SUPREME COURT OF CANADA

CITATION: Globe and Mail *v*. Canada (Attorney General), 2010 SCC 41

DATE: 20101022
DOCKET: 33114, 33097, 32975,

BETWEEN:

Globe and Mail, a division of CTVglobemedia Publishing Inc.
Appellant
and
Attorney General of Canada and Groupe Polygone Éditeurs inc.
Respondents
- and -
Fédération professionnelle des journalistes du Québec,
Ad IDEM/Canadian Media Lawyers Association, Astral Media Radio Inc.,
Groupe TVA inc., La Presse, ltée, Médias Transcontinental inc.,
Canadian Broadcasting Corporation and
Canadian Civil Liberties Association
Interveners

AND BETWEEN:

Globe and Mail, a division of CTVglobemedia Publishing Inc.
Appellant
and
Attorney General of Canada and Groupe Polygone Éditeurs inc.
Respondents
- and -
Barreau du Québec, Gesca Limitée, Joël-Denis Bellavance
and Canadian Civil Liberties Association
Interveners

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Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 102)	LeBel J. (McLachlin C.J. and Binnie, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ. concurring)

GLOBE AND MAIL *v.* CANADA (A.G.)

Globe and Mail, a division of CTVglobemedia Publishing Inc. *Appellant*

v.

Attorney General of Canada and
Groupe Polygone Éditeurs inc. *Respondents*

and

Fédération professionnelle des journalistes du Québec,
Ad IDEM/Canadian Media Lawyers Association, Astral Media Radio Inc., Groupe TVA inc.,
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Globe and Mail, a division of CTVglobemedia Publishing Inc. *Appellant*

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Globe and Mail, a division of CTVglobemedia Publishing Inc. *Appellant*

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Indexed as: Globe and Mail *v.* Canada (Attorney General)

2010 SCC 41

File Nos.: 33114, 33097, 32975.

2009: October 21; 2010: October 22.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE SUPERIOR COURT OF QUEBEC AND THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Canadian Charter — Human rights — Quebec Charter of Human Rights and Freedoms — Evidence — Journalist-source privilege — Freedom of expression — Access to information — Professional secrecy — Newspaper journalist receiving information from confidential unauthorized government source concerning company retained by federal government under Sponsorship Program — Newspaper publishing information alleging misuse and misdirection of public funds — Journalist compelled on cross-examination to answer questions possibly leading to identity of source — Newspaper objecting — Whether relationship protected by class-based journalist-source privilege — Whether basis for privilege constitutional or quasi-constitutional rooted in Canadian Charter and Quebec Charter rights — Whether common law framework to recognize case-by-case privilege relevant for civil litigation proceedings under Quebec law — Canadian Charter of Rights and Freedoms, s. 2(b) — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 3, 9, 44.

Constitutional law — Charter of Rights — Freedom of expression — Publication ban — Newspaper journalist receiving information from confidential unauthorized government source

concerning company retained by federal government under Sponsorship Program — Information published including details about confidential settlement negotiations between government and company — Court making order prohibiting journalist from reporting and publishing further details concerning settlement negotiations — Whether order having effect of limiting journalist's freedom of expression rights under Canadian Charter — Whether publication ban necessary to prevent serious risk to proper administration of justice

— Whether salutary effects of publication ban outweigh deleterious effects — Canadian Charter of Rights and Freedoms, s. 2(b).

These three appeals have as their origin the litigation flowing from what is known as the Sponsorship Scandal. In March 2005, the Attorney General of Canada filed a motion in the Quebec Superior Court seeking to recover the money paid by the federal government under the Sponsorship Program. The proceedings were instituted against several of the companies and individuals retained by the Program and implicated in the Scandal, including Groupe Polygone. In response, Groupe Polygone advanced a defence of prescription under the *Civil Code of Quebec*. As the litigation proceeded, and in support of its prescription defence, Groupe Polygone obtained orders requiring that certain persons, including several federal government employees, answer questions aimed at identifying the source of a journalist's information. Based primarily on information received from a confidential unauthorized government source, L, a Globe and Mail journalist, had written a series of articles about the Sponsorship Program, alleging the misuse and misdirection of public funds. The Globe and Mail brought a revocation motion in respect of the orders issued by the Superior Court judge, arguing that their effect would be to breach journalist-source privilege. L testified on the motion and was cross-examined by counsel for Groupe Polygone. Counsel for the Globe and

Mail objected to a number of questions posed to L, on the basis that they were either irrelevant, or that his answering them would lead to a breach of journalist-source privilege. The judge refused to recognize the existence of a journalist-source privilege and the objections were dismissed. Leave to appeal was denied by the Court of Appeal ("journalist-source privilege appeal"). Rather than have its journalist answer the questions, the Globe and Mail sought to discontinue the revocation proceedings. The judge refused to allow the discontinuance, and the Quebec Court of Appeal dismissed the appeal ("discontinuance appeal"). Meanwhile, during the hearing of the discontinuance proceedings, Groupe Polygone complained about leaks dealing with the content of confidential settlement negotiations in which it was engaged with the Attorney General, the details of which were reported by L and published by the Globe and Mail. In response, and on his own motion, the Superior Court judge made an order prohibiting L from further reporting and publishing on the state of the negotiations. While the Globe and Mail objected to what it insisted was a publication ban, and one issued without the benefit of hearing from either party, the judge maintained that the order was not a publication ban, providing no further written or oral reasons for his decision. The Quebec Court of Appeal again rejected the Globe and Mail's application for leave to appeal ("publication ban appeal").

In the journalist-source privilege appeal in this Court, the Globe and Mail argued that a class-based journalist-source privilege is rooted in the *Canadian Charter* and the *Quebec Charter*. In the alternative, it contended that the common law Wigmore doctrine to establish privilege on a case-by-case basis, but modified to account for the civil law tradition, is applicable. The Globe and Mail also challenged the order prohibiting the publication of information related to the settlement negotiations, as well as the order denying the discontinuance.

Held: The journalist-source privilege appeal should be allowed and the matter remitted to the Superior Court of Quebec for consideration in accordance with the reasons for judgment. The publication ban appeal should be allowed and the order prohibiting the publication of information relating to the settlement negotiations quashed. The discontinuance appeal should be dismissed as moot.

There is no basis for recognizing a class-based constitutional or quasi-constitutional journalist-source privilege under either the *Canadian Charter* or the *Quebec Charter*. For reasons set out in *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, and in particular the difficulty in defining such a heterogenous and ill-defined group of writers and speakers with the necessary degree of certainty, freedom of expression under the *Canadian Charter* and the *Quebec Charter* cannot constitute the basis for recognizing journalist-source privilege. Similarly, s. 44 of the *Quebec Charter*, which protects access to information, does not broaden the scope of the right beyond what is defined by the provision itself. While the s. 44 right can inform the protection of the confidential relationship between journalists and their sources, it cannot constitute the basis for recognizing the privilege. Finally, because journalists are not bound to professional secrecy by law, s. 9 of the *Quebec Charter*, which protects professional secrecy, cannot ground a quasi-constitutional right to the protection of media sources. There is, however, a basis in the laws of Quebec for a journalist-source privilege or an exemption from the general obligation to give evidence in civil cases. Despite its common law origins, the use of a Wigmore-like framework to recognize the existence of case-by-case privilege in the criminal law context is equally relevant for civil litigation matters subject to the laws of Quebec; recognition would result in consistency across the country, while preserving the distinctive legal context under the *Civil Code of Quebec*. This case-by-case

approach is consistent with the overarching principles set out in the *Civil Code*, the *Quebec Charter* and the *Canadian Charter*, and conforms with the law of evidence in Quebec as found in the *Civil Code* and the *Code of Civil Procedure*. It is also sufficiently flexible to take into account the variety of interests that may arise in any particular case.

Therefore, under the proposed test, to require a journalist to answer questions in a judicial proceeding that may disclose the identity of a confidential source, the requesting party must demonstrate first that the questions are relevant. If the questions are relevant, the court must then consider the four Wigmore factors: (1) the relationship must originate in a confidence that the source's identity will not be disclosed; (2) anonymity must be essential to the relationship in which the communication arises; (3) the relationship must be one that should be sedulously fostered in the public interest; and (4) the public interest served by protecting the identity of the informant must outweigh the public interest in getting at the truth. At the crucial fourth Wigmore factor, the court must balance the importance of disclosure to the administration of justice, against the public interest in maintaining journalist-source confidentiality. This balancing must be conducted in a context specific manner, having regard to the particular demand for disclosure at issue. The considerations relevant at the fourth Wigmore stage include: the stage of the proceeding when a claim of privilege is raised; the centrality of the issue to the dispute; whether the journalist is a party to the litigation, or simply a witness; whether the facts, information or testimony are available by any other means; the degree of public importance the journalist's story; and whether the story has been published and therefore already in the public domain. In this case, the Superior Court judge erred in concluding that it was preferable to compel L's answers on cross-examination. L was entitled to have the questions put to him challenged for relevancy, and his claim for privilege rigorously tested against

the Wigmore criteria. In particular, if the judge concluded that the first three factors favoured disclosure, he was then required to ask whether, on balance, the public interest in maintaining journalist-source confidentiality outweighed the importance of disclosure to the administration of justice. The public interest here, is based largely on whether the questions would tend to reveal the identity of L's confidential source. Ultimately, these matters are for the judge to determine, but in this case they were never considered because neither party was permitted to make submissions or tender evidence on the issue.

With respect to the publication ban appeal, the Superior Court's order must be assessed for what it is: a court-ordered publication ban which had the effect of limiting L's s. 2(*b*) freedom of expression *Canadian Charter* rights. The Superior Court judge therefore erred in not applying the *Dagenais/Mentuck* framework. The order was made without notice, without application and without the benefit of formal submissions from either party. By proceeding in this manner, in a case where there was no suggestion of urgency or delay inherent in hearing submissions that would prejudice either party, the Superior Court violated one of the fundamental rules of the adversarial process: it denied the parties an opportunity to be heard before deciding an issue that affected their rights. This, in itself, is sufficient to allow the appeal. Considering the publication ban on its merits, maintaining the confidentiality of settlement negotiations is a public policy goal of the utmost importance. However, confidentiality undertakings bind only the parties and their agents. Neither L nor the Globe and Mail was a party to the settlement negotiations. The wrong was committed by the government source who provided L with the information. Nothing in the record suggests that L was anything other than a beneficiary of the source's desire to breach confidentiality. L was not required to ensure that the information was provided to him without the source breaching any of her

legal obligations and he was under no obligation to act as her legal adviser. In any event, Polygone offered no tangible proof that its ability to effectively engage in settlement negotiations with the government has been irreparably harmed, nor has it offered any evidence of a serious risk to the administration of justice. At the time L's article was published, the fact that the parties were engaged in settlement negotiations was already a matter of public record. Even if the ban were necessary to prevent a serious risk to the administration of justice, its salutary effects do not outweigh its deleterious effects which are serious. Upholding the order would prevent the story from coming to light, stifling the media's exercise of their constitutionally mandated role to report stories of public interest, such as one where the federal government is seeking to recover a considerable amount of public money because of an alleged fraud against a government program. Given the result in the journalist-source privilege and publication ban appeals, the discontinuance appeal is moot.

