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See table of contents

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Article abstract

While “freedom of the press” is explicitly guaranteed in section 2(b) of the *Charter*, Canadian courts have tended to treat the term as a superfluity to be protected, if at all, through the related but conceptually distinct notion of freedom of expression. This paper argues that the absence of a discrete analytical framework for press freedom fails to give full meaning to the text of the *Charter* and is inconsistent with the Supreme Court’s own acknowledgment of the vital and unique importance of press freedom within the context of section 2(b). I suggest that the reasons provided for rejecting constitutional protection are typically based on the presumed absence of any workable *Charter* framework, which the analysis proposed here attempts to supply. To that end, this paper advances a three-step framework for the protection of newsgathering activity and illustrates its operation by applying it to the vexed issue of confidential sources. It concludes by suggesting that adopting a purposive interpretation of press freedom—as a freedom intended to guarantee the public’s “right to know”—would ensure that the Court’s doctrine matches its rhetoric and that this fundamental freedom is no longer treated as a mere constitutional redundancy.

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FREEDOM OF THE PRESS AS A DISCRETE CONSTITUTIONAL GUARANTEE

*Benjamin Oliphant**

While "freedom of the press" is explicitly guaranteed in section 2(b) of the *Charter*, Canadian courts have tended to treat the term as a superfluity to be protected, if at all, through the related but conceptually distinct notion of freedom of expression. This paper argues that the absence of a discrete analytical framework for press freedom fails to give full meaning to the text of the *Charter* and is inconsistent with the Supreme Court's own acknowledgment of the vital and unique importance of press freedom within the context of section 2(b). I suggest that the reasons provided for rejecting constitutional protection are typically based on the presumed absence of any workable *Charter* framework, which the analysis proposed here attempts to supply. To that end, this paper advances a three-step framework for the protection of newsgathering activity and illustrates its operation by applying it to the vexed issue of confidential sources. It concludes by suggesting that adopting a purposive interpretation of press freedom—as a freedom intended to guarantee the public's "right to know"—would ensure that the Court's doctrine matches its rhetoric and that this fundamental freedom is no longer treated as a mere constitutional redundancy.

La liberté de la presse est explicitement garantie par l'article 2(b) de la *Charte*, mais les cours canadiennes ont tendance à la juger superflue et à la protéger, s'il y a lieu, par la notion liée, mais distincte, de la liberté d'expression. Cet article avance que l'absence d'un cadre analytique de la liberté de la presse empêche de donner au texte de la *Charte* toute sa signification et est incompatible avec l'importance vitale et singulière reconnue par la Cour suprême dans le contexte de l'article 2(b). Je suggère que les raisons en faveur de rejeter la protection constitutionnelle sont généralement basées sur l'absence présumée de tout cadre viable de la *Charte*. Cet article vise à combler ce besoin, en proposant un cadre en trois étapes pour protéger la collecte de nouvelles et en démontrant son opération par l'application à l'épineuse question des sources confidentielles. L'article se termine en suggérant que l'adoption d'une interprétation téléologique de la liberté de la presse—en tant que liberté destinée à garantir le « droit de savoir » du grand public—peut assurer que la doctrine de la Cour corresponde à sa rhétorique et que cette liberté fondamentale ne soit plus considérée comme une redondance constitutionnelle.

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Introduction

Although "freedom of the press" is expressly articulated in section 2(b) of the *Canadian Charter of Rights and Freedoms*,[1] Canadian courts have tended to treat the term as one of the *Charter*'s few superfluities: a freedom that is protected largely if not exclusively through freedom of expression writ large. While matters involving directly expressive press activity—like those that arise in defamation[2] and publication ban[3] cases—are naturally enough considered under the freedom of expression rubric, the Supreme Court of Canada has also found a range of nonexpressive press activity to either fall under the free expression umbrella or to escape constitutional status entirely. This process began with "open court" cases in which the press sought access to locations (such as courtrooms) and to court documents, which the Court found implicated "freedom of expression by the press."[4] Likewise, section 2(b) claims involving searches of press premises[5] are considered under the freedom of expression rubric,[6]

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] ("freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication," s 2(b)).

2 See e.g. *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, 126 DLR (4th) 129 [*Hill*]; *WIC Radio Ltd v Simpson*, 2008 SCC 40, [2008] 2 SCR 420 [*WIC Radio*]; *Grant v Torstar Corp*, 2009 SCC 61, [2009] 3 SCR 640 [*Grant v Torstar*].

3 See e.g. *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326 at 1339–40, 64 DLR (4th) 577 [*Edmonton Journal*]; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 120 DLR (4th) 12 [*Dagenais*]; *R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442; *R v ONE*, 2001 SCC 77, [2001] 3 SCR 478; *Toronto Star Newspapers Ltd v Canada*, 2010 SCC 21, [2010] 1 SCR 721.

4 See e.g. *Canadian Broadcasting Corp v New Brunswick (AG)*, [1996] 3 SCR 480, 139 DLR (4th) 385 [*Carson*]; *Re Vancouver Sun*, 2004 SCC 43 at para 33, [2004] 2 SCR 332 [*Vancouver Sun*]; *Toronto Star Newspapers Ltd v Ontario*, 2005 SCC 41, [2005] 2 SCR 188 [*Toronto Star*]; *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522; *Named Person v Vancouver Sun*, 2007 SCC 43, [2007] 3 SCR 253; *Canadian Broadcasting Corp v Canada (AG)*, 2011 SCC 2 at para 2, [2011] 1 SCR 19 [*CBC v Canada (AG)*].

5 See e.g. *Canadian Broadcasting Corp v Lessard*, [1991] 3 SCR 421, 9 CR (4th) 133 [*Lessard*]; *Canadian Broadcasting Corp v New Brunswick (AG)*, [1991] 3 SCR 459, 85 DLR (4th) 57 [*CBC v NB*]. While the Supreme Court has highlighted the "special consideration" owed in issuing search warrants of press buildings, the majority's analyses in these cases were based on the reasonableness of a search under the *Criminal Code*: the *Charter* had no application. See the similar reasoning in the pre-*Charter* case of *Descôteaux v Mierzwinski*, [1982] 1 SCR 860, 141 DLR (3d) 590. See also Jamie Cameron, "Section 2(b)'s Other Fundamental Freedom: The Press Guarantee, 1982–2012" (2013) Comparative Research in Law & Political Economy Research Paper Series No 23/2013 at 10 [Cameron, "The Other 2(b) Freedom"].

even though there is no directly expressive activity on the radar. The Court has also frequently referred to "freedom of expression and of the press"[7] without distinguishing between the two concepts, and has at times even collapsed the two guarantees explicitly, for instance by referring to press freedom as an "embodiment" of freedom of expression.[8]

The Supreme Court's reluctance to give freedom of the press independent content or meaning under section 2(b) is plainly illustrated by the majority's decision in *National Post*,[9] a case involving a search warrant and an assistance order obtained by the RCMP in order to gain access to material a confidential source had provided to a journalist. The Court found that while newsgathering was implicit in news publication (which, in turn, constitutes protected press expression), journalist–source relationships or newsgathering activity more broadly should receive no *Charter* protection.[10] At times, the Court in *National Post* reduces the entirety of section 2(b) to freedom of expression: the argument for a journalist–source constitutional immunity "is built on the premise that protection of confidential sources should be treated as if it were an enumerated *Charter* right or freedom. But this is not so. *What is protected by s. 2(*b*) is freedom of expression*."[11]

I will argue that this singular focus on expressive freedom in the context of section 2(b) is misplaced, particularly where the press activity in question (such as the protection of confidential source relationships in *National Post*) involves no directly expressive activity or content whatsoever. While there is no doubt that freedom of expression and freedom of the press are conceptually, textually, and functionally linked in our constitutional framework,[12] this does not necessitate the conclusion that the latter concept should be entirely subsumed by the former. Press freedom has a unique function and plays a distinct role in the constellation of fundamen-

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6 See e.g. *CBC v NB*, *supra* note 5 ("constitutional protection of *freedom of expression* afforded by s. 2(*b*) of the *Charter* does not, however, import any new or additional requirements for the issuance of search warrants" at 475 [emphasis added]).

7 *Grant v Torstar*, *supra* note 2 at para 2. See also *Dagenais*, *supra* note 3 at 921, Gonthier J, dissenting; *Mentuck*, *supra* note 3 at para 27; *Toronto Star*, *supra* note 4 at para 7.

8 *CBC v Canada (AG)*, *supra* note 4 at para 2.

9 *R v National Post,* 2010 SCC 16 at para 38, [2010] 1 SCR 477 [*National Post*].

10 *Ibid*.

11 *Ibid* [emphasis added].

12 For a discussion of the "synergy" between freedom of expression and of the press, see Jamie Cameron, "A Reflection on Section 2(b)'s Quixotic Journey, 1982–2012" (2012) 58 Sup Ct L Rev (2d) 163 [Cameron, "Quixotic Journey"].

tal freedoms, and it deserves to be rescued from its neglected place in our constitutional framework.

In fact, despite the Supreme Court's unwillingness to give press freedom independent *Charter* consideration, three key principles in the Court's jurisprudence militate against a conception of freedom of the press as a mere adjunct of freedom of expression. First, the Court has repeatedly and consistently extolled the essential and discrete role[13] of the press in facilitating social and democratic discourse, which is the central unifying purpose of section 2(b).[14] According to Justice La Forest in *Carson*, "[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*) guarantees. Debate in the public domain is predicated on an informed public, *which is in turn reliant upon a free and vigorous press*."[15]

This is not an isolated observation. The Court has recognized that "press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions";[16] has found that certain information can "*only* be obtained from the newspapers or other media";[17] and has stated that it is "the media that, 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."[18] These statements involve a recognition that freedom of the press performs not only a fundamental but a *unique* function integral to a democratic society—most notably by safeguarding and ensuring the "public's right to know"[19] through newsgathering and dis-

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13 See e.g. *Canadian Newspapers Co v Canada (AG)*, [1988] 2 SCR 122, 52 DLR (4th) 690, Lamer CJ ("[f]reedom of the press is indeed an important and essential attribute of a free and democratic society" at 129 [cited to SCR]). See also *Carson*, *supra* note 4 at paras 18, 23–25; *Lessard*, *supra* note 5 at 429, LaForest J, concurring; *Lessard*, *supra* note 5 at 449–53, McLachlin J, dissenting; *Edmonton Journal*, *supra* note 3 at 1339–40.

14 *Carson*, *supra* note 4 at para 23; *National Post*, *supra* note 9 at para 28.

15 *Carson*, *supra* note 4 at para 23 [emphasis added].

16 *Vancouver Sun*, *supra* note 4 at para 26.

17 *Edmonton Journal*, *supra* note 3 at 1340 [emphasis added]; the Court notes that:

> [i]t is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court (*ibid*).

18 *CBC v NB*, *supra* note 5 at 475.

19 See e.g. *Edmonton Journal*, *supra* note 3 at 1371. See also *Carson*, *supra* note 4 (discussing "the right of members of the public to obtain information about the courts in the first place" at para 23); *Vancouver Sun*, *supra* note 4 ("the right of the public to receive

semination of information—and tend to discredit an overly circumscribed conception of press freedom.

Second, from a constitutional interpretation standpoint, the distinctive function of press freedom appears to be bolstered by the existence of the term "freedom of the press" itself in section 2(b).[20] As Justice McLachlin (as she then was) noted, dissenting in *Lessard*, "[b]y specifically referring to freedom of the press, s. 2(*b*) affirms the special position of the press and other media in our society."[21] The assumption that freedom of the press means no more than the availability of freedom of expression to the press[22] renders the press freedom clause effectively vapid[23] and tautological.[24] While jurists and scholars have argued that the US First Amendment—which prohibits abridgement of "freedom of speech, or of the press"[25]—merely intended to protect individuals in their "right to print what they will as well as to utter it,"[26] such an interpretation is unappealing in the

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information is also protected by the constitutional guarantee of freedom of expression" at para 26); *Global Communications*, *supra* note 14 ("there are times when the freedom of the press and the concomitant right of the public to know must yield to the even more important right to a fair trial before an impartial tribunal" at 23); *National Post*, *supra* note 9 ("[i]t is in the context of the *public* right to knowledge about matters of public interest that the legal position of the confidential source or whistleblower must be located" at para 28).

20 See Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 4th ed (Toronto: Irwin Law, 2009) ("[t]he task of *Charter* interpretation has structure and discipline. The first source is obvious—the language of the *Charter* itself" at 59). According to Dickson CJ, a purposive interpretation of *Charter* rights and freedoms is to be sought with reference to, *inter alia*, "the language chosen to articulate the specific right or freedom" (*R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 344, 18 DLR (4th) 321 [*Big M*]).

21 *Lessard*, *supra* note 5 at 449. McLachlin J added that this discrete treatment "affirms that the press and the media have the constitutional right to pursue their legitimate functions in our society" (*ibid* at 449–50). See also Cameron, "The Other 2(b) Freedom", *supra* note 5 (the *Charter*'s "text itself treats the two differently" at 4, n 3).

22 This appears to be a crucial assumption supporting the Court's opinion in *National Post*, *supra* note 9 at para 40.

23 As Stewart J stated in the American context: "That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgement of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively" (*Houchins v KQED, Inc*, 438 US 1 at 17, 98 S Ct 2588 (1978), Stewart J, dissenting [*Houchins*]).

24 See Melville B Nimmer, "Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?" (1975) 26:3 Hastings LJ 639 ("[a]s nature abhors a vacuum, the law cannot abide a redundancy" at 640).

25 US Const amend I.

26 *Pennekamp v Florida*, 328 US 331 at 364, 66 S Ct 1029 (1946), Frankfurter J, concurring [*Pennekamp*]. See also Anthony Lewis, "A Preferred Position for Journalism?" (1979) 7:3 Hofstra L Rev 595 ("[t]he most natural explanation seems the most probable:

Canadian context where freedom of *expression* covers both spoken and written expression (and much else). Thus, even a plain reading of section 2(b) implies that press freedom entails something more than the extension of freedom of expression to reporters.

Admittedly, the fact that the freedoms in section 2(b) are available to "everyone"[27] appears to have played a role in convincing the courts that press freedom should not have independent legal force: "It follows from this that freedom of the press is not a separate and distinct right granted to the media but a means by which each citizen can achieve the constitutionally enshrined 'freedom of thought, belief, opinion and expression'."[28] Although I agree that freedom of the press is a means, it does not follow that those undertaking press-like functions should, as a result, not benefit from unique protection in light of this instrumental role. Indeed, insufficiently protecting means is a very effective way to obstruct the achievement of ends, which is precisely the reason that press freedom requires independent constitutional protection, a point I develop below.[29]

This limited interpretation of section 2(b) may be premised less on an assessment of the language of the *Charter* but rather on the (understandable) hostility to the notion that the "press" should occupy a "preferred position in our constitutional scheme of things."[30] As I hope to demonstrate below, this concern presumes that it is not possible to give effect to the *Charter*'s press guarantee without creating a privileged class of citizens. However, a focus on the *activity* being protected ensures that the freedom is available to "everyone", while at the same time giving tangible meaning to the *whole* of section 2(b).

Finally, the Supreme Court has accepted that section 2(b) does not merely protect *expressive* activity as such but also activity that is a necessary precondition for meaningful expression. This has occurred most notably in the development of the "open courts" doctrine[31] through which the Court repeatedly affirmed both the need for *access* to court proceedings

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The framers wanted to protect expression whether in unprinted or printed form" at 599). For a thorough overview, see Eugene Volokh, "Freedom for the Press as an Industry, or for the Press as a Technology?: From the Framing to Today" (2012) 160:2 U Pa L Rev 459.

27 *National Post*, *supra* note 9 at para 40.

28 *Phillips v The Vancouver Sun et al*, 2002 BCSC 1169 at para 57, 238 DLR (4th) 167.

29 See Part I.A, below.

30 *National Bank of Canada v Melnitzer* (1991), 5 OR (3d) 234 at 239, 84 DLR (4th) 315 (Gen Div). See also *R v Pilarinos*, 2001 BCSC 1332 at paras 81–96, 158 CCC (3d) 1.

