SUPREME COURT OF CANADA

CITATION: R. *v.* National Post, 2010 SCC 16

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BETWEEN:

National Post, Matthew Fraser and Andrew McIntosh
Appellants
and
Her Majesty The Queen
Respondent
- and -
Attorney General of Canada, Attorney General of New Brunswick, Attorney General of Alberta, Bell GlobeMedia Inc., Canadian Broadcasting Corp., British Columbia Civil Liberties Association, Canadian Civil Liberties Association, and Canadian Newspaper Association, AD IDEM/Canadian Media Lawyers Association, Canadian Journalists for Free Expression, Canadian Association of Journalists, Professional Writers Association of Canada, RTNDA Canada/Association of Electronic Journalists, Magazines Canada, Canadian Publishers' Council, Book and Periodical Council, Writers' Union of Canada and Pen Canada ("Media Coalition")
Interveners

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

REASONS FOR JUDGMENT: (paras. 1 to 92)	Binnie J. (McLachlin C.J. and Deschamps, Fish, Charron, Rothstein and Cromwell JJ. concurring)
PARTIALLY CONCURRING REASONS: (paras. 93 to 97)	LeBel J.
	Abella J.
DISSENTING REASONS: (paras. 98 to 159)	

R. *v.* NATIONAL POST

National Post,
Matthew Fraser and
Andrew McIntosh *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Canada,
Attorney General of New Brunswick,
Attorney General of Alberta,
Bell GlobeMedia Inc.,
Canadian Broadcasting Corporation,
British Columbia Civil Liberties Association,
Canadian Civil Liberties Association, and
Canadian Newspaper Association,
AD IDEM/Canadian Media Lawyers Association,
Canadian Journalists for Free Expression,
Canadian Association of Journalists,
Professional Writers Association of Canada,
RTNDA Canada/Association of Electronic Journalists,
Magazines Canada, Canadian Publishers' Council,
Book and Periodical Council, Writers' Union of Canada
and Pen Canada ("Media Coalition")

Interveners

Indexed as: R. *v.* National Post

2010 SCC 16

File No.: 32601.

2009: May 22; 2010: May 7.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of expression — Journalist and confidential source — Document received by confidential source from anonymous sender given to journalist on condition of confidentiality — Document alleged to be forged — Search warrant and assistance order compelling production of document and envelope — Protection of confidential source — Whether guarantee of freedom of expression creates constitutionally entrenched immunity to protect journalists against compelled disclosure of confidential source — Canadian Charter of Rights and Freedoms, s. 2(b).

Constitutional law — Charter of Rights — Search and seizure — Journalist and confidential source — Document received by confidential source from anonymous sender given to journalist on condition of confidentiality — Document alleged to be forged — Search warrant and assistance order compelling production of document and envelope — Protection of confidential source — Whether search warrant and assistance order reasonable withing meaning of s. 8 of

Canadian Charter of Rights and Freedoms — Whether newspaper should have been given notice of warrant application to search its premises.

Evidence — Privilege — Journalist and confidential source — Document received by confidential source from anonymous sender given to journalist on condition of confidentiality — Document alleged to be forged — Search warrant and assistance order compelling production of document and envelope — Protection of confidential source — Whether guarantee of freedom of expression creates constitutionally entrenched immunity to protect journalists against compelled disclosure of confidential source — Whether confidential source protected by common law of privilege — If so, whether journalist-confidential source privilege constituted on case-by-case basis — What elements must be established and who bears burden of proof — Whether privilege established in circumstances of this case.

Criminal law — Search warrants — Search of newspaper office — Whether newspaper should be given notice of application for search warrant.

The National Post employed M as a journalist. M investigated whether C, then Prime Minister of Canada, was improperly involved with a loan from a federally funded bank to a hotel in C's riding which allegedly owed a debt to C's family investment company. X, a secret source, provided M with relevant information in exchange for a blanket, unconditional promise of confidentiality. In 2001, M received a sealed envelope in the mail that contained a document which appeared to be the bank's authorization of its loan to the hotel. If genuine, it could show that C had a conflict of interest in relation to the loan. M faxed copies of the document to the bank, to the

Prime Minister's office, and to a lawyer for the Prime Minister. All three said that the document was a forgery. Shortly thereafter, X met M. X described receiving the document anonymously in the mail, discarding the original envelope, and passing the document on to M in the belief that it was genuine. M was satisfied that X was a reliable source who did not believe that the document was a forgery when he or she forwarded it to M. X feared that fingerprint or DNA analysis might reveal his or her identity and asked M to destroy the document and the envelope. M refused but told X that his undertaking of confidentiality would remain binding as long as he believed that X had not deliberately misled him.

The bank complained to the RCMP and an officer asked the appellants to produce the document and the envelope as physical evidence of the alleged crimes i.e. the forgery itself and the "uttering" (or putting into circulation) of the doctored bank records. They refused and M declined to identify his source.

The officer applied for a search warrant and an assistance order compelling M's editor to assist the police in locating the document and the envelope. He intended to submit them for forensic testing to determine if they carried fingerprints or other identifying markings (including DNA) which might assist in identifying the source of the document. Although the Crown informed the judge that the National Post had requested notification of the application, the hearing proceeded *ex parte* and a search warrant and an assistance order were issued.