Cases Cited

Referred to: *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *Gesca ltée v. Groupe Polygone Éditeurs inc. (Malcom Média inc.)*, 2009 QCCA 1534, [2009] R.J.Q. 1951, rev'g 2009 QCCS 1624 (CanLII); *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429; *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Société d'énergie de*

la Baie James v. Lafarge Canada Inc., [1991] R.J.Q. 637; *Boiler Inspection and Insurance Company of Canada v. Corporation municipale de la paroisse de St-Louis de France*, [1994] R.D.J. 95; *Grenier v. Arthur*, [2001] R.J.Q. 674; *Centre de réadaptation en déficience intellectuelle de Québec v. Groupe TVA inc.*, [2005] R.J.Q. 2327; *Drouin v. La Presse ltée*, [1999] R.J.Q. 3023; *Tremblay v. Hamilton*, [1995] R.J.Q. 2440; *Landry v. Southam Inc.*, 2002 CanLII 20587; *Marks v. Beyfus* (1890), 25 Q.B.D. 494; *D. v. National Society for the Prevention of Cruelty to Children*, [1978] A.C. 171; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647; *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 89 O.R. (3d) 81; *Charkaoui (Re)*, 2008 FC 61, [2009] 1 F.C.R. 507; *Attorney-General v. Mulholland*, [1963] 2 Q.B. 477; *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487; *Secretary of State for Defence v. Guardian Newspapers Ltd.*, [1985] 1 A.C. 339; *In re An Inquiry under the Company Securities (Insider Dealing) Act 1985*, [1988] 1 A.C. 660; *Globe and Mail v. Canada (Procureur général)*, 2008 QCCA 2516 (CanLII); *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721; *Kosko v. Bijimine*, 2006 QCCA 671 (CanLII); *Waldridge v. Kennison* (1794), 1 Esp. 143, 170 E.R. 306; *Histed v. Law Society of Manitoba*, 2005 MBCA 106, 195 Man. R. (2d) 224; *Canadian Broadcasting Corp. v. Paul*, 2001 FCA 93, 198 D.L.R. (4th) 633; *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Peat Marwick Thorne v. Canadian Broadcasting Corp.* (1991), 5 O.R. (3d) 747; *Amherst (Town) v. Canadian Broadcasting Corp.* (1994), 133 N.S.R. (2d) 277; *Canada (Canadian Transportation Accident Investigation and Safety Board) v. Canadian Press*, [2000] N.S.J. No. 139 (QL); *Calgary Regional Health Authority v. United Western Communications Ltd.*, 1999 ABQB 516, 75 Alta. L.R. (3d) 326; *K. v. K. (E.)*, 2004

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Constitution Act, 1867, s. 96.

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Royer, Jean-Claude, et Sophie Lavallée. *La preuve civile*, 4e éd. Cowansville, Qué.: Yvon Blais, 2008.

Vallières, Nicole. "Le secret professionnel inscrit dans la Charte des droits et libertés de la personne du Québec" (1985), 26 *C. de D.* 1019.

[33114] APPEAL from an order of the Superior Court of Quebec (de Grandpré J.) dismissing objections to evidence. Appeal allowed.

[33097] APPEAL from a judgment of the Quebec Court of Appeal (Pelletier, Doyon and Duval Hesler JJ.A.), 2009 QCCA 235, [2009] J.Q. nº 713 (QL), dismissing an application for leave to appeal from an order of de Grandpré J. prohibiting the publication of information. Appeal allowed.

[32975] APPEAL from a judgment of the Quebec Court of Appeal (Otis, Forget and Côté JJ.A.), 2008 QCCA 2464, [2008] J.Q. nº 13554 (QL), 2008 CarswellQue 12763, dismissing an application for leave to appeal from an order of de Grandpré J. refusing to grant a discontinuance of proceedings. Appeal dismissed.

William Brock, *Guy Du Pont*, *David Stolow* and *Brandon Wiener*, for the appellant.

Claude Joyal, for the respondent the Attorney General of Canada.

Patrick Girard, *Louis P. Bélanger, Q.C.*, and *Frédéric Pierrestiger*, for the respondent Groupe Polygone Éditeurs inc.

Christian Leblanc, *Marc-André Nadon* and *Chloé Latulippe*, for the interveners Fédération professionnelle des journalistes du Québec, Ad IDEM/Canadian Media Lawyers Association, Astral Media Radio Inc., Groupe TVA inc., La Presse, ltée, Médias Transcontinental inc., the Canadian Broadcasting Corporation, Gesca Limitée and Joël-Denis Bellavance.

Jamie Cameron, *Christopher D. Bredt* and *Cara F. Zwibel*, for the intervener the Canadian Civil Liberties Association.

Michel Paradis, *François-Olivier Barbeau*, *Gaston Gauthier* and *Sylvie Champagne*, for the intervener Barreau du Québec.

The judgment of the Court was delivered by

LeBel J. —

I. Introduction

[1] It is a general and well-accepted rule of evidence that witnesses who are called to testify are obliged to answer the questions put to them, so long as they are relevant. *The Globe and Mail* ("Globe and Mail") seeks an exception to this rule for the benefit of one of its journalists, Mr. Daniel Leblanc, on the basis that his testimony would reveal the identity of a confidential source and thereby infringe his s. 2(*b*) rights under the *Canadian Charter of Rights and Freedoms*. The Globe and Mail also asks this Court to quash an order prohibiting it from publishing any information, however obtained, regarding confidential settlement negotiations involving the Government of Canada and Groupe Polygone Éditeurs inc.

[2] These appeals all have as their origin the litigation flowing from what is now known as the "Sponsorship Scandal". More broadly, however, these appeals raise questions concerning access to the information provided by sources to journalists, and the confidentiality of their relationship, in the context of civil litigation subject to the law of Quebec. While some of these questions are analogous to those recently considered by this Court in *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, which also dealt with the confidentiality of the journalist-source relationship, although in the context of a criminal investigation, these appeals also require this Court to consider the propriety of ordering a ban on the publication of settlement negotiations. A related procedural issue, in respect of an attempted discontinuance of procedures before the Superior Court of Quebec, is also before our Court in a third appeal.

[3] For the reasons that follow, the appeals dealing with the confidentiality of the journalist-

source relationship and the publication ban are allowed. Because this result renders the discontinuance appeal moot, that appeal is dismissed.

II. Source of the Litigation and its Procedural History

[4] Following the results of the 1995 referendum on Quebec sovereignty, the federal Cabinet created the Sponsorship Program ("Program"), which was designed to counteract the sovereignty movement and increase the visibility of the federal government in Quebec. Based primarily on information he received from a confidential source — who later became known by the alias MaChouette — a Globe and Mail journalist, Daniel Leblanc, wrote a series of articles on the Program. Mr. Leblanc focussed primarily on several problematic activities relating to the Program's administration. His most significant allegations targeted the misuse and misdirection of public funds. Throughout the course of his communication with MaChouette, Mr. Leblanc agreed to protect her confidentiality and anonymity.

[5] In response to the articles written by Mr. Leblanc and others who picked up the story, considerable media and public interest was directed toward the Sponsorship Program. Following a scathing report from the Auditor General, a Royal Commission (the"Gomery Inquiry") was struck to investigate what had become known colloquially as the "Sponsorship Scandal".

[6] In 2006, Mr. Leblanc took an unpaid leave of absence from the Globe and Mail in order to author a book about the Sponsorship Scandal, which he eventually published under the title *Nom de code: MaChouette : l'enquête sur le scandale des commandites* (2006). While the Globe and Mail

authorized the reproduction of articles that it had published and for which it held the copyright, it was not Mr. Leblanc's book publisher. Nor did the Globe and Mail have any financial stake in the book's publication.

[7] In March 2005, the Attorney General of Canada filed a motion, in the Quebec Superior Court, seeking to recover the money paid by the federal government under the impugned Program, which amounted to over $60 million. The proceedings were instituted against several of the companies and individuals retained by the Program and implicated in the Sponsorship Scandal, including the entities that collectively form Groupe Polygone. Since these proceedings were initiated, the Attorney General has maintained that it was not until May 2002 — after receiving the Auditor General's report — that the government began to suspect fraud. The full extent of the fraud and the identity of its perpetrators, the government says, crystallized only with the revelations disclosed by the Gomery Inquiry.

[8] In response, Groupe Polygone, maintaining that the Government of Canada had earlier knowledge of the scandal, sought to advance a defence of prescription under the *Civil Code of Québec*, S.Q. 1991, c. 64 ("*Civil Code*" or "*C.C.Q.*"). As the litigation proceeded, and in support of its prescription defence, Groupe Polygone applied for an order requiring that certain persons, including several federal government employees, answer questions aimed at identifying Mr. Leblanc's source. In a series of orders, Hébert J. instructed the individuals identified by Groupe Polygone to answer the questions in writing and to keep the matter confidential. At the request of the Attorney General, he also appointed counsel to act as advisor to those named individuals. Hébert J. then extended his initial order to answer questions to an additional group of individuals.

[9] Almost a year later, the Globe and Mail brought a revocation motion in respect of the orders issued by Hébert J., arguing that their effect would be to breach journalist-source privilege. It asked that these orders be quashed. Mr. Leblanc testified on the motion, argued before de Grandpré J., and he was cross-examined by counsel for Groupe Polygone. Counsel for the Globe and Mail objected to a number of questions posed to Mr. Leblanc, on the basis that they were either irrelevant, or that his answering them would lead to a breach of journalist-source privilege (the "objection motion"). De Grandpré J. dismissed these objections, orally, and refused to recognize the existence of a journalist-source privilege. Leave to appeal was denied by a single judge of the Court of Appeal, on the basis that the court lacked jurisdiction to hear the appeal. Rather than have its journalist answer the questions, the Globe and Mail sought to discontinue the revocation proceedings. De Grandpré J. refused to allow the discontinuance, and the Quebec Court of Appeal dismissed the appeal (2008 QCCA 2464 (CanLII)).

