

The Future of Privacy: The Conflict with Free Expression

Paper Presented at the CIAJ Annual Conference, October 2014

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Protecting privacy in the modern context poses many challenges. Perhaps the most fundamental of these is defining what we mean by ‘privacy’ in the first place. This is a notoriously difficult task: There is no consensus on a *conceptual* definition of privacy in the theoretical literature, and various common law jurisdictions employ different tests for identifying when a *legal* right to privacy will arise.¹ As important as this definitional work is, in a practical sense it is only half of the story when examining the ‘future of privacy in the information age’—the subject of this panel presentation—for, even if we assume a right to privacy is established (using *any* legal or conceptual framework), the claimant’s right to control or prevent disclosure of ‘private information’ will inevitably conflict with the defendant’s right to freedom of speech. Unless a principled framework for adjudicating between these rights is established, there is a real danger that even a robust conception of privacy may ultimately be sacrificed on the alter of free expression.² Put simply, privacy’s future depends very much on its relationship with free speech.

Developing a principled structure for reconciling competing claims to privacy and speech has taken on a new urgency in light of two recent developments in Canadian law. The first is the Ontario Court of Appeal’s recognition of a common law tort of invasion of privacy in *Jones v. Tsige*.³ This tort is modelled on the American *Restatement* tort of ‘intrusion upon seclusion’.⁴ Although wrongdoing does not depend on the defendant disclosing the claimant’s private information,⁵ there is in my view every reason to believe that this tort will evolve to capture disclosures in the future,⁶ at which point mediating between conflicting *Charter* values of privacy and speech will become necessary.

A second recent development concerns the Supreme Court of Canada’s decision in *Information and Privacy Commissioner of Alberta v. United Food and Commercial Workers, Local 401*.⁷ The Court held

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¹ For a discussion of these issues, see: C. Hunt, “Privacy in the Common Law: A Critical Appraisal of the Ontario Court of Appeal’s Decision in *Jones v. Tsige*” (2012) 37 *Queen’s L.J.* 665; C. Hunt, “Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for Canada’s Fledgling Privacy Tort” (2011) 37:1 *Queen’s Law Journal* 167.

² Indeed, this is a fair way to characterize the American position: see D. Anderson, “The Failure of American Privacy Law” in B. Markesinis ed., *Protecting Privacy* (Oxford University press, 1999), p. 139.

³ *Jones v. Tsige*, 2012 ONCA 32.

⁴ *Restatement of the Law of Torts, Second*, para. 652, American Law Institute.

⁵ See *Jones v. Tsige*, 2012 ONCA 32, para. 70.

⁶ The Court’s rationale for creating a privacy tort draws upon the doctrine of *Charter* Values and notes the importance of ‘informational privacy’ in particular (see *ibid.*, at paras. 41-3, 66), which has been interpreted by the Supreme Court to mean “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others” (*ibid.*, at para. 41, citations omitted). Lower courts in Ontario and Nova Scotia have already begun to recognize a common law disclosure action (for a review of cases, see A. Cameron and Mimi Palmer, “Invasion of Privacy as a Common Law Tort in Canada” (2009) 6:11 *Can. Privacy. L. Rev.* 105) and four provinces have statutory privacy torts applicable to disclosures (B.C.—*Privacy Act*, RSBC 1996, c. 373; Sask.—*The Privacy Act*, RSS 1978, c P-24; MB.—*The Privacy Act*, CCSM c P125; NFLD & Lab.—*Privacy Act*, RSNL 1990, c P-22).

⁷ 2013 SCC 62.

that Alberta's Personal Information Protection Act⁸ (PIPA) infringed a union's right to free expression under s. 2(b) of the *Charter*, and that this infringement could not be justified under s.1. The Court declared PIPA as a whole unconstitutional, and suspended this declaration for one year to afford the Alberta legislature time to recalibrate the balance between privacy and speech in a constitutionally compliant manner. The *United Food and Commercial Workers* decision has implications beyond Alberta's borders. Two other provinces (British Columbia⁹ and Quebec¹⁰) have private sector data protection legislation that is nearly identical to Alberta's PIPA; and the federal Personal Information Protection and Electronic Documents Act¹¹ (PIPEDA), which applies by default to private sector organizations in every province without discrete data protection legislation, is likewise substantially similar to Alberta's PIPA¹². Crucially, as these regimes suffer from the same defects as Alberta's PIPA, they too are now presumptively unconstitutional for the reasons given by the Court in *United Food and Commercial Workers*.¹³ As a result, recalibrating the balance between privacy and speech is now a matter of national importance if Canada's various private sector data protection regimes are to survive.

It is the purpose of this paper to sketch, in broad terms, the essential features of a potential adjudicative model for mediating between privacy and free speech. I will begin, in section 1, by outlining Canada's various private sector data protection regimes. In section 2 I will summarize the Supreme Court's decision in *United Food and Commercial Workers*, explaining the specific constitutional problem that manifested in that case—namely, that PIPA subordinated an important exercise of 'picket line union speech' to a relatively anodyne privacy interest. In section 3 I will argue that, although this specific defect formally drove the conclusion in *United Food and Commercial Workers*, a close reading of the case reveals that there is a much more fundamental problem: The Alberta PIPA, like all other Canadian private sector data protection regimes, is structured in a manner that prevents decision-makers from striking a fair balance between privacy and free speech on a case by case basis. This is because these regimes are organized such that all privacy interests will automatically be protected at the expense of free speech unless the latter can be fitted into a discrete legislative exemption; and, if an exemption does apply, then such speech will automatically be protected at the expense of any privacy claim. The Court in *United Foods and Commercial Workers* suggested that this *a priori* ordering of one right above another is wrong in principle, and hinted that to be constitutionally compliant data protection regimes must be structured so that decision-makers can assess the contextual importance of conflicting privacy and speech interests on a case by case basis. In section 4, I will outline the essential principles that should guide *ad hoc* balancing. Specifically, I propose that decision-makers (administrative, in the data-protection context; and judicial, in the tort context) take broad guidance from the common law test to balancing privacy and free expression currently applied in English tort law. I briefly outline the essential features of this English approach, and integrate it into Canadian law by showing it is

⁸ S.A. 2003, c. P-6.5.

⁹ Personal Information Protection Act, S.B.C., c. 63.

¹⁰ An Act Respecting the Protection of Personal Information in the Private Sector, R.S.Q. c.P-39.1.

¹¹ S.C. 2000, c.5.

¹² The federal cabinet has declared these three provincial regimes substantially similar to PIPEDA, thus suspending the operation of PIPEDA in those jurisdictions: see C. McNairn, *A Guide to the Personal Information Protection and Electronic Documents Act* (Markham: LexisNexis, 2010), at p. 9; Quebec: SOR/2003-174; Alberta: SOR/2004-219; British Columbia: SOR/2004-220.

¹³ See below, for a discussion.

broadly consistent with recent dicta from the Supreme Court of Canada. I conclude the paper by arguing that this English tort approach is sound in principle, and recommend it as a new structure for analysis to be followed by Canadian decision-makers grappling with the conflict between privacy and speech in all private law contexts.