The warrant and the order provided the appellants with one month before the RCMP could search the National Post's premises and included other terms intended to accommodate the

needs of the National Post as a media entity. The appellants applied to quash the warrant and assistance order. The reviewing judge held that there was sufficient information to conclude the document was a forgery but that there was only a remote and speculative possibility that disclosure of the document and the envelope would advance a criminal investigation. She set aside the search warrant and the assistance order. The Court of Appeal reversed that decision and reinstated the search warrant and the assistance order. In this Court, the appellants and supporting interveners argued that the warrant and the order should be quashed because they infringe s. 2(*b*) or s. 8 of the *Canadian Charter of Rights and Freedoms*, or because the secret sources are protected by the common law of privilege.

Held (Abella J. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and **Binnie**, Deschamps, Fish, Charron, Rothstein and Cromwell JJ.: It is well established that freedom of expression protects readers and listeners as well as writers and speakers. It is in the context of the *public* right to information about matters of public interest that the legal position of the confidential source or whistleblower must be located. The public has an interest in effective law enforcement. The public also has an interest in being informed about matters of public importance that may only see the light of day through the cooperation of sources who will not speak except on condition of confidentiality. The role of investigative journalism has expanded over the years to help fill what has been described as a democratic deficit in the transparency and accountability of our public institutions. There is a demonstrated need, as well, to shine the light of public scrutiny on the dark corners of some private institutions. The appellants and their expert witnesses make a convincing case that unless the media can offer anonymity in

situations where sources would otherwise dry-up, freedom of expression in debate on matters of public interest would be badly compromised. Important stories will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment.

In appropriate circumstances, accordingly, the courts will respect a promise of confidentiality given to a secret source by a journalist or an editor. The public's interest in being informed about matters that might only be revealed by secret sources, however, is not absolute. It must be balanced against other important public interests, including the investigation of crime. In some situations, the public's interest in protecting a secret source from disclosure may be outweighed by other competing public interests and a promise of confidentiality will not in such cases justify the suppression of the evidence.

This case involves an attempt by person(s) unknown to dupe the appellants into publishing a document which, on its face, implicated a former Prime Minister of Canada in a serious financial conflict of interest. The appellants were unable to confirm the document's authenticity and the police have reasonable grounds to believe that the document is a forgery. The document and envelope that came into M's possession constitute physical evidence reasonably linked to a serious crime. The police seek to subject this material to forensic analysis. A search to retrieve the physical instrumentality by which the offence was allegedly committed would likely satisfy the test in s. 487 of the *Criminal Code*, even if (as the reviewing judge predicted) forensic analysis of the document and the envelope do not shed light on the identity of the offender. The document and the envelope are not merely pieces of evidence tending to show that a crime has been committed. They constitute the *actus reus* or *corpus delicti* of the alleged offences.

Freedom to publish the news necessarily involves a freedom to gather the news, but each of the many important news gathering techniques, including reliance on secret sources, should not itself be regarded as entrenched in the Constitution. The protection attaching to freedom of expression is not limited to the "mainstream media", but is enjoyed by "everyone" (in the words of s. 2(*b*) of the *Charter*) who chooses to exercise his or her freedom of expression on matters of public interest. To 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 (or, as here, choose to amend it with the benefit of hindsight) would blow a giant hole in law enforcement and other constitutionally recognized values such as privacy. The law needs to provide solid protection against the compelled disclosure of secret sources in appropriate situations, but the history of journalism in this country shows that the purpose of s. 2(*b*) can be fulfilled without the necessity of implying a constitutional immunity. Accordingly, a judicial order to compel disclosure of a secret source in accordance with the principles of common law privilege would not in general violate s. 2(*b*).

Although the common law does not recognize a class privilege protecting journalists from compelled disclosure of secret sources, a journalist's claim for protection of secret sources can be assessed properly using the case-by-case model of privilege. The Wigmore criteria provide a workable structure within which to assess, in light of society's evolving values, the sometimes-competing interests of free expression and the administration of justice and other values that promote the public interest. This will provide the necessary flexibility and an opportunity for growth that is essential to the proper function of the common law.

The scope of the privilege will depend, as does its very existence, on a case-by-case analysis, and may be total or partial. It is capable, in a proper case, of being asserted against the issuance or execution of a search warrant. A promise of confidentiality will be respected if: the communication originates in a confidence that the identity of the informant will not be disclosed; the confidence is essential to the relationship in which the communication arises; the relationship is one which should be sedulously fostered in the public good; and the public interest in protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth. This approach properly reflects *Charter* values and balances the competing public interests in a context-specific manner.

The media party asking the court to uphold a promise of confidentiality must prove all four criteria and no burden of proof shifts to the Crown. This includes, under the fourth criterion, proving that the public interest in protecting a secret source outweighs the public interest in a criminal investigation. The weighing up under this criterion will also include the nature and seriousness of the offence under investigation, and the probative value of the evidence sought to be obtained measured against the public interest in respecting the journalist's promise of confidentiality. The underlying purpose of the investigation is relevant as well. Until the media have met all four criteria, no privilege arises and the evidence is presumptively compellable and admissible. Therefore, no journalist can give a secret source an absolute assurance of confidentiality.

In this case, the first three of the four criteria are met. The communication originated in confidence and neither the journalist-source relationship nor the communication would have

occurred without confidentiality. This type of journalist-source relationship ought to be sedulously fostered given the importance of investigative journalism exploring potential conflicts of interest at the highest levels of government. The appellants, however, have failed to establish the fourth criterion. The alleged offences are of sufficient seriousness to justify the decision of the police to investigate the criminal allegations. The physical evidence is essential to the police investigation and likely essential as well to any future prosecution. While it is appropriate under this criterion to assess the likely probative value of the evidence sought, the reviewing judge ought not to have pre-empted the forensic investigation by seemingly prejudging the outcome without first considering all the relevant factors in her assessment. DNA analysis is capable of producing results even under exceptionally unpromising circumstances. The police should not be prevented from pursuing well-established modes of forensic analysis of relevant physical evidence on the basis that in the end such analysis may prove to be unsuccessful.