[10] In October 2008, Mr. Leblanc, in an article entitled "Sponsorship firm moves to settle with Ottawa", *The Globe and Mail*, October 21, 2008, at p. A11, reported that Groupe Polygone had made a $5 million offer to settle its portion of the lawsuit. He also reported that the federal government had rejected the offer, and was in negotiations to obtain an additional $10 million from Groupe Polygone. Mr. Leblanc obtained the information at the heart of this article from an unauthorized government source.

[11] During the hearing of the discontinuance proceedings, counsel for Groupe Polygone complained intently about the leaks dealing with the content of the confidential settlement

negotiations, and about repeatedly finding Groupe Polygone the subject of news articles and stories. In response, and on his own motion, de Grandpré J. made an order prohibiting Mr. Leblanc from further reporting and publishing on the state of the confidential settlement negotiations between the Attorney General and the defendants in the principal litigation. While the Globe and Mail objected vigorously to what it insisted was a publication ban, and one issued without the benefit of hearing from either party, de Grandpré J. maintained that the order was not a publication ban. He provided no further written or oral reasons for his decision, and the Quebec Court of Appeal again rejected the Globe and Mail's application for leave to appeal (2009 QCCA 235 (CanLII)).

[12] A few months later, de Grandpré J. ordered a similar publication ban against *La Presse* and one of its journalists, Joël-Denis Bellavance. It forbade the publication of any information related to the confidential settlement negotiations. On this occasion, he provided written reasons (2009 QCCS 1624 (CanLII)). The Quebec Court of Appeal quashed this decision (*Gesca ltée v. Groupe Polygone Éditeurs inc. (Malcom Média inc.)*, 2009 QCCA 1534, [2009] R.J.Q. 1951), and an application for leave to appeal is currently before this Court.

[13] The legal issues raised by the appeals concerning journalist-source privilege in the civil litigation context and the publication ban warrant their own consideration. I will consider each appeal in its own right.

III. The Objections and Questions Relating to the Confidentiality of Sources

A. *Nature of the Appeal*

[14] The first appeal (33114) deals with the questions put to Mr. Leblanc in the course of his examination with respect to the revocation matter. The issue raised by this appeal is whether the relationship between Mr. Leblanc and MaChouette is protected by journalist-source privilege, and thereby exempts Mr. Leblanc from answering any questions that would lead to her identification.

[15] The Globe and Mail argues that the basis of the journalist-source privilege is a constitutional one, rooted in s. 2(*b*) of the *Canadian Charter* and s. 3 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"). The privilege will arise when a person (1) is engaged in newsgathering; and (2) has provided an undertaking of confidentiality to his or her source, without which it is reasonable to assume that the source would not have come forward. Recognizing that no constitutional right is absolute, the Globe and Mail argues that s. 9.1 of the *Quebec Charter* requires a weighing of the right not to disclose the identity of a confidential source, against the "democratic values, public order and the general well-being of the citizens of Québec". In the absence of a competing *Quebec Charter* right to obtain all relevant evidence in civil proceedings, the balancing must tip in favour of freedom of the press. The Globe and Mail argues that a wide range of factors are relevant to this balancing exercise: whether the cause of action is patrimonial or extra-patrimonial; whether the action is for damages, or some other form of relief; whether the journalist is a party to the proceedings; whether the issue is central to the resolution of the dispute; whether the story was published, and if so, its degree of public importance; and the potential consequences of disclosure.

[16] According to the Globe and Mail, the party seeking to pierce the privilege must then

demonstrate (1) that the identity of the source is necessary to establish a particular fact; and (2) that establishing that particular fact is necessary for disposing of an issue in the dispute. Requiring a journalist to reveal the identity of a confidential source, under testimonial compulsion, should be a matter of last resort, not one of mere convenience. A recognition of the privilege, the Globe and Mail argues, translates into an evidentiary privilege, and thereby operates in a manner analogous to the right to professional secrecy under s. 9 of the *Quebec Charter*. However, if this Court rejects the existence of a stand-alone right, then the Globe and Mail argues, in the alternative, that the Wigmore doctrine, developed under the common law, however modified so as to account for the civil law tradition, is appropriate.

[17] Groupe Polygone argues ardently against the recognition of constitutional protection for the journalist-source relationship. Rather, the Wigmore test or a similar test developed under the civil law, and more specifically a recognition of the privilege on a case-by-case basis, is preferable. For the privilege to be recognized in a particular case, a journalist must demonstrate, on the facts, that the benefits of maintaining the privilege outweigh the prejudicial effects on the rights of parties to civil litigation, and those of society in the quest for truth and the proper administration of justice. Pursuant to this approach, Groupe Polygone says, disclosure should be the rule and testimonial immunity the exception.

[18] The Attorney General of Canada argues that, prior to determining whether a privilege of any kind exists, a court must first consider whether the proposed questions are relevant. If they are not, then there is no need to consider the existence of a privilege. As to the nature of journalist-source privilege, the Attorney General advances that, in the context of civil proceedings under the

Civil Code, the court cannot resort to the Wigmore framework. The applicable framework must be grounded in the *Civil Code* and the *Quebec Charter*, and involve an assessment and balancing of competing interests. A journalist seeking to have the privilege recognized must demonstrate: that he or she was performing the work of a journalist; that the source requested anonymity and the journalist agreed to protect the source's identity; that the protection has not been waived; that the questions put to the journalist, if answered, would disclose the identity; and that the prejudice caused to freedom of the press outweighs any prejudice to the fairness of the trial. By contrast, a party seeking disclosure must demonstrate: that the questions are relevant, and not simply a fishing expedition; that there is no other means of obtaining the information; that the cause of action or defence is well-founded in law; that the questions do not infringe unnecessarily on the right to privacy; and that the failure to answer the questions will necessarily jeopardize the fairness of the trial.

B. *The Scope and Reach of R. v. National Post*

[19] In *R. v. National Post*, this Court recently addressed the question of whether journalist-source privilege exists in Canada and, more importantly, the methodological framework through which it should be assessed. *R. v. National Post* involved the sending to the *National Post* newspaper, and its investigative reporter Andrew McIntosh, of a document that appeared to implicate then Prime Minister Jean Chrétien in a serious financial conflict of interest. The document in question, upon further investigation, appeared to be a forgery. The *National Post* found itself in possession of physical evidence, which in the view of the Crown was reasonably linked to a serious crime, and possibly the *actus reus* or *corpus delicti* of the alleged offences. The RCMP sought and

obtained a search warrant and assistance order, which compelled the *National Post* to assist in locating the document, in order to conduct forensic and DNA testing on it and, it was hoped, identify the alleged forger. The *National Post* applied to have the warrant and assistance order quashed, partly on the basis that its disclosure, and the subsequent forensic testing, would "out" Mr. McIntosh's confidential source.

[20] The Court was presented with three possibilities for recognizing the journalist-source privilege in the context of a criminal investigation: a constitutional privilege rooted in s. 2(*b*) of the *Canadian Charter*; a class-based privilege, analogous to solicitor-client privilege; or a privilege recognized on a case-by-case basis according to the four-factored Wigmore framework. The Court, unanimously, rejected the first two options. With respect to a constitutional privilege, Justice Binnie, writing for the majority, found that it carried the argument too far to suggest that specific newsgathering techniques are constitutionally entrenched. Furthermore, this Court had avoided conferring constitutional status on testimonial immunities more generally. Finally, the Court was unprepared "[t]o throw a constitutional immunity around the interactions of such a heterogeneous and ill-defined group of writers and speakers and whichever 'sources' they deem worthy of a promise of confidentiality and on whatever terms they may choose to offer it" (para. 40). The Court also held that, while there was a need for the law to protect the identity of confidential sources in some circumstances, the purpose of free expression guaranteed in s. 2(*b*) could be met without granting a broad constitutional immunity to journalistic sources. Therefore, an order compelling a journalist to identify a source would generally not violate s. 2(*b*) (para. 41).

[21] The Court also rejected the existence of a class-based privilege, on the basis that there

is no formal accreditation or licensing process for journalists in place, as there is for lawyers for example, and no professional organization regulates the profession and maintains professional standards (para. 43). Nor is it clear, when dealing with this type of privilege, whether the journalist or the source is the "holder" of the privilege (para. 44), and no one had been able to suggest "workable criteria for the creation or loss of the claimed immunity" (para. 45). Finally, because a class-based privilege is more rigid than a privilege recognized on a case-by-case basis, it would "not lend itself to the same extent to be tailored to fit the circumstances" (para. 46) as they arise in individual cases.

[22] The Court concluded that the case-by-case approach, based on the Wigmore criteria and infused with *Canadian Charter* values, provided "a mechanism with the necessary flexibility to weigh and balance competing public interests in a context-specific manner" (para. 51), and would allow the "opportunity for growth that is essential to the proper function of the common law" (para. 55). Therefore, in order for journalist-source privilege to be recognized in a particular case, the claimant must satisfy all four Wigmore factors: (1) the relationship must originate in a confidence that the source's identity will not be disclosed; (2) anonymity must be essential to the relationship in which the communication arises; (3) the relationship must be one that should be sedulously fostered in the public interest; and (4) the public interest served by protecting the identity of the informant must outweigh the public interest in getting at the truth (para. 53).

[23] Justice Binnie put particular emphasis on the significance of the third and fourth factors, in the journalist-source context. The third factor, whether the relationship is one that the community should sedulously foster (para. 57), introduces a certain degree of flexibility in the evaluation of the

different types of sources and different types of journalists. He suggested that whether the relationship is between a source and a blogger, or between a source and a professional journalist, will impact upon the court's weighing exercise. But, according to Justice Binnie, the fourth factor does the lion's share of the work, and the court's task is to "achieve proportionality in striking a balance among the competing interests" (para. 59).

[24] As in this case, the Court in *National Post* was presented with an argument that, after a journalist has established the first three Wigmore criteria, the onus ought to shift to the party seeking disclosure to demonstrate, on a balance of probabilities, why it should be ordered. The Court rejected this argument. Given that the evidence is presumptively compellable and admissible, the burden of persuasion remains on the media to show that the public interest in protecting a secret source outweighs the public interest in criminal investigations. The Court ultimately concluded that every claim to journalist-source privilege — be it in the face of testimonial compulsion or the production of documents — is situation specific, with the public's interest in the freedom of expression always weighing heavily in the court's balancing exercise.