(i) Private Sector Data Protection Legislation in a Nutshell

The legislative regimes for data protection in Canada are “something of a patchwork”.¹⁴ The Personal Information Protection and Electronic Documents Act¹⁵ (PIPEDA) is a default federal statute that applies to all private sector organizations in Canada that collect, use or disclose “personal information” in the course of their “commercial activities”. Personal information is defined extremely broadly in PIPEDA as “information about an identifiable individual”, excluding names and telephone numbers.¹⁶ It clearly captures information contained in photographs.¹⁷

If applicable, PIPEDA imposes ten broad obligations (referred to as “fair information principles”¹⁸) on organizations with regard to the proper handling of personal information.¹⁹ Three of these principles are core: the first, and ostensibly most important, is the idea of individual consent; the second and third concern organizational transparency and accountability in the collection, use and disclosure of personal information.²⁰ Importantly, PIPEDA also imposes an overarching, additional, limitation: for the collection, use or disclosure of personal information to be legitimate, it must be done “*only* for purposes that a reasonable person would consider [...] appropriate in the circumstances”.²¹ This requirement was inserted after lobbying by privacy advocates, who argued that organizations should be required to justify their purposes in handling personal information.²² The objective reasonableness requirement serves to buttress the consent paradigm. For our purposes, it is fair to characterize the PIPEDA regime as one that conditions fair information practices upon a combination of individual *consent* and objective *reasonableness* in the collection, use and disclosure of personal information.²³

¹⁴ T. Scassa, “Journalistic Purposes and Private Sector Data Protection Legislation: Blogs, Tweets and Information Maps” (2010) 35 Queen’s L.J. 733, at p. 741.

¹⁵S.C. 2000, c.5.

¹⁶ Ibid. s. 2 (1).

¹⁷For a discussion, see: A. Levin, “Big Brother and Little Brother: The Potential Erosion of Workplace Privacy in Canada” (2007) 22 Can. J. L. Soc. 197, at pp. 205-6.

¹⁸ See C. McNairn, *A Guide to the Personal Information Protection and Electronic Documents Act* (Marham: LexisNexis, 2010), at p. 3 (Noting PIPEDA’s privacy principles incorporate the Model Code adopted by the Technical Committee on Privacy of the Canadian Standards Association).

¹⁹ Ibid., schedule 1. These principles are: Accountability; Identifying Purpose; Consent; Limiting Collection; Limiting Use, Disclosure and Retention; Accuracy; Safeguards; Openness; Individual Access; Challenging Compliance.

²⁰See L. Austin, “Is Consent the Foundation of Fair Information Practices? Canada’s Experiment Under PIPEDA” (2005), available at: <http://ssrn.com/abstract=864364>, p. 1.

²¹ Ibid., s. 5.(3) (emphasis added).

²² See L. Austin, “Is Consent the Foundation of Fair Information Practices? Canada’s Experiment Under PIPEDA” (2005), available at: <http://ssrn.com/abstract=864364>, text at fn. 56.

²³ Ibid. at pp.27-30.

Section 7 of PIPEDA contains a number of discrete exceptions which permit organizations to collect, use or disclose personal information without the subject's consent.²⁴ The exceptions are numerous and detailed, and apply differently depending on whether the impugned activity concerns 'collection', 'use' or 'disclosure'. The broadest, and most important, exceptions are those contained in s.7(1)(c), which exempt organizations from PIPEDA where "the collection is solely for journalistic, artistic or literary purposes". Importantly, although the need for consent is obviated in these circumstances, this provision nevertheless remains subject to the overarching objective reasonableness requirement in s. 5(3).

Three provinces (Alberta²⁵, British Columbia²⁶ and Quebec²⁷) have enacted private sector data protection legislation that the federal Cabinet has deemed "substantially similar" to PIPEDA.²⁸ This designation means private sector organizations in these three provinces are exempt from the operation of PIPEDA.²⁹ PIPEDA remains applicable to private organizations in the rest of Canada, however. The Alberta and B.C. Acts (referred to as PIPAs) are very similar.³⁰ Like PIPEDA, their purpose is to govern the collection, use and disclosure of personal information, which is defined equally as broadly as it is in PIPEDA.³¹ Furthermore, like PIPEDA, the PIPAs place substantive restrictions on the collection, use and disclosure of personal information by imposing substantively similar 'fair information principles'. Importantly, like PIPEDA, these acts also contain a series of detailed exemptions, the most important being the non-application of PIPA if the personal information is collected, used or disclosed for journalistic, artistic or literary purposes and for "no other purpose"³². Finally, like PIPEDA, the PIPAs subject such dealing in personal information to an overarching reasonableness requirement.³³

(ii) *Information and Privacy Commissioner of Alberta v. United Food and Commercial Workers, Local 401*

The dispute arose when the United Food and Commercial Workers union, which represents employees of Edmonton's Palace Casino, recorded and photographed individuals crossing a picket line when entering the Palace during a lawful strike. The union subsequently placed several of these photographs on a website ('www.casinoscabs.ca') that it operated. The union also inserted various disparaging comments as captions in relation to some of these photographs, which were designed to embarrass the individuals concerned. Three individuals who were recorded without their consent filed complaints with the Alberta Information and Privacy Commissioner under PIPA. The Commissioner appointed an adjudicator, who decided in favour of the complainants. She held that

²⁴ PIPEDA, s. 7(1)-(5)..

²⁵ *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ('PIPA-AB').

²⁶ *Personal Information Protection Act*, S.B.C. 2003, c. 63 ('PIPA-BC').

²⁷ An Act Respecting the Protection of Personal Information in the Private Sector, R.S.Q. c.P-39.1.

²⁸ C. McNairn, *A Guide to the Personal Information Protection and Electronic Documents Act* (Marham: LexisNexis, 2010), at p. 9 (Quebec: SOR/2003-174; Alberta: SOR/2004-219; British Columbia: SOR/2004-220).

²⁹ PIPEDA s. 26(2)(b) and C. McNairn, *A Guide to the Personal Information Protection and Electronic Documents Act* (Marham: LexisNexis, 2010), at p. 9.

³⁰ The Quebec legislation will not be discussed in this paper.

³¹ PIPA-AB, ss. 1, 3; PIPA-BC, ss. 1, 2.

³² PIPA-AB, s. 4(3) 9b)(c); PIPA-BC, s. 3(2) (b).

³³ PIPA-AB, s. 11, s. 14, s.15; PIPA-BC, s. 4, s. 12, s.13.

the union's activities clearly involved the collection, use and disclosure of personal information, which the complainants had not consented to. The only question was whether one of the Alberta PIPA's statutory exceptions applied to justify the union's activities. The adjudicator rejected the union's argument that the recordings and disclosures were made for "journalistic purposes *and for no other purpose*"³⁴, as required by the relevant exception, because she found as a fact that the union was pursuing several ancillary non-journalistic purposes, including pressuring the employer to end the labour dispute.³⁵ She ordered that the union stop collecting and disclosing personal information.

On judicial review³⁶, the Chambers judge held that the union's activity had expressive content, and therefore fell within the scope of s. 2(b) of the *Charter*. She further held that, as the adjudicator's decision directly limited the union's freedom to engage in expressive activities, there was an infringement of s. 2(b) which could not be justified under s. 1 of the *Charter*. On further appeal, the Alberta Court of Appeal³⁷ agreed with the Chambers judge that the union's expressive activities were infringed, and that this could not be justified under s. 1. The union was granted a constitutional exemption from the application of PIPA.