The argument that there is a "fatal disconnect between the envelope, the document, the identity of X and the alleged forgery" hinges on the credibility of X's story that he or she was not the perpetrator of the forgery, but an innocent recipient, who passed it on to M in good faith. However a denial of criminal involvement is not a sufficient ground to put an end to a serious criminal investigation, even where the intermediate (though not the ultimate) intended victim of the alleged crime happens to be a media organization. The police need not accept X's anonymous, uncorroborated and self-exculpatory statements to a third party (M) as a reason to terminate their investigation of the physical evidence any more than they need accept the disclaimers of any other potential witness to a crime, especially when the witness may also be the perpetrator.

The media's ss. 2(*b*) and 8 *Charter* interests are clearly implicated when the police seek to seize documents in their possession. Even where no privilege is found to exist, warrants and assistance orders against the media must take into account their "special position" and be reasonable in the "totality of circumstances". It is not sufficient for the Crown merely to establish that the requirements set out in ss. 487.01 and 487.02 of the *Criminal Code* were met. In this case the conditions governing the search ensured that the media organization would not be unduly impeded by a physical search in the publishing or dissemination of the news. The order contained the usual clause directing that any documents seized be sealed on request. The police had reasonable grounds to believe that criminal offences had been committed and that relevant information would be obtained. The search warrant was reasonable within the meaning of s. 8 of the *Charter*.

On the facts of this case, the *ex parte* nature of the issuing judge's order is not a ground for setting the warrant aside. There is no jurisdictional requirement to give notice to a media entity of an application for a warrant to search its premises. The media should have an opportunity to argue against a warrant at the earliest reasonable opportunity, but whether and when to provide prior notice remain matters of judicial discretion. Where, as here, a court proceeds *ex parte*, adequate terms must be inserted in the warrant to protect the special position of the media, and to permit the media ample time and opportunity to challenge the warrant.

In this case, the issuing judge was aware that the secret source issue lay at the heart of the controversy, and the appellants' position was fully protected by the terms of the warrant. They have not demonstrated any prejudice on that account. The assistance order also was reasonable. Given the concerted action between M and his editor, it was appropriate to enlist the editor's

assistance in locating and producing the concealed documents.

Accordingly, the warrant and assistance order were properly issued and must be complied with even if the result is to disclose the identity of the secret source who, the police have reasonable cause to believe, uttered (and may indeed have created) a forged document.

Per **LeBel** J.: Claims of journalist-source privilege should be resolved on a case-by-case basis applying the Wigmore criteria, and there is agreement with the majority's weighing of the relevant rights and interests under the fourth criterion of the analysis.

There is agreement with Abella J. that when an application for a search warrant is made against a media organization, there is a presumptive requirement to give notice of the application to the affected organization. The media play a key role in disseminating information and triggering debate on public issues. The process of applying for search warrants should be sensitive to the need to prevent undue or overly intrusive interference in media operations and affected media organizations should be able to raise their concerns at the first opportunity. The requirement to give notice may be waived in urgent situations, in which case the issuing judge should craft conditions to limit interference with the media organization's operations. In this case, since the lack of notice did not make the search unreasonable and the issuing judge proceeded on the basis of established law, the search warrant should not be quashed.

Per **Abella J.** (dissenting): Journalist-source privilege should be assessed on a case-by-case basis. The balancing of the interests of the press against other societal interests, such

as crime prevention, prosecution and investigation, should be done in accordance with the four Wigmore criteria, infused with *Charter* values. In this case, the search warrant and assistance order should be quashed. The criteria are met, including the fourth criterion, which requires the claimant to demonstrate that the injury that would inure to the relationship by the disclosure of the communications is greater than the benefit thereby gained for the correct disposal of the litigation. The harm caused by the disclosure of the identity of the confidential source in this case is far weightier on the scales than any benefit to the investigation of the crime.

The media's role in disseminating information is pivotal in its contribution to public debate, and the use of confidential sources can be an integral part of the responsible gathering of the news and the communication of matters of public interest. Several jurisdictions have already recognized the importance of confidential sources by granting, legislatively or judicially, some form of qualified privilege to journalists. The chilling effect that could result from the compelled exposure of confidential journalistic sources also cannot be ignored. In the case before us, X's confidentiality was crucial to M's ability to write on a subject of public interest. M had prior positive experiences with X where he had been able to confirm the authenticity of information provided by X via an intermediary. He also took steps to assure himself of X's credibility and integrity in connection with the latest document by asking for a confidential affidavit and telling X that his/her confidentiality would only be protected if M were satisfied that he was not being misled. Where a journalist has taken credible and reasonable steps to determine the authenticity and reliability of a source, one should respect his or her professional judgment and pause before trespassing on the confidentiality which is the source of the relationship. In this case, demonstrable and profound injury to the journalist/source relationship will result from disclosure of the documents and potentially of the

identity of the source.

