and media the Court has insisted that the guarantee can be adequately protected without engaging section 2(b). That was its position when search warrants were issued against the CBC and again when journalists sought help from the Charter to protect confidential newsgathering sources.<sup>41</sup>

The press function is directly linked to democratic governance because it provides the means for the public to hold government and other powerful institutions accountable. The kind of transparency that inspires accountability can only be achieved through robust reporting and commentary by a press that operates free from government interference and functions independently of the state. This checking function or watchdog role defines the press and media as an institution and explains its constitutional status. To its credit the Court had no difficulty with this concept in *Edmonton Journal*, where a statutory publication ban prohibited the press from reporting on certain legal proceedings.<sup>42</sup> It did not

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<sup>40</sup> Though it is not convincing, an argument could be made that this entitlement is subsidiary in nature because the text states that freedom of expression merely includes freedom of the press and other media. *Supra*, note 7.

<sup>41</sup> The two pairs of cases are *Lessard* and *New Brunswick – search warrant* on the search warrant issue, and *National Post* and *Globe and Mail* on the question of journalist-source privilege. *Supra*, notes 8 and 9.

<sup>42</sup> *Edmonton Journal*, *supra*, note 6, at 1339 (stating that it is “essential to a democracy and crucial to the rule of law that the courts are seen to function openly” and adding that “[t]he press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny”). Though the ban was invalidated, the panel divided by a 4-3 margin on the question whether openness should prevail over the privacy interests of litigants in matrimonial proceedings.

respond the same way when the authorities initiated a search against the CBC to obtain video footage belonging to the broadcaster.

Companion cases in 1991 tested the relationship between sections 2(b) and 8 of the Charter.<sup>43</sup> By then Cory J. had emerged as a leader on press issues and would assume that role again by writing the majority opinions in both CBC cases.<sup>44</sup> In *New Brunswick* he confirmed the value of a free press in democratic society<sup>45</sup> and then cautioned, in *Lessard*, that “particularly careful consideration” is required any time a search warrant is issued against the press.<sup>46</sup> Having announced these principles, Cory J. went on to conclude that section 2(b) does not create additional requirements under section 8, but merely serves as the backdrop in determining whether a search is reasonable.<sup>47</sup>

In his view section 2(b) could be sidestepped by rolling media-specific factors into section 8’s conception of reasonableness. Justice Cory went on to generate a checklist of nine elements to consider, four of which are specific to the circumstances of the press and media. First, he indicated the need for a balancing that weighs the demands of law enforcement against the media’s privacy rights.<sup>48</sup> Second, he stated that the affidavit in support of a warrant should ordinarily indicate whether the information is available from other sources and whether reasonable efforts to obtain it have been undertaken and exhausted.<sup>49</sup> A third factor, which was critical in the CBC cases, proposed that a search warrant will normally be issued when any of the information being sought by the authorities has been disseminated.<sup>50</sup> Finally, Cory J. held that any search

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<sup>43</sup> *Lessard*, *supra*, note 8, and *New Brunswick – search warrant*, *supra*, note 9.

<sup>44</sup> In addition to his majority opinion in *Edmonton Journal*, *supra*, note 6, he wrote a powerful dissent in *Vickery*, *supra*, note 10 (supporting press access to a video confession under the common law).

<sup>45</sup> *New Brunswick – search warrant*, *supra*, note 9, at 475 (stating that the media “have a vitally important role to play in a democratic society” and that it is the media which, “by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being”).

<sup>46</sup> *Lessard*, *supra*, note 8, at 444.

<sup>47</sup> *New Brunswick – search warrant*, *supra*, note 9, at 475.

<sup>48</sup> *Id.*, at 481 (stating that “the justice of the peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and dissemination”). The Court confirmed and applied the same nine factors in *Lessard*, *supra*, note 8, at 445.

<sup>49</sup> *New Brunswick – search warrant*, *id.* (stating that “the affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained, and if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted”).

<sup>50</sup> *Id.*

of media premises should be subject to conditions that minimize interference with press operations.<sup>51</sup>

These press-specific factors were recommended, not mandatory, and did little to protect the CBC in these cases. Two factors, in Cory J.'s view, all but eliminated the threat to newsgathering. First, he found it puzzling, if not hypocritical, for the CBC to challenge the warrants after broadcasting some of the footage. As far as he was concerned the CBC was effectively estopped from asserting an interest in its privacy once footage entered the public domain.<sup>52</sup> Second, he equated the media and public to argue that the CBC has the same responsibility to divulge information as any member of the public.<sup>53</sup> Though the evidence on alternative sources was incomplete in one case and absent in the other, the Court upheld the warrants in both cases.<sup>54</sup>

The search warrant cases are conceptually and methodologically important. At the level of principle the Court provided little discussion of newsgathering and its status under section 2(b). The context of a criminal investigation seemed to obscure the point that newsgathering is a core function of the press and that its integrity depends on a high degree of independence from the state. As La Forest J. explained in his concurring opinion, “[t]he press should not be turned into an investigative arm of the

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<sup>51</sup> *Id.* (stating that where a warrant is issued “consideration should be then given to the imposition of some conditions on its implementation, so that the media organization will not be unduly impeded in the publishing and dissemination of the news”).

<sup>52</sup> *Lessard, supra*, note 8, at 446-47 (stating that “the crucial factor is that, prior to the application for the warrant, the media had broadcast portions of the videotape ... on two occasions, both in French and English” and that “once the news media have published the gathered information, that information then passes into the public domain”). Although the CBC did report the labour demonstration, the police seized five videotapes, four of which contained raw footage that was not broadcast. *Id.*, at 441.

<sup>53</sup> *Id.*, at 446 (stating that “all members of the community have an interest in seeing that crimes are investigated and prosecuted” and suggesting that “the media might even consider voluntarily delivering their videotapes to the police”). See also *New Brunswick – search warrant, supra*, note 9, at 477 (stating that “[t]he media, like any good citizen, should not be unduly opposed to disclosing to the police the evidence they have gathered” (emphasis added)). Compare *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] S.C.J. No. 61, [2002] 3 S.C.R. 209 (S.C.C.) (invalidating a *Criminal Code* provision that authorized law office searches, on the ground that it violated a sacrosanct solicitor-client privilege).