[25] While this appeal raises issues similar to those addressed in *National Post*, the context is nevertheless different. This case involves civil litigation, not the criminal investigative process. It involves testimonial compulsion, and not the production of documents or other physical evidence. The parties' dispute is subject to the laws of Quebec and the *Quebec Charter*. These factors must be considered in determining how, and to what extent, the majority reasons in *National Post* are equally applicable to the issues raised by this appeal.

C. *National Post and the Law of Civil Procedure and Evidence in the Context of the Civil Law of Quebec*

[26] There is no question that the Wigmore case-by-case approach to journalist-source privilege applies in the context of ordinary civil litigation subject to the laws of the common law provinces. However, it was argued before us that, given the civil law tradition in the province of Quebec, it would be inappropriate for this Court to introduce into the Quebec law of civil procedure and evidence a framework for considering journalist-source privilege which originates entirely in the common law.

[27] The question of how to address the problem of the relationship between the media and their sources, in the context of civil litigation in Quebec, raises difficult issues and warrants careful consideration. It requires yet another examination of the sources of the law of civil procedure and evidence in the province of Quebec. At issue is the relationship between Quebec's civil law, its *Civil Code*, its system of procedure and its *Code of Civil Procedure*, R.S.Q., c. C-25 ("*C.C.P.*"), the *Quebec Charter* and, in some instances, the *Canadian Charter*. An added dimension of the problem is that Quebec's rules of procedure and evidence are nevertheless applied by a court system that reflects the British common law tradition, and is largely similar to the court organization in the common law provinces of Canada.

[28] As in the criminal law, the relationship between journalists and their sources in the context of civil litigation may engage basic constitutional and societal values relating to freedom of expression and the right to information in a democratic society. A proper framework to address them

must be established, which is consistent with the normative structure of Quebec law and with its civil tradition. But it must be acknowledged that the law of procedure and civil evidence in the province of Quebec reflects a hybrid legal tradition and culture, with rules and principles originating in both the common law and the civil law (D. Jutras, "Culture et droit processuel : le cas du Québec" (2009), 54 *McGill L.J.* 273). This is also an area of the law which is deeply influenced by constitutional and quasi-constitutional instruments.

[29] Section 2(*b*) of the *Canadian Charter* applies in the province of Quebec, within the scope of s. 32. The *Quebec Charter* enjoys quasi-constitutional status (s. 52) (see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2000 SCC 27, [2000] 1 S.C.R. 665, at paras. 27-28), and protects several important rights that may be at stake in a claim of journalist-source privilege: s. 3, freedom of expression; ss. 4 and 5, the protection of the dignity of the person and of his private life; and s. 9, professional secrecy. Under the *Quebec Charter*, these rights are both public and private. In addition, the *Civil Code*, in force since 1994, constitutes a fundamental component of the legal structure. Its preliminary provision affirms that it is the "*jus commune*" of Quebec:

> The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication.
>
> (See also *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862.)

Several provisions of the *Civil Code* itself protect aspects of the fundamental rights of the person, such as the right to life and integrity of the person (art. 3) and his reputation (art. 35). It also includes

a whole book, Book Seven, arts. 2803 to 2874, on the law of civil evidence.

[30] Civil procedure is also codified. Civil procedure in Quebec is primarily made up of the laws adopted by the National Assembly, found in the *C.C.P.*, and not of judge-made rules. In *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, this Court confirmed the fundamental importance of the *C.C.P.* It is the primary source of the principles and rules of the law of civil procedure in Quebec. But the codification of civil procedure does not mean that civil procedure, as administered by the courts of Quebec, is completely detached from the common law model. The structure of the court system itself remains basically the same, as I mentioned above. Superior courts enjoy the constitutional protection of s. 96 of the *Constitution Act, 1867*. Moreover, as this Court indicated in *Lac d'Amiante*, not everything is found in the *C.C.P.* It leaves room for rules of practice. It also allows for targeted judicial intervention, and the authority to issue orders that address the particular context of court cases, particularly under arts. 20 and 46 of the *C.C.P.*

[31] The law of evidence is applied by the Quebec courts in this context. With respect to the problems raised by freedom of expression and the right to information, the judges of the province of Quebec must address the same challenge of reconciling conflicting values and interests as their colleagues in other provinces. The *Civil Code* sets out the legal framework and the essential rules of the law of civil evidence. But it does not resolve every issue that the application of the laws of evidence and procedure may ultimately give rise to. General principles and rules that belong to other areas of the law, particularly constitutional law, may have to be considered or should inform the solution crafted by the courts. A solution to the complex problem of the existence, nature and scope

of journalist-source privilege will have to be found within this complex environment, bringing together its many strands.

D. *Journalist-Source Privilege Under the Quebec Charter*

[32] It was argued before us that ss. 3, 9 and 44 of the *Quebec Charter* can constitute the basis for a class-based, quasi-constitutional journalist-source privilege in the province of Quebec, analogous to the claim of a constitutional class privilege rooted in the *Canadian Charter* that was argued in *National Post*.

[33] Section 3 of the *Quebec Charter* protects, among other rights, freedom of expression:

> Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

However, for the reasons set out in *National Post*, and in particular the difficulty in defining such a "heterogeneous and ill-defined group of writers and speakers" subject to the privilege in the province of Quebec with the necessary degree of certainty, freedom of expression under the *Quebec Charter* cannot constitute the basis for recognizing a class-based, quasi-constitutional journalist-source privilege. It can, of course, inform the analysis.

[34] But the Globe and Mail also suggests that another provision of the *Quebec Charter* is relevant to the analysis. It argues that unlike the *Canadian Charter*, s. 44 of the *Quebec Charter* expressly protects access to information: "Every person has a right to information to the extent

provided by law." However, s. 44 does not confer a fundamental right. Rather, it belongs to a class of social and economic rights, the scope of which is defined by the law itself (*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429). This right is limited to the extent that access to information is already provided for by law. Section 44 does not broaden the scope of the right, and cannot be the source of a quasi-constitutional right to the protection of journalists' sources. While the s. 44 right can also inform the protection of the confidential relationship between journalists and their sources, it cannot constitute the basis for recognizing that privilege.

[35] That leaves a consideration of s. 9, which protects professional secrecy:

> Every person has a right to non-disclosure of confidential information.
>
> No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.
>
> The tribunal must, *ex officio*, ensure that professional secrecy is respected.

Professional secrecy applies only to those professionals bound to it by law, and is currently restricted to the 45 professional orders subject to the Quebec *Professional Code*, R.S.Q., c. C-26 (see, e.g., N. Vallières, "Le secret professionnel inscrit dans la Charte des droits et libertes de la personne du Québec" (1985), 26 *C. de D.* 1019, at pp. 1022-23). This list does not include journalists, even though their inclusion was contemplated, but yet ultimately rejected, by the National Assembly (see *Journal des débats : Commissions parlementaires*, 3rd Sess., 30th Leg., No. 6, January 22, 1975, at p. B-322; Ministry of Justice, *Justice Today*, by J. Choquette (1975), at p. 232). Accordingly,

professional secrecy cannot ground a quasi-constitutional right to the protection of media sources.

[36] In my view, there is no basis for drawing an analogy between professional secrecy and journalist-source privilege. Firstly, the associations of journalists are not regulated. Any person can become a member, and importantly not all journalists are members of the associations that exist, like the Fédération professionnelle des journalistes du Québec (see online: www.fpjq.org). The Fédération has no monopoly over the practice and regulation of journalism in the province. Nor is journalism a profession which the legislature has, in the public interest, sought to regulate directly or to which it has sought to delegate the authority of self-regulation.

[37] More importantly, journalism is not a profession of the type that professional secrecy traditionally purports to protect. Professor Ducharme has described the two criteria that must be satisfied before a professional will be made subject to professional secrecy:

> [TRANSLATION] First, there must be a law that imposes an obligation of silence on an individual and, second, that obligation must be rooted in a helping relationship. In our view, only members of professional orders governed by the *Professional Code* meet this twofold condition.
>
> (*L'administration de la preuve* (3rd ed. 2001), at p. 94 (emphasis added))

The second criterion is an important one: that the obligation of silence be rooted in a relationship where the beneficiary of the privilege seeks out the professional for personal help or assistance. In other words, the obligation of confidentiality is [TRANSLATION] "in the exclusive interest of the person who disclosed [the information], and in the context of a helping relationship" (Ducharme, at p. 97). Given this emphasis on "helping relationship", and the fact that some 45 professions are already by law subject to s. 9, Ducharme suggests that [TRANSLATION] "no member of any other

profession would meet this twofold condition" (p. 97).

[38] The relationship between journalists and their sources is not one that would often result in such a "helping relationship". What is more, the legislature has not seen fit to include journalists in the list of professions subject to professional secrecy. It has spoken, and done so clearly.

[39] In my view, there is no basis for recognizing journalist-source privilege in the rest of the *Quebec Charter*. The basis for recognizing the privilege must be found in other parts of the law.

E. *Testimonial Privilege Under the Civil Law of Quebec*

[40] This Court has on many occasions recognized the mixed nature of Quebec procedural law (see, e.g., *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456; *Lac d'Amiante*; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60). Generally speaking, the sources of the *Civil Code*'s substantive evidentiary rules are derived from the French law tradition (see J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at pp. 22-23 and 39). However, many of the procedural and evidentiary rules — those dealing with testimony, the administration of justice, and the exclusion of evidence, for example — have their source in the old common law rules (see Royer, at pp. 317-18; *Bisaillon*; *Foster Wheeler*, at paras. 28-29). As was noted in *Foster Wheeler*, "[t]hese mixed origins are without doubt at the root of the semantic, if not conceptual problems that continue to affect this field of law" (para. 23).

[41] Article 1206 of the *Civil Code of Lower Canada* ("*C.C.L.C.*") explicitly allowed Quebec

judges, in commercial matters, to resort to common law rules and principles of evidence when there was no otherwise applicable Code provision relating to the proof of a particular fact. When the *C.C.L.C.* was repealed and replaced with the *C.C.Q.*, no substantive equivalent to art. 1206 was included. The parties all argue that the effect of the repeal of the *C.C.L.C.*, and its replacement with the *C.C.Q.*, is that it is now impossible to resort to common law legal principles to fill any gaps present in the *Civil Code*. It is on this basis, primarily, that they argue that the Wigmore framework cannot be imported into the law of Quebec as a basis for recognizing journalist-source privilege.

[42] There is an academic and jurisprudential divide on this particular issue. On the one hand, Ducharme is of the view that [TRANSLATION] "when it came into force, the Code repealed the old French law and English law as the suppletive law of evidence" (*Précis de la preuve* (6th ed. 2005), at p. 5). By contrast, Royer states that [TRANSLATION] "[t]he new provisions of the *Civil Code of Québec* that apply to such matters do not alter the former law. They merely restate it and clarify it. They are therefore interpretive rules that can apply even to juridical acts from before January 1, 1994" (p. 41).