On the other side of the balancing exercise, the benefits of disclosure range from speculative to negligible. While it is undisputed that the investigation of crime is an important public objective, the evidence sought by the state is of only questionable assistance in this case. The police hoped to find DNA and fingerprint evidence on the envelope and the document which they thought might reveal the identity of the source of the alleged forgery. However, there is a fatal disconnect between the envelope, the document, the identity of X and the alleged forgery. X received the document anonymously and discarded the original envelope in which he/she received the document. Since X does not know the identity of the sender, learning X's identity will yield virtually no evidence that could assist in determining who was responsible for the alleged forgery. Moreover, the more documents are manipulated, the less likely the chances of obtaining fingerprints. Both the document and the envelope had been extensively handled. X is therefore in no position to provide any information of assistance to the investigation and is, in any event, under no legal obligation to speak to the police. The benefit to the forgery investigation of getting the documents is, therefore, at best marginal. The only remaining purpose for learning the confidential source's identity is to discover who created this public controversy. This by itself is not an acceptable basis for interfering with freedom of the press. Lastly, the remote possibility of resolving the debt forgery — a crime of moderate seriousness — is far from sufficiently significant to outweigh the public benefit in protecting a rigorously thorough and responsible press.

A search warrant of media premises is a particularly serious intrusion, and a decision should not be made about its propriety without submissions from the party most affected. The

operating presumption should be that the media's unique institutional character entitles it to notice when a search warrant is sought against it unless there are urgent circumstances justifying an *ex parte* hearing. No such notice was given to the National Post and there was no such urgency. It therefore lost the opportunity to make timely submissions on the confidential nature of the source and the serious informational gaps in the Information to Obtain. Had the fuller record and their arguments been known, the outcome of the hearing might have been different.

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By Binnie J.

Referred to: *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 230 C.C.C. (3d) 199; *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 421; *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572; *Ashworth Hospital Authority v. MGN Ltd.*, [2002] UKHL 29, [2002] 1 W.L.R. 2033; *McGuinness v. Attorney-General of Victoria* (1940), 63 C.L.R. 73; *John Fairfax and Sons Ltd. v. Cojuangco* (1988), 165 C.L.R. 346; *Branzburg v. Hayes*, 408 U.S. 665 (1972); *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *O'Neill v. Canada (Attorney General)* (2006), 213 C.C.C. (3d) 389; *R. v. Murray* (2000), 144 C.C.C. (3d) 289; *Financial Times Ltd. v. The United Kingdom*, [2009] ECHR 2065 (BAILII); *Financial Times v. Interbrew*, [2002]

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By Abella J. (dissenting)

Moysa v. Alberta (Labour Relations Board), [1989] 1 S.C.R. 1572; *Branzburg v. Hayes*, 408 U.S. 665 (1972); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d. 964 (2005); *The New York Times Co. v. Gonzales*, 459 F.3d. 160 (2006); *X Ltd. v. Morgan-Grampian Ltd.*, [1991] 1 A.C. 1; *Ashworth Hospital Authority v. MGN Ltd.*, [2002] UKHL 29, [2002] 1 W.L.R. 2033; *Goodwin v. The United Kingdom*, Eur. Court H.R., judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II; *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 230 C.C.C. (3d) 199; *John v. Express Newspapers*, [2000] 3 All E.R. 257; *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127; *Ernst v. Belgium* (2004), 39 E.H.R.R. 724; *Voskuil v. Netherlands* (2007), 24 B.H.R.C. 306; *Prosecutor v. Brdjanin and Talic*, ICTY, No.

IT-99-36-AF73.9, 11 December 2002; *Van den Biggelaar/Dohmen en Langenberg*, Hoge Raad der Nederlanden, Judgment of 10 May 1996, NJ 1996/578; *British Steel Corp. v. Granada Television Ltd.*, [1981] 1 All E.R. 417; *Financial Times Ltd. v. The United Kingdom*, [2009] ECHR 2065 (BAILII); *R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. Chambers*, [1990] 2 S.C.R. 1293; *R. v. Turcotte*, 2005 SCC 50, [2005] 2 S.C.R. 519; *O'Neill v. Canada (Attorney General)* (2006), 213 C.C.C. (3d) 389; *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 421; *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459; *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487.

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APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Simmons and Gillese JJ.A.), 2008 ONCA 139, 230 C.C.C. (3d) 472, 290 D.L.R. (4th) 655, 56 C.R. (6th) 163, 168 C.R.R. (2d) 193, 234 O.A.C. 101, 89 O.R. (3d) 1, [2008] O.J. No. 744 (QL), 2008 CarswellOnt 1104, setting aside a decision of Benotto J. (2004), 69 O.R. (3d) 427, 19 C.R. (6th) 393, 115 C.R.R. (2d) 65, [2004] O.T.C. 50, [2004] O.J. No. 178 (QL), 2004 CarswellOnt 173. Appeal dismissed, Abella J. dissenting.

Marlys A. Edwardh, *John Norris* and *Jessica Orkin*, for the appellants.

Robert Hubbard and *Susan Magotiaux*, for the respondent.

Cheryl J. Tobias, *Q.C.*, *Jeffrey G. Johnston* and *Robert J. Frater*, for the intervener the Attorney General of Canada.

Written submissions only by *Gaétan Migneault*, for the intervener the Attorney General of New Brunswick.

Jolaine Antonio, for the intervener the Attorney General of Alberta.

Peter M. Jacobsen and *Tae Mee Park*, for the intervener Bell GlobeMedia Inc.

Daniel J. Henry, for the intervener the Canadian Broadcasting Corporation.

Tim Dickson, for the intervener the British Columbia Civil Liberties Association.

Jamie Cameron and *Matthew Milne-Smith*, for the intervener the Canadian Civil Liberties Association.

Brian MacLeod Rogers and *Iain A. C. MacKinnon*, for the interveners the Canadian Newspaper Association, AD IDEM/Canadian Media Lawyers Association, Canadian Journalists for Free Expression, the Canadian Association of Journalists, the Professional Writers Association of Canada, RTNDA Canada/Association of Electronic Journalists, Magazines Canada, the Canadian Publishers' Council, the Book and Periodical Council, the Writers' Union of Canada and Pen Canada.