<sup>54</sup> There was nothing in the information on this question in *Lessard, id.*, at 440-41; in *New Brunswick – search warrant, id.*, the information addressed the point but did not disclose the presence of police identification experts at the crime scene or explain why alternative sources were not available. *Id.*, at 483 (stating that it “must be assumed that the information was drawn and presented in good faith” (emphasis added)).

state.”<sup>55</sup> It seems obvious that a warrant against the press violates section 2(b), and that nothing in the text negates that violation by asking whether the search is reasonable under section 8. Equating the press and the public in such circumstances, on the pretext that section 8 posed the only issue at stake, belittled section 2(b)'s explicit guarantee. Justice McLachlin challenged the analogy by pointing out that “[t]he history of freedom of the press in Canada belies the notion that the press can be treated like other citizens or legal entities when its activities come into conflict with the state.”<sup>56</sup> Removing the analysis from section 2(b) attenuated the consequences for the press and substituted a malleable concept of reasonableness for a structured standard of justification under section 1.<sup>57</sup>

Only McLachlin J., on her own in dissent, was prepared to find a violation of section 2(b), propose a standard that was aimed at protecting the newsgathering process, and invalidate the search warrants for failing to meet those requirements. Like Cory J., she considered the question of alternative sources and the degree of interference with the press function. The key variables in her opinion were the section 2(b) frame, the section 1 criteria, and the rigour she brought to the application of those criteria — in short, the methodological rigour of her approach. Justice McLachlin began from the proposition that “an effective and free press is dependent on its ability to gather, analyze and disseminate information, independent from any state imposed restrictions on content, form or perspective except those justified under section 1”.<sup>58</sup> She placed the CBC's newsgathering and reporting activity on a labour demonstration at the core of section 2(b)'s values. In contrast to the majority, she also recognized that it is the prospect of interference with newsgathering that creates a chilling effect on the press function.<sup>59</sup> These principles led her to propose a section 1 standard that adapted the elements of the *Oakes* test to the circumstances of the violation.<sup>60</sup> She invalidated the warrants because the

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<sup>55</sup> *Lessard, id.*, at 432. Justice La Forest wrote of the need to protect newsgathering but agreed to uphold the search warrants both because the media had published some of the materials and because the interference with the press function, in the circumstances, was “highly tenuous”. *Id.*, at 433.

<sup>56</sup> *Id.*, at 450.

<sup>57</sup> *New Brunswick – search warrant, supra*, note 9, at 478 (stating that it is “essential that flexibility in the balancing process be preserved so that all factors relevant to the individual case may be taken into consideration and properly weighed”).

<sup>58</sup> *Id.*, at 452.

<sup>59</sup> *Id.*, at 453.

<sup>60</sup> Her test for a search warrant against a member of the press has these elements:

(1) The search/seizure is necessary because there are no alternative sources for the information required; (2) The importance of the search/seizure outweighs the damage to be



availability of other sources was not adequately addressed, but also because the affidavit material failed to indicate why the search was necessary and why the investigative imperative should prevail over the constitutionally protected newsgathering activities of the press. In *Lessard* she described these defects as fatal.<sup>61</sup> Though her approach was not adopted by other members of the panel, it presaged the breakthrough doctrine soon to be introduced in *Dagenais*.<sup>62</sup>

Years passed before the Court returned to the question of special consideration for the press, though issues that joined section 2(b)'s entitlements arose in the interim. One example is the law of defamation, which has been analyzed from the perspective of expressive freedom but has enormous implications for the press. On this issue the Court's first look at defamation under the Charter in *Hill v. Church of Scientology of Toronto* yielded an unenlightened response.<sup>63</sup> Justice Cory's majority opinion followed the core values approach that governed limits on the content of expression, declared defamatory statements to be of low value and unworthy of the Charter's protection, and refused to modify common law doctrine that favoured reputation at the expense of expressive and press freedom.<sup>64</sup> It is regrettable that the press interest in breathing space and relief from tort law's regime of strict liability was not exigent, for it is widely agreed that *Church of Scientology* prevented the law of defamation from evolving, with negative consequences for press and expressive freedom. The Court has since revised the common law of defamation, but without admitting that it misfired in *Church of Scientology* and also without engaging section 2(b) or linking its reforms to any theory of the press.<sup>65</sup>

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caused by the infringement of freedom of the press; and (3) The warrant ensures that the search/seizure interferes with the press's freedom as little as possible.

*Id.*, at 455.

<sup>61</sup> *Id.*, at 458.

<sup>62</sup> *Supra*, note 10.

<sup>63</sup> *Supra*, note 33.

<sup>64</sup> There, Cory J. not only rejected the Charter's application but in balancing values to determine whether the common law required modification stated that "defamatory statements are very tenuously related to the core values which underlie s. 2(b)". He continued that they are "inimical to the search for truth", "cannot enhance self-development" and do not lead to "healthy participation in the affairs of the community". To the contrary, he declared, they are "detrimental to the advancement of those values and harmful to the interests of a free and democratic society". *Id.*, at para. 106.

<sup>65</sup> *Grant v. Torstar Corp.*, *supra*, note 19 (introducing a new common law defence of responsible communication). See also *WIC Radio* (modernizing the fair comment doctrine); *Bou Malhab* (rejecting a group defamation claim under Quebec's civil law); and *Crookes v. Newton* (concluding that hyperlinks, without more, do not constitute publication for purposes of defamation law), all *supra*, note 19. For a comment that discusses the Court's defamation reforms and criticizes

Meanwhile, the press and media played a leading role in developing the open justice principle during this period. The emphasis in this jurisprudence is not the press *per se* but the public interest in the transparency and accountability of the justice system. Still, a theory of the press is nascent in decisions that recognized and validated the role of the press as a surrogate for, or agent of, the public. It is notable here that the open justice principle could not be protected without constitutionalizing the newsgathering function, and that is because openness has two arms: the right to report proceedings, which is implicated when a publication ban is ordered, and the right to attend proceedings, which is compromised when courtrooms or hearings are closed to the public. The right to attend proceedings is an entitlement that belongs to the public at large, though it also engages the newsgathering function. Far from resisting it, the Court embraced the constitutionalization of newsgathering in this context.