[43] From a jurisprudential perspective, the Quebec Court of Appeal has accepted Wigmore as the appropriate framework for dealing with claims of privilege raised on a case-by-case basis: *Société d'énergie de la Baie James v. Lafarge Canada Inc.*, [1991] R.J.Q. 637 (litigation privilege); *Boiler Inspection and Insurance Company of Canada v. Corporation municipale de la paroisse de St-Louis de France*, [1994] R.D.J. 95 (litigation privilege). However, these cases predate the coming into force of the *Civil Code of Quebec*.

[44] The Superior Court is divided on whether Wigmore is applicable in Quebec, in a number of judgments rendered since the coming into force of the *Civil Code*. The doctrine was explicitly rejected in *Grenier v. Arthur*, [2001] R.J.Q. 674, *Centre de réadaptation en déficience intellectuelle de Québec v. Groupe TVA inc.*, [2005] R.J.Q. 2327, and *Drouin v. La Presse ltée*, [1999] R.J.Q. 3023. In each case the court preferred to rely on the *Civil Code* and a balancing of applicable *Quebec Charter* rights. By contrast, Wigmore was expressly used to recognize a case-by-case privilege in *Tremblay v. Hamilton*, [1995] R.J.Q. 2440, and *Landry v. Southam Inc.*, 2002 CanLII 20587. *Tremblay* dealt specifically with the recognition of journalist-source privilege.

[45] When the mixed source of the Quebec law of procedure and evidence, and in particular the common law source of many exclusionary rules of evidence, is properly recognized, it becomes difficult to accept the argument that there is no residual role for common law legal principles in the development of this part of Quebec law. Quebec is, after all, a mixed jurisdiction. If the ultimate source of a legal rule is the common law, then it would be only logical to resort to the common law, in the process of interpreting and articulating that same rule in the civil law. Even if the rule was transplanted and naturalized in the civil law context, it remains interesting and relevant to consider how the rule is evolving in the Canadian common law system, in order to frame an appropriate interpretation in the civil law system:

> [TRANSLATION] However, the rules set out in the *Civil Code of Québec* are rooted in French law and in the common law, which means that French law and the common law can continue to be used to interpret those rules.
>
> . . .
>
> This could justify maintaining certain common law privileges associated with the

> accusatorial and adversarial nature of trials even though those privileges are not formally recognized in the articles of the *Code of Civil Procedure*.
>
> (Royer, at p. 39)

This is, of course, premised on the fact that the interpretation and articulation of such a rule would not otherwise be contrary to the overarching principles set out in the *C.C.Q.* and the *Quebec Charter*.

F. *Development of an Analytical Framework*

[46] Neither the *Civil Code* nor the *Code of Civil Procedure* explicitly provides for the recognition in the civil litigation context of journalist-source privilege, which now exists in the common law jurisdictions. A gap in the codified law exists, and the question becomes one of determining the appropriate way of filling it. Of course, the judiciary's authority to go beyond the written codes and legislation, in the event of a gap, is far more circumscribed under the civil law tradition than it is under the common law:

> A Quebec court may not create a positive rule of civil procedure simply because it considers it appropriate to do so. In this respect, a Quebec court does not have the same creative power in relation to civil procedure as a common law court, although intelligent and creative judicial interpretation is often able to ensure that procedure remains flexible and adaptable. Although Quebec civil procedure is mixed, it is nonetheless codified, written law, governed by a tradition of civil law interpretation. (See J.-M. Brisson, "La procédure civile au Québec avant la codification: un droit mixte, faute de mieux", in *La formation du droit national dans les pays de droit mixte* (1989), 93, at pp. 93 to 95; also by the same author: *La formation d'un droit mixte: l'évolution de la procédure civile de 1774 à 1867*, *supra*, at pp. 32-33.) In the civil law tradition, the Quebec courts must find their latitude for interpreting and developing the law within the legal framework comprised by the Code and the general principles of procedure underlying it. The

> dissenting opinion written by Biron J.A. quite correctly reminds us of these characteristics of a codified legal system and accurately identifies the nature of the method of analysis and examination that applies in this case.
>
> (*Lac d'Amiante*, at para. 39; see also *Foster Wheeler*.)

[47] The only provision in the *C.C.Q.* dealing with the discretion of a judge to exclude otherwise relevant evidence is art. 2858:

> The court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are breached and that its use would tend to bring the administration of justice into disrepute.
>
> The latter criterion is not taken into account in the case of violation of the right of professional privilege.

Because journalist-source privilege is not a quasi-constitutional privilege under the *Quebec Charter*, a judge cannot exempt a journalist from testifying as to the identity of a confidential source, on the basis that doing so would constitute a violation of either s. 3 or s. 44 of the *Quebec Charter*.

[48] Nevertheless, constitutional rights under the *Canadian Charter* and quasi-constitutional rights under the *Quebec Charter* are engaged by a claim of journalist-source privilege. Some form of legal protection for the confidential relationship between journalists and their anonymous sources is required. Conflicting rights and interests arise under the *Quebec Charter* and must be addressed and reconciled. This case also raises important questions related to the development of human rights in Quebec. The creation of a framework to address these issues represents a legitimate and necessary exercise of the power of the court to interpret and develop the law.

[49] In my view, a helpful analogy can be drawn between the journalist-source privilege at issue in this case, and police-informer privilege, which is also a judicially created "rule of public policy" (*Bisaillon*, at p. 90, citing *Marks v. Beyfus* (1890), 25 Q.B.D. 494 (C.A.), at p. 498). Indeed, I find that, admittedly in a very broad sense, police-informer privilege is more analogous to journalist-source privilege than is the professional secrecy contemplated by s. 9 of the *Quebec Charter*, although it arose in the context of criminal procedure within the common law.

[50] Police-informer privilege, like professional secrecy and solicitor-client privilege, is a class-based privilege. In this sense, it is unlike journalist-source privilege, which is clearly a case-by-case privilege. However, it has its roots as a common law rule of public policy, aimed at facilitating the investigation of crime. As Beetz J. noted in *Bisaillon*:

> The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal. [pp. 91-92]
>
> (Quoting *D. v. National Society for the Prevention of Cruelty to Children*, [1978] A.C. 171 (H.L.), at p. 218, *per* Lord Diplock.)

[51] In *Bisaillon*, Beetz J. also took note of the structure of the privilege: ". . . at common law the secrecy rule regarding police informers' identity has chiefly taken the form of rules of evidence based on the public interest . . ." (p. 93). When police-informer privilege is successfully established, "relevant evidence is excluded in the name of a public interest regarded as superior to that of the

administration of justice" (p. 96). Therefore, the manner in which the exclusionary rule operates is also analogous to journalist-source privilege.

[52] Importantly, for the purposes of this appeal, this Court held in *Bisaillon* that the common law rule of police-informer privilege applies in the province of Quebec. An issue in that case, among others, was whether the Commissioner investigating aspects of police conduct during the F.L.Q. crisis could compel the disclosure of an informant's identity, contrary to the common law rule. It had been argued that the *Code of Civil Procedure* was comprehensive, and because a testimonial exception for police informants was not included, the Commissioner could compel the disclosure. Beetz J., for a unanimous Court, disagreed. Notably, the *C.C.P.* provision relied upon as displacing police-informer privilege was not nearly specific enough:

> However, in my opinion the scope of this codification is limited to these two aspects which it mentions expressly: it does not extend to the secrecy rule regarding police informers' identity, as to which it is silent. In other words, the codification of art. 308 applies only to the part of the common law which is included in the law on Crown privilege, but not to the specific legal system relating to the secrecy rule regarding police informers.
>
> The law had itself decided that it is always contrary to the public interest for a peace officer to be required to disclose the identity of a police informer, and that this aspect of the public interest must always take precedence over the need to do more complete justice, subject to a single exception in criminal law. To decide as the Court of Appeal did would mean that by adopting such a general provision as art. 308, the legislator intended simply to obliterate this final judgment made by the law and the absolute rule which results from it . . . . [pp. 102-03]

Beetz J. concluded that, because the origin of police-informer privilege is the common law, the rule remained a part of Quebec law unless it had been overturned by a validly adopted statutory

provision:

> Unless overturned by validly adopted statutory provisions, these common law rules must be applied in an inquiry into the administration of justice, which is thus a matter of public law. Moreover, the point at issue concerns the power to compel a witness to answer, by contempt of court proceedings if necessary, the source for which is also the common law . . . . [p. 98]

Beetz J. then turned to a consideration of whether the common law rule had been altered by the *C.C.P.* Having found that it had not, Beetz J. concluded that the common law rule remained a part of Quebec law in its original form.

[53] There is therefore a basis in the laws of Quebec for a journalist-source privilege or an exemption from the general obligation to give evidence in civil cases. Despite its common law origins, the use of a Wigmore-like framework to recognize the existence of the privilege in the criminal law context, as established in *National Post*, is equally relevant for litigation subject to the laws of Quebec. This approach conforms both with s. 2(*b*) of the *Canadian Charter* and ss. 3 and 44 of the *Quebec Charter*. Indeed, I reject the submission of the intervener Canadian Civil Liberties Association that the Wigmore framework cannot differentiate between relationships that have a constitutional dimension and those that do not. It is clear that it does so already (*R. v. Gruenke*, [1991] 3 S.C.R. 263; *National Post*). This approach also accords with the law of evidence in Quebec. The *C.C.Q.* grants judges the authority to exclude evidence or testimony in the event of a breach of the *Quebec Charter*. It is not inconsistent, either in principle or in fact, to give judges the authority to exempt a journalist from testifying, when his s. 2(*b*) *Canadian Charter* and s. 3 *Quebec Charter* rights are found to be paramount. Indeed, I would add that art. 46 of the *C.C.P.*, which provides for the general powers of the Superior Court, appears to provide its judges with the necessary authority

to do so on a case-by-case basis:

> The courts and judges have all the powers necessary for the exercise of their jurisdiction.
>
> They may, at any time and in all matters, whether in first instance or in appeal, issue orders to safeguard the rights of the parties, for such time and on such conditions as they may determine. As well, they may, in the matters brought before them, even on their own initiative, issue injunctions or reprimands, suppress writings or declare them libellous, and make such orders as are appropriate to deal with cases for which no specific remedy is provided by law.