The judgment of McLachlin C.J. and Binnie, Deschamps, Fish, Charron, Rothstein and Cromwell JJ. was delivered by

BINNIE J. —

[1] The public has the right to every person's evidence. That is the general rule. The question raised by this appeal is whether the appellants can exempt themselves from this obligation on the basis of a journalistic privilege rooted either in s. 2(*b*) of the *Canadian Charter of Rights and*

Freedoms which guarantees freedom of expression, "including freedom of the press and other media of communication", or in the common law.

[2] Specifically, the *National Post*, its editor-in-chief and one of its journalists apply to set aside a search warrant obtained from the Ontario Court of Justice authorizing the police to seize what are alleged to be forged bank records and the envelope in which the appellants received the records from secret source(s). The police believe that seizure of the physical documents is essential to proof of the forgery, and that forensic analysis may lead them directly or indirectly to the identity of the perpetrators. The appellants, for their part, seek to protect the identity of their secret source(s), who may or may not be directly implicated in the forgery. If the police are correct, therefore, the documents in the control of the *National Post* and its co-appellants are not merely links in the chain of criminal investigation but constitute in themselves the essential physical evidence of alleged crimes — the forgery itself and the "uttering" (or putting into circulation) of the doctored bank records in the plain brown envelope.

[3] The courts should strive to uphold the special position of the media and protect the media's secret sources where such protection is in the public interest, but this is not the usual case of journalists seeking to avoid testifying about their secret sources. This is a physical evidence case. It involves what is reasonably believed to be a forged document. Forgery is a serious crime. For the reasons that follow I agree with the Ontario Court of Appeal (2008 ONCA 139, 89 O.R. (3d) 1) that the media claim to immunity from production of the physical evidence is not justified in the circumstances disclosed in the evidence before the court even if the end result proves to be information that may lead to the identification of the secret source(s). I would dismiss the appeal.

I. Overview

[4] This dispute is a controversy of undoubted public importance. It involves an attempt by a person or persons unknown to dupe the *National Post* into publishing an allegedly forged bank document which, on its face, implicated the then Prime Minister of Canada, Jean Chrétien, in a serious financial conflict of interest. The courts below concluded that the police possess reasonable and probable grounds to believe that the inculpatory entries on the "leaked" document are false. The document, if authentic, would have suggested that at the same time the Prime Minister was said to be exerting influence on the federal Business Development Bank of Canada ("BDBC") to grant a $615,000 loan to the Auberge Grand-Mère, a private business in his riding, the Auberge Grand-Mère allegedly owed the Chrétien family investment company $23,040. Unless the Auberge Grand-Mère could be saved from insolvency, the story went, the debt would likely go unpaid. The Prime Minister's private financial interest, on this theory of events, conflicted with his public duty. Some in the media referred to cluster of events around the loan controversy as "Shawinigate".

[5] The public interest in freedom of expression is of immense importance but it is not absolute and in circumstances such as the present it must be balanced against other important public interests, including the investigation and suppression of crime. The courts understand the need in appropriate circumstances to protect from disclosure the identity of secret sources who provide the media, on condition of confidentiality, with information of public interest, but even the journalist Andrew McIntosh recognized that if his source had provided the document "to deliberately mislead me" the source would no longer be worthy of protection (A.R., vol. 4, p. 1, McIntosh Affidavit, at

para. 227). It is true that Mr. McIntosh believed his source to be sincere. Nevertheless, according to Mr. McIntosh, the source acknowledged participation (he or she says innocently) in forwarding the alleged forgery. There would not be many successful criminal investigations if the police were required to accept at face value protestations of innocence by unknown persons relayed at third hand.

[6] The reviewing judge, Benotto J., quashed the warrant in part because she considered it unlikely that the outcome of the forensic analysis of the appellants' documents would be successful. With respect, I do not think the possibility of failure is a reason to prevent the police from undertaking forensic inquiry by well-established techniques such as DNA analysis of documents which the appellants concede are reasonably linked to the alleged criminal offences. A search to retrieve the physical instrumentality by which the offence was allegedly committed would likely satisfy the test in s. 487 of the *Criminal Code*, R.S.C. 1985, c. C-46, even if the documents did not shed light on the identity of the offender. Moreover, if Benotto J. is correct, and the envelope is unlikely to identify the confidential source, then there is little public interest in refusing its production to the police.

[7] In terms of the *Charter*, the appellants go too far in claiming a broad immunity from production of physical evidence. A claim that secret sources may be disclosed is not a complete answer to a criminal investigation. I conclude that the warrant in question does not infringe the appellants' s. 2(*b*) *Charter* freedom of expression. Nor, in my view, are the documents in question protected by a common law journalistic privilege. Nor, for the reasons to be discussed, does the warrant at issue in this case give rise to an unreasonable search or seizure within the meaning of s.

8 of the *Charter*. Journalistic privilege is very context specific. The appellants have not, in my view, made out their claim on the facts. The warrant is valid.

II. Facts

[8] The appellant Andrew McIntosh was employed by the *National Post* from August 1998 until February 2005. He took an interest in then Prime Minister Jean Chrétien's involvement with the Grand-Mère Golf Club located in Mr. Chrétien's home riding of St-Maurice, Quebec. His investigation led him to suspect Mr. Chrétien's involvement with a 1997 loan from the BDBC to the Auberge Grand-Mère, a hotel located next to the golf club, and with other federal grants in the riding. During his investigations, Mr. McIntosh contacted a person known to us only as X, but at that time X was unwilling to talk to Mr. McIntosh, even on a confidential basis.