One decision stands out for its insight on section 2(b)'s press guarantee, and that is La Forest J.'s majority opinion in *CBC v. New Brunswick*.<sup>66</sup> Not only did he consolidate the doctrinal breakthrough made in *Dagenais*<sup>67</sup> and set a demanding evidentiary threshold for limits on openness, he developed a theory of the press that was anchored in key links between democracy, public engagement and criticism, and a free press. Citing *Edmonton Journal*, La Forest J. emphasized the “democratic function of public criticism of the courts” and confirmed the Court’s view that “it is difficult to think of a guaranteed right more important to a democratic society than freedom of expression”.<sup>68</sup> That is where the newsgathering function tied in to the public interest in access.

Under La Forest J.’s theory, “[t]he full and fair discussion of public institutions, which is vital to any democracy, is the *raison d’être* of the s. 2(b) guarantee,” and “[d]ebate in the public domain is predicated on an informed public, which is in turn reliant on a free and vigorous press.”<sup>69</sup> It was obvious to him that the press cannot inform the public and equip it to discharge its democratic responsibilities without having access to

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its refusal to engage s. 2(b), see J. Cameron, “Does Section 2(b) Really Make a Difference? Part I: Freedom of Expression, Defamation Law and the Journalist-Source Privilege”, in J. Cameron & B. Ryder, eds. (2010) 51 S.C.L.R. (2d) 133.

<sup>66</sup> *Supra*, note 10.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*, at paras. 17 and 19 (also stating, at para. 18, that “[t]he freedom of individuals to discuss information about the institutions of government, their policies and practices, is crucial to any notion of democratic rule”).

<sup>69</sup> *Id.*, at para. 23.

courts and court proceedings. The synergy between the public and press entitlements reached full momentum when La Forest J. stated, this time in a majority opinion, that “freedom of the press not only encompass[s] the right to report news and other information, but also the right to gather this information”.<sup>70</sup> Though he upheld it under section 1, the *Criminal Code* provision that authorized judges to close criminal proceedings, in part or in whole, violated section 2(b) of the Charter.<sup>71</sup>

Justice La Forest took the opportunity in *CBC v. New Brunswick* to develop the views he had expressed in *Lessard* and secure majority support for the constitutionalization of newsgathering. Still it remained unclear whether the Court would recognize other aspects of newsgathering under section 2(b). That question arose twice the same year when investigative journalists from *The National Post* and *The Globe and Mail* newspapers invoked section 2(b) to protect the identity of confidential sources.<sup>72</sup> These cases gave the Court an unprecedented chance to take the next step in developing a Charter theory of the press.<sup>73</sup> With *New Brunswick* and the search warrant cases pointing in different directions, the Court rejected the analogy to open justice and refused to grant confidential newsgathering sources status under section 2(b). It claimed, instead, that freedom of the press would be adequately protected by common law doctrine.

At common law a privilege to protect various confidential relationships is available under the Wigmore test.<sup>74</sup> It is described as a “privilege” because it allows the party in possession to withhold confidential information that would otherwise provide relevant evidence in legal proceedings. The question in the *National Post* and *Globe and Mail* cases was whether the Court would allow an investigative reporter to protect a confidential source. In both instances the reporters received damaging

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<sup>70</sup> *Id.*, at para. 24. In doing so he relied on his concurring opinion in *Lessard* and its conclusion that “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 government interference” (emphasis in original).

<sup>71</sup> *Id.*, at para. 32.

<sup>72</sup> *National Post*, *supra*, note 9; *Globe and Mail v. Canada*, *supra*, note 9.

<sup>73</sup> The issue arose once before, but was not directly addressed: *Moysa v. Alberta (Labour Relations Board)*, [1989] S.C.J. No. 54, [1989] 1 S.C.R. 1572 (S.C.C.). *National Post*, *id.*, also gave the Court an opportunity to re-think the search warrant cases and adopt the view of McLachlin J. (as she then was) that such orders violate s. 2(b). Without addressing that point the Court followed the s. 8 approach and considered whether the orders were reasonable.

<sup>74</sup> A case-by-case privilege is available to protect confidential communications in doctor-patient, psychologist, and journalist-source relationships, as well as in certain religious communications. *R. v. McClure*, [2001] S.C.J. No. 13, [2001] 1 S.C.R. 445, at para. 29 (S.C.C.).

information about explosive political scandals from sources who requested and received a promise of confidentiality. While *National Post* concerned a criminal investigation and orders seeking the production of physical evidence which could reveal the identity of the source, *Globe and Mail* raised the issue in civil proceedings where access to the source might have brought a defence to light.<sup>75</sup> Despite the political drama surrounding Shawinigate and the Quebec sponsorship scandal, the key structural question was whether the Court would shelter the journalist-source relationship under the Charter.

Justice Binnie's majority opinion in *National Post* was quick to praise the virtues of a free press, the role of confidential sources and the democratic importance of investigative reporting.<sup>76</sup> Once having done so, he rejected a Charter approach to this issue in no uncertain terms<sup>77</sup> and maintained that a free press is sufficiently protected by infusing the common law Wigmore test with Charter values.<sup>78</sup> While the Court flatly refused to protect the journalist's source in *National Post*, LeBel J.'s majority opinion in *Globe and Mail* provided a more source-protective interpretation of the Wigmore standard.<sup>79</sup>

The common law was attractive to the Court because the Wigmore test incorporates a balancing test that weighs the law's interest in access to the evidence against the public interest in protecting confidential sources.<sup>80</sup> *Grant v. Torstar Corp.* was still fresh at the time, and there the

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<sup>75</sup> For extensive analysis see J. Cameron, "Of Scandals, Sources and Secrets: Investigative Reporting, *National Post* and *Globe and Mail*", in J. Cameron & B. Ryder, eds. (2011) 54 S.C.L.R. (2d) 232.

<sup>76</sup> *National Post*, *supra*, note 9, at paras. 28-34 (discussing freedom of expression and the press, and the importance of confidential sources).