31 See the cases cited in *supra* notes 3 and 4.

and, importantly, the distinctive role[32] played by the press in facilitating the public's ability to exercise its right to know what occurs in the legal system.[33] Using similar reasoning (the *Charter* must protect access to information necessary to exercise the section 2(b) freedoms), the Supreme Court has also recognized a limited right of access to government information outside the courthouse.[34] Most germane for our purposes is that the Court has consistently recognized the importance of newsgathering in the context of a section 2(b) analysis.[35] According to Justice La Forest, concurring in *Lessard*, "the freedom to disseminate information would be of little value if the freedom under s. 2(*b*) did not also encompass the right to gather news and other information without undue governmental interference."[36] He later elaborated upon this point on behalf of the Court in *Carson*, stating repeatedly that measures that prevent the media from accessing and gathering news and information may constitute a violation of

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[32] See *CBC v Canada (AG)*, *supra* note 4 (without the press, "the public's ability to understand our justice system would depend on the tiny minority of the population who attend hearings, and the inevitable result would be to erode democratic discourse, self-fulfilment and truth finding" at para 45). See also The Right Honourable Beverly McLachlin, "Courts, Transparency and Public Confidence—To the Better Administration of Justice" (2003) 8:1 Deakin L Rev 1 at 7 [McLachlin CJ, "Transparency"].

[33] See *Edmonton Journal*, *supra* note 3 at 1339–40; *Carson*, *supra* note 4 at para 23. See also David M Paciocco, "When Open Courts Meet Closed Government" (2005) 29 Sup Ct L Rev (2d) 385 at 393.

[34] See *Ontario (Ministry of Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 SCR 815 [*CLA*] (finding that individuals or groups (which would, in the normal course, be those specifically involved in newsgathering activity) have a section 2(b) "right to access to documents" where such access is "necessary to permit meaningful discussion on a matter of public importance" at para 31). While both the "open courts" and the "access" cases were considered under the rubric of freedom of expression broadly, in practical effect they will apply most frequently to those individuals fulfilling press-like functions.

[35] See *Carson*, *supra* note 4 at para 24; *Lessard*, *supra* note 5 at 430–31; *National Post*, *supra* note 9 at para 33; *Globe and Mail v Canada (AG)*, 2010 SCC 41 at para 56, [2010] 2 SCR 592 [*Globe and Mail*].

[36] *Lessard*, *supra* note 5 at 429–30. See also Cory J: "the media are entitled to particularly careful consideration ... to ensure that any disruption of the *gathering* and dissemination of news is limited as much as possible" (*ibid* at 444 [emphasis added]). In dissent, McLachlin J provided an even more fulsome treatment of newsgathering as it relates to freedom of the press (*ibid* at 452). See also *Moysa v Alberta (Labour Relations Board)*, [1989] 1 SCR 1572, 60 DLR (4th) 1 (finding resolution of the constitutional issue unnecessary but assuming that newsgathering may be constitutionally protected under section 2(b)). In the US context, see *Branzburg v Hayes*, 408 US 665, 92 S Ct 2646 (1972), White J [*Branzburg* cited to US] ("[n]or is it suggested that news gathering does not qualify for First Amendment protection; *without some protection for seeking out the news, freedom of the press could be eviscerated*" at 681 [emphasis added]). The limited relevance of *Branzburg* in the context of the *Charter* will be dealt with more thoroughly in Part II.C, below.

section 2(b).[37] The constitutional status of newsgathering was accepted in the more recent cases of *Globe and Mail* and *C.B.C. v. Canada (A.G.)*, in which the Supreme Court referred expressly to "the s. 2(*b*) newsgathering rights of the press"[38] and found that because "news gathering is an activity that forms an integral part of freedom of the press," interference with such activity constitutes a violation of section 2(b).[39]

Thus, while the Supreme Court has effectively treated press freedom as a species of freedom of expression, with no independent legal content or force,[40] this assumption appears to have gone largely unstated and undefended in the jurisprudence and seems to conflict with the Court's nascent acceptance of the unique importance of press freedom in our constitutional and social order.[41] Press freedom has "too often been overlooked" by the Court, which to date "has not decided whether the press clause is an independent entitlement, with distinctive content, or is subsumed in expressive freedom."[42]

Proceeding from the belief that freedom of the press is more than a mere constitutional redundancy,[43] I will outline in Part I an understand-

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37 *Carson*, *supra* note 4 at paras 23–27.

38 *Globe and Mail*, *supra* note 35 at para 56.

39 *CBC v Canada (AG)*, *supra* note 4 at para 46.

40 A similar trend is identifiable in the US context. See Jeffrey S Nestler, "The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege" (2005) 154:1 U Pa L Rev 201 at 204–10; Sonja R West, "Awakening the Press Clause" (2011) 58:4 UCLA L Rev 1025 at 1033–41 (describing the US Supreme Court's "modern practice of reading the First Amendment with its judicial thumb over the Press Clause" at 1033); Erwin Chemerinsky, "Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering" (2000) 33:4 U Rich L Rev 1143 ("[t]he judiciary, at all levels of courts, has refused to provide any special protection for newsgathering activities by the press" at 1143); Frederick Schauer, "Towards an Institutional First Amendment" (2005) 89:4 Minn L Rev 1256 ("existing First Amendment doctrine renders the Press Clause redundant and thus irrelevant" at 1257); Paul Horwitz, "Or of the [Blog]" (2006) 11 NEXUS 45 ("the Press Clause is about as useful as a vermiform appendix" at 46). By contrast, consider the unique treatment for press freedoms afforded by courts interpreting the freedom of expression guarantee in the European Convention on Human Rights, despite that document not containing any explicit mention of the press. See e.g. *Társaság A Szabadságjogokért v Hungary*, [2011] 53 EHRR 3, at paras 26–28, 36; *Independent News and Media Limited v A*, [2010] EWCA Civ 343, [2010] 1 WLR 2262 at paras 39–44; *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court*, [2012] EWCA Civ 420, [2012] 3 WLR 1343 at paras 41–53.

41 See Cameron, "Quixotic Journey", *supra* note 12 at 179.

42 *Ibid* at 165. See also Cameron, "The Other 2(b) Freedom", *supra* note 5 ("despite supporting the role of a free press in democratic governance, the Court has refused to engage the press guarantee under s.2(b)" at 4).

43 See Potter Stewart, "Or of the Press" (1975) 26:3 Hastings LJ 631 at 633. See also *Lessard*, *supra* note 5, McLachlin J, dissenting.

ing of the facilitative and instrumental purpose of press freedom in our constitutional framework. This discussion will emphasize the role of the press in ensuring the public's right to know: in gathering and disseminating news and information, the press provides an opportunity for members of the public to become informed about issues that affect their lives. The shelter of the press guarantee should be available to those engaged in press-like activity, namely newsgathering for the purposes of disseminating news and factual information to the public. On this understanding, the serious definitional and normative difficulties in characterizing "the press" as a static entity—with only those inside the notional press box entitled to special constitutional protection—are avoided by providing a functional definition that identifies the *activities* as opposed to the *entities* that are to receive the protection of the press clause.

Part II of this paper will then propose a preliminary doctrinal scaffold for the discrete constitutional treatment of press freedom outside of the freedom of expression framework. Where an individual, regardless of status or affiliation, is engaged in gathering news for the purposes of publication to an audience, her newsgathering activity will be *prima facie* protected under the press guarantee. In order to not overshoot the purpose of press freedom,[44] however, the framework below further refines the proposed doctrine by requiring the claimant to also demonstrate that the activity in question is not inherently harmful and ultimately serves the purpose underlying the protection of press freedom.[45] If each of these criteria can be established, state interference with the activity in question must be demonstrably justified in a free and democratic society under section 1 of the *Charter*. At the end of Part II, I illustrate the operation of this framework by applying it to the vexing issue of confidential sources.

Part III will address objections to constitutional protection for newsgathering generally and for confidential sources particularly, most notably those offered by the Supreme Court in *National Post*. I will argue that the hostility toward constitutional recognition for press freedom *as such* is largely premised on the presumed absence of any principled framework for its application and, in *National Post*, on the disputable adequacy of a common law privilege analysis in protecting confidential source relationships. Ultimately, discrete treatment for freedom of the press would ensure that the Supreme Court's section 2(b) doctrine better reflects its principled rhetoric, fosters doctrinal clarity, and provides a meaningful constitutional basis for the protection of confidential sources—among other activity central to a free press functioning in the interests of society.

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44 See *Big M*, *supra* note 20 ("it is important not to overshoot the actual purpose of the right or freedom in question" at 344).

45 These issues addressed in Parts II.A(2) and (3), below, respectively.

I. The Purpose and Beneficiaries of Press Freedom

A. Purpose of Freedom of the Press

It is now widely accepted that *Charter* rights and freedoms are to be given a purposive interpretation;[46] that is, a constitutional provision must be understood "in the light of the interests it was meant to protect."[47] As such, we should begin our inquiry with the unique purpose of freedom of the press, which will imbue and ground the analysis and definition of press freedom throughout. I argue below that the purpose of a free press is integrally connected to, but not coterminous with, that of freedom of expression, and indeed, that the function of the press goes far beyond facilitating informed expression. The unique role of the press is to inform the population on a wide range of matters, from global geopolitical events to those of purely local significance. While freedom of expression is critical to ensuring that members of the press (and everyone else) are able to *express* themselves without undue government interference, the purpose of freedom of the press is largely *instrumental* to freedom of expression,[48] both of members of the press and of the public at large. Through its broader informative function, press freedom moreover undergirds the exercise of many other rights and freedoms:[49] it provides citizens with the means not only to express themselves, but also with the opportunity to govern themselves in a well-informed manner.

As noted above, the Supreme Court has recognized that freedom of the press is a central precondition to free expression in a vital democracy and has expressly linked the press function with the public's right to know. Nowhere is this more clearly manifested than in the open justice cases. In

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46 See *Hunter v Southam Inc*, [1984] 2 SCR 145, 11 DLR (4th) 641 [*Southam*]; *Big M*, *supra* note 20 at 344; *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536; *Edmonton Journal*, *supra* note 3 at 1352, Wilson J; *R v Beaulac* [1999] 1 SCR 768 at 770, 173 DLR (4th) 193; Peter W Hogg, *Constitutional Law of Canada: 2009 Student Edition* (Toronto: Carswell, 2009) at 757–58.

47 *Big M*, *supra* note 20 at 344, Dickson CJ, interpreting the Court's approach in *Southam*, *supra* note 44.

48 See e.g. Thomas I Emerson, "Freedom of the Press Under the Burger Court" in Vincent Blasi, ed, *The Burger Court: The Counter-Revolution That Wasn't* (New Haven: Yale University Press, 1983) 1 (describing press freedom as part of "an integrated system of freedom of expression" at 3). See also Cameron, "Quixotic Journey", *supra* note 12 (discussing how freedom of expression and freedom of the press are integrated in a "process of freedom" under section 2(b)).

49 See e.g. Carl C Monk, "Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection" (1986) 51:1 Mo L Rev 1 (journalistic privilege under the rubric of press freedom is "a principle or precept that enables individuals to more effectively secure other rights held against the state" at 62).

Carson, Justice La Forest noted: "That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom."[50] As Gerald Chan has noted, this same rationale applies with equal force to access to information *outside* the context of the court system, although the Supreme Court has thus far been reluctant to apply this logic.[51] Of course, the fact that the open courts rationale applies to access and newsgathering outside courthouse walls does not mean that all such activity must be guarded to the same extent or in the same way. The purpose of the framework described below is to separate activity that warrants protection under a purposive definition of press freedom from that which does not. The rationale provided in the open courts context—that citizens require access to and transparency in public institutions—does not lose its force outside the court system.

Ultimately, a robust conception of press freedom facilitates the exercise of other fundamental freedoms in section 2(b) by permitting members of the public to receive news and information upon which thought, belief, and opinion can be based.[52] The interdependence of and interaction between freedom of expression and freedom of the press seem to flow naturally from the text of the *Charter*, which expressly mentions "freedom of the press and other media of communication" but nevertheless maintains a textual link ("including") with the other section 2(b) freedoms.

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[50] *Carson*, *supra* note 4 at para 23 [emphasis added]. See also *Saxbe v Washington Post*, 417 US 843, 94 S Ct 2811 (1974), Powell J, dissenting ("[t]he press is the necessary representative of the public's interest in this context and the instrumentality which effects the public's right" at 864) [*Saxbe* cited to US].

[51] See Gerald Chan, "Transparency Confined to the Courthouse: A Critical Analysis of *Criminal Lawyers' Assn.*, *C.B.C.* and *National Post*" (2011) 54 Sup Ct L Rev (2d) 169. See especially *ibid* at 170, where the author distills the key principles from *Edmonton Journal*, *supra* note 3, and concludes that "[t]aken together, these three propositions suggest a broad vision of section 2(b) of the Charter that protects not only the simple act of expression, but also the acts necessary to make that expression meaningful *(e.g.*, access to information, reliance on the ability of the press to gather information, *etc.*)." The author later notes that "[w]ithin the courthouse, the value of transparency still retains its primacy in the section 2(b) analysis. The same is not true once one leaves the courthouse doors" (*ibid* at 195).

[52] See e.g. *Lamont v Postmaster General*, 381 US 301, 85 S Ct 1493 (1965), Brennan J, concurring ("[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers" at 308). See also *Houchins*, *supra* note 23, Stevens J, dissenting ([i]t would be an even more barren market-place that had willing buyers and sellers and no meaningful information to exchange" at 32, n 22).

The role of the media is not only instrumental in facilitating the exercise of other freedoms contained in section 2(b), however. As widely observed, the press serves other related interests;[53] in particular, those who perform press-like functions undertake a checking[54] or watchdog role that is integrally linked to democratic governance.[55] Justice Rand stated that "government by the free public opinion of an open society ... demands the condition of a virtually unobstructed access to and diffusion of ideas."[56] The press plays a vital role not only in diffusing ideas and information, but also in seeking and securing access to it in the first place. In this way, the press can also serve as an agent of the public[57] in accessing and disseminating information critical not only to democratic self-governance but to informed living in general.[58] The Supreme Court has indeed recognized the special significance of the role of the media in Canadian society, a role

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53 See Floyd Abrams, "The Press *Is* Different: Reflections on Justice Stewart and the Autonomous Press" (1979) 7:3 Hofstra L Rev 563 at 591–92.

54 See e.g. Dana Adams, "Access Denied? Inconsistent Jurisprudence on the Open Court Principle and Media Access to Exhibits in Canadian Criminal Cases" (2011) 49:1 Alta L Rev 177 at 180; Cameron, "Quixotic Journey", *supra* note 12 ("[t]his checking function or watchdog role defines the press and media as an institution and explains its constitutional status" at 174). The value of checking the abuse of official power has been more thoroughly canvassed in the US context, but I suggest that the observations are broadly applicable to Canada. See generally Vincent Blasi, "The Checking Value in First Amendment Theory" (1977) 3:3 Am B Found Res J 521 (discussing the checking value in newsgathering at 591–611); David A Anderson, "Freedom of the Press" (2002) 80:3 Tex L Rev 429 at 449.

55 See Cameron, "The Other 2(b) Freedom", *supra* note 5 at 19. See also Jamie Cameron, "Of Scandals, Sources and Secrets: Investigative Reporting, *National Post* and *Globe and Mail*" (2011) 54 Sup Ct L Rev (2d) 233 at 254–55 [Cameron, "Scandals"]; Thomas I Emerson, "The Right of Privacy and Freedom of the Press" (1979) 14:2 Harv CR-CLL Rev 329 at 349; Thomas I Emerson, "The First Amendment and the Right to Know: Legal Foundations of the Right to Know" (1976) 1 Wash ULQ 1 at 16 [Emerson, "Right to Know"]; Susan M Gilles, "The Image of 'Good Journalism' in Privilege, Tort Law, and Constitutional Law" (2006) 32:3 Ohio NUL Rev 485 at 487; William P Marshall & Susan Gilles, "The Supreme Court, the First Amendment, and Bad Journalism" (1994) Sup Ct Rev 169 at 201; *Branzburg*, *supra* note 36, Douglas J, dissenting at 714–15.