On further appeal, Justices Abella and Cromwell, writing for the unanimous Supreme Court, agreed with the Court of Appeal, though differed in the remedy. PIPA was declared unconstitutional in its entirety, with the declaration of invalidity suspended for twelve months.³⁸ The Court had no trouble finding that the union's recordings and disclosures were inherently expressive activities, and thus protected under s. 2(b) of the *Charter*; nor did it hesitate to find that s. 2(b) was clearly infringed by the adjudicator's order.³⁹ The bulk of the Court's analysis focused instead on whether PIPA's trenching on the union's right to free expression could be justified under s. 1 of the *Charter*.

The first question under the justification analysis—whether PIPA serves a pressing and substantial objective—was answered in the affirmative. PIPA, according to the Court, aims to "provid[e] an individual with [a right to] some measure of control over his or her personal information", which is a right "intimately connected" to individual "autonomy, dignity and privacy" which are themselves "fundamental values that lie at the heart of a democracy".⁴⁰ Moreover, the need to take measures to secure informational privacy in the "modern context" is obvious and demonstrable, the Court said, given the multiplicity of "new technologies" which "give organizations an almost unlimited capacity to collect personal information, analyze it, use it and communicate it to others for their own

³⁴ Alberta PIPA, s. 4(3), emphasis added.

³⁵ For a list of the union's stated purposes in recording and disclosing these images, which included deterring violence, dissuading people from crossing the picket line, creating training materials, and boosting morale on the picket line, see *Information and Privacy Commissioner of Alberta v. United Food and Commercial Workers, Local 401*, 2012 SCC 62, at para. 6.

³⁶ (2011) ABQB 415.

³⁷ (2012) ABCA 130.

³⁸ It is noteworthy that both the Information and Privacy Commissioner of Alberta, and the Attorney General of Alberta, stated in oral argument that this was their preferred remedy in the event the appeal was unsuccessful: see *Information and Privacy Commissioner of Alberta v. United Food and Commercial Workers, Local 401*, 2012 SCC 62, at para. 40.

³⁹ *Information and Privacy Commissioner of Alberta v. United Food and Commercial Workers, Local 401*, 2012 SCC 62, at para. 17.

⁴⁰ *ibid.*, at para. 19.

purposes”.⁴¹ Interestingly, the Court further opined that, insofar as PIPA aims to secure some measure of informational privacy, it, and other legislation like it⁴², should be “characterized as quasi-constitutional” in nature.⁴³

The second question under the justification analysis—whether PIPA is rationally connected to the objectives of protecting informational privacy—was also answered in the affirmative. According to the Court, there was really “no serious question” here, since the respondent had conceded that PIPA “directly addresses the objective [of protecting informational privacy] by imposing broad restrictions on the collection, use and disclosure of personal information”.⁴⁴

The critical question under the justification analysis was that of proportionality, namely: Is the *Charter* infringement on s. 2(b) “too high a price to pay for the benefit of the law”?⁴⁵ The Court determined that it was, for the deleterious effects on speech outweighed the salutary effects of protecting privacy in the context of this case. Regarding the privacy side of the equation, the Court emphasized that PIPA’s scope was unduly broad: Absent an applicable exception, or the subject’s consent, it forbids the collection, use and disclosure of *all* personal information, regardless of the nature of the information or the context of its collection or use.⁴⁶ The facts of the instant case illustrated this over-breadth. The Court suggested that a combination of contextual factors in this case rendered the actual privacy interest relatively weak, yet it was legislatively protected nonetheless. These factors included: (i) that the images were captured while the complainants were at an “open political demonstration [that] was readily and publically observable”⁴⁷; (ii) the complainants should have reasonably expected that their “images could be caught and disseminated by others” when they crossed the picket line in the circumstances of the case⁴⁸; (iii) and no

⁴¹ *ibid.*, at para. 20.

⁴² *ibid.*, at para. 19 (“...[L]egislation which aims to protect control over personal information should be characterized as ‘quasi-constitutional’ because of the fundamental role privacy plays in the preservation of a free and democratic society...”). One clear implication of this statement is that provincial statutory privacy torts—which each aim to protect informational privacy—should likewise be characterized as being ‘quasi-constitutional’. It follows, for the reasons set out below, that the approach to mediating between privacy and speech under these torts should be aligned with the balancing approach I outline below in relation to data protection regimes. The four provinces that have statutory privacy torts are: (B.C.) Privacy Act, R.S.B.C. 1996, c. 373; (M.B.) The Privacy Act, C.C.S.M., 2009 c. P125; (N.F.L.D.) Privacy Act, R.S.N.L. 1990, c.P-22; (Sask.) The Privacy Act, R.S.S. 1978, c. P-24.

⁴³ *Information and Privacy Commissioner of Alberta v. United Food and Commercial Workers, Local 401*, 2012 SCC 62, at para. 19; *cf.* 21-22.

⁴⁴ *ibid.*, at para. 20.

⁴⁵ *ibid.*, at para. 20.

⁴⁶ *ibid.*, at para. 25, *cf.* para. 15.

⁴⁷ Note that the Court was careful to emphasize that mere exposure of oneself or personal information to public view does not automatically deprive him or her of a legitimate privacy interest: see *ibid.*, at para. 27. A right to privacy was found to exist in relation to a person being photographed in a public place by the Supreme Court of Canada in *Aubry v. Editions Vice-Versa Inc.*, [1998] 1 S.C.R. 591.

⁴⁸ Note that the Supreme Court has previously held that the mere fact that a person can foresee the risk of a privacy invasion, but proceeds nonetheless, is not itself sufficient to invalidate his or her privacy interest. This point was made in the context of a s.8 *Charter* case in *R. v. Wong*, [1990] 3 S.C.R. 36 (La Forest J.) and recently in the workplace context in *R. v. Cole*, 2012 SCC 53 (Teacher had a reasonable expectation of privacy in the contents of employer owned and issued laptop, notwithstanding annual notices given by the employer that the computer could be searched and was not private). Commentators have argued that a simplistic risk analysis approach—wherein knowingly courting the risk of invasion results in one’s consent to the same—is undesirable in principle, for it leads to self-erosion of privacy, and is a logical *non sequitur*: see J. Craig,

“biographical details”, such as “intimate details of the lifestyle or personal choices”, of the complainants were captured or revealed.⁴⁹ In the end, the Court’s analysis reveals that PIPAs blanket protection of *all* personal information is simply too blunt a tool to survive *Charter* scrutiny when the inevitable effect is a trenching on s. 2(b). Instead, the Court suggested that data protection regimes must be context-sensitive, by tailoring the protection they offer in light of the extent to which privacy rights (and the values underpinning them) are *actually* engaged in the case at hand.⁵⁰ I will return to this point below.

The Court then turned to scrutinize the expression side of the equation, noting that the deleterious effects on s.2(b) “weigh[ed] heavily” in the proportionality analysis.⁵¹ PIPA’s essential shortcoming, which was of “utmost significance” in the Court’s view, is that it did not make *any* room for many types of expressive activity which may be undertaken by unions for “legitimate purposes” in the context of labour disputes.⁵² This is because PIPA’s structure is such that *all* personal information is protected, absent consent or an applicable, specific exception. Without a discrete exception for picket-line ‘union speech’ (which does not exist in any Canadian private sector data protection regime), many expressive union activities were necessarily curtailed without having any regard to the nature or importance of the context-specific speech right being asserted. This conclusion was itself sufficient to find PIPA’s effects on speech disproportionate and hence unjustified under s.1.