<sup>77</sup> *Id.*, at paras. 37-41 (explaining why the constitutional model should be rejected and emphasizing, in particular, that newsgathering could not be constitutionalized on this issue without creating expectations for other techniques — such as chequebook journalism — and claiming that to protect "a heterogeneous and ill-defined group of writers and speakers" would "blow a giant hole in law enforcement and other constitutionally recognized values such as privacy": *id.*, at para. 40).

<sup>78</sup> *Id.*, at paras. 54 and 64 (stating, at para. 64, that "[t]he public interest in free expression will *always* weigh heavily in the balance" and noting that "[w]hile confidential sources are not constitutionally protected, their role is closely aligned with the role of 'freedom of the press and other media of communication', and will be valued accordingly" (emphasis in original)).

<sup>79</sup> *Supra*, note 9 (strengthening the common law standard, in the civil setting, by emphasizing that the party seeking disclosure has the onus, in the first instance, to demonstrate the relevance of communications that are protected by confidentiality).

<sup>80</sup> The Wigmore test's four elements must be met to establish a privilege:

- (1) The communications must originate in a confidence that they will not be disclosed;
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and
- (4) The injury that would

Court placed its confidence in the common law's capacity to protect section 2(b) by adding a new defence to the law of defamation.<sup>81</sup> That alone made it less likely that the Court would be receptive to a Charter approach in *National Post* and *Globe and Mail*. Despite endorsing the status quo on journalist-source privilege, the Court's rhetorical embellishments to the Wigmore test will alter the way common law balancing is done and may affect the outcome in some instances.<sup>82</sup> Even so, and whether the issue is defamation or privilege, common law doctrines do not protect section 2(b)'s guarantees in the same way a constitutional standard would.

There are important differences between the common law Wigmore test and a Charter solution to this issue. Under the common law, the party seeking to protect a source has the burden to show that it is justifiable to preserve the confidentiality of the relationship. Under the Charter, once the journalist establishes a confidential newsgathering relationship under section 2(b), the onus shifts and the party seeking disclosure has the burden to explain why it is justifiable to violate that relationship.<sup>83</sup> Moreover, in place of a structured test that is designed to protect the entitlement, the common law contemplates an open-ended balancing of the competing interests in confidentiality and disclosure.<sup>84</sup> In the absence of criteria that fetter the exercise of discretion, Wigmore balancing favours the disclosure of information that is relevant in legal proceedings.<sup>85</sup> By leaving it outside the Charter's framework of protection the Court relegated protection for confidential newsgathering sources to the good faith application of Charter values under common law doctrine.

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inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Cited in *R. v. McClure*, *supra*, note 74, at para. 30.

<sup>81</sup> *Supra*, note 19.

<sup>82</sup> See, e.g., *Canwest Publishing Inc. v. Wilson*, [2012] B.C.J. No. 808, 2012 BCCA 181 (B.C.C.A.) (applying the Wigmore criteria and finding in favour of a privilege to protect a confidential newsgathering source).

<sup>83</sup> *National Post*, *supra*, note 9, at para. 37 (describing the constitutional proposal, the way it would require the party claiming Charter protection to establish a constitutionally protected newsgathering relationship under s. 2(b), and how the burden would then shift to the party seeking access to confidential information to justify the violation of that relationship under s. 1).

<sup>84</sup> The difference is between balancing under the fourth step of Wigmore's test, *supra*, note 80, and the requirements of the *Dagenais/Mentuck* test, *infra*, note 100.

<sup>85</sup> That is because the information being sought is relevant in a concrete way to proceedings that are underway; by contrast, the countervailing interest in protecting a confidential source may depend, instead, on a more abstract understanding of the process of newsgathering and the need to protect sources in order to safeguard the integrity of that process.

The search warrant and journalist-source decisions are of a piece. In both instances the Court was invited to recognize and protect news-gathering activities under section 2(b) of the Charter. Both times the Court dodged section 2(b) to avoid granting those activities constitutional status. Both times it maintained that free press interests are adequately protected by balancing tests, first under section 8 and then at common law. Both times the press interest had little chance against the law's interest in compelling newsgathering material to be disclosed, whether for investigative or testimonial purposes.

The Court is sympathetic to section 2(b)'s press guarantee but uncomfortable with its implications. It has been reluctant to protect news-gathering when doing so would entail a constitutional exemption for members of the press. Special rules for search warrants against the press and an immunity or privilege to keep relevant evidence a secret push against the principle that all are equal before the law. In recognition that it plays a distinctive role the Court has been willing to treat the press somewhat differently, but not to formalize that difference in constitutional doctrine. The collapse of an identifiable class of claimants is a complication that adds to the challenge. As Binnie J. made clear in *National Post*, the Court is not inclined to constitutionalize news-gathering now that technology has undermined the status and identifiability of the institutional press. A function that was served in the past by a class that could be defined has been all but universalized by technological change.

By entrenching a form of constitutional exceptionalism, the press guarantee creates distinctive rights and privileges for members of a certain class. The Court is wary of this exceptionalism, and the question at present is whether that fear can be overcome. As seen, the Court has identified and endorsed elements of a press theory but stopped short of granting it recognition under section 2(b). A final branch of the jurisprudence shows that the Court can be fearless as well as principled in protecting freedom of expression and the press. The constitutionalization of open justice is section 2(b)'s greatest feat in the first 30 years of the Charter and should be heralded, not only because it demonstrates the Court's commitment to openness, but also because it creates a template for section 2(b).

#### IV. OPEN JUSTICE: A SECTION 2(b) TEMPLATE

A third branch of section 2(b) jurisprudence offers a more inspiring account — these are the open justice cases, which stand at the crossroad of expressive and press freedom.<sup>86</sup> In this setting, the Court’s grasp of the media’s agency in promoting transparency and accountability values was automatic, instinctive, reflexive. The result was a constitutional solution, including a customized section 1 standard of justification. The bedrock is the doctrine itself, along with the evidentiary threshold it set and then followed in invalidating limits on openness. The distinguishing features of this jurisprudence — what sets it apart from other branches of section 2(b) — are the thickness of the open justice principle and the rigour of the *Dagenais/Mentuck* test.<sup>87</sup>

Though the rationales for openness were well ingrained in the common law, that pedigree was not necessarily auspicious for the Charter. In other contexts, like defamation and the journalist-source privilege, the Court found it easier to incorporate Charter values into the common law than to adopt a Charter solution. Though section 2(b)’s entitlements gained ground in the process, improving the common law is not the same as enforcing constitutional guarantees. As a matter of chronology, open justice had already taken a different turn by the time the Court confirmed the common law, in default of the Charter, in defamation law.