[54] Whether they rely explicitly on the Wigmore framework or not, what the lower court decisions ultimately demonstrate is the need for a balancing exercise between the competing rights or interests at stake. To paraphrase my colleague Justice Binnie in *National Post*, this all sounds very much like Wigmore where, at the crucial fourth step, the question is whether the public interest served by protecting the identity of the informant outweighs the public interest in getting at the truth. Indeed, the Wigmore framework itself, when stripped to its core, is simply a taking into account of competing interests. The Wigmore criteria can therefore shape the structure of the analysis and the elements to be considered, in claims of journalist-source privilege brought in matters engaging the laws of Quebec.

[55] It is also a framework that is sufficiently flexible to take into account the variety of interests that may arise in any particular case, and those that are certain to arise in civil proceedings taking place in the common law provinces. The overarching issues raised by this appeal are of course not unique to the province of Quebec. The news media's reach is borderless. This is further support for an approach that would result in consistency across the country, while preserving the

distinctive legal context under the *Civil Code*.

[56] As mentioned at the outset, this case deals with testimonial compulsion and not, as in *National Post*, with the production of documents or other physical evidence. Nevertheless, in civil litigation proceedings, the presumption is that all relevant evidence is admissible and that all those called to testify with respect to relevant evidence are compellable. On this point, art. 2857 of the *Civil Code* is relevant: "All evidence of any fact relevant to a dispute is admissible and may be presented by any means." It therefore goes almost without saying that if the party seeking disclosure of the identity of the source cannot establish that this fact is relevant, then there will be no need to go on to consider whether the privilege exists. The threshold test of relevance plays, as it does in many other contexts, an important gatekeeping role in the prevention of fishing expeditions. (See, e.g., *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 647 (holding that the production of medical records must be inextricably linked to the ability to prepare a full defence and go to the central issue in the proceeding, and that there must be no other means for proving the case). See also *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 89 O.R. (3d) 81, at para. 3, *per* Sharpe J.A.; *Charkaoui (Re)*, 2008 FC 61, [2009] 1 F.C.R. 507, at paras. 70-71 and 74, *per* Noël J.; *Tremblay*, at p. 2442.) It also constitutes an added buffer against any unnecessary intrusion into aspects of the s. 2(*b*) newsgathering rights of the press.

[57] As Justice Binnie noted in *National Post*, it is the fourth Wigmore factor that will do most of the grunt work in the analysis of any claim for journalist-source privilege. He set out a number of relevant considerations in the determination of whether physical evidence must be disclosed in the criminal context (see paras. 61-62). It is therefore helpful, particularly given that

this issue is being remitted to the Superior Court for reconsideration, to highlight some of the considerations that will be relevant to the court's balancing exercise at the fourth Wigmore stage, in claims arising in the context of civil litigation.

[58] The first two considerations are related: the stage of the proceedings, and the centrality of the issue to the dispute between the parties. With respect to the stage of the proceedings, several points may be observed. On the one hand, the early stage of the proceedings — such as the examination for discovery stage in this case — might militate in favour of recognizing the privilege. The case will be at its preliminary stages only, and will yet to have reached the stage of determining the liability or the rights of the parties. This is a variation on the U.K. "newspaper rule" (*Attorney-General v. Mulholland*, [1963] 2 Q.B. 477), whereby journalists are allowed to protect their sources during the discovery stage, because at this point the procedural equities do not outweigh the freedom of the press, but may be required to disclose at trial. On the other hand, given the overall exploratory aims of examinations for discovery and the confidentiality with which they are cloaked, in principle, the testimony may be capable of providing a more complete picture of the case and have the potential to resolve certain issues prior to going to trial. This would militate in favour of not recognizing the privilege at this stage.

[59] I recognize that, pursuant to art. 398.1 *C.C.P.*, the party conducting the discovery may file the transcript in evidence. Therefore, should a situation arise where a court orders the journalist to answer questions on examination for discovery, and the opposing party later in fact decides to file the transcript pursuant to art. 398.1, then, given that the testimony would no longer be confidential, the journalist should be entitled to again raise the issue of privilege before the court and highlight

any change in circumstances that the filing of the transcript would have made.

[60] The centrality of the question to the dispute will also be a relevant consideration. While the identity of a confidential source may be relevant to the dispute, particularly given the broad definition of relevancy in civil proceedings, that fact may nevertheless be so peripheral to the actual legal and factual dispute between the parties that the journalist ought not to be required to disclose the source's identity.

[61] Another consideration, related to the centrality of the question to the dispute, is whether the journalist is a party to the litigation, or simply an ordinary witness. For example, whether it is in the public interest to require a journalist to testify as to the identity of a confidential source will no doubt differ if the journalist is a defendant in a defamation action, for example, as opposed to a third party witness, compelled by subpoena to testify in a matter in which he or she has no personal stake in the outcome. In the former context, the identity of the source is more likely to be near the centre of the dispute between the parties. When a journalist is called as a third party witness, there is likely to be more of a question whether the source's identity is central to the dispute.

[62] A crucial consideration in any court's determination of whether the privilege has been made out will be whether the facts, information or testimony are available by any other means. As the Court recognized in *National Post*, "[t]he 'alternate sources' principle has been part of Canadian law since *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C.S.C.), as it has been in the U.K." (para. 66). Indeed, courts in the United Kingdom have endorsed this necessity requirement, and held that mere administrative convenience is insufficient (*Secretary of State for*

Defence v. Guardian Newspapers Ltd., [1985] 1 A.C. 339; *In re An Inquiry under the Company Securities (Insider Dealing) Act, 1985*, [1988] 1 A.C. 660; *Cross and Tapper on Evidence* (11th ed. 2007), at p. 501).

[63] This, of course, makes perfect sense. If relevant information is available by other means and, therefore, could be obtained without requiring a journalist to break the undertaking of confidentiality, then those avenues ought to be exhausted. The necessity requirement, like the earlier threshold requirement of relevancy, acts as a further buffer against fishing expeditions and any unnecessary interference with the work of the media. Requiring a journalist to breach a confidentiality undertaking with a source should be done only as a last resort.

[64] Other considerations that may be relevant in a particular case include the degree of public importance of the journalist's story, and whether the story has been published and is therefore already in the public domain. This list is, of course, not comprehensive. In the end, context is critical.

G. *Summary of the Proposed Test*

[65] In summary, to require a journalist to answer questions in a judicial proceeding that may disclose the identity of a confidential source, the requesting party must demonstrate that the questions are relevant. If the questions are irrelevant, that will end the inquiry and there will be no need to consider the issue of journalist-source privilege. However, if the questions are relevant, then the court must go on to consider the four Wigmore factors and determine whether the journalist-

source privilege should be recognized in the particular case. At the crucial fourth factor, the court must balance (1) the importance of disclosure to the administration of justice against (2) the public interest in maintaining journalist-source confidentiality. This balancing must be conducted in a context-specific manner, having regard to the particular demand for disclosure at issue. It is for the party seeking to establish the privilege to demonstrate that the interest in maintaining journalist-source confidentiality outweighs the public interest in the disclosure that the law would normally require.

[66] The relevant considerations at this stage of the analysis, when a claim to privilege is made in the context of civil proceedings, include: how central the issue is to the dispute; the stage of the proceedings; whether the journalist is a party to the proceedings; and, perhaps most importantly, whether the information is available through any other means. As discussed earlier, this list is not comprehensive. I will now consider whether a claim of privilege could be established in this case.

H. *Application of the Framework*

[67] After a cursory mention of the four Wigmore factors, de Grandpré J. rejected the Globe and Mail's claim of journalist-source privilege. His oral reasons on this issue, in their entirety, are as follows (A.R. (32975 and 33114), at pp. 13-14):

> [TRANSLATION]
>
> MARK BANTEY:

But . . . so, you're dismissing them only . . .

THE COURT:

On the basis that the answers to the questions will be relevant, regardless of the . . .

MARK BANTEY:

Regardless of the privilege.

THE COURT:

. . . the privilege invoked by the witness. Are we agreed? So, I have very quickly (*vite*, *vite*, *vite*) analysed the four (4) criteria from . . .

SYLVAIN LUSSIER:

Wigmore.

THE COURT:

. . . from *Wigmore*, and I conclude that, in the circumstances, it would be preferable that the evidence be entered in the record. Is that all right? [Emphasis added.]

[68] I agree with the Globe and Mail that de Grandpré J. erred in concluding, [TRANSLATION] "very quickly", that it was "preferable" to compel Mr. Leblanc's answers on cross-examination. Mr. Leblanc was entitled to have the questions put to him challenged for relevancy, and his claim for privilege rigorously tested against the Wigmore criteria, rather than having his claims left to the simple determination that it would be "preferable" that the questions be answered (*St. Elizabeth Home Society*, at paras. 38 and 52). In particular, if de Grandpré J. concluded that the first three factors favoured disclosure, he was then required to ask whether, on balance, the public interest in maintaining journalist-source confidentiality outweighed the importance of disclosure to the administration of justice.

[69] In the present case, it appears that the public interest in confidentiality would be based largely on the degree to which specific questions would tend to reveal the identity of MaChouette. It therefore follows that Mr. Leblanc could not refuse to answer a question that could materially advance Polygone's prescription defence, but which could not threaten the identity of MaChouette. Accordingly, evidence as to the likelihood that an answer to a particular question would tend to reveal MaChouette's identity would be of assistance. Only where there would be a real risk that Mr. Leblanc's answer would disclose MaChouette's identity, should the judge ask himself whether, after an assessment of the relevant considerations, the balance of interests favours privilege over disclosure. For example, at the far end of the spectrum, if Mr. Leblanc's answers were almost certain to identify MaChouette then, bearing in mind the high societal interest in investigative journalism, it might be that he could only be compelled to speak if his response was vital to the integrity of the administration of justice. Ultimately, these matters will be for the judge to determine, but he must consider them.

[70] I would therefore allow the appeal, with costs throughout, and quash the decision of the Superior Court. Given that neither party was permitted to make submissions or tender evidence on the issue of journalist-source privilege, particularly with respect to the balancing of interests at the fourth stage, I would remit the matter to the Superior Court for a consideration of Mr. Leblanc's claim, in accordance with these reasons.