A. *The Secret Source*

[9] However, in the Fall of 2000, another individual known only as Y contacted Mr. McIntosh and indicated that he or she had important information but would only disclose it in return for a promise of confidentiality. Mr. McIntosh was generally authorized by the then editor-in-chief of the *National Post* to give promises of confidentiality and he routinely did so. The editor-in-chief testified that he considers himself a party to such promises of confidentiality. Indeed, the reviewing judge found that "[a]ll of Mr. McIntosh's work was done with the support of the then Editor-in-Chief" ((2004), 69 O.R. (3d) 427, at para. 8).

[10] Mr. McIntosh testified that "the condition I agreed to in order to gain access to these materials was that I would give a blanket, unconditional promise of confidentiality to protect the identity of both X and Y" (McIntosh Affidavit, at para. 156).

[11] Y told Mr. McIntosh that he was acting on X's behalf and explained that X was willing to provide McIntosh with documents and information concerning the Auberge Grand-Mère loan. Based on materials received from Y, including what appeared to be copies of original documents from BDBC files and information received from other sources, Mr. McIntosh reported in the *National Post* that Mr. Chrétien had called the president of the BDBC and urged approval of the bank loan to Auberge Grand-Mère. When asked by reporters to comment, Mr. Chrétien acknowledged that the story was accurate. Numerous articles followed.

B. *The Plain Brown Envelope*

[12] On April 5, 2001, Mr. McIntosh received a sealed plain brown envelope at the Ottawa Bureau of the *National Post*. The envelope contained a document that appeared to be a copy of a BDBC internal loan authorization for a $615,000 mortgage to Les Entreprises Yvon Duhaime Inc. (Auberge Grand-Mère) in August 1997. On the face of it, the document purported to show that, at the time it applied for and received the loan, Auberge Grand-Mère listed an outstanding debt of $23,040 to "JAC Consultants", a Chrétien family investment company. Mr. McIntosh concluded that if the document were genuine, it would represent a major escalation in the Shawinigate story.

[13] To check the authenticity of the document, Mr. McIntosh faxed copies to the BDBC,

the Prime Minister's office, and to a lawyer for the Prime Minister. All three said that the document was a forgery. The BDBC sent two letters to the *National Post* on April 6, 2001. The first claimed that the BDBC's records showed no indication of a debt owed to JAC Consultants. In the second letter, the BDBC warned the *National Post* that bank documents were confidential and should not be disclosed. A short time after receiving these letters, Mr. McIntosh put the document and its envelope somewhere, he claims, where only he is able to access them.

[14] The Bloc Quebecois also received a copy of the BDBC "document" which it photocopied and distributed to its members and others. The story was picked up by some news sources. The police believe, however, that only the *National Post* has an envelope and document that could disclose fingerprint or DNA evidence that might in turn lead to identification of the perpetrator(s) and provide physical evidence of the alleged crime(s).

[15] Since it was unable to confirm the document's authenticity, the *National Post* hesitated to publish the allegations. However, other news organizations published details about the leaked document and the reference to the alleged $23,040 loan and eventually the *National Post* picked up the story and reported that the *Globe and Mail*, SunMedia and CTV had already published some details of the alleged bank document, as had the *Ottawa Citizen*.

C. *The Modified Undertaking of Confidentiality*

[16] Sometime during the week after the receipt of the document, X sought a meeting with Mr. McIntosh, who then consulted legal counsel and editors. X confirmed that it was he or she who

had sent the envelope and asked that it be destroyed. X expressed concern that the police might try to use it to identify him or her through fingerprint or DNA analysis, and feared that the envelope might link him or her to the bank document now alleged to be a forgery. Mr. McIntosh testified that he told X "that I would not dispose of them. I said this would be both improper and highly unethical given the serious allegation that the document had been forged" (McIntosh Affidavit, at para. 225).

[17] However, as stated earlier, Mr. McIntosh also told X that so long as "I believed that [X] had not provided the document to deliberately mislead me, my undertaking of confidentiality would remain binding. I also told Confidential Source X that should irrefutable evidence to the contrary emerge, our agreement of confidentiality would become null and void. X agreed to these terms" (McIntosh Affidavit, at para. 227).

[18] Mr. McIntosh testified that X explained that he or she had received the document in the mail anonymously and had passed it on to Mr. McIntosh in the belief that it was genuine. On at least one other occasion, Mr. McIntosh had been able to confirm the authenticity of documents that X claimed to have received in the same way. In his evidence, Mr. McIntosh said he was satisfied that X was a reliable source and that the loan authorization was genuine. If the loan authorization was a forgery, Mr. McIntosh did not believe X knew that.

D. *The Police Investigation*

[19] In the meantime, the BDBC had complained to the RCMP about the alleged forgery. On June 7, 2001, RCMP Corporal Roland Gallant met with Mr. McIntosh, his editor-in-chief,

another editor of the *National Post*, and its legal counsel. Counsel for the *National Post* refused Corporal Gallant's request to produce the documents. The police officer was told that before becoming aware of the police investigation, Mr. McIntosh had placed the document and envelope in a secure location not on *National Post* premises. Mr. McIntosh declined to identify the secret source.

[20] Corporal Gallant indicated that he would have to apply for a search warrant and assistance order in relation to two offences — forgery (creation of a false document with the intent that it be acted upon as genuine) and uttering a forged document (attempting to cause Mr. McIntosh and the *National Post* to act on the forged loan authorization as if it were genuine). The *National Post* expressed "grave concerns" about the constitutionality of a warrant to disclose a confidential source and requested an *inter partes* hearing on the warrant application.