*Dagenais* is section 2(b)’s most important landmark.<sup>88</sup> There, a judge ordered a nationwide publication ban to prevent the CBC from airing a docudrama on the sexual abuse of boys in Catholic training schools when a criminal trial on similar issues was underway in Ontario. On appeal the Court could have applied the common law doctrine that governed contests between openness and a fair trial. Along those lines, the dissenting judges complained that the merits of a constitutional solution were far from obvious and maintained that the common law had protected openness for centuries. As far as they were concerned existing doctrine did not require improvement or modification under the Charter.<sup>89</sup> In

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<sup>86</sup> *Supra*, note 10 (providing a list of the Supreme Court’s open justice decisions).

<sup>87</sup> *Infra*, note 100.

<sup>88</sup> *Supra*, note 10.

<sup>89</sup> *Id.*, at 928-29 (*per* Gonthier J., declaring that “the *Charter* does not oblige departing from [common law] tradition in any substantive respect” and adding that “[t]he impact of the *Charter* will be minimal in areas where the common law is an expression of, rather than a derogation from, fundamental values”). *Id.*, at 916 (*per* L’Heureux-Dubé J., stating that “[w]hile this common law balancing of fundamental rights was developed in the pre-*Charter* era, the proclamation of the

disagreeing, Lamer C.J.C. noted that the text of the Charter is straightforward and pointed in particular to the equal status of section 2(b) and section 11(d). To him it meant that the common law practice of privileging fair trial at the expense of openness violated the Charter.<sup>90</sup> Not only did he constitutionalize the common law, in doing so he introduced a doctrine that protects openness by setting structured criteria and emphasizing that justifiable limits must be evidence-based.

*Dagenais* marks a turning point in section 2(b)'s history which brought the common law into the Charter and established a framework to protect open justice. In doing so, it offered a near-seamless transition from the common law to the Charter. The Court supported openness in decisions that began with *Nova Scotia (Attorney General) v. MacIntyre*,<sup>91</sup> predating the Charter, and *Edmonton Journal*.<sup>92</sup> After picking up momentum with *Dagenais*, the Court consolidated and extended the *Dagenais* test in *CBC v. New Brunswick*<sup>93</sup> and *Mentuck/O.N.E.*,<sup>94</sup> then applied a presumption of openness to an investigative hearing in *Re Vancouver Sun*.<sup>95</sup> These developments culminated in the Court's declaration, in *Toronto Star*, that "the *Dagenais/Mentuck* test applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings".<sup>96</sup>

The open justice jurisprudence is based on a methodology of principle, which forms around three central elements. First is the principle itself. Here, as noted elsewhere, it would have been easy for the Court to infuse the common law balancing of fair trial and expressive freedom with Charter values. The simplicity of Lamer C.J.C.'s reasoning in *Dagenais* disguised the importance of his decision to adopt a Charter solution. To him, a non-hierarchical conception of the Charter meant that a common law rule that privileged fair trial against open justice violated

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*Charter* does not render it invalid" and commenting, "[a]fter all, the pre-*Charter* balancing was an expression of the very rights protected by the *Charter*").

<sup>90</sup> *Id.*, at 877 (stating that "[t]he pre-*Charter* common law rule governing publication bans emphasized the right to a fair trial over the free expression interests" at stake and in doing so struck a balance that is "inconsistent with the principles of the *Charter*, and, in particular, the equal status" of ss. 2(b) and 11(d)).

<sup>91</sup> *Supra*, note 10.

<sup>92</sup> *Supra*, note 6.

<sup>93</sup> *Supra*, note 10.

<sup>94</sup> *Supra*, note 10.

<sup>95</sup> *Supra*, note 10. *Infra*, note 102.

<sup>96</sup> *Toronto Star*, *supra*, note 10, at para. 7 (emphasis in original).



the Charter and required modification.<sup>97</sup> To highlight the contrast, compare *Hill v. Church of Scientology*, which was decided the following year. There, the Court could only condone defamation law's preference for the protection of reputation by ignoring the textual significance of section 2(b) and the explicit concern in *Dagenais* about doctrinal hierarchies that are incompatible with Charter rights. Constitutionalizing the common law test in *Dagenais* was also a critical step because it triggered a process of justification.

The second step in the *Dagenais* methodology under section 1 is even more monumental. Recognizing that the *Oakes* test could not apply in this setting, Lamer C.J.C. introduced a translation of *Oakes* that resulted in a customized standard to test the justifiability of the publication ban.<sup>98</sup> By the time he proposed this standard the *Oakes* test had been diluted by *Irwin Toy*'s dichotomy and the contextual approach. Limits on expressive freedom under the *Criminal Code* had been upheld and the "core values" approach was well established. The *Dagenais* test was a doctrinal oasis alongside other branches of the jurisprudence that allowed substantial slippage on the *Oakes* requirements that limits be demonstrably justified.

The third feature of this methodology is an evidence-based approach to limits. Elsewhere under section 2(b) the Court surrendered on section 1's requirements and upheld limits under an attenuated standard, on the pretext that low-value expression should receive little or no Charter protection. As a matter of abstract principle the Court expressed its support for freedom of expression and freedom of the press, and often did so in strong terms. But the jurisprudence revealed how easily principle could be expended, and that is exactly what happened to expression under section 1 and the press, which was excluded from section 2(b). While freedom's prospects were dimmed by compromise, La Forest J.'s decision in *CBC v. New Brunswick* consolidated the *Dagenais* test and extended its reach from publication bans to closed

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<sup>97</sup> *Dagenais*, *supra*, note 10, at 877 (stating that "[a] hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law").