As this finding formally drove the conclusion in this case, the Court determined that it was unnecessary to go further and scrutinize the “precise expressive activity at issue”.⁵³ Nevertheless, it did take the opportunity to speak in general terms about the importance of ‘union speech’ during labour disputes, noting that it has “long recognized the fundamental importance” of expressive activities in this context.⁵⁴ Freedom of expression, the Court said, is an “*essential* component of labour relations”⁵⁵, for, amongst other things: (i) it is “directly related to the *Charter* protected right of workers to associate to further common workplace goals under s.2(d)”⁵⁶; (ii) it “contributes to self-understanding, as well as the ability to influence one’s working and non-working life”⁵⁷; (iii) it plays a “significant role” in alleviating the “presumptive [power] imbalance” between employer and employee⁵⁸; and (iv) it can “enhance broader societal interests” by providing an “avenue for unions to promote collective bargaining issues as public ones to be played out in civic society” and not be confined to picket lines.⁵⁹

“Invasion of Privacy and Charter Values: The Common Law Tort Awakens” (1997) 42:2 McGill L.J. 355, at p. 396; cf. C. Hunt, “Privacy in the Common Law: A Critical Appraisal of the Ontario Court of Appeal’s Decision in *Jones v. Tsige*” (2012) 37 Queen’s L.J. 665, at p. 676-7 (discussion with sources).

⁴⁹ *Information and Privacy Commissioner of Alberta v. United Food and Commercial Workers, Local 401*, 2012 SCC 62, at para. 26.

⁵⁰ See *ibid.*, at paras. 25, 26.

⁵¹ *ibid.*, at para. 28.

⁵² *ibid.*, at para. 28.

⁵³ *ibid.*, at para. 38.

⁵⁴ *ibid.*, at para. 29.

⁵⁵ *ibid.*, at para. 29, emphasis original.

⁵⁶ *ibid.*, at para. 30.

⁵⁷ *ibid.*, at para. 31.

⁵⁸ *ibid.*, at para. 32.

⁵⁹ *ibid.*, at para. 33.

(iii) A Priori Ordering of One Right Above Another: A Structural Defect in Data Protection Regimes (and Why a Simple Legislative Exception for ‘Picket Line Union Speech’ Will Not Suffice)

A relatively simple, but in my view unsatisfactory, way to salvage Alberta’s PIPA (and, by extension, other data protection regimes) is to create a new discrete exception for unions that lies alongside the journalistic, artistic and literary exceptions already contained in these statutes. Framing such an exception in terms similar to the existing exceptions would read something like this:

‘This Act does not apply to the following:

The collection, use or disclosure of personal information if the collection, use or disclosure, as the case may be, is undertaken by a labour union in the context of a lawful strike’.

Had such an exception existed in *United Food and Commercial Workers*, the *Charter* challenge would not have been brought by the union at all. Given the adjudicator’s finding that the union was in fact engaged in expressive activities in the context of a lawful strike, the union would have been exempt from the operation of PIPA and hence free to pursue these expressive activities despite the invasion of privacy that resulted.

One could argue, in favour of this approach, that it leaves the broad text and structure of Canada’s various data protection regimes basically undisturbed. Such an exception would also permit an analysis that could be aligned with that currently followed when other exceptions, such as ‘journalistic purposes’, apply. The case law, limited as it is, suggests that if in fact the expressive activity qualifies as an exercise in ‘journalism’ which is undertaken solely for a ‘journalistic purpose’, then PIPA/ PIPEDA have no application, irrespective of the nature and extent of the privacy invasion at hand.⁶⁰ In other words, adjudicators treat the application of this exception as quasi-judicial in nature: If it covers the expressive activity in fact, then the organization is exempt from the operation of PIPA/PIPEDA and the adjudicator has no authority to intervene to impose restrictions on the collection, use or disclosure of personal information.⁶¹ The same analysis could be undertaken for union-speech in the context of labour disputes, thus harmonizing the proposed new exception with the structure and analysis of the current approach to the journalistic purposes exception.

The difficulty with such an approach is that, upon closer inspection, it is inconsistent with the underlying reasoning in *United Food and Commercial Workers*. Recall that the Court identified PIPA’s critical shortcoming as being that, absent consent or an applicable exception, it protects all ‘personal information’ (however trivial it may actually be, from a privacy perspective), while making no room for a union’s expressive activities (no matter how important they may actually be, from a free

⁶⁰ An Alberta PIPA case taking this approach is: *Calgary Herald Group Inc.* (16 February 2007), OIPC Alberta Order P2005-004; a federal PIPEDA case taking this approach is: *Radio Station Collected and Disclosed Personal Information for Journalistic Purposes* (28 February 2003), PIPEDA Case Summary #2003-123. For a good discussion of these cases, see: T. Scassa, “Journalistic Purposes and Private Sector Data Protection Legislation: Blogs, Tweets and Information Maps” (2010) 35 *Queen’s L.J.* 733, at pp. 750-55.

⁶¹For a discussion, see: T. Scassa, “Journalistic Purposes and Private Sector Data Protection Legislation: Blogs, Tweets and Information Maps” (2010) 35 *Queen’s L.J.* 733, at p. 755.

speech perspective).⁶² Expressed in more general terms, the essential problem is this: PIPA (like other Canadian data protection statutes) appears by its structure to order *a priori* all privacy claims above most exercises of free expression, because all ‘personal information’ is protected but all speech is not—unless it can be fitted into a discrete legislative exception (such as literary, artistic or journalistic purposes). PIPA’s fundamental defect, then, is a *structural* one: It ranks privacy above many types of speech *a priori*. This, the Court said, cannot be squared with the proportionality analysis, because neither privacy nor expression is an “absolute value”.⁶³ According to the Court, rather than order one right above the other in the abstract, proper and proportionate mediation requires a context-sensitive approach in which “both the nature of the privacy interests implicated and the nature of the expression [are] considered” and an “appropriate balance” is sought.⁶⁴

Seen in this light, it seems that a new discrete exception for ‘picket line union speech’ will not suffice to make PIPA constitutionally compliant. The reason is that such an exception would create the same problem, but in reverse, as existed in *United Food and Commercial Workers*: The effect would be to order *a priori* all exercises of ‘picket line union speech’ (however trivial they may actually be in the context of the case) above *any* privacy interest (irrespective of the nature or severity of the intrusion at hand). Such structural ordering, in which the exercise of one right (union speech) is ranked above another important interest (privacy) *a priori*, and in the abstract, is inconsistent with the Court’s injunction in *United Food and Commercial Workers* to undertake context-sensitive balancing which is responsive to the values underlying each interest as they actually arise in each case.⁶⁵

(iv) The Way Forward: Balancing Privacy and Free Speech in a Principled and Charter Compliant Manner

Canada’s data protection regimes are structurally flawed. They order privacy claims above those exercises of expression that do not fit into a discrete legislative exemption; and, if an exemption does apply (such as ‘journalistic purposes’), then such speech will automatically be ordered above any privacy claim. All of this ordering is done *a priori*, without any contextual assessment of the actual importance of either *Charter* value in the case at hand.

Moreover, this structural ordering will likely produce absurd results in practice, insofar as it will sometimes mean a contextually less important right is protected at the expense of a contextually more important one. Indeed, the Court hinted that this was the case in *United Food and Commercial workers* itself, when it emphasized the relatively weak nature of the privacy interest at hand, and

⁶² *Information and Privacy Commissioner of Alberta v. United Food and Commercial Workers, Local 401*, 2012 SCC 62, at para. 25.