56 *Switzman v Elbling*, [1957] SCR 285 at 306, 7 DLR (2d) 337 [emphasis added].

57 See e.g. June Ross, "Recent Developments: Edmonton Journal v. Attorney General of Alberta" (1990) 1:2 Const Forum Const 23 ("while the Supreme Court [in *Edmonton Journal*] did not suggest that freedom of the press conferred any different or greater rights than freedom of expression, the press' role as a surrogate for the public was emphasized" at 24). See also McLachlin CJ, "Transparency", *supra* note 32 at 7. In the US context, see *Richmond Newspapers, Inc v Virginia*, 448 US 555 at 572–73, 100 S Ct 2814 (1980) (media functions "as surrogates for the public" at 573); *Saxbe*, *supra* note 48 at 863, Powell J dissenting.

58 See Chan, *supra* note 51 at 192–93. See also Chemerinsky, *supra* note 40 ("[s]peech can benefit people with information relevant to all aspects of life. The media, through newsgathering, can obtain information and then disseminate it to the public" at 1159).

that goes beyond merely facilitating expression, and includes enabling citizens to make informed decisions regarding their life and well-being.[59] I do not mean to assume a Panglossian or idealized conception of the press as the sole bastion of truth and lone bulwark against tyranny, or to assert that those engaging in press-like activities always act with noble intentions. Rather, the point is simply to articulate the well-recognized purpose underlying press freedom and to indicate that by ensuring the public's right to know more generally, press freedom plays a central and unique role in a well-functioning constitutional, democratic, and social order.

This overriding purpose makes clear that freedom of the press is of constitutional significance not only with respect to press *expression* as such (as critical as this is), but also insofar as it protects press-like entities freely engaging in activity—most notably newsgathering—in which the press must participate in order to fulfill its function. Unlike the other fundamental freedoms, which may be at least partly grounded in both social and individualistic considerations,[60] press freedom on this conception is almost purely instrumental. We do not give special regard to press freedom because "the press" as an institution is imbued with natural rights or with preeminent moral significance. Rather, as Justice Douglas stated in *Branzburg*, "[t]he press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know."[61]

Freedom of the press has a unique constitutional significance, then, because robust protections permit and support the individual's exercise of her rights and freedoms and the pursuit of her interests in all facets of life. If the press is prohibited from collecting information for public dissemination or is limited in its ability to do so, it cannot effectively play this pivotal role. With this central purpose—which this article will compendiously refer to as the "public's right to know"[62]—in mind, we can pro-

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59 *CBC v NB*, *supra* note 5 at 475–76.

60 For example, it might be said that freedom of expression is founded upon a number of purposes (see *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy* cited to SCR]) that range from primarily individualistic interest (e.g. "self-fulfillment" and "human flourishing"), instrumental or social purposes ("seeking and attaining the truth"), and some combination thereof (encouraging "participation in social and political decision-making") (*ibid* at 976).

61 *Supra* note 34, Douglas J, dissenting at 721.

62 I do not use the term *right to know* as if it were an independently enforceable constitutional right (see e.g. Vincent Kazmierski, "Something to Talk About: Is There a *Charter* Right to Access Government Information" (2008) 31:2 Dal LJ 351; Emerson, "Right to Know", *supra* note 55; Roy Peled & Yoram Rabin, "The Constitutional Right to Information" (2011) 42:2 Colum HRL Rev 357). Rather, I use the term *public's right to know*

ceed to design a viable framework for the protection of press freedom that appropriately recognizes this freedom's status in the constitutional order.

B. Who is "The Press"?

Any meaningful treatment of press freedom as an independent constitutional entitlement must address an important definitional question: Who is "the press" that is to receive this protection? This raises two serious and related objections to discrete constitutional treatment for freedom of the press: that adequately defining "the press" is too demanding a task, and that elevating the interests of some citizens above the interests of others defies a deeply held commitment to equal constitutional protection for all. These issues have bedeviled jurists[63] and scholars[64] in the United States, where the difficulty in answering this definitional question has presented a significant stumbling block to independent constitutional protection for the press.[65] Indeed, if defining "the press" as a class was difficult before, it has become far more so with the advent of the Internet

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throughout this paper as a concise if imperfect marker for the overall purpose of press freedom in our constitutional system, as described and defended in this Part.

63 See *Branzburg*, *supra* note 36 at 703–04. Although finding in a concurring set of reasons that a journalistic privilege should be available on a case-by-case basis, Powell J also appeared to struggle with the issue. He wrote in his notes following the hearing in *Branzburg*: "And who are "newsmen"—how to define?" (Sean W Kelly, "Black and White and Read All Over: Press Protection After *Branzburg*" (2007) 57:1 Duke LJ 199 at 210).

64 For a roughly representative sample, see e.g. Abrams, *supra* note 53 at 580; Anderson, *supra* note 54 at 435–36; Kraig L Baker, "Are Oliver Stone and Tom Clancy Journalists?: Determining Who Has Standing to Claim the Journalist Privilege" (1994) 69:3 Wash L Rev 739; Yochai Benkler, "A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate" (2011) 46:2 Harv CR-CLL Rev 311 at 356–63; Randall P Bezanson, "The Developing Law of Editorial Judgment" (1999) 78:4 Neb L Rev 754 ("[d]efining 'press,' of course, is a matter that the Supreme Court has studiously, even adamantly, avoided" at 755); Volokh, *supra* note 26; Linda L Berger, "Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication" (2003) 39:5 Hous L Rev 1371; Clay Calvert, "And You Call Yourself a Journalist?: Wrestling With a Definition of "Journalist" in the Law" (1999) 103:2 Dick L Rev 411; Erik Ugland & Jennifer Henderson, "Who Is a Journalist and Why Does It Matter?: Disentangling the Legal and Ethical Arguments" (2007) 22:4 Journal of Mass Media Ethics 241; Stephanie J Frazee, "Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination" (2006) 8:3 Vand J of Ent & Tech L 609 at 631–40. See also West, *supra* note 40 at 1052–56, and the sources cited in *ibid* at 1054, n 204.

65 See e.g. Marshall & Gilles, *supra* note 55 ("[t]he failure to distinguish between media and non-media has its price. As the cases involving reporter's privilege and rights of access attest, it prevents the Court from providing special protection to the press consistent with its constitutional function of informing the electorate and providing a check on government" at 205); Schauer, *supra* note 40 at 1262; West, *supra* note 40 at 1029.

age,[66] in which everyone—from a professional reporter employed by a massive corporate media conglomerate to "a guy sitting in his living room in his pajamas"[67]—may publish widely.[68]

The normative issue is perhaps even more troublesome, as even if we could determine with some degree of precision who constitutes the press, there remains the concern that so defined, these individuals are elevated over other citizens. No other profession or station appears to be uniquely protected by the *Charter*, and there is an intuitive hostility toward any doctrine that "would grant privileges to an institution organized as a powerful private business which are not shared by other citizens."[69] Animated by this concern, the Supreme Court of the United States has declared that "liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who uses the latest photocomposition methods."[70] This egalitarian impulse has also seemed to play a role in the Supreme Court of Canada's broader reluctance to give the press freedom guarantee independent content. As Jamie Cameron has argued:

> The Court is sympathetic to section 2(b)'s press guarantee but uncomfortable with its implications. It has been reluctant to protect newsgathering 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.
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66 See Cameron, "Scandals", *supra* note 55 ("[t]echnology has fundamentally altered the status quo and, in a world where 'we're all journalists now', rendered prior conceptions of the press all but meaningless" at 238 [footnote omitted]).

67 In the colourful words of former CBS news executive Jonathan Klein, cited in Benkler, *supra* note 64 at 356.

68 The difficulty of defining *the press* and imbuing it with special rights, privileges, or immunities played a role in the rejection of constitutional protection for newsgathering in *National Post*, as I discuss in more detail in Part III, below.

69 *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 410, 100 DLR (4th) 212, Cory J, dissenting [*New Brunswick Broadcasting*]. See also Cameron, "The Other 2(b) Freedom", *supra* note 5 at 13.

70 *Branzburg, supra* note 36 at 704. See also *Pennekamp*, *supra* note 26 (finding that "the purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print" at 364, Frankfurter J, concurring); Gilles, *supra* note 55 at 494; Chemerinsky, *supra* note 40 ("the Court has not yet recognized a preferred right for the press and has generally rejected any special protections for the press" at 1151).

> 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.[71]

This anxiety is not to be disregarded, but I think both the difficulty of and the aversion to defining a class worthy of superordinate protection can be overcome by rejecting the premise of the question, that is, by acknowledging that there is no need to define a class in order to determine in advance who is entitled to protection. In fact, I would suggest that to do so is counterproductive to the purpose of press freedom as understood here, since a purposive definition of press freedom focuses on the *activity* to be protected as opposed to the *form* of the class that is to benefit[72] or the *outcome* of the newsgathering process.[73]

On this model, freedom of the press would protect those serving the function of the press,[74] which would include anyone who is undertaking newsgathering activity with intent to publish or otherwise disseminate

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71 Cameron, "Quixotic Journey", *supra* note 12 at 183.

72 Thus, whatever its merit in the US context, I reject Justice Stewart's claim that freedom of the press only "extends protection to an institution" in the sense of the publishing industry as an "organized private business" (Stewart, *supra* note 43 at 633). For an academic defence of this view in the context of a federal shield law, see Laura Durity, "Shielding Journalist–'Bloggers': The Need to Protect Newsgathering Despite the Distribution Medium", online: (2006) 5:1 Duke L & Tech Rev 11 <scholarship.law.duke.edu> ("a substantial connection with or a relationship to an established news media organization such that there is sufficient editorial oversight" at para 37 [footnote omitted]). I prefer the position of Anderson, *supra* note 54, on this point (arguing that it makes "little sense" to attempt a formal definition of the press, *inter alia*, "because there is little correlation between those forms and the purposes for which it might make sense to give preferential treatment to some media" at 436–42).

73 See e.g. Frazee, *supra* note 64 ("the inquiry should focus on whether the information at issue is 'of value to a public that must make intelligent decisions to govern itself'" at 639, citing Berger, *supra* note 64 at 1410).

74 This functional definition of the press has been endorsed, in various forms, by a wide range of US scholars and courts. See e.g. Timothy B Dyk, "Newsgathering, Press Access, and the First Amendment" (1992) 44:5 Stan L Rev 927 at 939; Anderson, *supra* note 54 ("[b]y focusing on function, entities that are thought to serve that function can be protected no matter what medium they use and no matter how technology might change the way they do business" 445–46); Baker, *supra* note 64 at 755; Benkler, *supra* note 64 at 359–60; Berger, *supra* note 64 at 1406–16 ("[w]hen you are engaged in certain kinds of activities, you are part of that flow of information and you are a journalist" at 1409); Geoffrey R Stone, "Government Secrecy vs. Freedom of the Press" (2007) 1:1 Harv L & Pol'y Rev 185 (a functional approach is "both manageable and preferable to the alternatives" at 216). For courts endorsing this approach, see also *Von Bulow v Von Bulow*, 811 F (2d) 136, 55 USLW 2462 (2nd Cir 1987) [*Von Bulow*]; *Shoen v Shoen*, 5 F (3d) 1289, 62 USLW 2212 (9th Cir 1993); *In Re Madden*, 151 F (3d) 125, 49 Fed R Evid Serv 1106 (3rd Cir 1998).

that information to the public.[75] As with any abstract definition, these concepts (newsgathering, publication and dissemination, and intention) can capture a range of meanings, from the very narrow to the very broad. What amounts to newsgathering, for instance, is certainly a challenging question,[76] but it is not beyond judicious resolution altogether. Nor should we reject giving meaning to a core constitutional freedom simply because it will involve difficult and at times imperfect line drawing, particularly where there will often be no serious dispute about whether a claimant is captured within any plausible definition of the press.[77] If our courts are able to define with some degree of precision the outer bounds of protected expression, the free practice of religion, the scope of impermissible discrimination, or an individual's reasonable expectation of privacy, it is hard to see how engagement with a more precise formulation ("newsgathering for the purposes of publication") is somehow prohibitively demanding. Fortunately, with a sound conception of the purpose underlying press freedom in place, we can attempt to assess any tension with our eyes open and with a view to fulfilling that purpose.

The Supreme Court's approach to questions involving freedom of expression of the press may provide a useful analogy. For instance, the egalitarian concern discussed above may have been on display in *Grant v. Torstar*, in which the Court emphasized that the "responsible communication in the public interest" defence in defamation is not limited to journalists:

> In arguments before us, the defence was referred to as the responsible journalism test. This has the value of capturing the essence of the defence in succinct style. However, the traditional media are rapidly being complemented by new ways of communicating on matters of public interest, many of them online, which do not involve journalists. These new disseminators of news and information should, absent good reasons for exclusion, be subject to the same laws as established media outlets. I agree with Lord Hoffmann that the new defence is "available to anyone who publishes material of public interest in any medium."[78]

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75 See *Von Bulow*, *supra* note 73 at 144. While this standard developed in the US case law, in the context of journalist–source privilege I think that it provides a sound basis for determining who is undertaking activity that the press guarantee is aimed at protecting more broadly. See Part II, below.

76 See generally Calvert, *supra* note 64.

77 See Abrams, *supra* note 53 at 580.

78 *Grant v Torstar*, *supra* note 2 at para 96 [footnote omitted]; Jamie Cameron, "Does Section 2(b) Really Make a Difference?: Part 1: Freedom of Expression, Defamation Law and the Journalist–Source Privilege" (2010) 51 Sup Ct L Rev (2d) 133 at 146 [Cameron, "Does 2(b) Make a Difference?"]. As *Grant v Torstar* involved the permissible content of

Although this defence was designed with journalists in mind and will apply to mainstream journalists most frequently given the type of responsible journalistic conduct required to gain its protection,[79] it does not categorically exclude those not employed by conventional media outlets. I propose a similar approach to press freedom. Any attempt to segment a group of citizens by employer, training, or accreditation is unnecessarily restrictive and ultimately misses the point of such protection. It runs the risk of being both overinclusive, by protecting members of the traditional press who are not in a given circumstance engaged in press-like activity, and underinclusive, by depriving individuals of protection even if they are demonstrably engaged in newsgathering for the purposes of publication. A focus on the conduct of the claimant and the activity being performed helps avoid these risks.

Thus, a purposive guarantee sensitive to present social realities must include those who operate outside the mainstream media but who may nevertheless clearly be engaged in newsgathering and dissemination (i.e. certain bloggers, academics, NGOs, etc.).[80] At the same time, it must deny protection to members of the press (however well-established their credentials) when they not in fact engaged in newsgathering for the purpose of publication. Where the press function assumed is the touchstone for protection, there is no need to fence off *ab initio* an identifiable "priestly class"[81] deserving of protection.[82] Just as freedom of expression is afforded

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expression, the desire to expand the defence—at least notionally—to all speakers was in my opinion entirely sensible.

79 A number of the contextual factors to be addressed in an assessment of the "responsibleness" of the communication—such as providing an opportunity to reply and assessing the reliability of the source—are hallmarks of sound journalistic practice. Indeed, the Court's focus on communication of the nature engaged in by media entities is made plain in its discussion of the relevant factors, such as in alluding to editorial choice and the publication of news. See e.g. *Grant v Torstar*, *supra* note 2 at paras 114, 118.

80 The US Supreme Court has rejected journalist–source privilege, partly on the basis that "[t]he informative function asserted by representatives of the organized press ... is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public" (*Branzburg, supra* note 36 at 705). I think the functional approach should embrace this proposition, but only with respect to those who are, in some sense and on the occasion in question, collecting and disseminating news.

81 See Eric Ugland, "Newsgathering, Autonomy, and the Special-Rights Apocrypha: Supreme Court and the Media Litigant Conceptions of Press Freedom" (2009) 11:2 U Pa J Const L 376 at 377 (describing this phrase as a favourite of opponents of journalist–source privilege).