<sup>98</sup> He concluded that a publication ban could only be ordered under the Charter when: "(a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban". *Id.*, at 877 (emphasis in original).

proceedings.<sup>99</sup> Justice Iacobucci developed it further in *Mentuck* and *O.N.E.* by adapting it more generally to contests between openness and the administration of justice, and giving the doctrine its current form as the *Dagenais/Mentuck* test.<sup>100</sup>

In *CBC v. New Brunswick La Forest J.* repeatedly emphasized that limits must be grounded in a sufficient evidentiary basis, and explained that absent that evidence the Court would not tolerate derogations from open justice.<sup>101</sup> The open justice principle reached its pinnacle a few years later in *Re Vancouver Sun*, when the Court refused to allow investigative hearings under the anti-terrorism provisions of the *Criminal Code* to be held in secret. Instead of viewing the proceedings as investigatory in nature and outside the purview of openness, the majority opinion characterized the hearing as judicial and indicated that it could not be closed without satisfying the *Dagenais/Mentuck* test's evidence-based requirements.<sup>102</sup>

The open justice principle seemed invincible until the Court upheld the *Criminal Code*'s ban on bail hearings in *Toronto Star v. Canada* and rejected challenges to restrictions on access to evidence and courthouse premises in the Quebec cases.<sup>103</sup> At the time, the central question was whether the *Dagenais/Mentuck* test was exclusive to open justice or would be broadened to set the standard of justification for all judicial

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<sup>99</sup> *Supra*, note 10, at para. 69 (adapting the *Dagenais* test and applying it to the judge's exercise of discretion in deciding to close part of a sentencing hearing).

<sup>100</sup> *Supra*, note 10, at para. 32 (setting out the elements of the revised *Dagenais* test and the new *Dagenais/Mentuck* standard).

<sup>101</sup> *CBC v. New Brunswick*, *supra*, note 10, at paras. 72, 73, 78, and 85 (stating, at para. 85, that "[t]he importance of a sufficient factual foundation upon which the discretion [under the *Code*] is exercised cannot be overstated").

<sup>102</sup> *Re Vancouver Sun*, *supra*, note 10, at para. 39 (stating that the presumption of openness should "only be displaced upon proper consideration of the competing interests at every stage of the process" and concluding that the existence of the order for an investigative hearing and as much of its subject matter as possible should be made public unless secrecy becomes "necessary" under the *Dagenais/Mentuck* test (emphasis in original)). See J. Cameron, "Governance and Anarchy in the s. 2(b) Jurisprudence: A Comment on *Vancouver Sun* and *Harper v. Canada*" (2004) 17 N.J.C.L. 71 (praising the Court's decision in *Re Vancouver Sun* and its open justice methodology).

<sup>103</sup> *Supra*, note 10 (noting other unsuccessful claims). It should also be noted that derogations from the open justice principle are discouragingly frequent in the lower courts. See *Globe and Mail*, *supra*, note 9 (invalidating a motions judge's publication ban which was ordered, *ex proprio motu*, without an application, notice, a hearing or argument); see also T. Tyler, "The criminal case you can't know about" (November 2, 2011), Inside the Star.com, online: <<http://www.thestar.com/news/gta/article/1080416--the-criminal-case-you-can-t-know-about>> (discovering and reporting on child pornography proceedings against an Ontario lawyer that were protected by a publication ban, again without explanation and without any hearing or notice to the media); C. Guly, "Need for notice when seeking a ban", *The Lawyers Weekly* (March 30, 2012), at 9.

orders that placed restrictions on expressive or press freedom.<sup>104</sup> Moreover, though the bail and courthouse case did not engage that test, the worry is that the Court will be cautious, if not resistant, to further extensions of open justice and the *Dagenais/Mentuck* standard.<sup>105</sup> The challenge at present is to discourage the Court from watering down this methodology.

Openness is not *per se* a press entitlement but has its roots in the common law's recognition that the integrity of justice depends, in large part, on the transparency of the system. This principle is deeply embedded in tradition and, despite derogations under statutory provisions and common law doctrine, is bedrock in the Anglo-Canadian system of justice.<sup>106</sup> Tradition and a concept of openness as a public entitlement may partly explain why the Court did not treat open justice exclusively or even predominantly as a press claim.

The Court first celebrated the values that attach to openness in *Nova Scotia (Attorney General) v. MacIntyre*, where Dickson J.'s majority opinion laid the groundwork for the Charter jurisprudence.<sup>107</sup> Though access to information about a search warrant was sought in *MacIntyre* by a journalist, the Court spoke from a broader and more systemic point of view. Justice Dickson saw the administration of justice as a matter of the integrity and legitimacy of the system.<sup>108</sup> His compromise, which would allow access but only after a warrant is executed, was not exclusive to the press but available generally to any member of the public. The line of jurisprudence that developed under the Charter is consistent with the

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<sup>104</sup> Litigants in *National Post*, *supra*, note 9 and *Globe and Mail*, *id.*, tried unsuccessfully to interest the Court in applying this test to the question of a privilege for journalist-source relationships. The basis of that argument was Fish J.'s statement, in *Toronto Star*, that "the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings". *Supra*, note 10, at para. 7. Though the remark was specific to open justice, the Court could have applied it to the journalist-source issue in *National Post*, but declined to do so.

<sup>105</sup> The Court did apply that standard in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, *supra*, note 10, and denied access on the basis of a distinction between a video made in the course of an investigation and testimony given in a courtroom.

<sup>106</sup> J. Cameron, "Toward a Theory of Responsible Justice", in *Open Justice*, Canadian Institute for the Administration of Justice (Montreal: Les Éditions Thémis, 1994) 138.

<sup>107</sup> *Supra*, note 10.

<sup>108</sup> *Id.*, at 185 (stating, famously, that "covertness is the exception and openness the rule" and commenting that "[p]ublic confidence in the integrity of the court system and understanding of the administration of justice" are fostered by openness), and at 189 (declaring that "[t]he curtailment of the traditionally uninhibited accessibility of the public to the working of the courts should be undertaken with the greatest reluctance").

view that open justice is preserved and enforced by the Court in the name of, and for the benefit of, the public interest.<sup>109</sup>

At the same time, and with few exceptions, the open justice principle was developed under the Charter through the leadership of the institutional press.<sup>110</sup> The Court recognized that press access to the justice system is compelling because the public interest in the transparency and accountability of the system is best served — and perhaps only served — when newsgathering activities concerning the justice system are protected. In this way, the public's section 2(b) entitlement meshed with a conception of the press to produce a constitutional solution and a methodology of principle that gave open justice strong protection under the Charter.