⁶³ *Ibid.*, at para. 38.

Ibid., at para. 38.

⁶⁴ *Ibid.*, at para. 38; cf. paras. 25, 26.

⁶⁵ If the above interpretation of the Court’s reasoning in *United Food and Commercial Workers* is correct, it follows that the current approach in Canada’s data protection regimes to the literary, artistic and journalistic purposes exceptions should also be regarded as unconstitutional, for they order these categories of speech above any privacy claim, regardless of the extent to which the competing privacy and expression interests (and their respective underlying values) are actually engaged in any particular case.

contrasted that with the elevated importance of ‘picket line union speech’ as an essential exercise of free expression.⁶⁶ Of course, the reverse problem can also manifest under the current approach. Consider the recent scandal in France, where a tabloid reporter, using a long range zoom lens, photographed the Duchess of Cambridge topless while she was resting with her husband by a private swimming pool. The invasion of privacy here is obviously extreme; and the value of this ‘journalism’ is trivial at best. Yet, under the current PIPA/PIPEDA approach this activity would be permitted if it qualifies in fact as ‘journalism’ (thus falling into the legislative exemption applicable thereto), which it surely does unless artificial definitions of that term are adopted.

Adjudicators seeking to reconcile the conflict between privacy and speech in a principled and *Charter*-compliant manner require a new structure for analysis—one that examines the contextual importance of each right, and permits, on a case by case basis, the more valuable right to prevail. What might this structure look like? One place to look for guidance is England. The highest courts in that jurisdiction have been grappling with the contest between privacy and speech on a regular basis, and a principled balancing test has recently emerged. Below, I briefly describe this English approach to balancing. I then argue that the essential ingredients of this approach resonate with dicta that has emerged in a series of Supreme Court of Canada decisions that concerned reconciling conflicts between competing *Charter* rights and values. In my view, the broad parameters of this approach provide a sound adjudicate model for data protection regimes and also for adjudicating between conflicting *Charter* values in the context of Canada’s inchoate privacy tort.

(a) The English ‘Ultimate Balancing Test’

In *Campbell v. MGN*⁶⁷, the House of Lords was faced with a conflict between privacy and speech when a tabloid took and subsequently published photographs of a supermodel as she existed a Narcotics anonymous meeting. The House was divided in the result, with a narrow 3-2 majority deciding that Campbell’s privacy rights ought to prevail over the tabloid’s right to free expression in the circumstances of this case.⁶⁸

Despite this difference of opinion in the result, the Law Lords each followed the same structure for analysis. Their approach shares three essential features. First, and most fundamentally, the rights to privacy and speech are treated as having equal value in principle. In other words, neither right has

⁶⁶ See section (iii), above, for a discussion of this point.

⁶⁷ *Campbell v. MGN*, [2004] 2 A.C. 457 (HL).

⁶⁸ Note that the rights to privacy and free expression are located in the United Kingdom *Human Rights Act* 1998, which incorporates these rights as enshrined in the *European Convention on Human Rights* (Articles 8 and 10, privacy and expression, respectively). Technically, the *Human Rights Act*, like the Canadian *Charter*, applies only to public bodies. However, European and English courts will apply the values underpinning these rights ‘horizontally’ to private parties in a manner closely analogous to the Canadian doctrine of ‘*Charter* values’. For an example of ‘horizontal’ applied to English common law, resulting in the creation of a de facto privacy tort, see *Campbell v. MGN*, [2004] 2 A.C. 457 (HL). For an example of the doctrine of *Charter* values being applied to Canadian common law to create a privacy tort, see *Jones v. Tsige*, 2012 ONCA 32.

‘as such’ priority over the other.⁶⁹ The second feature follows from the first: Because privacy and speech are of equal value in principle, ranking their relative importance cannot be done in the abstract, but rather must be assessed on a case by case basis. In other words, courts must evaluate the contextual importance of each right as actually being claimed. Each of the Law Lords spent considerable time discussing the importance of the respective privacy and expression rights being exercised by the parties in *Campbell*. In attempting to quantify this relative importance, the Lords considered the extent to which the rights as exercised actually engaged with the theoretical reasons why society values those rights in the first place. This is the key to the second step. The third feature is the proportionality inquiry. Lord Hoffmann explained that the “question” here is the “extent to which it is necessary to qualify the one right in order to protect the underlying value which is protected by the other.” The focus is on ensuring that the “extent of the qualification” is “proportionate to the need.”⁷⁰ Lord Hope added that it is important when conducting a proportionate balancing of rights to ensure that each right is “impaired” as “minimally” as possible, thus allowing for the maximum exercise of each.⁷¹ Fenwick and Phillipson, leading academic commentators on the *European Convention on Human Rights*, have subsequently termed this approach to proportionality the “parallel analysis.” It requires a court to consider, first, whether the justifications in favour of protecting speech support the limit on privacy proposed in the case; and then to consider, second, whether the justifications in favour of privacy support the limit proposed on speech.⁷² This parallel approach is important: It flows naturally from, and strives to respect, the fundamental premise that privacy and speech are of equal value in principle. Without the parallel analysis, there is a danger that one right would operate as the primary right and the other as a limited exception thereto, much in the way Canada’s data protection regimes place privacy above speech unless a discrete categorical exception applies.⁷³

The above approach has subsequently been endorsed, summarized and renamed the ‘ultimate balancing test’ by Lord Steyn, for a unanimous House of Lords, in the case of *Re S*, as follows:

First, neither article [referring to articles 8 and 10 of the *European Convention on Human Rights*, which confer rights to privacy and free expression, respectively] has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.⁷⁴

⁶⁹ *Campbell v. MGN*, [2004] 2 A.C. 457 (HL), at paras. 12 (Lord Nichols); 55 (Lord Hoffmann); 113 (Lord Hope); 111, 138 (Baroness Hale); 167 (Lord Carswell, agreeing with Lord Hope); cf. *In Re S (FC) (A Child) (Appellant)* 2004 UKHL 47, at para. 17.

⁷⁰ *ibid.*, at para. 55.

⁷¹ *ibid.*, at para. 115.

⁷² H. Fenwick and G. Phillipson, *Media Freedom Under the Human Rights Act* (Oxford: Oxford University Press, 2006), at p. 705; cf., M. Warby et al., *The Law of Privacy and the Media*, 2nd (Oxford: Oxford University Press, 2011), at s. 12.192. This ‘parallel analysis’ has been judicially endorsed post *Campbell: T v. BBC* [2007] EWHC 1683 (QB), at para. 6.

⁷³ See section (iii), above, for elaboration.

⁷⁴ *In Re S (FC) (A Child) (Appellant)* 2004 UKHL 47, at para. 17.

(b) Integrating the ‘Ultimate Balancing Test’ into Canadian Law

The essential features of *Re S* resonate with dicta from the Supreme Court of Canada.

In *Dagenais v. Canadian Broadcasting Corp.*,⁷⁵ a case involving a conflict between free expression (s.2(b)) and full answer and defense (s. 11(d)), the Court held that the starting point for analysis must be to avoid a “hierarchical approach”⁷⁶ that orders one right above the other. This reflects the English approach, insofar as neither right has ‘as such’ priority over the other. The Court in *Dagenais* justified this analytical starting point by emphasizing that both of these rights were given “equal status” under the *Charter*, and so any *a priori* ranking should be avoided.⁷⁷ In my view, this same *Dagenais* proposition (presumptive equality) should apply to the contest between privacy and speech as well.