82 The framework would in no way be "reminiscent of the abhorred licensing system of Tudor and Stuart England," as US Chief Justice Burger famously fretted in *First National Bank of Boston v Bellotti* (435 US 765 at 801, 98 S Ct 1407 (1978)).

equally to all to the extent they are engaging in expression,[83] and freedom of religion is available to all those undertaking religious practices,[84] freedom of the press should be available to all who are engaging in press-like activity—from the lonely pamphleteer or pajama-clad blogger to the institutional mainstream reporter.[85] Those undertaking a press-like function and thereby serving the public's right to know should be protected in undertaking that activity in the absence of a compelling reason for state interference. This is the natural consequence of a constitutional document that specifically places freedom of the press and other media of communication among the fundamental freedoms.[86] Given that we have come to terms with the fact that other constitutional rights are only available to select groups,[87] we should not recoil from the fact that a framework restricts press freedom to those fulfilling press-like functions any more than we would marginalize freedom of religion on the basis that it is only available to those practicing a religion.[88]

Finally, as described in the next Part, to the extent that this constitutional protection would be most frequently extended to members of the traditional media establishment, it would only be so extended where such protection specifically facilitates social and democratic discourse, fulfills a truth-finding function, and ultimately ensures the public's right to know. Unlike, for example, freedom of expression—which may at times play no role other than facilitating the self-fulfillment of the speaker and may even do some measure of violence to the other purposes underlying section 2(b)[89]—the framework designed below only accords constitutional protection where the press-like entity is in some sense fulfilling the

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83 Subject, of course, to different treatment under section 1 depending on the circumstances, content, and form of the expression. See generally Richard Moon, "Justified Limits of Free Expression: The Collapse of the General Approach to Limits on *Charter* Rights" (2002) 40:3 & 4 Osgoode Hall LJ 337 at 344–51.

84 See e.g. *Syndicat Northcrest v Amselem*, 2004 SCC 47 at paras 39–46, [2004] 2 SCR 551.

85 See Baker, *supra* note 64, describing the approach of some US courts ("[i]f the intent is present, the method of dissemination is irrelevant as long as it serves as a vehicle for information and opinion" at 749).

86 See *Lessard*, *supra* note 5, McLachlin J, dissenting at 449–50.

87 See the e.g. *Charter*, *supra* note 1, ss 6 (mobility rights are restricted to citizens), 23 (language rights are restricted to French and English linguistic minorities), 35 (aboriginal and treaty rights are restricted to Indian, Inuit, and Metis peoples).

88 On this point, see Abrams, *supra* note 53 at 580–81, who rejects the supposition that deciding who is and is not entitled to protection of press freedom amounts to licensing, any more than deciding who is and is not entitled to protection under religious freedom entails the licensing of religions.

89 See e.g. *R v Zundel*, [1992] 2 SCR 731, 95 DLR (4th) 202 [*Zundel*].

broader public purpose at which the free press guarantee is aimed. Any concerns that discrete treatment of press freedom extends undue protection to a privileged class should be diminished accordingly.

Beyond sidestepping the normative discomfort associated with elevating a privileged class and bestowing special rights and immunities upon its members, the functional definition also largely avoids the process of content discrimination, which offends the important value of equal protection of fundamental freedoms.[90] The courts need not undertake an analysis of the newsworthiness of the information gathered and reported or whether this information is worthy of dissemination, except in the very limited sense of ensuring it is "news" (i.e. factual information). Rather, the focus is on the process of the information's collection—newsgathering for the purpose of publication—leaving the gatherers (and recipients) to determine what information is sufficiently important for dissemination.

I do not mean to suggest that these are not complicated issues or that discerning who will be entitled to protection in any given case will be easy. I simply suggest that these concerns are manageable and that it is incumbent on the courts—and is within their unique sphere of competence—to give the concept of press freedom independent meaning. The difficulty of precisely determining the scope and content of the freedom from the outset should not doom the exercise, particularly where the clearly articulated purpose of press freedom can inform the analysis.

II. An Independent Freedom of the Press Framework

A. Proposed Framework for Freedom of the Press

In light of the distinct purpose animating freedom of the press and the functional definition of those entitled to its protection, the test I propose for determining whether non-expressive press activity should be shielded from state interference under section 2(b) involves three stages: (a) Was the claimant engaged in newsgathering for the purposes of publication? (b) Was the newsgathering conducted in a way that is not inherently harmful? and (c) Does the newsgathering activity in question generally serve the values underlying press freedom by furthering the public interest? I consider these steps separately below, with some qualifications, before applying the framework to confidential sources.

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[90] But see the discussion of the public interest requirement in Part II.A(3), below.

1. Newsgathering for the Purposes of Publication

With respect to the first requirement, an individual claiming the freedom must be engaging in a legitimate press-like function, namely *newsgathering for the purpose of publication*.[91] This requires "intent ... to disseminate information to the public and that such intent existed at the inception of the newsgathering process."[92] If the principal purpose of freedom of the press is to facilitate social and democratic deliberation and an informed citizenry by ensuring the public's right to know, constitutional protection should only be extended to activity conducted for the purposes of dissemination to the public, not to all information gathering. The focus at this stage is on the claimant's intent to gather and disseminate, not on the motive in so doing.[93] Whether the ultimate motive of the newsgatherer is to inform the public, to advance the reporter's career, or to destroy that of a politician is immaterial, as long as the activity in question is undertaken with the intention of publication.

A definition that includes "*news*gathering" places some minimal restriction on the content covered, but only in requiring intent to disseminate factual information. It is important to stress that such a definition of press freedom does not derogate from protection for the content of *expression*—the fact that certain expressive activity is not news of course does not in any sense mean that it is not entitled to protection as expression. However, a discrete freedom of the press framework only provides additional protection to those undertaking a press-like function of newsgathering. While distinguishing between news and entertainment is nonsensical with respect to restrictions on expression,[94] if the purpose of a free press is

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91 See the test enunciated in *Von Bulow*, *supra* note 73.

92 *Ibid* at 144. This standard contains both an activity element—newsgathering—and an element of intent—the purpose of collecting the information for dissemination to the public (see Calvert, *supra* note 64 at 419).

93 See Benkler, *supra* note 64 at 359–61. See also e.g. *Lewis v R*, [1979] 2 SCR 821 at 831, 98 DLR (3d) 111, for a discussion of the intent/motive distinction in the context of the criminal law.

94 Much of the criticism of this approach in the US case law appears premised on the assumption that discriminating between "news" and "entertainment" in some sense degrades or jeopardizes the *expression* of the latter form. See William E Lee, "The Priestly Class: Reflections on a Journalist's Privilege" (2006) 23:3 Cardozo Arts & Ent LJ 635. Lee notes that fictional writing "can be thinly veiled accounts of contemporary people, events and trends" and thus sees no reason to not protect a confidential privilege for fiction writers as for investigative reports (*ibid* at 675). I suggest that the importance of the press, as defined above, is precisely to *un*veil. In turning facts into fiction, the author abandons the function of informing the public about *news*, as informative and important as such writing may be in another sense. But see e.g. Daniel A Swartwout, "*In Re Madden*: The Threat to New Journalism" (1999) 60:4 Ohio St LJ 1589.

to *inform* the public, we may be less concerned with a more limited application of the *additional* protection afforded by press freedom.

This first stage of the analysis serves to screen out unmeritorious claims based on information not intended for publication, such as the claims of those seeking to conduct a vendetta[95] or demonstrating an intention to "plant false or misleading information."[96] As the focus under this framework is on the conduct of the party seeking constitutional protection (i.e. the newsgatherer), the conduct of the source is not directly relevant unless the claimant is aware of the inaccuracy of the information.[97] If it could be shown that the claimant (or, perhaps, a reasonable person in the claimant's position)[98] knew the information to be false at the time of collection, any additional protection for the newsgathering process would likely be forfeited,[99] because the intention of the claimant would not have been to gather news for the purposes of publication, and the conduct would exhibit no link to the press's role in facilitating the public's right to know.

The analysis at this stage does not necessarily require that any information gathered be subsequently published (some information collected may turn out to be inaccurate or simply uninteresting); it only requires that the newsgathering is done in contemplation of eventual publication or dissemination. What amounts to publication or dissemination need not be defined exhaustively from the outset and could safely be left to gradual judicial development informed by the purpose underlying the press free-

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95 Of course, this example strains the notoriously difficult intent/motive distinction. A reporter may be conducting a vendetta *through* newsgathering for the purpose of publication. In such cases the courts would have to look at the intention of the news gatherer: if the information was not collected for the purpose of publication, but rather to blackmail or destroy the reputation of the politician *clandestinely*, such conduct would lack the purpose of publication, and thus any claim for protection would fail at this stage.

96 See Cameron, "Scandals", *supra* note 55 at 234–35. Jamie Cameron cites as a potential example of the latter *O'Neill*, in which a source from within the government leaked false and damaging information about Maher Arar. See *O'Neill v Canada (AG)* (2006), 82 OR (3d) 241, 213 CCC (3d) 389 (SCJ).

97 As our purpose here is to address protections for newsgathering as distinct from expression, we are not directly concerned with the *publication* of such false and damaging (i.e. defamatory) information, a matter addressed by defamation law as informed by freedom of expression, as opposed to a matter of press freedom as such.

98 Whether a subjective intent element is preferable to an objective determination is a matter I leave aside.

99 Thus, while the *expression* of false information may be protected as an aspect of *freedom of expression* (see e.g. *Zundel*, *supra* note 90; *R v Lucas*, [1998] 1 SCR 439, 157 DLR (4th) 423), the collection and dissemination of clearly inaccurate information is likely not linked to the purpose of press freedom as such, and thus may not warrant constitutional protection under the proposed freedom of the press framework.

dom guarantee. There also seems to be no compelling reason to place any limitation whatsoever on the form of publication: paper, broadcast, the Internet, magazines, non-fiction books, documentaries, and any other means employed to publicize news should all be at least presumptively located within the scope of protection. The character of the publication, however, may cast light on whether a claimant has met the first requirement: a novelist would likely not be entitled to press protection, as the publication of fiction—while of course being entitled to the full scope of protection for expression—does not further the purpose of the *press* guarantee.[100] Novelists do not aim at disseminating news in the sense of providing factual information to the public[101] and thereby ensuring the public's right to know.

As noted above, there is no requirement here to establish any pattern of publishing, minimum circulation, exposure,[102] or any institutional affiliation in order to merit protection.[103] However, a demonstrated historical practice of newsgathering or affiliation with a more institutionalized press entity may at times be relevant in establishing intention to gather news with a view to publication.[104] A clear pattern of newsgathering for the purposes of publication may lend credence to the claim that such was the nature of the conduct in question. An investigative reporter with the Globe and Mail may have an easier time bringing ambiguous conduct within the definition of newsgathering at this stage than might someone with no similar history. This remains, however, simply one circumstantial factor among many to be considered by the trier of fact, and it is not a prerequisite of law.

2. Inherently Harmful Activity is Excluded

The second requirement ensures that the press activity in question is *not inherently harmful*: no constitutional protection is extended to threats, intimidation, extortion, fraud, illegal press wiretaps, computer hacking, or other illicit activity, even if it is conducted in the process of newsgathering with a view to publication. This requirement allays the concern of critics

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[100] Baker, *supra* note 64 at 760–63, noting that the functions of a newsgatherer and of an author of fiction are different, with only the former serving the purpose behind the privileged press protection.

[101] Of course, a publication for which the information was being collected need not be exclusively factual to be protected, although it should contain at least some factual content to bring it within the purpose of the guarantee.

[102] See on this point Baker, *supra* note 64 at 758.

[103] See Monk, *supra* note 49 (criticizing statutory press protections that require an individual to be "regularly engaged" in journalistic endeavors in order to receive protection at 28–29).

[104] See *Von Bulow*, *supra* note 73 at 144.

that protecting newsgathering may include illegal activity such as breaking into homes to access information.[105]

In determining what conduct should be classified as inherently harmful, it is useful to distinguish between activity deemed by law to be injurious *per se* and activity that is only contingently prohibited or restricted. For example, in contrast to trespassing or extortion, there is no blanket prohibition on the use of confidential sources generally; such conduct is only legally encumbered insofar as the collection and use of information derived from confidential sources is deemed to be required by a court of law. Similarly, assault is generally prohibited by criminal law and actionable in tort regardless of the purpose for which the assault took place,[106] and is thus treated by the proposed framework as *inherently* harmful; meanwhile, filming a public demonstration may be considered a breach of privacy depending on the legislation in question and, frequently, the purpose, content, and use of the footage.[107] Thus, in assessing whether the claimant meets the second criterion, courts would attempt to determine whether the action in question is generally prohibited and harmful by its very nature, in which case no constitutional protection is granted under the proposed framework, and the claim fails at this stage. Where the action in question is only contingently or selectively prohibited, the case proceeds to the final step of the analysis and to a section 1 justification.

Of course, where the conduct is subject to a general prohibition as inherently harmful, that prohibition itself may need to be assessed for its compatibility with press freedom. The argument that the prohibition of assault is incompatible with press freedom because reporters are not permitted to beat information out of sources will, needless to say, be easily rejected in the same way that violent conduct is found entirely outside freedom of expression's generous scope.[108] However, a common law doctrine or statute that prohibits certain conduct that is not harmful itself—photographing in public, for instance—but which is considered an invasion of privacy under certain circumstances may be challenged or assessed for its compatibility with freedom of the press. While Canada does

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[105] In *National Post supra* note 9 (oral argument, Appellant, online: <www.scc-csc.gc.ca/case-dossier/info/webcast-webdiffusion-eng.aspx?cas=32601>), Binnie J asked: "When you say that gathering news is part of the 2(b) protection, that doesn't mean, I don't think, that the reporter has a right to walk into somebody's private home in search of a story" (at 66:07–21).

[106] In the absence of an established defence.

[107] See e.g. *United Food and Commercial Workers, Local 401 v Alberta (AG)*, 2012 ABCA 130, 349 DLR (4th) 654 [*UFCW*], conf'd *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62 (available on CanLII) [*UFCW* SCC]. See the discussion in the Conclusion, below.

[108] See e.g. *R v Khawaja*, 2012 SCC 69 at para 70, [2012] 3 SCR 555 [*Khawaja*].

not have the same robust history of common law privacy protections as does the United States,[109] there is little doubt that, with the recognition of a new privacy tort by appellate and trial courts[110] and the proliferation of privacy legislation across the country, an independent press freedom guarantee will eventually bring these constitutional values into conflict.

Some lateral support for the "inherently harmful" criterion may be found in the Supreme Court's "wrongful action" model developed in *Pepsi-Cola*.[111] In that case, the Court found that while secondary picketing may have an impact on businesses not directly involved in a labour dispute, such activity should not be enjoined in the absence of independently wrongful activity. Thus, "[p]icketing which breaches the criminal law or one of the specific torts like trespass, nuisance, intimidation, defamation or misrepresentation, will be impermissible, regardless of where it occurs."[112] A similar methodology could be employed in determining whether the conduct in question is worthy of protection as an exercise of press freedom.[113]

Admittedly, the "inherently harmful" standard does not necessarily exempt from protection the collection or reception of illegal government leaks, information obtained in defiance of privilege, or other activity for

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109 See John DR Craig, "Invasion of Privacy and Charter Values: The Common-Law Tort Awakens" (1997) 42:2 McGill LJ 355 at 361–69; *Jones v Tsige*, 2012 ONCA 32 at paras 15–38, 346 DLR (4th) 34 [*Tsige*]. For a discussion of how such privacy protection may impact press freedom in Canada, see Jared Mackey, "Privacy and the Canadian Media: Developing the New Tort of 'Intrusion Upon Seclusion' with *Charter* Values", online: (2012) 2:1 UWO J Leg Stud 3 <ir.lib.uwo.ca/uwojls/vol2/iss1/3>. For the development of privacy protection in the US and its conflicts with a free press, see generally Amy Gajda, "Judging Journalism: The Turn toward Privacy and Judicial Regulation of the Press" (2009) 97:4 Cal L Rev 1039.

110 See *Tsige*, *supra* note 109. See also *Trout Point Lodge Ltd v Handshoe*, 2012 NSSC 245 at para 55, 320 NSR (2d) 22.

111 *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8, [2002] 1 SCR 156 [*Pepsi-Cola*].

112 *Ibid* at para 77.