E. *The Search Warrant and Assistance Order*

[21] On July 4, 2002, Corporal Gallant applied to the Ontario Court of Justice for a warrant assistance order stating that the evidence he wished to seize was not available from any other source because the document and envelope formed part of the *actus reus* of these offences and would be required to substantiate any charges. He intended to submit the document and envelope for forensic testing to determine if they had "fingerprints or other identifying markings which might assist in identifying the source of the document". These other possible identifying markers included saliva, from which a DNA sample could be obtained.

[22] Khawly J. was advised of the desire of the *National Post* for notice and a hearing but decided to proceed *ex parte*. The search warrant and assistance order were issued without written reasons. The intended effect of the assistance order was to require the editor-in-chief of the *National Post* to assist in locating the two documents in question and to make them available to Corporal Gallant.

[23] In relation to procedural protection, the terms of the orders attempted to accommodate the special position of the media. It was provided that the orders were to be served on July 5, 2002. The appellants would thereafter be given a month to consider their position. On August 9, 2002 (or such earlier date as the appellants agreed to) Corporal Gallant was again to attend at the offices of the *National Post* and request production of the BDBC loan authorization and the "associated" brown envelope. The warrant then provided that after waiting two hours (to give the appellants an opportunity for voluntary compliance without prejudice to any subsequent challenge they might see fit to make to the issuance or execution of the warrant) the police officer would then be free to search the *National Post* premises. The police were directed to interfere "as little as possible with the operations of the place being searched and avoid, to the extent possible, examining any notes, documents, records or lists unconnected with securing the location of the things subject to seizure". If found, the documents would on request be marked for identification and sealed in a package and delivered for safekeeping to the Ontario Court of Justice. The appellants would then have 14 days to apply "for the continued sealing and return of any things sealed".

[24] The appellants duly applied to quash the warrant and assistance order. Relying upon a considerably amplified record which included the cross-examination of Mr. McIntosh and the

filing of 15 affidavits from experienced journalists on the use and importance of secret sources, Benotto J., the reviewing judge, concluded that while there was "sufficient information to conclude the document was a forgery" (para. 22), there was "only a remote and speculative possibility that the fingerprints were those of the alleged forgerer" and "[d]isclosure of the document will minimally, if at all, advance the investigation while at the same time damage freedom of expression" (para. 79). Accordingly, she set aside the search warrant and assistance order. Her decision was reversed by the Ontario Court of Appeal on February 29, 2008 in reasons jointly authored by Justices Laskin and Simmons. References will be made in what follows to the reasons of the reviewing judge and the Court of Appeal.

III. Statutory Provisions

[25] *Canadian Charter of Rights and Freedoms*

> **2.** Everyone has the following fundamental freedoms:
>
> . . .
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> . . .
>
> **8.** Everyone has the right to be secure against unreasonable search or seizure.

Criminal Code

> **Information for general warrant**

487.01 (1) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if

(*a*) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;

(*b*) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and

(*c*) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

Assistance Order

487.02 Where an authorization is given under section 184.2, 184.3, 186 or 188, a warrant is issued under this Act or an order is made under subsection 492.2(2), the judge or justice who gives the authorization, issues the warrant or makes the order may order any person to provide assistance, where the person's assistance may reasonably be considered to be required to give effect to the authorization, warrant or order.

IV. Analysis

[26] The investigation and punishment of crime is vital in a society based on the rule of law but so is the freedom of the press and other media of communication. The general principle that the public has the right to every person's evidence is not absolute. Narrow exceptions have been recognized as necessary to further precisely defined and overriding public interests. Thus the identity of the police informant is shielded from an accused. A civil litigant has no right to know what the opposing party privately confided to its lawyer. Spouses cannot generally be compelled

to testify against each other. Information pertaining to national security and Cabinet confidences may be withheld on the basis of what is called public interest immunity.

[27] The appellants say that the public interest in getting the Shawinigate story before Canadians, which in part relied on the use of confidential sources, outweighs the public interest in pursuing this particular criminal investigation which they imply may have more to do with avenging political embarrassment than vindicating the rule of law. They ask that this Court quash the general warrant and assistance order issued against them, either because it infringes their freedom of expression under s. 2(*b*) of the *Charter*, or because it is otherwise unreasonable under s. 8, which guarantees "the right to be secure against unreasonable search and seizure". In any event, they say, the secret sources are protected by the common law of privilege.

A. *The Importance of Confidential Sources*

[28] It is well established that freedom of expression protects readers and listeners as well as writers and speakers. It is in the context of the *public* right to knowledge about matters of public interest that the legal position of the confidential source or whistleblower must be located. The public has an interest in effective law enforcement. The public also has an interest in being informed about matters of importance that may only see the light of day through the cooperation of sources who will not speak except on condition of confidentiality. Benotto J. accepted the evidence that many important controversies were unearthed only because of secret sources (often internal whistleblowers) including:

1. The tainted tuna scandal, that led to the resignation of the Minister of Fisheries in Canada.

2. The story that Airbus Industrie paid secret commissions in the sale of Airbus aircraft.

3. The book *For Services Rendered* about the search for a suspected KGB mole in the RCMP Security Service, and CBC's the Fifth Estate program on that mole, code-named "Long Knife".

4. Stories dealing with the City of Toronto's health inspection system for restaurants.

5. A story describing the operation of an illegal slaughterhouse that created a major health hazard.

6. Stories about the fall of Nortel Networks that contrasted optimistic public forecasts by Nortel executives with internal Nortel discussions warning of a potential devastating market downturn.