There is, however, an initial difficulty with this analogy. While a decision rendered by an adjudicator under PIPA may formally engage s. 2(b) of the *Charter* (i.e. if a privacy interest is vindicated at the expense of speech, as happened at first instance in *United Food and Commercial Workers* itself), the reverse scenario is unlikely to arise. This is because s.8 of the *Charter* does not confer a right to privacy *per se*, but rather a right to be free from unreasonable search and seizure. An adjudicator’s decision to vindicate a speech right at the expense of a privacy claim would not amount to a ‘search’, and hence s. 8 would not be formally engaged. As a result, it might be argued that since privacy invasions not amounting to a state search are not constitutionally protected, the privacy interests in such cases should be subordinated to the *Charter* right to free expression. In other words, the privacy *interest* should not be treated equally with the speech *right*.

In my view, this argument is not persuasive. It would unduly formalistic to automatically subordinate all privacy *interests* to expression *rights*, solely on the basis that the latter may be technically engaged by an adjudicator’s decision while the former likely will not be. It must be emphasized that although the *Charter* does not expressly create a right to privacy *per se*, the Supreme Court has “consistently interpreted the *Charter*’s s. 8 protection against unreasonable search and seizure as protecting the underlying right to privacy”.⁷⁸ And there is no doubt that the Supreme Court vests privacy—even absent a state search—as being of fundamental importance. Indeed, in *United Food and Commercial workers* itself, the Court went so far as to declare that any legislation aimed at protecting personal information, including PIPA, is “quasi-constitutional because of the fundamental role privacy plays in the preservation of a free and democratic society”.⁷⁹ Moreover, the importance of privacy, outside the context of a state search, was sufficiently compelling for the unanimous Ontario Court of Appeal to invoke the doctrine of *Charter* values to create a freestanding common

⁷⁵*ibid.*, at p. 838.

⁷⁶*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 838.

⁷⁷ *Ibid.*; *cf. R. v. Mills*, [1999] 3 S.C.R. 668, at para. 61: “No single principle is absolute and capable of trumping the others; all must be defined in light of competing claims”.

⁷⁸ Per Justice Sharpe, for the unanimous Ontario Court of Appeal, in *Jones v. Tsige*, 2012 ONCA 32, at para. 39, citing: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Dyment*, [1988] 2 S.C.R. 417; *R. v. Tessling*, 2004 SCC 67.

⁷⁹ *Information and Privacy Commissioner of Alberta v. United Food and Commercial Workers, Local 401*, 2012 SCC 62, at para. 19; *cf. paras. 22, 24*, where the Court noted the “importance of the protection of privacy in a vibrant democracy cannot be overstated...[It] is intimately connected to individual autonomy [and] dignity...[which are] self-evidently significant social values.

law privacy tort in *Jones v. Tsige*.⁸⁰ Taken together, all of this is to say that the *Charter* ‘value’ of privacy, even absent a state search, is arguably of sufficient importance to justify affording it equal abstract standing with free expression. If this argument is correct, and it can be said that privacy and expression are given equal (albeit, in the case of privacy, somewhat indirect) status in the *Charter* itself, then it makes sense to place them on an equal footing, at the outset, for the reason given by the Court in *Dagenais*. Indeed, much of the dicta in *United Food and Commercial Workers* is consistent with this premise.⁸¹

If *Dagenais* means privacy and speech should be treated as having equal value in the abstract, how then would the Supreme Court mediate between them? The answer probably lies in the framework recently articulated by the Chief Justice in *R. v. N.S.*⁸² The case involved a conflict between the *Charter* rights of freedom of religion (s.2(a)) and an accused’s right to a fair trial, including full answer and defence (ss. 7 and 11(d), respectively), which were in conflict when a Crown witness refused to remove her niqab while testifying in court. Building on dicta from two other Supreme Court decisions which concerned a conflict between trial fairness and freedom of expression in the context of publication bans⁸³, McLachlin C.J.C. developed a four-part framework, the “principles” of which are to have “broader application”⁸⁴ to all cases of conflicting *Charter* rights. The framework, *mutatis mutandis*, requires courts to first enquire, under steps one and two, whether two *Charter* rights are engaged.⁸⁵ Step three requires courts to try and find “a way to accommodate both rights” and thereby “avoid the conflict between them”.⁸⁶ If both rights cannot be “accommodated”, and a conflict is therefore unavoidable, the court must, under step four, undertake a proportionality analysis to determine which right ought to prevail in the specific circumstances of the case, having regard to the “competing harms” and “salutary effects” flowing to each right if either was to succeed.⁸⁷

The fourth step of the *N.S.* framework is plainly the critical part of the analysis. Its ultimate aim is to achieve a “just and proportionate balance”⁸⁸ between conflicting *Charter* values. In my view, if we assume the ‘just’ and ‘proportionate’ criteria are intended to have independent meaning, they can (and should) be interpreted in a manner that reflects the essence of the second and third analytical steps emerging in *Campbell*.

With respect to the latter concept, the Court in *N.S.* spoke of finding a “proportionate balance”⁸⁹ between the exercise of conflicting *Charter* rights. In *Hill v. Church of Scientology of Toronto*, the Court stated that in addressing conflicting *Charter* values in cases of private litigants the “balancing

⁸⁰ *Jones v. Tsige*, 2012 ONCA 32, at para. 45.

⁸¹ See *Information and Privacy Commissioner of Alberta v. United Food and Commercial Workers, Local 401*, 2012 SCC 62, at para. 38; cf. paras. 25, 26.

⁸² *R. v. N.S.*, 2012 SCC 72.

⁸³ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R.v. Mentuck*, 2001 SCC 76.

⁸⁴ See *R. v. N.S.*, 2012 SCC 72, at para. 7.

⁸⁵ *Ibid.*, at para. 9; cf. 32.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, at paras. 8- 9.

⁸⁸ *ibid.*, at para. 31.

⁸⁹ *R. v. N.S.*, 2012 SCC 72, at para. 31.

must be more flexible than the traditional s.1 analysis”⁹⁰, and in *R. v. Mentuck* the Court noted that proportionality in the private-litigant context is intended to “reflect [but not reproduce exactly] the substance of the *Oakes* test and its valuable function in determining what reasonable limits on the rights to be balanced might be”.⁹¹ Taken together, it seems fair to conclude that two long established *Oakes* principles should govern this inquiry, as long as they are applied flexibly. The first is the concept of ‘minimal impairment’ and the second is that of proportionality itself, meaning a comparison of the competing salutary and deleterious effects to each right if either was to succeed in the specific case at hand.⁹² As we have seen, both of these concepts—minimal impairment and overall proportionality—are incorporated in the final step of *Campbell/ Re S* framework. It is important, moreover, when applying this flexible *Oakes* test, that decision-makers follow the ‘parallel analysis’ identified above, as this flows from, and helps to reinforce, the *Dagenais* premise of abstract equality between *Charter* values.