The dynamics of this jurisprudence bear little resemblance to the Court's response to other section 2(b) issues. The overall record is unquestionably mixed: just as open justice failed in some instances, freedom of expression and the press prevailed in many others. Even so, the openness jurisprudence has a dynamic that sets it apart from other branches of section 2(b). As shown above, the Court relaxed the requirements of *Oakes* and the demand for a sufficient evidentiary basis, with the result that content-based limits were upheld without convincing evidence of harm. Where the press and media were concerned it found ways to avoid section 2(b) altogether and maintain, at the same time, that the constitutional entitlement is adequately protected. By contrast, the Court created a methodology that protected open justice through an evidence-based standard of justification.

From one point of view, open justice has excelled because the Court is comfortable managing its own institutions and found it easy to achieve continuity between a model of constitutional governance and long-

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<sup>109</sup> See also *Vickery*, *supra*, note 10, at 703 (*per* Cory J., dissenting, on the question whether the media should be granted access to a video confession in circumstances of an acquittal):

The public has accepted the media as their representatives at the unfolding of the criminal process. However, it necessarily follows that the modern community must rely upon the media for a fair and accurate depiction of the proceedings in order to facilitate the public right to comment on and criticize that process. This simply cannot be done without the degree of openness which would provide the media with full access to court documents, records and exhibits. The more barriers that are placed in the way of access, the more suspect the proceedings become and the greater will be the irrational criticism of the process. It is through the press that the vitally important concept of the open court is preserved.

<sup>110</sup> The exceptions include *Mentuck* and *O.N.E.*, *Sierra Club* and *Ruby*, though the media appeared as third party interveners in *Mentuck* and *O.N.E. Supra*, note 10.

standing common law tradition.<sup>111</sup> While taking care not to exaggerate the differences between the branches of section 2(b), the question is whether this jurisprudence is singular because open justice is singular, or because the Court uncritically assumed that it is, and acted on that assumption in granting this principle a different and higher level of protection under the Charter.

## V. THE JOURNEY BEHIND, THE JOURNEY AHEAD

Section 2(b) has had moments of glory though its legacy, to this point, is better described as middling. In reflecting back, the assumptions that are embedded in section 2(b)'s 30-year jurisprudence are more revealing than a tally of wins and losses. To name and assess those assumptions is to understand the journey behind, and to set a path for the journey ahead. An element that has played an as-yet-unseen role in this jurisprudence is the process-substance distinction, which is well known and discussed in other areas of Charter discourse. In the context of section 2(b), it differentiates open justice, which implicates access, transparency and process values, from content limits which, on first impression, seem to involve purely substantive questions.

To explain, open justice looks like a process entitlement because it protects access values. Access to information is interrupted when courtrooms or hearings are closed, and publication bans that prohibit proceedings from being reported can be just as draconian. Secret proceedings put the integrity and legitimacy of the justice system at risk, and offend democratic sensibilities. In addressing departures from openness under section 2(b), the Court was well aware that transparency and accountability were key values in the justice system long before the Charter. Constitutionalizing those values and developing a doctrine to protect them was a progressive step for the Court but not an abrupt departure from tradition.

How different it looks when freedom of expression is at stake. The focus in that branch of the jurisprudence is on the content or substance of the section 2(b) activity, and not on process concerns. The text of the Charter empowers — indeed obligates — the judiciary to invalidate

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<sup>111</sup> The relationship between statutory and judicial restrictions on openness cannot be overlooked. The Court has given open justice stronger protection under the *Dagenais/Mentuck* test, which applies to discretionary judicial orders, than under the *Oakes* test, which governs statutory provisions. See *Canadian Newspapers, CBC v. New Brunswick*, and *Toronto Star v. Canada*, *supra*, note 10 (upholding statutory restrictions on access to proceedings and publication bans).

unreasonable limits on expressive freedom. In doing so, it places the Court in the unwelcome position of second-guessing the legislature's perception that certain expressive activities harm democratic values. Rather than enforce the freedom to express objectionable views, the Court seconded section 2(b)'s principle of content neutrality to a merit-based test of values under section 1. That approach tested particular content, which was invariably controversial, against a standard of abstract and ideal value. In developing a methodology to address content limits, the Court's focus has been on a substantive conception of entitlement and a substantive assessment of expressive activity. That focus placed expression of perceived low value at an impossible disadvantage.

Assigning process and substance those roles breaks down on closer examination: just as open justice is subject to substantive limits, the jurisprudence on content limits engages process values. In the case of openness, the Court's section 2(b) solution protects access to the process but is subject to exceptions — either statutory or judicial in origin — which rest on substantive grounds. These limits protect a range of interests, including the rights of the accused, especially in pre-trial proceedings, the privacy and equality rights of certain complainants and witnesses in the criminal and civil process, security interests, confidentiality, and other interests related to the administration of justice.<sup>112</sup> Derogations from the process values that protect access to proceedings and information about proceedings are permitted when it is justifiable to prefer particular substantive values. Importantly, those values do not defeat the right without meeting a section 1 standard which has been relaxed of late but which, in genesis and development, was strict and protective of open justice.

Meanwhile, by focusing on substantive concerns the jurisprudence on expressive freedom obscures the role of process values. Unfortunately, that focus rests on a mistaken conception of section 2(b)'s purpose. As suggested earlier, the purpose of this guarantee is not to protect the content of expression but to guarantee a process of freedom. That process rests on the principle of content neutrality, which protects access values by setting judgment aside in favour of an inclusive and egalitarian concept of freedom. Under *Irwin Toy's* section 2(b) standard, speakers in principle are free to convey any meaning — no matter what it

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<sup>112</sup> See, e.g., ss. 517 and 539 of the *Criminal Code* (publication bans relating to bail hearings and preliminary inquiries); s. 486.4 (protecting the identity of witnesses and complainants in sexual assault proceedings); *Sierra Club* (confidentiality), *supra*, note 10; and *Mentuck/O.N.E.* (the administration of justice), *supra*, note 10.

is — and listeners in principle are equally free to hear and receive that meaning, and then engage or disengage with the speaker as they choose. It is a view of freedom that is democratic and participatory, and one that accepts it both as inevitable and right in principle that undesirable points of view also have a voice, a place in the public domain, and a stake in the process.<sup>113</sup> Elevating process values in this way tests a democracy's courage and humility, in the greater interest of capitalizing on the immense transformative energy of participatory self-government.