113 Of course, merely declaring activity illegal would not necessarily defeat the press freedom claim at this stage, as the government could then immunize itself from scrutiny through a general prohibition (e.g. "newsgathering constitutes an offence"). A helpful heuristic might be to ask, as counsel for the National Post suggested in oral arguments, whether the newsgathering activity in question was both "nonviolent" and "consensual", in which case we can assume it was not "inherently harmful" for the purposes of this analysis. This would remove from protection inherently harmful activities like assault, trespassing, clear invasions of privacy (i.e. secret press wiretaps), and so on, without simply immunizing from review all activities a government might deem to be illegal (see *National Post*, *supra* note 9 (oral argument, Appellant, online: <www.scc-csc.gc.ca/case-dossier/info/webcast-webdiffusion-eng.aspx?cas=32601>) at 66:35).

which the *sources* themselves may be legally answerable.[114] However, as Justice LeBel recognized in *Globe and Mail*:

> [T]here are sound policy reasons for not automatically subjecting journalists to the legal constraints and obligations imposed on their sources. The fact of the matter is that, in order to bring to light stories of broader public importance, sources willing to act as whistleblowers and bring these stories forward may often be required to breach legal obligations in the process. History is riddled with examples. In my view, it would also be a dramatic interference with the work and operations of the news media to require a journalist, at the risk of having a publication ban imposed, to ensure that the source is not providing the information in breach of any legal obligations. A journalist is under no obligation to act as legal adviser to his or her sources of information.[115]

Thus, unless the newsgatherer is deemed by law to have committed some wrongful, inherently harmful act—which the mere receipt of voluntarily disclosed information will rarely be[116]—then the illegal conduct of the source would not defeat the press freedom claim of the newsgatherer at this stage. Any desire to ascribe the illegal activity of the source to the press-like entity as a way of disclaiming 2(b) protection can be better dealt with under section 1, with the "inherently harmful" criterion restricted to activity undertaken by the claimant that is prohibited or wrongful as such.

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[114] See e.g. *Security of Information Act*, RSC 1985, c O-5, s 13(1) [*Security of Information Act*]. This raises what appears to be a major practical impediment to discrete constitutional protection for press freedom: the possibility of major national security leaks receiving protection. For thoughtful discussion of the topic in the US context, see Benkler, *supra* note 64; Stone, *supra* note 74. It should be noted, however, that press freedom as conceived here neither directly affects liability flowing from the relationship between the source and the government (i.e., the illegality of the leaks, as such), nor imposes any restriction on expression that may burden newspapers (i.e., the illegality of publication), both of which are treated as (admittedly difficult) matters of freedom of *expression* and section 1. This is not to say that the concern is not a real one, but rather that discrete constitutional protection for press freedom does not make the vexing issue of illegal transmission of government secrets significantly more difficult than it would otherwise be.

[115] *Supra* note 33 at para 84. On this point in LeBel J's judgment, see Cameron, "Scandals", *supra* note 55 at 269–70.

[116] It is considered to be on occasion. See e.g. *Security of Information Act*, *supra* note 115, s 4(3) (prohibiting knowing receipt of secret information). Again, however, this section could be reviewed for compatibility with press freedom under the freedom of the press doctrine articulated here.

3. Activity or Information in the Public Interest

The final definitional limit—that the protected activity must be in the public interest in the sense of serving the purpose underlying press freedom—further guarantees a link with the principles underlying section 2(b) and the objectives to which freedom of the press is directed. This purposive limit may serve to exclude from constitutionally protected status gratuitous press activity entirely divorced from the values underlying freedom of the press under section 2(b). As Justice McLachlin (as she then was) noted in *Lessard*, "it is not every state restriction on the press which infringes s. 2(*b*). Press activities which are not related to the values fundamental to freedom of the press may not merit *Charter* protection."[117] Where claimants engage in activity unmoored from the rationale behind press freedom, I argue that there is no justification for section 2(b) protection, and no section 1 balancing is required.

With respect to this final hurdle, a useful analogy can be drawn to cases where the effect (as opposed to the purpose) of state action constitutes a limit on freedom of expression. These cases require the claimant to demonstrate that the conduct in question is linked to an underlying value of 2(b)—seeking and attaining truth, participation in social and political decision-making, or individual self-fulfillment and human flourishing[118]—in order to acquire protection.[119] If considered necessary, a claim of press freedom could be put through a similar test before protection is extended: does the activity for which protection is claimed serve the objective of press freedom by facilitating social and democratic discourse and by generally ensuring the public's right to know?

A public interest criterion so stated is necessarily vague: it asks whether the genre of conduct tends to serve no public interest, in the sense of ensuring the public's right to know. The ambit of this exception would be narrow—reporters cannot always be held to the highest standards of gentility—but it would tend to exclude particularly offensive and unproductive conduct. For example, the practice of voyeurism[120] might lose protection at this stage on the basis that little demonstrable public interest is served in clandestinely observing, photographing, or distributing images of, for example, a politician inside his or her home. This

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[117] *Lessard*, *supra* note 5 at 453. McLachlin J gives the following example: "[T]he press might not be entitled to *Charter* protection with respect to documents relating to an alleged offence by the press itself" (*ibid*).

[118] See e.g. *Irwin Toy*, *supra* note 60; *R v Keegstra*, [1990] 3 SCR 697 at 763, 117 NR 1.

[119] See e.g. *Montreal (City) v 2952-1366 Quebec Inc*, 2005 SCC 62 at para 56, [2005] 3 SCR 141 [*Montreal (City)*]; Brian Slattery, "Freedom of Expression and Location: Are There Constitutional Dead Zones?" (2010) 51 Sup Ct L Rev (2d) 245.

[120] *Criminal Code*, RSC 1985, c C-46, s 162 [*Criminal Code*].

stage of the analysis also allows practices such as "[c]hequebook journalism", which seemed to trouble the Supreme Court in *National Post*, to be assessed for their compatibility with the purpose underlying press freedom.[121] While it is not clear to me that such conduct should be considered incompatible with the purposes of press freedom—chequebook journalism appears to as readily serve the public's right to know as does traditional investigative reporting—to the extent that a compelling argument can be made that it is contrary to or incompatible with the purpose of the press guarantee, it fails to receive protection at this stage. Such a public interest requirement serves as an exceptional safety valve to allow courts latitude to protect activity deemed sufficiently integral to the values and purpose underlying press freedom to warrant constitutional protection, without shielding all activity press-like entities might choose to undertake.[122]

There is another conception of public interest appearing in the case law which focuses directly on the *content* of the information being gathered for dissemination,[123] which is subtly different from focusing (as proposed above) on the social value of the newsgathering activity. Such a public interest limit assesses whether the type of information being collected is the kind that is in the public interest to disclose. While this article does not endorse such a definitional limit relating to the content of information being gathered, there are some benefits and downsides to this different conception of the public interest that deserve attention.

While such a public interest test is also imprecise and may frequently be subject to controversy, it is not unknown to Canadian law. Indeed, the Supreme Court has already applied this kind of public interest criterion in the area of press *expression* in order to defeat certain actions in defamation.[124] The newly created "responsible communication in the public interest" defence to defamation, as the name indicates, requires a claimant to demonstrate that the communication in question was in the public inter-

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121 *National Post*, *supra* note 9 at para 38.

122 This is not to say that unseemly press activities unconnected to section 2(b) values could not be protected elsewhere under the *Charter*, in particular under freedom of expression, just that they would not be protected under the freedom of the press framework proposed here.

123 For US case law and analysis regarding this type of public interest criterion, see Baker, *supra* note 64 at 750–54, and his criticism of this approach at 756–58.

124 See *Grant v Torstar*, *supra* note 2, especially at paras 99–109; *WIC Radio*, *supra* note 2, especially at paras 29–30. The test for fair comment established in *WIC Radio*, for instance, requires the "the comment must be on a matter of public interest" (*ibid* at para 28). The Court continues, describing the public interest criteria as "relatively easy to discharge," and stating that the "public interest is a broad concept" (*ibid* at para 30).

est in order to be relieved of liability. The Supreme Court described this criterion in *Grant v. Torstar*:

> First, and most fundamentally, the public interest is not synonymous with what interests the public. The public's appetite for information on a given subject—say, the private lives of well-known people—is not on its own sufficient to render an essentially private matter public for the purposes of defamation law. An individual's reasonable expectation of privacy must be respected in this determination. Conversely, the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. *It is enough that some segment of the community would have a genuine interest in receiving information on the subject*.[125]

The Court endorsed a generous definition of public interest,[126] recognizing that "[t]he public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality."[127] As such, the matter "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached."[128] This conception of public interest, focusing on the content to be disseminated as opposed to the newsgathering process, may be considered necessary to defeat claims in which publication appears to be a pretext for depraved purposes unrelated to the public's right to know but where the conduct is not screened out at the first two stages. For instance, the public interest criterion may deny protection to an individual who creates a website for the purpose of collecting and publishing extremely private details and lewd photos of an ex-lover while seeking refuge from tortious or other liability under the auspices of press freedom.

It might be objected at this stage that these two conceptions—one focusing on the link between the type of activity in question and the furtherance of the purposes underlying press freedom, the other on the content of the information being collected for dissemination and the public's interest in knowing that information—are not significantly different in practice. Indeed, some might suggest that the reason why, for instance, voyeurism could be deemed inimical to the purpose underlying the press guarantee is because the *content* of voyeurism—gratuitous nudity without

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125 *Grant v Torstar*, *supra* note 2 at para 102 [emphasis added].

126 Cameron, "Does 2(b) Make a Difference?", *supra* note 78 at 147.

127 *Grant v Torstar*, *supra* note 2 at para 106.

128 *Ibid* at para 105, citing Raymond E Brown, *The Law of Defamation in Canada*, vol 2, 2d ed (Scarborough, Ont: Carswell, 1999) (loose-leaf updated 2008, release 3) at 15-137 and 15-138.

the subject's consent—is not in any way socially valuable. Whatever the merits of this distinction, it is clear that the further a court shifts away from the activity itself and toward determining the social importance of the content of a publication, the greater the risk of content discrimination,[129] which has generally been eschewed in the context of section 2(b). The concern in the context of press freedom is that courts might provide less protection to information that is relevant to a *few* than to interests considered to possess more mainstream value.

I believe that such a risk is attenuated where courts focus on the activity in question and its link (or lack thereof) to the purpose of press freedom, but I acknowledge that there may be situations in which the latter definition of public interest has value. If this content-based public interest requirement is necessary to further circumscribe the reach of press freedom, however, I would recommend that adjudicators be reluctant to reject protection simply on the basis that the average citizen may not be interested in the content, that the information is relevant to a small constituency, or that its disclosure is not of critical importance to the functioning of society.

4. Qualifications

I concede that the final stage of this framework—whichever type of public interest standard applies—injects a normative element into the analysis at the stage of establishing section 2(b) protection. It seeks to determine whether or not either the activity in question or the information collected is socially valuable in some sense, which may not be consistent with the general practice of leaving consideration of the social importance of activity to the contextual section 1 stage of the *Charter* analysis. The general principle of content neutrality under section 2(b) is an important achievement and should not be lightly discarded, and the further courts are asked to determine the importance of the *content* of newsgathering, the more this principle is at risk. As such, there may be a considerable degree of analytical value in leaving such substantive judgments to the section 1 stage of the analysis, which typically requires the state to demonstrate some harm to the public instead of requiring the claimant to establish a benefit.

On the other hand, whatever framework is erected to establish an initial breach of press freedom under 2(b), the section 1 analysis requires balancing the public interest against the exercise of the *Charter* right or

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[129] The problem is not simply that the courts may misread what is in the public interest, but that the entire exercise of defining the public interest "smacks of paternalism and elitism" (Anderson, *supra* note 54 at 479).

freedom in question.[130] While the public interest criterion, particularly of the content-based variety, might be applied in such a way as to create a "ghetto" of low-value information that may be deemed unworthy of *Charter* protection, this has been no less the case in the application of section 1 to low-value expression.[131] The advantage of the approach recommended here is that courts will need to be attentive to the kind of activity that is, in general, not conducive to furthering the purpose or values underlying press freedom. If activity inconsistent or incompatible with the purpose of press freedom can be screened out at an early stage, this will tend to reduce the pressure on the *Oakes* test and mitigate the necessity of diluting the *Oakes* standard of harm.[132]

Indeed, while the prospect of unbridled content discrimination is to be avoided in any context, recall that freedom of the press as described and understood above has an *instrumental* value. Since we do not protect press freedom as an affirmation of the universal rights or inherent dignity of the institutional press apart from its members, a consequentialist approach may be more defensible in press freedom cases, as long as we recall that, of course, none of the above framework hampers the full scope of protection for press *expression*, irrespective of its content.

Ultimately, the objective of this paper is to propose a workable framework for interpreting freedom of the press, which recognizes its central importance to a free and democratic society while at the same time accounting for courts' understandable apprehension over the potential folly in deeming *all* activity engaged in by press-like entities as entitled to receive presumptive *Charter* protection. I believe that this purposive framework is one that has the potential to achieve this balance, but I am certainly sympathetic to the idea that others may be more adequate in that regard. To the extent that this discussion convinces some readers that discrete *Charter* protection to some extent and in some capacity is both warranted and workable, it will be a step in the right direction.

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130 See Jamie Cameron, "The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997) 35:1 Osgoode Hall LJ 1 at 15–27 [Cameron, "Expressive Freedom"].

131 See Cameron, "Quixotic Journey", *supra* note 12 at 164, 172. See more generally Cameron, "Expressive Freedom", *supra* note 130.

132 On the dilution of the *Oakes* test, see e.g. Christopher D Bredt & Adam M Dodek, "The Increasing Irrelevance of Section 1 of the Charter" (2001) 14 Sup Ct L Rev (2d) 175 at 182–86; Chanakya Sethi, "Beyond *Irwin Toy*: A New Approach to Freedom of Expression Under the *Charter*" (2012) 17 Appeal 21 at 22–23.

B. Application of Proposed Framework to Confidential Sources

It may be useful at this point to illustrate this abstract framework by applying it to a concrete example: protection for journalist–source relationships. While each of the above criteria places important internal limits on judicial protection for newsgathering activity, I argue here that each is typically met in the case of protection of confidential sources. Collecting information from confidential sources tends to be done by press-like entities with a view to publication, so the first prong is easily met in most confidential sources cases, subject to the limits described above. Nevertheless, this first requirement provides a safeguard against, for example, journalist–source relationships entered into exclusively for the purpose of shielding physical evidence of no inherent newsworthiness from the authorities or obtaining confidential information to satisfy a personal vendetta with no eye to publication. The fact-finding process at this stage is also aimed at ferreting out sham publications or convenient *ex post facto* claims of intended publication—a concern that has appeared frequently in the US literature around reporters' privilege[133]—in order to determine that the activity in question was genuinely undertaken with the purpose of collecting information for dissemination of material to the public.

Likewise, while the "inherently harmful" criterion will rarely come into play in the case of confidential sources—the information is generally collected with the consent and cooperation of the source, and sometimes even at his or her behest—this hurdle denies constitutional protection to intimidation, extortion, or other inherently harmful (i.e., violent or non-consensual) conduct employed to access information from a confidential source.

Finally, with regard to the third step, there appears to be a strong consensus that protection for confidential source relationships is generally in the public interest in the sense of furthering the public's right to know. Even the majority of the Supreme Court in *National Post*—despite refusing to extend constitutional protection in that case—acknowledged that:

> [U]nless the media can offer anonymity in situations where sources would otherwise dry-up, freedom of expression in debate on matters of public interest would be badly compromised. Important stories will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment.[134]

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[133] See Baker, *supra* note 64 at 756; Anderson, *supra* note 54 at 516 n 474.

[134] *National Post*, *supra* note 9 at para 33.

This point was made even more forcefully by Justice Abella in dissent[135] and has been buttressed by empirical research,[136] academic commentary,[137] and judicial authority both inside[138] and outside Canada.[139]

While this is a cursory treatment of the admittedly difficult issue of confidential sources, it suffices for the purposes of this paper. The upshot of the above framework is that those individuals engaged in newsgathering with a view to publication, not conducting inherently harmful activity, and generally serving the public's right to know will be granted constitutional protection. As claims to maintain the confidentiality of sources will frequently meet these conditions, constitutional protection will normally be extended to them. However, as with any *Charter* analysis, there is of course a final and critical restriction on granting section 2(b) protection: section 1.