If we assume *N.S.*’s ‘just’ balance criterion means something analytically distinct from the ‘proportionate’ balance one, I think we can interpret it as a reflection of the second step of the *Campbell/Re S* test. That is, a ‘just’ balance will be achieved when it can be said that the contextually more important right succeeds by curtailing the contextually less important right.⁹³ The crucial question then becomes how do we decide a right’s importance? Since the analytical starting point must be that privacy and speech are of equal value, and hence neither is deemed more important than the other *a priori*, this assessment cannot be done in the abstract. Rather, consistent with the fundamental premise of formal equality, courts must assess each right’s importance not by way of generalizations but instead by analyzing the value of each interest, as actually being claimed, in the context-specific facts of each case. This point was made plain by the Court in *United Food and Commercial Workers*.⁹⁴ A similar values driven analysis has been recommended by several other Canadian courts as well.⁹⁵ It is here that the second step of the *Campbell / Re S* framework is

⁹⁰ *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 97.

⁹¹ *R. v. Mentuck*, [2001] 3 S.C.R. 442, at para. 23; cf. *R. v. N.S.*, 2012 SCC 72, at para. 35 (noting “This is a proportionality inquiry, akin to...*Oakes*”).

⁹² Cf. *Information and Privacy Commissioner of Alberta v. United Food and Commercial Workers, Local 401*, 2012 SCC 62, at paras. 38, 25-6.

⁹³ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 838, calls for an avoidance of a “hierarchical approach to rights” and recommends an approach that “fully respects the importance of both rights”. In my view, these injunctions are not offended when a factually less important right receives less protection than a factually more important right does. *Dagenais* simply counsels against adopting an analytical starting point that regards one *Charter* right as more important than another in the abstract.

⁹⁴ *Information and Privacy Commissioner of Alberta v. United Food and Commercial Workers, Local 401*, 2012 SCC 62, at paras. 25-26 (Noting that a key deficiency with PIPA’s structure is that it automatically ordered all privacy claims above ‘union speech’, because no discrete exception existed for the latter; and that this was offensive, not just because of the deleterious effects on this important speech, but also because it was inherently disproportionate to treat all privacy claims equally without regard to “the nature of the personal information” (para. 25) or the “extent to which significant [privacy] values were actually impaired in the context of this case” (para. 26).

⁹⁵ In *Aubry v. Editions Vice-Versa Inc.*, [1998] 1 S.C.R. 591, at para. 64, in which the Supreme Court of Canada grappled with competing claims to privacy and free speech under Quebec’s civil law, the Court looked to the underlying “values at issue” which had to be “balanced” in a manner that was sensitive to their “purpose” which is to “strengthen the democratic ideal [of] individual freedom”; cf. *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, in which Wilson J. noted that “a particular right or freedom may have a different value depending on the context”...[and]...that freedom of expression has a greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute”; cf. *Ontario*

particularly useful, for it tells us that a right's importance is to be measured by assessing the extent to which it engages with the theoretical reasons why society values that right in the first place.

It is important to emphasize that although *N.S.* arose in the context of two competing *Charter* rights which were formally engaged, there is little doubt that the Supreme Court would endorse a consistent approach (anchored in balance and proportionality) in the administrative context where the conflict is between a *Charter* right and a *Charter* value.⁹⁶ Indeed, recall that in *United Food and Commercial Workers* itself, the Court suggested that the essential feature of a constitutionally complaint framework for PIPA is one in which “the nature of the privacy interests implicated and the nature of the expression [are] considered in striking an appropriate balance”.⁹⁷ Likewise, in *Dore v. Barreau du Quebec*,⁹⁸ the Court recently emphasized that administrative decision-makers must always consider fundamental *Charter* values⁹⁹ and their decisions must balance these with relevant statutory objectives by undertaking a flexible¹⁰⁰ proportionality analysis.¹⁰¹ In the Court's view, doing so necessarily requires flexing the same “justificatory muscles” as the formal *Oakes* analysis—namely “balance and proportionality”.¹⁰²

Conclusion

The Supreme Court was right to find Alberta's PIPA unconstitutional. In the circumstances of that case, PIPA subordinated important ‘union speech’ to a relatively anodyne privacy claim. That said, the constitutional defect in PIPA goes much deeper than the imbalance between the specific privacy and speech interests at stake in *United Food and Commercial Workers*. A close reading of the case reveals that the fundamental defect is actually a structural one. PIPA, like all other Canadian private sector data protection regimes, orders the right to privacy above all exercises of speech that do not fit into discrete legislative exemptions; and, if an exemption does apply, then such speech will automatically be ordered above any privacy claim. Importantly, all of this ordering is done *a priori*, without any contextual assessment of the actual importance of either right as it is actually being

(Attorney-General) v. Dieleman, 1994 ONSC 7509, at para. 596, in which the court held that in “determining the scope of s.2(b) [of the *Charter*], the emphasis, indeed the exclusive focus, is to be on those values, interests and purposes which underlie freedom of expression”; cf. *R. v. Violette*, 2008 BCSC 1154, at para. 37, the court stated, following the approach of La Forest J. in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, that “Quite simply, the level of protection to which expression may be entitled will vary with the nature of the expression. The further that expression is from the core values of this right the greater will be the ability to justify the state's restrictive action”.

⁹⁶ Recall that s.8 of the *Charter* will not likely be formally engaged by an adjudicator's decision in the data protection context, because said decision, even if limiting of privacy, will not constitute a state ‘search and seizure’.

⁹⁷ *Information and Privacy Commissioner of Alberta v. United Food and Commercial Workers, Local 401*, 2012 SCC 62, at para. 38.

⁹⁸ 2012 SCC 12.

⁹⁹ *ibid.* at para. 35.

¹⁰⁰ *ibid.* at paras. 37, 40.

¹⁰¹ *ibid.* at para. 55.

¹⁰² *ibid.*, at para. 5. The Court observed that where statutory decision-makers strike a *proportionate balance* between *Charter* values and statutory objectives, their decision, if judicially reviewed, will be evaluated on a ‘reasonableness’ standard, applying the *Oakes* formula. In the context of data protection legislation, this means the statutory decision-maker would be required to balance the *Charter* value of free expression against the importance of personal privacy (because the protection of privacy is the core objective of data protection legislation), and a reasonable decision rendered here will consequently also pass an *Oakes* analysis on judicial review (see especially paras. 55-8).

exercised in the individual case. The Court suggested that this approach is wrong in principle—for neither privacy nor speech are “absolute value[s]”—and it also hinted at the right solution: Decision-makers need to strike “an appropriate balance” by examining the “nature” of the privacy and expression “interests” actually implicated in each case.¹⁰³ There is no reason to believe the Court would confine this suggestion to the data protection context. It ought to apply equally to the tort context as well.

I have argued that the House of Lords’ ‘ultimate balancing test’, which is used to resolve conflicts between privacy and free expression in tort law, provides a sound model for adjudication in Canada, and that its essential features are consistent with dicta emanating from the Supreme Court of Canada in a series of cases concerning how to balance competing *Charter* rights and values.