IV. The Publication Ban (33097)

A. *Overview*

[71] During the course of the discontinuance proceedings incidental to the revocation motion, counsel for Groupe Polygone provided de Grandpré J. with a copy of an article written by Mr. Leblanc and published by the Globe and Mail on October 21, 2008, entitled "Sponsorship firm moves to settle with Ottawa". Counsel for Groupe Polygone then proceeded with the following complaint, in respect of the breach of confidentiality with respect to the negotiations between his client and the federal government (reproduced in *Globe and Mail v. Canada (Procureur général)*, 2008 QCCA 2516 (CanLII), at para. 9, *per* Bich J.A.):

> [TRANSLATION] Not only do I not have the right to defend myself, but now I also have a problem even negotiating because, as you and I both know, when . . . the very principle of confidentiality of negotiations, it's to allow parties to discuss things freely, say things to each other that they would not say in public, to explain their positions, which they would not necessarily state in public. And that is also why mediation is strictly confidential, and why agreements to that effect must be signed.
>
> So I can't defend myself, and I can no longer negotiate because Mr. Leblanc still has a source in the government who is leaking information whose truth I can neither confirm nor deny, but, you know, we don't even have the right to put it before a judge. The trial judge shouldn't even see it. In your case, it's a bit different, you aren't the trial judge.
>
> But can you see the sort of prejudice — and this is something I must bring to your attention — the sort of prejudice that my client has to suffer in the circumstances? At some point, we have to put our foot down and draw the line. To what extent can journalist-source privilege, when anonymous sources are quoted, prevent parties from defending themselves, throwing a wrench in the works when they try to negotiate? How far can it go before it tears the basic fabric of the proper administration of justice?
>
> And I think I have a serious problem with what's happening here, especially with the way my colleague's client is exercising its right to journalist-source privilege. It's doing so in such a way as to trample on my client's rights, whether the right to defend itself or the right to negotiate in confidence.

[72] Counsel for Groupe Polygone made no specific request, and appeared content at this point simply to voice his obvious frustration. Counsel for the Globe and Mail offered no response,

and the discontinuance proceedings proceeded accordingly. At its conclusion, de Grandpré J. made the following order, which included a complete publication ban on all proceedings then pending before the court (A.R. (33097), at p. 55):

> [TRANSLATION] So, although I am most reluctant to let cases be managed through procedural wrangling, I'm going to let you to go across the street. And as for Mr. Leblanc, I'm going to prohibit you from publishing anything whatsoever regarding the proceedings pending before the Court.

[73] The order was made without notice, without an application, and without the benefit of formal submissions from either party. Moreover, de Grandpré J. insisted that it was not a publication ban. Both the fact of the order and its characterization were met with understandable surprise by counsel for the Globe and Mail. The transcript reveals the following exchange (A.R. (33097), at pp. 55-56):

> [TRANSLATION]
>
> MARK BANTEY:
>
> Then, Mr. Justice, before that, I'm going to have some submissions to make. That . . .
>
> THE COURT:
>
> No, no. That, I . . .
>
> MARK BANTEY:
>
> . . . you're issuing — Mr. Justice, pardon me, with respect, you're issuing a publication ban. Before issuing a publication ban, you have to . . .
>
> THE COURT:
>
> It is not a publication ban.

MARK BANTEY:

> Mr. Justice, before issuing a publication ban, you have to give us a chance to make submissions.

THE COURT:

> What I don't want to hear and what I don't want to read in the newspapers is an article like the one that appeared in *The Globe and Mail* on October 21.

MARK BANTEY:

> Mr. Leblanc has an absolute right to publish what he did, Mr. Justice.

THE COURT:

> If he does it, he must do it in accordance with the strict letter of the law. In that regard, you'll inform me when the Court of Appeal has made its decision.

MARK BANTEY:

> So, Mr. Justice, just to make sure I understand, you've issued a publication ban?

THE COURT:

> Yes.

[74] By proceeding in this manner, in a case where there was no suggestion of urgency or delay inherent in hearing submissions that would prejudice either party, de Grandpré J. violated one of the fundamental rules of the adversarial process: he denied the parties an opportunity to be heard before deciding an issue that affected their rights. In so concluding, I should not be taken as departing from *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721, and *National Post*, where it was held that, in some cases, the question of journalist-source privilege may be determined without hearing from the media in advance of making the order. However, as I stated at the outset of these reasons, the Globe and Mail, which was representing Mr. Leblanc's interests,

was already a party to these proceedings. The circumstances for the exemption from notice and hearing contemplated by *Toronto Star* and *National Post* are simply not present in this appeal.

[75] Given these circumstances, the fact that de Grandpré J. made the impugned order on his own motion and without having heard submissions from either party is sufficient to allow the appeal. While I recognize that art. 46 of the *C.C.P.* gives Superior Court judges the authority to make orders *ex proprio motu*, it is incumbent on the judge to do so to "safeguard the rights of the parties". A publication ban, which by its very nature infringes the constitutional rights of the party against whom it is imposed, cannot, absent extraordinary circumstances not present here, be imposed *ex proprio motu*. However, because the question of the publication ban has yet to be considered on its merits, I will proceed with a complete analysis.

B. *Fundamental Questions Raised by This Appeal*

(1) <u>The Importance of Confidentiality at the Pre-trial Stage</u>

[76] It is important to pause and reiterate here the importance placed, by both the judiciary and the legislature, on confidentiality at the pre-trial stage, whether the proceedings are examinations for discovery, mediation or settlement negotiations. It is also important to note that the rationale animating the confidentiality undertaking in all of these contexts is the same.

[77] In *Lac d'Amiante*, this Court concluded that there was an implied undertaking of confidentiality concerning the evidence obtained or provided in examinations on discovery. This

undertaking is meant to allow the parties to obtain as full a picture of the case as possible, without the fear that disclosure of the information will be harmful to their interests, privacy-related or otherwise:

> It appears that the preferred approach is a far-reaching and liberal exploration that allows the parties to obtain as complete a picture of the case as possible. In return for this freedom to investigate, an implied obligation of confidentiality has emerged in the case law, even in cases where the communication is not the subject of a specific privilege. . . The aim is to avoid a situation where a party is reluctant to disclose information out of fear that it will be used for other purposes. The aim of this procedure is also to preserve the individual's right to privacy.
>
> . . .
>
> . . . the purpose of the examination is to encourage the most complete disclosure of the information available, despite the privacy imperative. On the other hand, if a party is afraid that information will be made public as a result of an examination, that may be a disincentive to disclose documents or answer certain questions candidly, which would be contrary to the proper administration of justice and the objective of full disclosure of the evidence. [paras. 60 and 74]

It is difficult for the parties, at the examination on discovery stage, to assess the relevancy of the evidence, and the confidentiality undertaking helps to ensure that the parties will be full and frank in exercising their examination on discovery obligations.

[78] This same rationale applies in the context of pre-trial settlement negotiations and mediation. In *Kosko v. Bijimine*, 2006 QCCA 671 (CanLII), the Quebec Court of Appeal commented on the rationale animating confidentiality undertakings — similar to those in the context of examination on discovery — in the context of judicial mediation:

> The protection of the confidentiality of these "settlement discussions" is the most

> concrete manifestation in the law of evidence of the importance that the courts assign to the settlement of disputes by the parties themselves. This protection takes the form of a rule of evidence or a common law privilege, according to which settlement talks are inadmissible in evidence.
>
> The courts and commentators have unanimously recognized that, first, settlement talks would be impossible or at least ineffective without this protection and, second, that it is in the public interest and a matter of public order for the parties to a dispute to hold such discussions. [paras. 49-50]

[79] In Quebec, the *C.C.P.* provides a mechanism for settlement conferencing presided over by a judge of the Superior Court (art. 151.14). Article 151.16 provides that those conferences are meant to facilitate a dialogue, aimed at exploring mutually satisfactory solutions to the dispute, and are to be held in private. Article 151.21 more specifically provides that "[a]nything said or written during a settlement conference is confidential". Similar rules exist in the common law provinces *(Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 9-1(2) (settlement conference), r. 9-2(1) and 3 (judicial pre-trials); *Alberta Rules of Court*, Alta. Reg. 390/68, r. 173 (compromise using court process); Saskatchewan, *The Queen's Bench Rules*, r. 181(3) (offer to settle), r. 191(14) and (15) (judicial pre-trials); *Queen's Bench Rules*, Man. Reg. 553/88, r. 49.06(1) and (2) (offer to settle), r. 50.01(9) and (10) (judicial pre-trials); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 24.1.14 (mandatory mediation), r. 49.06 (offer to settle), r. 50.09 and .10 (judicial pre-trial); Nova Scotia *Civil Procedure Rules*, r. 10.13(4)(a) (ordinary settlement), r. 10.14(4)(a) (judicial pre-trial), and r. 10.16).

[80] Even in the absence of a legislated rule of procedure, the common law has long recognized that, in order to encourage parties to resolve their disputes through settlement

negotiations, those negotiations must remain confidential. Indeed, the privilege dates back to at least the 1790s when, in *Waldridge v. Kennison* (1794), 1 Esp. 143, 170 E.R. 306, Lord Kenyon C.J. observed:

> . . . any admission or confession made by the party respecting the subject matter of the action, obtained while a treaty was depending, under faith of it, and into which the party might have been led, by the confidence of a compromise taking place, could not be admitted to be given in evidence to his prejudice . . . .

This approach has translated into a rule of evidence, whereby the contents and substance of settlement negotiations are, should a dispute ultimately proceed to trial, inadmissible (*Histed v. Law Society of Manitoba*, 2005 MBCA 106, 195 Man. R. (2d) 224, at para. 44; *Canadian Broadcasting Corp. v. Paul*, 2001 FCA 93, 198 D.L.R. (4th) 633). In Quebec, the Court of Appeal in *Gesca* held recently that settlement negotiations held outside the framework provided by the *C.C.P.* — in other words those not presided over by a judicial mediator — similarly benefit from the protection of confidentiality (para. 47).

[81] Maintaining the confidentiality of settlement negotiations is a public policy goal of the utmost importance, and nothing in these reasons should be interpreted as derogating from that position. However, it must be noted that these confidentiality undertakings bind only the parties to settlement negotiations and their agents. Provided a journalist has not participated in the breach of confidentiality, a publication ban will only be appropriate in cases where the balancing test otherwise favours non-publication.

(2) <u>Preliminary Questions and Legal Framework</u>

[82] As a preliminary matter, I must address Groupe Polygone's submission that Mr. Leblanc, in publishing the content of the confidential settlement negotiations between itself and the federal government, committed a civil fault. Groupe Polygone relies on art. 36(2) of the *C.C.Q.*:

> 36. The following acts, in particular, may be considered as invasions of the privacy of a person:
>
> . . .
>
> (2) intentionally intercepting or using his private communications . . . .

Groupe Polygone argues that the Globe and Mail and its journalist "interfered" with its privacy rights, and have therefore committed the civil wrong contemplated by art. 36(2). I cannot accept this submission.