C. Section 1 and Reasonable Limits on Press Freedom

It is important at this point to briefly distinguish the Canadian constitutional framework from that of the United States, given the respondent's [140] and the Supreme Court's [141] reliance in *National Post* on

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[135] *Ibid* at paras 116–23.

[136] See generally Jason Burke, "Shielding the Public Interest: What Canada Can Learn from the United States in the Wake of *National Post* and *Globe & Mail*" (2012) 35:1 BC Int'l & Comp L Rev 189 at 198–200; John E Osborn, "The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas" (1985) 17:1 Colum HRL Rev 57 at 72–81; Laurence B Alexander, Linda M Perry & Bill F Chamberlain, "*Branzburg v. Hayes* Revisited: A Survey of Journalists Who Become Subpoena Targets" (1994) 15:2 Newspaper Research Journal 83. But see Lillian R BeVier, "The Journalist's Privilege—A Skeptic's View" (2006) 32:3 Ohio NUL Rev 467.

[137] See e.g. David Abramowicz, "Calculating the Public Interest in Protecting Journalists' Confidential Sources" (2008) 108:8 Colum L Rev 1949, at 1966–70; Emerson, "Right to Know", *supra* note 55 at 19–20; Nestler, *supra* note 40 ("[t]he system unravels if the reporter is unable to keep her promise of confidentiality" at 239).

[138] See *St Elizabeth Home Society v Hamilton (City)*, 2008 ONCA 182 at paras 31–35, 291 DLR (4th) 338; *National Post*, *supra* note 9 at paras 28–34; *Lessard*, *supra* note 5 at 430, 432, LaForest J and 452, McLachlin J; *Globe and Mail*, *supra* note 35 at para 48.

[139] In the United States, see *Zurcher v Stanford Daily*, 436 US 547 at 572, 98 S Ct 1970 (1978), Stewart J, dissenting; *Branzburg*, *supra* note 36; *National Post*, *supra* note 9 at para 120, Abella J, disenting. Outside the United States, see Calvert, *supra* note 64 at 413–18; Nestler, *supra* note 40 at 227–30. See also *Goodwin v United Kingdom*, (1996) 22 EHRR 123; *Ashworth Security Hospital v MGN Ltd*, [2002] UKHL 29 at para 61, [2002] 1 WLR 2033; *Financial Times Ltd v The United Kingdom*, [2009] ECHR 2065. See more generally Kyu Ho Youm, "International and Comparative Law on the Journalist Privilege: The *Randal* Case as a Lesson for the American Press" (2006) 1:1 J Int'l Media & Ent L 1.

[140] *R v National Post,* 2010 SCC 16, [2010] 1 SCR 477 (Factum of the Respondent at para 67) [Respondent].

Branzburg, in which the Supreme Court of the United States refused to grant constitutional protection for journalist–source confidentiality in the context of a grand jury subpoena. Recall that the US Constitution does not contain an equivalent to section 1, and as such, any consideration of countervailing factors weighing against press freedom must be done *within* the First Amendment.[142] Despite the perception that the rights and freedoms in the US Bill of Rights are absolute, they are in fact limited internally by a restrictive definition of the given right or freedom.[143] Indeed, many First Amendment cases read like section 1 disputes, with members of the Supreme Court of the United States disagreeing over whether a statute limiting a right or freedom is necessary for an important purpose in a way that minimally impairs the constitutionally protected interest in question.[144]

Unsurprisingly, then, *Branzburg* did in fact involve a balance of constitutional values against the broader public interest,[145] and, on the more categorical American approach, the US Supreme Court deemed that society's interest in hearing "every person's evidence"[146] outweighs the freedom of the press in that circumstance. *Branzburg* stands for the proposition that, for the purposes of the First Amendment, "the public interest in adjudicating crimes outweighs the need for reporters to guarantee the

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[141] *National Post*, *supra* note 9 at paras 47–49, Binnie J, and paras 107–11, Abella J, dissenting.

[142] On this point, see *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at 152, 77 DLR (4th) 385, Lamer CJ.

[143] See e.g. Mark Tushnet, "Judicial Activism or Restraint in a Section 33 World" (2003) 53:1 UTLJ 89 at 92.

[144] For a recent example, see e.g. *United States v Alvarez*, 132 S Ct 2537, 183 L Ed (2d) 574 (2012), Breyer J concurring (in determining whether a law violates the First Amendment, the Court will consider "the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive alternatives" at 2540–41 [cited to S Ct]).

[145] This is bolstered by a close reading of *Branzburg* itself, where the majority noted that "without some protection for seeking out the news, freedom of the press could be eviscerated" and that grand jury investigations without a legitimate purpose "would have no justification" (*Branzburg*, *supra* note 36 at 681, 708). Powell J, concurring, advocated a case-by-case balancing process similar to a section 1 analysis, noting that each case "should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct" (*ibid* at 710). See also Burke, *supra note* 150 at 207–08.

[146] *National Post*, *supra* note 9 at para 1. This is, broadly speaking, the primary justification offered for infringing upon confidential source relationships. See also *Globe and Mail*, *supra* note 35 at para 1; Nestler, *supra* note 40 at 216–17.

confidentiality of relationships with their sources."[147] Whatever the merits of this abstract approach in the US context, such a zero-sum inquiry is not warranted in the context of the *Charter*, given that courts can consider whether an infringement is justifiable under section 1 on a case-by-case basis.

The limited scope of this paper does not permit a full discussion of the contours of the section 1 analysis to be employed at this stage; however, whether it is conducted under the *Dagenais*/*Mentuk* framework,[148] a standard specifically designed for the factual matrix of the press freedom in question,[149] or a more traditional *Oakes* analysis, any limitation on activity which the Supreme Court of Canada has recognized as carrying constitutional importance—such as legitimate newsgathering in the public interest—should be demonstrably justified by the state.

III. Arguments Against Constitutionalizing Newsgathering

Militating against constitutional protection for newsgathering as such, and the protection of confidential sources in particular, is the concern that this unduly broadens the scope of the *Charter*. In *National Post*, the majority provided three related but distinct slippery slope arguments against protection: that it would immunize all press activity, however indecent or illegal; that it would shield all promises of confidentiality, thereby compromising the administration of justice; and that it would grant protection to all self-styled journalists, regardless of their level of accountability or accreditation. This section will attempt to address these concerns in light of the framework designed above and will ultimately challenge the critical conceit of *National Post*: the Supreme Court's faith that confidential sources can be adequately protected through a common law Wigmore test[150] designed to establish case-by-case privilege.

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147 Christian Leblanc, Marc-André Nadon & Émilie Forgues-Bundock, "The Journalist–Source Privilege in Quebec Civil Law: *Globe and Mail v Canada (Attorney General)*" (2011) 54 Sup Ct L Rev (2d) 273 at 279 [Leblanc et al].

148 See Cameron, "Scandals", *supra* note 55 at 248.

149 Consider for example the test suggested by McLachlin J in *Lessard*, *supra* note 5 at 455, specifically for search warrant cases.

150 In order to establish privilege on a case-by-case basis according to the Wigmore test, the claimant must demonstrate the following:

> First, the communication must originate in a confidence that the identity of the informant will not be disclosed. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good ... Finally, if all of these requirements are met, the court must consider whether in the instant case the public interest served by protecting the identity of the

A. The "Entrenchment of All Newsgathering Activity" Slippery Slope

First, the majority in *National Post* noted that while newsgathering is implicit in news publication (which is protected through freedom of expression),[151] "it carries the argument too far ... to suggest that each of those news gathering techniques (including reliance on secret sources) should itself be regarded as entrenched in the Constitution."[152] The Court worried that if newsgathering as such received independent constitutional protection this might cover too wide a range of activity, including cheque-book journalism, the use of telephoto lenses and long-range microphones, or the collection of private information.[153]

With respect, this line of argument is hard to accept given that the Court expounded, just paragraphs before, the *exceptional* importance of protecting confidential sources in light of the values underlying section 2(d).[154] Indeed, at least with respect to professional journalists, the Court found that such confidential source relationships should not only be fostered, but "sedulously" so.[155] Even leaving this aside, if the claimant can establish that the ostensibly unseemly activity in question constitutes newsgathering for the purposes of publication, is not inherently harmful in and of itself, and generally serves the public interest, it is difficult to see why the state should be able to directly or indirectly frustrate the newsgathering process merely on the basis that it wishes specific news had not been gathered.

As an illustration of the type of activity that might be wrongly granted constitutional protection, the Supreme Court provided the example of a camera operator photographing then-Finance Minister Lalonde's budget documents during a photo opportunity.[156] This example might seem odd, because cameras were in fact *permitted* in that circumstance;[157] that is, no state action limited the newsgathering activity in question. It is difficult to see how the spectre of an activity permitted in law illustrates the dan-

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informant from disclosure outweighs the public interest in getting at the truth (*National Post*, *supra* note 9 at para 53).

151 *Ibid* ("[n]ews gathering, while not specifically mentioned in the text of s. 2(*b*) is implicit in news publication" at para 38).

152 *Ibid*.

153 *Ibid*.

154 *Ibid* at paras 28, 33.

155 *Ibid* at para 57.

156 *Ibid* at para 38.

157 See "When Government Information Goes Astray" (9 June 2009), online: CBC News <www.cbc.ca/news/canada/when-government-information-goes-astray-1.792429> (budget documents were seen during a photo-session in Minister Lalonde's office).

ger in affording constitutional protection to a different activity altogether, in particular one that is legally encumbered. That a politician may not have intended certain information to be legally obtained (that is, photographed where cameras are allowed) appears to provide no greater justification for suppressing the newsgathering activity than that a reporter might write down information that a politician preferred not to be overheard.

More relevant to the inquiry is whether extending protection in some cases constitutionalizes activity that is reasonably prohibited, such as situations in which the state forbids cameras in areas otherwise accessible to the public. *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, for instance, involved review of a decision of the provincial legislature to prohibit the press from filming legislative proceedings from the gallery.[158] The majority of the Supreme Court found that the decision was shielded by parliamentary privilege and therefore not subject to *Charter* review. If the policy had not been immune from constitutional review by the operation of parliamentary privilege, however, Justice Cory's dissenting opinion appears consistent with the disposition I suggest. He notes that "[s]o long as the camera is neither too pervasive nor too obtrusive, there can be no good reason for excluding it. How can it be said that greater accuracy and completeness of reporting are to be discouraged?"[159] The press in such circumstances are newsgathering for the purpose of publication, they have done nothing inherently harmful, and the activity itself serves the values underlying press freedom. As such, the state should be required to justify limiting press freedom under section 1.

This is not to say that the use of telephoto lenses or cameras generally, like any other newsgathering technique, could not under appropriate circumstances be limited or regulated, whether because their use does not meet the internal requirements of the proposed framework or because such a limit is nevertheless justifiable under section 1. As with all other section 2 freedoms, no specific activity is entrenched in the constitution *per se* by the framework, and it certainly renders no activity immune from any and all legal encumbrance. The question of whether or not an activity should be protected as an aspect of press freedom, however, is better dealt with through a meaningful doctrinal framework linked directly to the values underlying the freedom and, if necessary, a section 1 analysis. This approach is preferable to the practice of merely listing activities consid-

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158 *New Brunswick Broadcasting*, *supra* note 68.

159 *Ibid* at 409. The need to permit filming for the purposes of improving the accuracy of reporting appears again in *CBC v Canada (AG)*, *supra* note 4 at para 48, and is discussed in the Conclusion, below.

ered to be unworthy of constitutional protection and presumptively rejecting *all* claims on the basis that *some* may not be meritorious.

Thus, where the use of electronic means to collect information is inherently harmful, for example through activity prohibited by the *Criminal Code*,[160] by privacy legislation,[161] or where information is acquired through extortion or trespassing, it is not covered under the proposed framework and no constitutional protection attaches. This is not to say that the inhibiting provisions themselves should not be subject to constitutional scrutiny for undue restrictions on press freedom, just as privacy protections may be unconstitutional for other reasons, including as a matter of freedom of expression.[162] But in those cases where the activity in question is deemed by a court to be *inherently* harmful, the claimant will not meet the second stage of the proposed press freedom framework, and protection will be denied. Finally, where the activity in question has no discernible link to the purposes of section 2(b) and of press freedom in particular (i.e., ensuring the public's right to know), constitutional protection will be withheld.

Beyond these criteria, of course, there may still be a sufficient state interest in a specific case to warrant adversely affecting certain otherwise-legal newsgathering activities under section 1. However, the hypothetical presence of a state interest in certain circumstances should not exclude the possibility of finding that at least some newsgathering activity must merit constitutional protection,[163] any more than the presence of reasonable limitations on expression or religion requires that constitutional protection should never be afforded to expressive or religious activity. Simply put, finding that freedom of the press protects some newsgathering activi-

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[160] See e.g. *Criminal Code*, *supra* note 120, ss 184 (interception of private communications), 191 (possession of a device used to intercept private communications), 342.1 (unauthorized use of a computer), 342.2 (possession of a device for unauthorized computer use), 430(1.1) (mischief in relation to data).

[161] For a comprehensive treatment of privacy legislation and protection in Canada, see Barbara McIsaac, Rick Shields & Kris Klein, *The Law of Privacy in Canada*, vol 2, loose-leaf, (Scarborough, Ont: Carswell, 2000).

[162] See e.g. *UFCW*, *supra* note 107, in which a union's videotaping of picket lines was prohibited by provincial privacy legislation, which legislation was subsequently found to be unconstitutional by the Supreme Court (*UFCW* SCC, *supra* note 107). This case raises some difficult conceptual issues regarding the distinction between freedom of expression and access to information for the purposes of expression, and is touched on only briefly in the Conclusion, below.

[163] As Jamie Cameron has noted, with reference to *National Post*: "Finding fault with these newsgathering practices had little relevance in a case where an award-winning journalist relied on confidential sources while engaged in investigative reporting with undeniable links to core section 2(b) values" (Cameron, "Scandals", *supra* note 55 at 249).

ty by no means implies that it protects all such activity, as long as a purposive framework is established and section 1 is available.

B. The "Protecting All Confidential Sources" Slippery Slope

The majority of the Court in *National Post* was also concerned that any constitutional protection for confidential source relationships might immunize a broad range of actors and "whichever 'sources' they deem worthy of a promise of confidentiality and on whatever terms they may choose to offer it."[164] Thus, the Court appeared worried that extending *any* protection to confidential sources would allow scores of self-styled journalists to be granted blanket constitutional immunity by pledging confidentiality to a source.

This argument, with respect, appears to beg the question: it would only "blow a giant hole in law enforcement and other constitutionally recognized values"[165] if no reasonable framework were established to determine the content of the freedom or the circumstances in which its protection is available. Undermining the criminal justice system is by no means an inevitable consequence when protection is only available to those engaged in legitimate press-like activity directly tied to the purpose underlying freedom of the press. That a meaningful press freedom framework has not yet been accepted by the Supreme Court does not logically imply that no workable scheme could be erected or that no constitutional protection could be reasonably afforded.

None of which is to say that the Court's concerns here are unfounded or that there is not a genuine tension between "the public's right to the free flow of information that leads to the truth, and the public's right to the testimony of witnesses that leads to the truth."[166] I only argue that the purpose of a *Charter* framework—including a section 1 analysis—is precisely to address this tension. Indeed, *National Post* may be such a case where a section 1 analysis ought to permit an infringement upon press freedom. A number of commentators, as well as the Court itself in *Globe and Mail*, noted that *National Post* involved concealment of evidence that may have constituted the *actus reus* of a crime,[167] which understandably weighed heavily in the Court's analysis.[168] But under the framework sug-

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164 *National Post*, *supra* note 9 at para 40.

165 *Ibid*.

166 Berger, *supra* note 64 at 1411.

167 See Leblanc et al, *supra* note 147 at 285; *National Post*, *supra* note 9 at para 77; *Globe and Mail*, *supra* note 35 at para 19.

168 This clearly had a strong influence on the Court's reasoning in *National Post*. See Cameron, *supra* note 53 ("[i]t leaves little doubt that the Court's decision turned on a single,

gested here, this consideration is relevant in determining whether the state's burden under section 1 is met, not whether any protection for newsgathering should be afforded.