In my view, each of the essential features of this English approach, as reflected in Canada, is also sound in principle. Regarding the first premise—abstract equality between privacy and speech—*Dagenais* must be right that arranging *Charter* rights hierarchically is discordant with the *Charter*’s structure because the document itself draws no such distinctions. Moreover, if *Charter* rights were ordered hierarchically (with one operating as the primary right and another as a limited exception thereto, as Canadian data protection regimes are currently structured), the effect would be to turn the *Charter*’s purpose on its head. Where the *state* has infringed either privacy or free expression courts must consider whether this can be justified by evaluating various countervailing societal interests that form part of the s.1 analysis. However, where *both litigants are private parties* alleging their rights are in conflict, regarding one right (privacy, say) as the primary norm and the other (expression, say) as a limited exception thereto would in effect treat expression in the same way as the countervailing societal interests that form part of the s.1 derogation analysis. Fenwick and Phillipson, the leading academic commentators on the structure and operation of the *European Convention on Human Rights*, have noted the problem with such an approach is that it “collapses the basic scheme of the Convention, which, as a human rights treaty is, axiomatically, to afford human rights a special status over other [societal] interests”.¹⁰⁴ These comments apply with equal force to the *Charter*, insofar as it too necessarily elevates primary rights above the societal interests that may serve to limit them under s.1. Accordingly, it is a mistake to approach the conflict between privacy and speech by saying, in effect, ‘free speech will be protected unless a sufficient privacy interest justifies its limitation’; or, ‘privacy will be protected unless a sufficiently strong free speech justification applies’.¹⁰⁵ If this argument is correct, and thus prior ordering of rights should be avoided, the only practical alternative is to begin from the premise of formal equality, as both *Dagenais* and the English ‘ultimate balancing test’ recommend.

Recall that the second step of the ‘ultimate balancing test’ calls for an “intense focus on the comparative importance of the specific rights being claimed in the individual case”.¹⁰⁶ As

¹⁰³ *Information and Privacy Commissioner of Alberta v. United Food and Commercial Workers, Local 401*, 2012 SCC 62, at para. 38.

¹⁰⁴ H. Fenwick and G. Phillipson, *Media Freedom Under the Human Rights Act* (Oxford: Oxford University Press, 2006), at p. 701.

¹⁰⁵ As explained above, this latter proposition essentially reflects how Canada’s data protection regimes are currently framed, because all ‘personal information’ is protected unless a discrete legislative exception applies, the most important being speech that qualifies factually as being an exercise in ‘literary, artistic or journalistic’ expression.

¹⁰⁶ *Re S* (HL), at para. 17.

mentioned, this is a values driven analysis, insofar as the court must scrutinize the extent to which the right, as claimed, is connected to the theoretical reasons why we value that right in the first place. In my view, such an approach is self-evidently correct; indeed, it is difficult to imagine how else a court could assign value to any right in as principled a manner¹⁰⁷. The only viable alternative method would be to distinguish between different categories of privacy and free speech and assign relative values to each in the abstract. After all, there are “undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others”.¹⁰⁸ The difficulty with such an approach, however, is that it is inevitably too blunt a tool to operate effectively. For example, one might argue that ‘medical information’ should be treated as a highly important category of private information, but what about information that a celebrity has a cold? Likewise, most people would probably agree that exercises of ‘journalism’ should rank high on any list of valuable speech, but what about a tabloid’s “vapid tittle-tattle about the activities of footballers’ wives and girlfriends”?¹⁰⁹ The point, for our purposes here, is simply to note that even within ostensibly simple categories of privacy and expression, numerous gradations exist. Rather than attempt to identify each gradient and assign a value in the abstract, it makes more sense to evaluate each right, as actually claimed, in the context of the specific case, as recommended by *United Food and Commercial Workers*¹¹⁰ and reflected in the English approach. Of course, it bears emphasizing that this presupposes decision-makers familiarize themselves with the theoretical literature concerning the values that underpin privacy and expression.¹¹¹

The final step—proportionality—is also sound in principle. It compels decision-makers to examine the deleterious and salutary effects to each right if either were to prevail, and thereby flows naturally from, and strives to respect, the principle of abstract equality, recommended by *Dagenais*. The proportionality principle also has practical advantages, insofar as it helps decision-makers reach a principled resolution in cases where the competing rights are of roughly equal strength. A good illustration of this can be found in a *T v. BBC*¹¹², a recent English case applying the *Re S* framework. Justice Eady issued an injunction preventing the media from identifying the claimant in a

¹⁰⁷ This values based approach has been recommended by various important commentators. See: R. Gavison, “Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Speech” (1992) 43 South Car. L. Rev. 437, at pp. 462-3; E. Barendt, *Freedom of Speech* (2nd) (Oxford: Oxford University Press, 2005), at pp. 5-6; H. Fenwick and G. Phillipson, *Media Freedom Under the Human Rights Act* (Oxford: Oxford University Press, 2006), at pp. 706, 782-3.

¹⁰⁸ *Campbell v. MGN*, [2004] 2 A.C. 457 (HL), at para. 148 (per Baroness Hale).

¹⁰⁹ Of this, Baroness Hale opined there was no “real public interest”: *Jameel v Wall Street Journal Europe Sprl* [2007] 1 A.C. 359 (HL), at para. 147.

¹¹⁰ See *Information and Privacy Commissioner of Alberta v. United Food and Commercial Workers, Local 401*, 2012 SCC 62, at paras. 38, and 25-6.

¹¹¹ Although this literature is vast, there is broad agreement about what these values are. Privacy theorists typically refer to dignity, autonomy and personhood as the key underlying deontological values; and free speech theorists emphasize the importance of democracy, truth and individual dignity as underpinning that right. For comprehensive overviews of both, with sources, see: C. Hunt, “Conceptualizing Privacy and Elucidating its Importance: Foundational Considerations for Canada’s Fledgling Privacy Tort” (2011) 37:1 *Queen’s Law Journal* 167; K. Greenwalt, “Free Speech Justifications” (1989) 89 *Columbia Law Review* 119; E. Barendt, *Freedom of Speech* (2nd) (Oxford: Oxford University Press, 2005). Courts in Canada and England are increasingly sensitive to these underlying same values; for recent examples, see: *Campbell v. MGN*, [2004] 2 A.C. 457 (HL) (privacy and expression values discussed); *Grant v. Torstar Corp.*, 2009 SCC 61 (free speech values discussed); *Jones v. Tsige*, 2012 ONCA 32 (privacy values discussed).

¹¹² *T v BBC* [2007] EWHC 1683 (QB).

documentary illustrating an adoption practice which placed children with foster parents while evaluating the mother's fitness. Eady J. accepted there were strong arguments in favour of both privacy and speech. His Lordship noted that depicting the birth mother in hospital giving up her child was obviously a "massive" invasion of privacy; but, equally, he observed that "no one doubts" there is a "genuine public interest in the subject of adoption and child care" and the documentary was in his view a "serious and informative" attempt to cover this subject.¹¹³ The proportionality principle justified an injunction because there was no need to identify the mother. In his Lordship's view, substantially the same story could be told in a less intrusive way by concealing her identity.¹¹⁴ In my view, this approach must be right in principle: By striving to minimally impair each right by permitting its maximum exercise compatible with the other, the proportionality principle facilitates balancing and respects abstract equality, especially in difficult cases where the competing rights are of approximately equivalent importance when examined in context.

It is worth emphasizing, in conclusion, that following the broad strokes of the 'ultimate balancing test' offers a very real practical appeal for Canadian jurists. English courts have been grappling with competing claims to privacy and expression on a regular basis over the past decade, and there is every indication that this trend will continue into the future. There is now a substantial body of case law—much of it at the appellate level—elucidating the nuanced considerations that fall under this broad balancing test. Structuring our inquiry in a similar manner will enable Canadian decision-makers to benefit from the English experience.

¹¹³ibid., at paras. 16-17.

¹¹⁴ibid., at paras. 18, 20.