[83] The wrong contemplated by art. 36(2) in this case was committed by the government source, whoever he or she may be, who provided Mr. Leblanc with the information that ultimately made its way into the article published on October 21, 2008. Nothing in the record suggests that Mr. Leblanc was anything other than a beneficiary of the source's desire to breach confidentiality. There is no "interference", as suggested by Groupe Polygone, on the part of Mr. Leblanc in the confidential negotiations and communications of the parties. No proof was made of any illegal acts on the part of the Globe and Mail or Mr. Leblanc leading to the discovery of the information. Groupe Polygone's remedy, in terms of the commission of a civil fault, is more properly viewed as being against the source, or its negotiating partner more generally.

[84] Moreover, there 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.

[85] Such a legal policy is consistent with what has come to be known as the U.S. "*Daily Mail* principle". In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the United States Supreme Court held that if a newspaper obtains truthful information about a matter of public importance, and does so in a lawful manner, then, absent a higher order public interest, the state cannot punish the publication of that information. This principle was extended, in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), to situations where the published information about an important public issue had been unlawfully intercepted, and where the press knew or ought to have known that the information had been intercepted by a third party, but had not participated in the interception. Justice Stevens, for the majority, held that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern" (p. 535).

[86] I must also address Groupe Polygone's submission that de Grandpré J.'s order was not a publication ban and, therefore, the *Dagenais/Mentuck* framework is both inapplicable and inappropriate (see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*,

2001 SCC 76, [2001] 3 S.C.R. 442). Groupe Polygone says that the remedy sought was a ceasing of a serious violation of privacy and reputation, caused by the media. I cannot accept this submission.

[87] De Grandpré J.'s order must be assessed for what it looks like, sounds like and in fact is: a court-ordered publication ban. As this Court held in *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, the *Dagenais/Mentuck* framework "is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings" (para. 31). In my view, Groupe Polygone takes too narrow a view of "judicial proceedings". The impugned order in this case was made in the context of discontinuance proceedings incidental to a revocation motion. While its target or substance — the content of the parties' settlement negotiations — is indeed not a judicial proceeding, that is no matter. The order itself was made in the context of a judicial proceeding, and had the effect of infringing on the Globe and Mail's and Mr. Leblanc's respective s. 2(*b*) rights. The order was issued in a civil proceeding, is a publication ban and therefore engages s. 2(*b*) *Canadian Charter* rights.

[88] Groupe Polygone cites a number of trial level cases from across the country, which it says demonstrate that the *Dagenais/Mentuck* framework is both inappropriate and inapplicable in this context. Using *Dagenais/Mentuck* in this case, Groupe Polygone says, would be unprecedented. I disagree. All of the jurisprudence cited by Groupe Polygone is distinguishable on the basis of having been decided before the release of *Dagenais* (*Peat Marwick Thorne v. Canadian Broadcasting Corp.* (1991), 5 O.R. (3d) 747 (Gen. Div.); *Amherst (Town) v. Canadian Broadcasting Corp.* (1994), 133 N.S.R. (2d) 277 (C.A.)); the nature of the legal issue (*Canada (Canadian*

Transportation Accident Investigation and Safety Board) v. Canadian Press, [2000] N.S.J. No. 139 (QL) (S.C.): the media breached a statutory confidentiality obligation, and challenged the constitutionality of the provision itself); or the facts (*Calgary Regional Health Authority v. United Western Communications Ltd.*, 1999 ABQB 516, 75 Alta. L.R. (3d) 326: the media were in physical possession of confidential hospital records, of which the hospital sought the return, and the case involved the safety and security concerns of doctors who performed abortions). *K. v. K.E.*, 2004 ABQB 847, 37 Alta. L.R. (4th) 118, involved the review of a previously ordered publication ban, and did in fact analyse the issue by way of the *Dagenais/Mentuck* framework.

[89] De Grandpré J.'s order was a discretionary one, made pursuant to his authority under art. 46 of the *C.C.P.*, and had the effect of limiting the s. 2(*b*) rights of Mr. Leblanc and the Globe and Mail. He therefore erred in not applying the *Dagenais/Mentuck* framework prior to making the order.

(3) Application of the *Dagenais/Mentuck* framework

[90] I now move on to a consideration of the *Dagenais/Mentuck* framework:

(a) Is the order necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk?

(b) Do the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the right to free expression

and the efficacy of the administration of justice?

I will assess each of these elements in turn.

[91] The article that prompted de Grandpré J. to order the publication ban was published on October 21, 2008. However, on August 27, 2008, lawyers for Groupe Polygone filed with the Registrar of the Quebec Superior Court a motion requesting a change in the trial dates. The trial between Groupe Polygone and the Attorney General had originally been set to run between September and December 2008. The principal reason given for the requested postponement was that the parties wanted to attempt settlement negotiations. It was anticipated that the negotiations would be long and complex, and therefore not likely to be completed before September 2008. The motion was granted on October 14, 2008, by Wery A.C.J., "pour les motifs contenus à la requête". Therefore, when the impugned article was published on October 21, 2008, the *fact* that Groupe Polygone and the Attorney General were engaged in settlement negotiations was already a matter of public record, by virtue of the public court file. It is only the contents of those negotiations — the amount being discussed and the federal government's position with respect to it — that could be said to be confidential. Furthermore, the Attorney General has authorized disclosure, by virtue of publication on the Public Works and Government Services Canada website, of the full terms of any settlement that it reaches in Sponsorship Scandal-related litigation.

[92] Groupe Polygone also argues that its reputation has been irreparably harmed in the eyes of the public, who will interpret Groupe Polygone's willingness to engage in settlement negotiations as an admission of fault or liability. Again, this submission cannot be supported by the record.

Firstly, Groupe Polygone offers no evidence of this specific harm. Secondly, and more importantly, the fact that the parties intended to pursue settlement negotiations was already a matter of public record, by virtue of Groupe Polygone's own motion in the Superior Court to postpone the trial dates.

[93] I am not prepared to accept Groupe Polygone's bald assertions, without more, that its ability to negotiate a settlement with the federal government has been irreparably harmed. That it is now in the public domain that the parties are attempting to negotiate a settlement cannot affect the discussions between the parties themselves. Moreover, as I indicated above, at the time when Mr. Leblanc's article was published, the fact that the parties were engaged in settlement negotiations was already a matter of public record, because it was the reason given by Groupe Polygone as the basis for a request to postpone the trial dates. Groupe Polygone suspended its negotiations on its own initiative.

[94] Groupe Polygone has offered no tangible proof that its ability to effectively engage with the government has been irreparably harmed. Nor has it offered any evidence or proof of a serious risk to the administration of justice. Groupe Polygone's failure to do so is not surprising, given that it did not specifically apply for the ban imposed by de Grandpré J. But even if the parties did not ask for the production of evidence and did not apply for a remand of the case to the motion judge, the positions of both the Globe and Mail and Groupe Polygone with respect to the propriety of the ban were prejudiced by the manner in which de Grandpré J. chose to proceed. The conduct of the matter by de Grandpré J. deprived them of the opportunity, at the time, to make argument about the application of the *Dagenais/Mentuck* test.

[95] I note again that the breach of confidentiality in this case was made not by Mr. Leblanc, but by someone bound by the undertaking. Other avenues available to Groupe Polygone, which would not have any effect on freedom of the press, could have been directed against its negotiating partner, in the form of an injunction or an order for costs. Some other form of relief could also have been directed against the party directly responsible for the breach in this case, if its identity could be accurately established. Finally, the ban imposed by de Grandpré J. is, if nothing more, clearly overbroad. It is a blanket prohibition, and no indication was given as to when it would expire.

[96] Even if I were convinced that the publication ban was necessary to prevent a serious risk to the administration of justice, I would not be convinced that its salutary effects outweigh its deleterious effects. The salutary effects of the ban are, primarily, a cessation of the breach of Groupe Polygone's s. 5 privacy rights and, indirectly, a breach of its right to negotiate a settlement confidentially. I say indirectly, of course, because the media are not the party responsible for the breach of confidentiality. However, I am not convinced that such a breach, in the circumstances of this case, led to a failure in the negotiations and can therefore justify a publication ban.

[97] On the other hand, the deleterious effects of the ban are serious. The Globe and Mail received information about settlement negotiations involving, as a party, the Government of Canada, which is seeking to recover a considerable amount of taxpayer money, on the basis of an alleged fraud against a government program. There is clearly an overarching public interest in the outcome of this dispute, and barring the Globe and Mail from publishing the information that it obtained in this regard would prevent the story from coming to light. In other words, upholding de Grandpré J.'s order would be to stifle the media's exercise of their constitutionally mandated role.

[98] While not in any way wanting to diminish the importance that this Court places on the confidentiality of settlement negotiations, I again emphasize that the confidentiality undertakings are a binding only on the parties to negotiation. The obligation does not, and cannot, extend to the media. Neither Mr. Leblanc nor the Globe and Mail did anything — illegal or otherwise — to obtain the information published in the article. Mr. Leblanc did not even have to make any requests in this regard. As discussed earlier in these reasons, I am reluctant to endorse a situation where the media or individual journalists are automatically prevented from publishing information supplied to them by a source who is in breach of his or her confidentiality obligations. This would place too onerous an obligation on the journalist to verify the legality of the source's information. It would also invite considerable interference by the courts in the workings of the media. Furthermore, such an approach ignores the fact that the breach of a legal duty on the part of a source is often the only way that important stories, in the public interest, are brought to light. Imposing a publication ban in this case would be contrary to all these interests.

[99] As we have seen, on the factual record before us, the ban was not necessary to prevent a serious risk to the proper administration of justice. Moreover, the salutary effects of the publication ban imposed in the court below do not outweigh its deleterious effects. I would thus allow the appeal and quash the publication ban imposed by de Grandpré J.

[100] For all these reasons, the Globe and Mail's appeal is allowed, with costs throughout, and the order prohibiting the publication of anything relating to the settlement negotiations between the parties is quashed, with costs throughout.

V. The Discontinuance Proceedings (32975)

[101] Given the appellant's success in the other two appeals, it is unnecessary to consider this issue. The appeal from the dismissal of the discontinuance proceeding is moot and is dismissed, without costs.

VI. Disposition

[102] For these reasons, the appeals with respect to the confidentiality of journalist sources (33114) and the publication ban (33097) are allowed, with costs throughout. The issue of journalist-source privilege is remitted to the Superior Court for consideration in light of these reasons. The order prohibiting the publication of information relating to the settlement negotiations is quashed. The appeal concerning the discontinuance proceeding (32975) is dismissed as moot, without costs.

Appeals 33114 and 33097 allowed with costs. Appeal 32975 dismissed without costs.

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