In short, recognition of newsgathering as integral to press freedom under section 2(b) does not end the inquiry; nor does it guarantee that free press concerns always prevail over those related to trial fairness or the proper administration of justice. But it recognizes that there is a tension that implicates constitutional interests, potentially on both sides of the equation. It requires genuine promises of confidentiality, collected in accordance with the framework described above, to be protected unless the state can justify a limitation.

C. The "Who is the Press?" Slippery Slope

The Supreme Court's concern noted in the section above appears to be animated not only by the assumption that confidential source relationships, as such, will be too broadly protected, but also that because freedom of expression is not limited to media actors but applies to "everyone", it would unduly protect a "heterogeneous and ill-defined group of writers and speakers" who may not have the sense of responsibility or enforceable codes of conduct of more tightly regulated professionals.[169] Later in the judgment, in rejecting a class-based privilege framework, the Court expresses concern about "the immense variety and degrees of professionalism (or the lack of it) of persons who now 'gather' and 'publish' news said to be based on secret sources."[170] The Court contrasts such indiscipline with the legal profession, which is restricted by a licensing process and by the enforcement of professional standards. Thus, the Court was not only uneasy about the prospect that the activity in question (promises of confidentiality) may become too broadly protected, but also about the risk of extending protection to the capricious or unprofessional, as there is no principled way to limit the privilege only to accredited journalists adhering to rigorous codes of conduct.[171]

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compelling fact: that the purpose of the search was to gain access to the physical evidence, the physical instrumentality, the *actus reus* of an offence against the Prime Minister of Canada" at 245).

169 *National Post*, *supra* note 9 at para 40.

170 *Ibid* at para 43.

171 *Ibid*. According to Jamie Cameron, the Court "found the scope of the privilege concerning, not only because the class lacks boundaries but because it lacks standards as well" (Cameron, "Scandals", *supra* note 55 at 250).

The Court again appears to be acting upon the assumption that, as in the American context,[172] once it is found that any confidential source relationship (or other newsgathering activity) is to be given constitutional protection in some cases, it must be provided in all such cases, and furthermore that section 1 is inadequate to protect pressing interests by derogating from these recognized freedoms. As argued above, this is not the case given a conception of freedom of the press with meaningful, definitional limits linked directly to the protection's purpose, and with the final section 1 safeguard. Moreover, the issues raised by the "unstated equivalence"[173] drawn between a class privilege framework and the proposed *Charter* test would, I think, be largely answerable by a functional definition of the press that it is explicitly directed at determining which conduct falls within the purpose of freedom of the press.

As argued above, I consider this focus on the identity or characteristics of the claimant—as opposed to the conduct in question—to be unnecessary in the context of press freedom, and indeed to run contrary to the concept of a constitutional freedom more generally. Like all other fundamental freedoms that are available to "everyone" provided they are engaging in the conduct found within the ambit of the freedom in question,[174] the principal question should not be *who* gets the protection but whose *conduct* warrants it. We do not ask whether an author is likely to express herself responsibly, or whether a religious man is liable to act reasonably, but whether an individual's conduct in the circumstances is protected according to the purpose of the freedom in question.

For these reasons, the difficulty of identifying the holder of the privilege[175] is effectively beside the point in a press freedom case—both the source and the reporter are, subject to any ethical or contractual obligations, perfectly free to refute a promise of confidentiality. The relevant legal relationship in a *Charter* analysis is that between the press-like entity and the state attempting to interfere, in purpose or effect, with legitimate press-like functions. Once the constitutional dimensions of confidential source relationships as an important aspect of newsgathering are acknowledged, the question is what state intrusions are permitted and in what circumstances, not the deemed responsibility of the actors or the relationship between the reporter and the source.

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[172] See Part I.D, above.

[173] Cameron, "Scandals", *supra* note 55 at 250.

[174] This point is taken up in the Conclusion, below.

[175] *National Post*, *supra* note 9 at para 45.

D. The Privilege Framework is Insufficient to Protect Press Freedom

The critical conceit of *National Post*'s refusal to constitutionalize the protection of confidential source relationships is the presumption that press freedom can be adequately protected under the common law of privilege.[176] There are a number of reasons why the Wigmore case-by-case privilege framework does not represent a satisfactory alternative. First, the Wigmore test is a rule of evidence that is not "grounded in any theory of press function."[177] It is simply not designed to afford protection to constitutionally entrenched rights and freedoms. This common law privilege frequently applies to purely private relationships (e.g. psychiatrist–patient) that lack the same constitutional dimension and that do not implicate the same broader public interest as journalist–source relationships.[178] Although the Court appeared to imply that the Wigmore framework is applied differently according to the particular context,[179] the fact that certain interactions directly implicate *Charter* freedoms while others do not suggests that it is inadequate to apply an identical common law framework. As such, the privilege analysis is deficient in light of the Court's acknowledgment, which I note in the introduction, that a free press is uniquely integral to section 2(b) and that newsgathering activity assumes a constitutional dimension. Even presuming that the fourth stage of the Wigmore analysis covers those considerations that are relevant to a section 1 analysis,[180] it does so without the analytical stringency necessary for protecting constitutional interests.[181]

The above discussion raises another problem with the privilege-based framework: although the Court acknowledged that "the media's ss. 2(*b*) and 8 interests are clearly implicated" in *National Post*,[182] it nevertheless

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176 See Cameron, "Scandals", *supra* note 55 at 255; *National Post*, *supra* note 9 at para 41.

177 Cameron, "Scandals", *supra* note 55 at 237; see also Cameron, "Does 2(b) Make a Difference?", *supra* note 78 at 153–54. In fact, this may be the only point on which all parties agreed during the *National Post* litigation. See e.g. Respondent, *supra* note 140 at para 39; *R v National Post,* 2010 SCC 16, [2010] 1 SCR 477 (Factum of the Intervener Canadian Civil Liberties Association at paras 12–13).

178 See e.g. *R v Gruenke*, [1991] 3 SCR 263 at 288–89, 67 CCC (3d) 289 [*Gruenke*]; *M (A) v Ryan*, [1997] 1 SCR 157, 143 DLR (4th) 1. On this point, see Cameron, "Scandals", *supra* note 53 at 254–55. See also Monk, *supra* note 49 at 3; Nestler, *supra* note 40 at 212–15.

179 See *National Post*, *supra* note 9 at para 53, quoting *Gruenke*, *supra* note 178 at 290.

180 See *R v The National Post,* 2008 ONCA 139 at para 76, 80 OR (3d) 1.

181 Cameron, "Scandals", *supra* note 55 at 256–58, 272. As applied in *National Post*, the test meant "law enforcement prevails even when the probative value of the evidence approaches the vanishing point" (*ibid* at 258). See also Cameron, "Quixotic Journey", *supra* note 12 at 182.

182 *National Post*, *supra* note 9 at para 78.

found that the burden of disproving a countervailing public interest rested on the claimant rather than requiring the state to prove that an intrusion upon constitutionally protected interests was demonstrably justifiable.[183] If section 2(b) interests are engaged by state action (which the Court accepted) and if an inquiry balancing those protections against the public interest more broadly is required and engaged in (which the Court also accepted), reversing the burden onto the claimant[184] further upsets the well-established framework for adjudicating cases in which state action has clearly implicated *Charter*-protected rights or freedoms.

Finally, while the Supreme Court was, as argued here, overly attentive to the possible adverse consequences of recognizing journalist–source confidentiality as a constitutional entitlement, it appeared unconcerned with the inverse. That is, even if a common law framework is infused with the nebulous vapours of "*Charter* values",[185] it can still be displaced by regular legislation.[186] If the Court fails to grant such activity constitutional protection, this leaves it without recourse where state action deliberately and seriously harms interests the Court has recognized as important and constitutional[187] but that do not naturally fall under the rubric of expression. For example, a "tough-on-crime" government could conceivably legislate a statutory privilege framework that expressly disavows special protection for journalist–source privilege in the context of criminal investigations, or could amend the *Criminal Code* to provide that no special consideration shall be given to the media when judges exercise discretion to issue search warrants. This would place the Court in the awkward position of either constitutionalizing arrangements previously deemed unworthy of such protection, or retreating from its affirmation of the importance of increased caution and protection in media cases. A purposive press freedom framework would instead provide a bulwark against unjustifiable state action that engages activity of constitutional importance, while at the same time permitting derogation from press freedoms where demonstrably justified.

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183 *Ibid* at para 60.

184 This burden reversal may have real consequences on the outcome of the dispute. See Cameron, "Scandals", *supra* note 55 at 256.

185 *National Post*, *supra* note 9 at para 50, Binnie J, and para 115, Abella J, dissenting.

186 As Cameron notes with respect to the search warrant cases, the "press-specific factors were recommended, not mandatory, and did little to protect the CBC in these cases" (Cameron, "Quixotic Journey", *supra* note 12 at 176).

187 Cameron, "Does 2(b) Make a Difference?", *supra* note 78 at 155.

E. Toward a Purposive and Independent Interpretation of Press Freedom

Slippery slope arguments, where compelling, are premised on the unavailability of an adequate framework or a logical set of principles to arrest the slippage.[188] While the underlying concerns expressed by the Court in *National Post* are important, they are not necessarily prohibitive where a workable and purposeful analytical structure is available to address those concerns. This is particularly so in the Canadian constitutional context, given the presence of section 1. As Justice McLachlin (as she then was) noted, dissenting in *Lessard*: "The more difficult question is how freedom of the press is to be reconciled with society's interest in the administration of justice and the conviction of the guilty. Under the *Canadian Charter of Rights and Freedoms*, *that analysis takes place under the rubric of s. 1 of the* Charter."[189]

This is more consistent with how the Court typically approaches broadly worded *Charter* guarantees; broad wording calls for thoughtful application of these guarantees, not for their marginalization. If an expansive and content-neutral standard for freedom of expression, for example, has not resulted in all fraudulent, hateful, obscene, conspiring, defamatory, commercial, or violent speech being entirely immune from state limitations, it is difficult to see how a more restrictive and purposive definition of press freedom, one that requires demonstration of a link to the underlying values and purposes of section 2(b), would be necessarily unwieldy.

I do not presume to have proposed the only or even the most effective freedom of the press framework here. It may turn out, upon reflection, that another framework is more workable or strikes a better balance between the constitutional and broader social interests at issue. The point is simply that such a legal framework is not beyond the reach of human creativity; constitutionalizing some press activity need not as a matter of logic lead indiscriminately to constitutionalizing *every* press activity, however unrelated to the distinct function of press freedom or however injurious to the public interest.

Given the trite refrain that *Charter* rights and freedoms "must be interpreted in a generous and liberal fashion having regard to the history of

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[188] As the US scholar Robert Bork once noted, "[j]udges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom" (Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990) at 169).

[189] *Lessard*, *supra* note 5 at 453 [emphasis added]. See also La Forest J in *Carson*, *supra* note 4 ("[i]n answer to the respondents' submissions, however, it is to be noted that this Court has repeatedly favoured a balancing of competing interests at the s. 1 stage of analysis" at para 34).

the guarantee and focusing on the purpose of the guarantee,"[190] courts should not resile from giving meaning to the Supreme Court's rhetoric that freedom of the press serves a vital function and that non-expressive newsgathering activity deserves constitutional protection. This conclusion becomes more compelling for those who accept that alternatives, such as a common law framework for journalist–source privilege, are inadequate substitutes for *Charter* scrutiny where the conduct in question implicates interests of constitutional importance, which the Court has repeatedly stated includes newsgathering.

In undertaking a purposive definition of *Charter* rights and freedoms, the Supreme Court has inferred the open courts principle from the purpose of freedom of expression,[191] collective bargaining rights from freedom of association,[192] a right to "effective representation" from the right to vote,[193] and the right to remain silent as a principle of fundamental justice,[194] to name a few examples. The scheme proposed here is more modest, and requests only that some meaningful content be given to the express words in section 2(b) that protect "freedom of the press and other media of communication." The content of this freedom should be established through an analysis of what freedom of the press entails and the purpose it serves—namely, facilitating freedom of expression, the free flow of information, public accountability, and transparency, all by safeguarding the public's "right to know". Respectfully, it would be incongruous for the Court to use a purposive definition to expand the limits of the *Charter* well beyond its literal text in some circumstances, only to refuse to give any meaningful and independent content or effect to those guarantees found expressly within its language.

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190 *Lessard*, *supra* note 5 at 450 (McLachlin J, dissenting).

191 See Chan, *supra* note 51 ("[w]hile it has since been inextricably woven into the fabric of section 2(b), the constitutionality of the open court principle is not immediately apparent from the text of that provision" at 169).

192 See *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391. This extension has been severely criticized in some quarters as not only falling outside the text of section 2(d) but also outside the section's purpose. See e.g. *Ontario (AG) v Fraser*, 2011 SCC 20 at paras 252–54, [2011] 2 SCR 3, Rothstein J, dissenting; Brian Langille, "The Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009) 54:1 McGill LJ 177.

193 See *Reference Re Prov Electoral Boundaries (Sask)*, [1991] 2 SCR 158 at 188, 81 DLR (4th) 16.

194 See *R v Hebert*, [1990] 2 SCR 151 at 179, 47 BCLR (2d) 1.

Conclusion

This paper takes the position that inclusion of the phrase "freedom of the press" in section 2(d) is not a mere interpretive provision,[195] nor is it simply a species of freedom of expression. It is more fruitfully seen as a substantive entitlement, in the absence of good reason to treat it as effectively superfluous or reiterative. Just as the freedoms of thought, belief, and opinion are concepts distinguishable from freedom of expression, the mere inclusion of freedom of the press within the same subsection as freedom of expression is a weak textual basis on which to presume the latter entirely assimilates the former. To put it bluntly, just as courts should be reluctant to read *in* constitutional provisions with no basis in the text of the *Charter*,[196] so should they be reluctant to read them *out* where expressly guaranteed.

While the analysis of directly expressive press activity may, in the main, continue to be treated under the general freedom of expression framework,[197] a purposive definition of section 2(b) shields from undue state interference lawful activities integral to the functioning of a free press—most notably newsgathering—even if they do not fit naturally within the *Irwin Toy* analysis designed by and large for directly expressive activity.[198] While the line can blur at times, the ability to access, collect, or gather information is not identical to the ability to express information already possessed, and attempting to treat issues of press access or newsgathering within the same conceptual framework as expressive activity tends to muddy the analytical waters.

Consider, for example, *C.B.C. v. Canada (A.G.)*, which involved the constitutionality of restricting access to information outside the courtroom (i.e., filming, photographing, and interviewing) and restricting the publication of audio recordings of court hearings. The Supreme Court found that because "news gathering is an activity that forms an integral part of freedom of the press ...[,] measures that limit filming, taking photographs

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195 See e.g. *Charter*, *supra* note 1, ss 25–31.

196 See e.g. *R v Prosper*, [1994] 3 SCR 236, 118 DLR (4th) 154 ("the 'living tree' theory has its limits and has never been used to transform completely a document or add a provision which was specifically rejected at the outset. It would be strange, and even dangerous, if courts could so alter the constitution of a country" at 297, l'Heureux-Dubé J, dissenting (but concurring on this issue) [cited to SCR]).

197 For example, publication ban cases expressly limit expressive activity as such and can be adequately treated under the freedom of expression framework. See e.g. *Dagenais*, *supra* note 3; *Mentuck*, *supra* note 3. (Although the Court employs a freedom of expression analysis in determining a breach of section 2(b), the section 1 analysis has been tailored to specific circumstances of publication bans.)