Like open justice, content neutrality and its process values are subject to limits that are substantive. Yet that is where the pattern diverges, because content neutrality's process objectives are not reflected in the Court's approach to justification on these issues. Rather than protect those values, the jurisprudence softened section 1's requirements and relaxed its evidentiary conception of what is "demonstrably justified". The result is a double standard and a contrast in approach to section 2(b)'s primordial value of open access — to proceedings as well as to ideas. From that perspective it is difficult to see how this asymmetry can be defended under any theory of section 2(b) that is based on democratic values of access, participation, transparency and accountability. Equally unpersuasive is any suggestion that access to information about the justice system is vitally linked to democratic values but access to all points of view on matters of public interest is not.

This brief discussion of process and substance values shows that both play a role in the section 2(b) jurisprudence, but also that the gap between them is smaller than initially appears. Drawing the analogy between open justice and the expressive freedom jurisprudence demonstrates that the Court's approach to these issues — conceptually and methodologically — is incoherent. The jurisprudence rests on mistaken assumptions about the relationship between process and substance under section 2(b). While outcomes will vary from issue to issue under an evidence-based standard of justification, the Court's analytical framework must be based on sound principle.

Similar reasoning demonstrates how much freedom of the press and media also depend on process values. Newsgathering is a core function that directly involves access to process in the interest of transparency and accountability. As La Forest J. observed, news cannot be reported unless

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<sup>113</sup> But see *Keegstra, supra*, note 21, at 766 (upholding hate propaganda provisions in order to foster "a vibrant democracy *where the participation of all individuals*" — except those who are offensive — "is accepted and encouraged" (emphasis added)).

it can freely be gathered in the first instance.<sup>114</sup> Despite readily agreeing in the context of open justice, the Court rejected that logic in other settings. In failing to grasp the connection between newsgathering in different settings, the Court also missed the link to the process values that are section 2(b)'s essence. As with openness and content limits on expression's content, this core function of the press can be limited where substantive interests are strong enough to compel state access to news-gathering product, whether in the form of a video, a confidential source or a reporter's files. The key point is that outside the example of open justice the Court has yet to acknowledge the constitutional status of this activity, much less forge a connection to process values or provide a methodology to protect it from interference from the state in all but the most compelling circumstances.

It is not enough for the Court to endorse freedom of expression and freedom of the press in the abstract. Though doing so has meant that claims succeed from time to time, section 2(b) is at constant risk under unsound methodologies. Freedom does not matter much when the section 1 test foreordains that limits will be upheld, when the Charter's requirements are satisfied by infusing the common law, informally, with constitutional values, or when freedom of the press is lifted from the text and subordinated to a standard of reasonableness under section 8. These are the legacies of the first 30 years and the point of departure for the future.

The journey behind presents obstacles which hold freedom back, but also shows what steps can be taken in plotting the path ahead. It is positive that the Court has endorsed freedom of expression and freedom of the press in strong, albeit abstract, terms. That endorsement can be deployed to thicken the Court's commitment to principle at both stages of the analysis. First, under section 2(b) the Court should recognize that the guarantee is predominantly concerned with process values, and with preserving access and openness, broadly speaking, on all matters of public interest. Re-conceptualizing freedom in that way would link section 2(b)'s expression and press entitlements to the underlying assumptions of the open justice jurisprudence and provide the rationale — through the principle of content neutrality — for a fresh start under section 1. This step must be paired with a willingness to support news-gathering under section 2(b) and develop a theory of the press that defines its content as an independent entitlement. Second, the Court must

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<sup>114</sup> *Supra*, note 70.



adopt methodologies to ensure that limits are only permitted under a section 1 standard that sets and enforces evidentiary requirements. In the case of content limits on expressive freedom, the section 1 analysis should be conditioned by a presumption of content neutrality, and limits should only be permitted when that presumption is rebutted under section 1 through the terms of a revitalized *Oakes* test.<sup>115</sup> Otherwise, the common law should yield to a Charter methodology on issues like defamation and the journalist-source privilege, and interference with newsgathering should be treated as a violation of section 2(b) that requires justification under section 1. In rough outline, these are the next steps in the journey ahead. The starting point for that journey, necessarily, is a theory of section 2(b) that explains why freedom matters and why it should be protected, whenever it is threatened.<sup>116</sup> Without that theoretical foundation, section 2(b) may well be left on the sidelines once again at the Charter's next anniversary celebration.

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<sup>115</sup> For an illustration of what strict scrutiny of content limits looks like, both on proportionality and evidentiary requirements, see these first amendment decisions of the Roberts Court: *United States v. Stevens*, 130 S.Ct. 1577 (2010) (invalidating a law which prohibited the sale and distribution of video and other depictions of cruelty to animals); *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (protecting the First Amendment rights of those who conducted a highly offensive demonstration at the funeral of an American serviceman); *Brown v. Entertainment Merchants*, 131 S.Ct. 2729 (2011) (invalidating a law that restricted access by minors to violent videos); and *United States v. Alvarez* (June 28, 2012) (invalidating the *Stolen Valor Act*, which made it an offence to falsely claim military decorations and awards).

<sup>116</sup> See, e.g., *Irwin Toy*, *supra*, note 12, at 1008 (*per* McIntyre J., dissenting, stating that “freedom of expression is too important to be lightly cast aside or limited”, that the advertising restrictions “represent a small abandonment of a principle of vital importance”, that “we have seen whole societies utterly corrupted by the suppression of free expression” and concluding that “[w]e should not lightly take a step in that direction, *even a small one*” (emphasis added)).