198 *Montreal (City)*, *supra* note 119 at para 56, citing *Irwin Toy*, *supra* note 60 at 967–68.

and conducting interviews infringe s. 2(*b*) of the *Charter*."[199] However, as in other cases in which press freedom has been recognized,[200] the Court did not attempt to create an independent freedom of the press framework in order to determine what other limitations on newsgathering constitute an infringement. Indeed, at other points in the judgment, the Court implies that the concept of press freedom is entirely collapsed into expressive freedom by stating that "[f]reedom of the press has always been an *embodiment* of freedom of expression,"[201] that the claim in the case was based on "freedom of expression, including freedom of the press,"[202] and that the operative question is "whether the activity falls within a sphere protected by freedom of expression."[203]

Although the access issues in this case stretch the logic of the open court principle—the court proceedings themselves were quite open to the press and public alike, and no obvious issues of state accountability arose[204]—the Supreme Court relied heavily on open court cases in concluding that the newsgathering activity in this case was protected.[205] Indeed, the Court found that the normal freedom of expression test applies despite the fact that there was no content-based restriction on expression, nor was the press prohibited from expressing itself in a particular location or a particular manner;[206] rather, the press was restricted in the *collection* of information for later publication.[207]

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199 *CBC v Canada (AG)*, *supra* note 4 at para 46.

200 See *Lessard*, *supra* note 5, LaForest J concurring; *Carson*, *supra* note 4; *Globe and Mail*, *supra* note 35 at para 56.

201 *CBC v Canada (AG)*, *supra* note 4 at para 2 [emphasis added].

202 *Ibid* at para 31.

203 *Ibid* at para 33.

204 See *Juman v Doucette*, 2008 SCC 8 at para 22, [2008] 1 SCR 157.

205 *CBC v Canada (AG)*, *supra* note 4 at paras 1, 27–39.

206 The cases in which laws or regulations had the *effect* of limiting freedom of expression have all revolved around whether expression itself can take place in a specific location or in a specific way. See e.g. *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295 [*Greater Vancouver Transportation*], and the cases cited in *ibid* at para 27. That is, the question in these cases was location as a *forum* for expression, not location as an opportunity to collect information for future expression. See Hogg, *supra* note 46 at 43.12.

207 Notably, perhaps, the Court also did not address the "necessary for the meaningful exercise of free expression" standard that operated in *CLA* for determining where *access* to information inhibited by the government possessed sufficient expressive content to bring it within the ambit of s 2(b) protection (*CLA*, *supra* note 34 at paras 35–37). This standard, as explained in *CLA*, provides an important buffer against finding that all individuals are constitutionally entitled to all information in government hands (e.g.

Relying on the general expressive freedom framework may have appeared natural as it was apparently uncontested in that case that filming, photographing, and interviewing in courthouse areas open to the press had the necessary expressive content to fall within the ambit of freedom of expression.[208] The Court's approach in this case may, however, cause some confusion. For instance, the Court found that the prohibition on broadcasting audio recordings of court proceedings had the requisite expressive content to ground a section 2(b) violation, because "the official recordings are made available to the media to foster accuracy in their reporting, and reporting constitutes an expressive activity."[209] Such a standard suggests that regardless of whether an activity itself conveys or attempts to convey a meaning, which is the customary articulation of the test for expressive activity,[210] it is protected under freedom of expression as long as the absence of restriction serves to facilitate or improve *future* expression.

While this might be brushed off as a misreading, a comparable elision might have occurred in the case *U.F.C.W.*, which was recently released by the Supreme Court. The Alberta Court of Appeal had found that the prohibition on filming a picket line derived from privacy legislation constituted a violation of freedom of expression, because "if the union had a right to express its views about the collective bargaining process, the strike, and crossing of the picket line, *it also had a right to gather information for that purpose*."[211] This might be read to suggest that 2(b) protects the collection of any information, so long as one may want to comment on that information in the future. The Supreme Court largely sidestepped the issue, noting that while "there was some debate about whether the particular aspects of the conduct engaged in by the Union were protected by s. 2(*b*)," a holistic view of the legislation (which prohibited the collection, use, *and* dissemination of information) makes it clear that a 2(b) breach occurred.[212] However, the Court also implies that the *collection* of ("record-

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the recordings) or access to all areas in which government business is conducted. See also Chan, *supra* note 51 at 175.

208 See *CBC v Canada (AG)*, *supra* note 4 at para 40.

209 *Ibid* at para 48.

210 See e.g. *Irwin Toy*, *supra* note 60 at 970; *Greater Vancouver Transportation*, *supra* note 207 at para 27. See also Hogg, *supra* note 46 at 43.5; Slattery, *supra* note 119 ("for an activity to qualify as 'expressive' at the first stage, a claimant need only show that it attempts to convey a meaning in a non-violent way" at 248).

211 *UFCW*, *supra* note 107107 at para 65 [emphasis added]. The Court of Appeal seemed to rely, at least in part, on the fact that "[t]he picket line itself is an expressive activity" (*ibid* at para 62). This is surely true, but it is not as clear that it is the expressive activity of the *claimants* in this case.

212 *UFCW* SCC, *supra* note 107 at para 10.

ing and potentially using") personal information may have been independently protected under 2(b), as it was undertaken for the purpose of dissuading people from crossing the picket line.[213] This may simply have been recognition of the fact that physical activity itself can attempt to convey meaning;[214] however, to the extent that it implies that any restrictions on activity undertaken with an eye to eventual expression violate 2(b), it may be broadening the provision's scope significantly.

Similarly, while the Supreme Court did not focus much attention on the issue in *C.L.A.*,[215] the lower courts found that the expressive content in question was the "*potential* comments the CLA *would make*"[216] and the "*desire* to comment publicly."[217] A generous reading of the logic from these cases suggests that *all* information collection activity is *prima facie* protected by section 2(b), simply because one must be able to gather information on a subject matter in order to comment on that subject matter, and commenting is expression. This reading results in a potentially massive expansion of expressive freedom, insofar as it deviates from protecting activity that conveys or attempts to convey a meaning, to protecting all activity that in some way facilitates expression on some topic. At the same time, this expansive interpretation of expressive freedom butts up against the holdings in cases such as *National Post* and *C.L.A.* For instance, the Court stated in *C.L.A.* that there is "no general right of access to information"[218] and therefore found that in order to have the required expressive content to constitute a violation of freedom of expression, access to the information must be "necessary for the meaningful exercise of free expression on matters of public or political interest."[219]

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213 *Ibid* at para 11.

214 A difficult issue in its own right. See the discussion of Lamer J (as he then was) in *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123 at 1181–86, [1990] 4 WWR 481; see also *Irwin Toy*, *supra* note 60 at 968–71 (Dickson CJ).

215 *Supra* note 32 ("nothing would be gained by furthering this debate" at para 31). The Court instead applied the general freedom of expression framework.

216 *Criminal Lawyers' Association v Ontario (Ministry of Public Safety and Security)*, 2007 ONCA 392 at para 30, 280 DLR (4th) 193 [emphasis added].

217 *Ibid* at para 144, Juriansz JA, dissenting [emphasis added].

218 *CLA*, *supra* note 34 at para 35.

219 *Ibid* at para 36. In order to deal with the difficult issue of state action that only indirectly impacts expression, the Supreme Court of the United States has developed an "incidental effects" doctrine. See e.g. Stone, *supra* note 74:

> The rationale of the incidental effects doctrine is largely one of practicality. Because almost every law can have some effect on speech, and because individuals would readily claim they were engaged in speech if that claim could make out a defense to a criminal charge, an approach that required courts

What we seem to be left with, then, is a freedom of expression doctrine for which conduct must either convey or attempt to convey meaning[220] in order to be protected under the rubric of section 2(b), but with two (or perhaps three) exceptions. First, in the courtroom (and directly outside it), the ability to access or gather news and information is equated with expression—restrictions on access are, by virtue of that fact alone, considered restrictions on expression and violate 2(b). Second, there is an "extremely narrow right"[221] to information that is "a necessary precondition of meaningful expression on the functioning of government,"[222] with all of the difficulties that come with such a standard.[223] Finally, newsgathering as a means of accessing and collecting information—which is surely a way to "foster accuracy in their reporting, and reporting constitutes an expressive activity," in the terms of *C.B.C. v. Canada (A.G.)*[224]—is rhetorically protected in broad terms, but its protection is restricted in practice to the courthouse, and even then only as derivative of the general public's right of access, itself arising from expressive freedom.

There is a deep conceptual thicket here that is well beyond the scope of this paper, but it suffices to say that further burdening the concept of freedom of expression, which may be at its saturation point, by including the conceptually distinct notion of press freedom may be unwise. Independent treatment of freedom of the press with regard to non-expressive activity (most notably newsgathering), as proposed here, would allow the Supreme Court to offer constitutional protection in appropriate cases while neither bending the freedom of expression framework intended for cases in which the conduct being prohibited or restricted is itself *expressive*, nor sidestepping its strictures altogether through the *ad hoc* extension of protection.

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seriously to consider the incidental effects of laws on speech-related activities in *every* case would be a judicial nightmare" (*ibid* at 208).

220 See *Irwin Toy*, *supra* note 60 at 970; Hogg, *supra* note 46 at 43.5; Slattery, *supra* note 119 at 248.

221 Daniel Guttman, "*Criminal Lawyers' Assn. v. Ontario*: A Limited Right to Government Information under Section 2(b) of the Charter" (2010) 51 Sup Ct L Rev (2d) 199 at 199; see also *ibid* at 221.

222 *CLA*, *supra* note 34 at para 30.

223 See Chan, *supra* note 51 ("[t]he entire analysis depends on the level of generality with which one defines the subject matter to be debated" at 183–84); Ryder L Gilliland, "Supreme Court Recognizes (a Derivative) Right to Access Information" (2010) 51 Sup Ct L Rev (2d) 233 ("[t]he word "meaningful", a new addition to the matrix of section 2(b) Charter analysis, leaves uncertainty respecting when a right to access information can be invoked" at 233).

224 *CBC v Canada (AG)*, *supra* note 4 at para 48.

Moreover, erasing any distinction between directly expressive activity and that which may facilitate future expression[225] may not bode well for a coherent approach to section 2(b) that includes a meaningful role for press freedom. Speaking practically, while maximum access to information is a goal to be lauded in general, there may be situations in which a right to full public access would be problematic, but a right of access limited to those undertaking press-like functions may be perfectly viable.[226] Characterizing press claims of access in such cases as freedom of expression claims compels making access available either to the public as a whole or to no one at all and ignores the strength of the more limited and compelling claim: that the public as a whole should be *informed*, and those undertaking that newsgathering and disseminating function should (and viably could) have access. As Timothy Dyk has argued in the American context:

> Analyzing the situation in terms of expressive activity obscures the distinction between the different *functions* served by press and public access. The right being asserted is to have access to information, not to communicate it. By mischaracterizing newsgathering activity as expressive in nature, this approach allows press access only when the public has a right of access for expressive activity at the particular location and ignores the critical issue of whether special access for newsgathering should be permitted.[227]

Providing discrete treatment to press freedom would serve the valuable objectives not only of promoting analytical clarity but also of focusing attention on what is really at stake in press freedom cases, on the inter-

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[225] Other cases may have inaugurated this conceptual slippage, notably *Baier v Alberta*, 2007 SCC 31, [2007] 2 SCR 673, in which the Court found at para 33 that running for the office of school trustee had the required "expressive aspects" to ground a s 2(b) violation. In dissent, LeBel J noted that "[n]early everything people do creates opportunities for expression if 'expression' is viewed expansively enough" (*ibid* at para 76). See also Richard E Charney, "The Shaky Foundation of 'Statutory Platforms': A Comment on *Baier v. Alberta*" (2008) 42 Sup Ct L Rev (2d) 115 at 118–21.

[226] See e.g. the prison visitation cases in the US (*Saxbe*, *supra* note 48). Another example may be in the case of areas that by necessity are closed off to the general public, but may permit some supervised access, such as the location of the tragic train derailment in Lac-Mégantic, Quebec (see Paul Wells, "Time to Lift the Curtain at Lac-Mégantic" *MacLean's* (8 July 2013), online: MacLean's <www2.macleans.ca/2013/07/08/time-to-lift-the-curtain-at-lac-megantic/>). While there might be very good reason not to extend public access to the disaster zone on the reasoning that such access is derivative of freedom of expression, there may be little reason to prohibit press access on the logic that the press acts as a surrogate of the public to ensure the public remains informed. Indeed, Dyk, *supra* note 74, has discussed this very issue (in such cases, the press acting as a surrogate for the public "achieves the goal of obtaining and disseminating information in a way that public access cannot" at 935).

[227] *Ibid* at 936 [footnote omitted]. See also Nimmer, *supra* note 24 ("the Court cannot properly assess the balance in each situation without distinguishing between the separable press and speech interests" at 655).

ests to be protected, and on the reasons why—instead of simply throwing everything into the free expression and section 1 mix and seeing what comes out. To avoid the prospect of under-protected press freedom or an overloaded conception of expressive freedom, we should seek to foster an "independent *Charter* guarantee that stands apart from, and is protected in different ways than, expressive freedom."[228]

At this point, it is worth revisiting an objection raised by the Supreme Court in *National Post*. The Court in that case declined to offer protection to confidential source relationships, in part, because freedom of expression is not limited to (presumably more responsible) media actors, but applies to "everyone", from the mainstream press, to tweeters, to street corner preachers.[229] Admittedly, under the proposed framework freedom of the press is extended to all of those undertaking legitimate press-like functions, whether or not they do so for the Toronto Star, a non-profit organization, or an unincorporated blog; however, this is only so to the extent they are exercising that freedom in accordance with the framework proposed above. Protecting the function assumed by the claimant, as opposed to the claimant as a member of a class, would make freedom of the press (like every other fundamental freedom) available to everyone provided they are engaging in the protected activity. This is a democratizing feature of the framework proposed here, not a regrettable bug, and has the added benefit of best fulfilling the purpose of press freedom: enabling the public's right to know.

On this understanding, the preliminary constitutional issue is not whether the press should enjoy greater constitutional protection than others, nor whether extending constitutional protection in some circumstances requires extending it in all of them. The scope and content of press freedom are important and difficult issues and have been (at least in a preliminary fashion) addressed above. The logically prior question is whether freedom of the press as specifically entrenched in the *Charter* has discrete and independent constitutional significance, and whether it protects at least some activity that is not directly expressive but is nevertheless instrumental to the values and purposes of section 2(b) and the *Charter* more broadly. It is only once this is answered in the affirmative, as the Supreme Court's rhetoric and this article suggest it should be, that the inquiry turns to who should be granted protection and in what circumstances. Answering these questions is the purpose of both the above framework and, ultimately, a meaningful section 1 analysis. I do not

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[228] Cameron, "The Other 2(b) Freedom", *supra* note 5 at 21. See also Cameron, "Quixotic Journey", *supra* note 12 (advocating "a theory of the press that defines its content as an independent entitlement" at 193).

[229] See *National Post*, *supra* note 9 at para 40.

doubt that there may be factors and circumstances unforeseen here that will require judicial deliberation, creativity, and caution. However, I have faith that our courts are up to the task of securing this long-overlooked freedom and ensuring that it is properly balanced with important social interests.

Without a doubt, the proposed framework, as with all other *Charter* rights and freedoms articulated at a high level of abstraction, will require drawing lines that have only been roughly sketched here. Who is engaged in press-like activity with a view to publication? What activity is inherently as opposed to only contingently or potentially harmful? What constitutes press activity that serves the public interest in line with the values underlying press freedom specifically and section 2(b) more broadly? When has state action in fact amounted to a breach of press freedom? When is an infringement nevertheless demonstrably justified? Should there be greater allowance in section 1 for information collected for certain purposes (for example, to hold public officers and bodies to account) than for others? And on and on as far as the imagination will permit. However, the fact that line drawing is required does not imply the "pen should not even be lifted."[230] The always-quotable Oliver Wendell Holmes once noted that where to draw the line is "the question in pretty much everything worth arguing in the law."[231] My proposed framework undoubtedly leaves much to be argued about, and in many ways it supplies more questions than answers. However, refusing entirely to undertake the challenging process of defining press freedom fails to give proper recognition to the text and purpose of the *Charter* and undermines the Supreme Court's own pronouncements regarding the vital and unique importance of press freedom in fulfilling the *raison d'être* of section 2(b).

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[230] Turn of phrase borrowed, with apologies, from Major J, dissenting, in *Winnipeg Child and Family Services (Northwest Area) v G (DF)*, [1997] 3 SCR 925 at para 95, 152 DLR (4th) 193.

[231] *Irwin v Gavit*, 268 US 161 at 168, 45 S Ct 475 (1925).