7. Stories about wrongdoing by members of the RCMP security service in early 1977, including a break-in to obtain documents from a left-wing news agency in Montreal, Agence Presse Libre du Québec, illegal wiretaps in Vancouver and pen-registers.

It is important, therefore, to strike the proper balance between two public interests — the public interest in the suppression of crime and the public interest in the free flow of accurate and pertinent information. Civil society requires the former. Democratic institutions and social justice will suffer without the latter.

[29] The media perspective was forcefully put in a 2005 editorial in the *New York Times*:

> In such [whistleblowing] cases, press secretaries and public relations people are paid not to give out the whole story. Instead, inside sources trust reporters to protect their identities so they can reveal more than the official line. Without that agreement and that trust between reporter and source, the real news simply dries up, and the whole truth steadily recedes behind a wall of image-mongering, denial and even outright lies.
>
> (Editorial, "Shielding a Basic Freedom", *N.Y. TIMES*, September 12, 2005, at p. A20)

[30] If a reporter, usually in consultation with an editor, gives an assurance of confidentiality, professional journalistic ethics understandably command that the promise be kept. The courts have long accepted the desirability of avoiding where possible putting a journalist in the position of breaking a promise of confidentiality or being held in contempt of court. See, e.g. *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 230 C.C.C. (3d) 199. Nevertheless, most journalistic codes of ethics recognize that the promise of confidentiality cannot be absolute, see e.g. the Canadian Association of Journalists' *Guidelines for Investigative Journalism* regarding "[u]se of confidential and anonymous sources".

[31] Our Court has previously recognized the special position of the news media in two search warrant cases that did not involve secret sources, namely *Canadian Broadcasting*

Corporation v. Lessard, [1991] 3 S.C.R. 421, and *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459. In these cases, Cory J., for the majority, emphasized that a justice of the peace or judge must "consider all the circumstances in determining whether to exercise his or her discretion to issue a warrant" (*Lessard*, at p. 445 (emphasis added)). The majority of the Court laid down nine principles applicable to media cases, and in particular:

> The justice of the peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination. It must be borne in mind that the media play a vital role in the functioning of a democratic society. Generally speaking, the news media will not be implicated in the crime under investigation. They are truly an innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant.
>
> . . .
>
> . . . Although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted.
>
> [p. 445]

[32] The appellants and their media supporters argue that these principles are too general. The media interest, they say, is not just one of many factors to be taken into account in "all of the circumstances". The *Charter*, they contend, entitles them to greater protection than *Lessard* and *New Brunswick* provide. Thus, armed with ss. 2(*b*) and 8 of the *Charter*, the appellants seek a re-examination of the existing law. The Court of Appeal in this case, they say, focussed too narrowly on the needs of law enforcement while downplaying, if not effectively ignoring, the broader public interest in the media being able to play its important role as public watchdog. This skewed

perspective led the court, the appellants argue, to relieve the Crown of the usual and appropriate onus of establishing that compelled disclosure in this case was a demonstrable limit on the constitutionally guaranteed freedom of expression in a free and democratic society.

[33] In *Lessard* and *New Brunswick*, the Court accepted that freedom to publish the news necessarily involves a freedom to gather the news. We should likewise recognize in this case the further step that an important element in the news gathering function (especially in the area of investigative journalism) is the ability of the media to make use of confidential sources. The appellants and their expert witnesses make a convincing case that unless the media can offer anonymity in situations where sources would otherwise dry-up, freedom of expression in debate on matters of public interest would be badly compromised. Important stories will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment.

[34] Viewed in this light, the law should and does accept that in some situations the public interest in protecting the secret source from disclosure outweighs other competing public interests — including criminal investigations. In those circumstances the courts will recognize an immunity against disclosure of sources to whom confidentiality has been promised.

[35] In light of these preliminary observations I propose to address the relevant questions with respect to the claim of journalist-confidential source privilege in this case in the following order:

– Firstly, how should the journalists' claim for protection of secret sources be characterized in law? In particular, does s. 2(*b*) of the *Charter* create a constitutionally entrenched immunity to protect journalists against the compelled disclosure of secret sources, and if so, in what circumstances may breaches of such an immunity be justified under s. 1?

– Secondly, if there is no such s. 2(*b*) immunity, is there nevertheless a common law privilege, to be applied in light of the important public interest in freedom of expression, and if so, is it properly conceived of as a class privilege or a case-by-case privilege?

– Thirdly, if the journalist-confidential source privilege is constituted on a case-by-case basis, what are the elements that must be established, and who has the onus to do so? This was the main battleground of this appeal.

– Fourthly, were the elements of a case-by-case privilege established on the expanded record before the reviewing judge here in relation to suppression of the physical evidence described in the general warrant and assistance order?

B. *How Should Journalists' Claims for Protection of Secret Sources be Characterized in Law?*

[36] The appellants and supporting interveners put forward a number of conceptual models by which to protect the identity of secret sources. None of the parties or interveners asserts an

absolute protection of sources, but there is a difference of opinion about the provenance of a qualified privilege and its limitations.

(1) The Constitutional Model

[37] The broadest conception was put forward by the intervener Canadian Civil Liberties Association ("CCLA") supported in part by the intervener the British Columbia Civil Liberties Association ("BCCLA"). In their view, the applicable concept is not a common law privilege but some form of constitutional immunity against compelled disclosure of secret sources. The CCLA argues that a s. 2(*b*) immunity is established by a claimant showing (i) that he or she is a journalist; (ii) engaged in news gathering activity; (iii) who has acquired information under a promise of confidentiality (transcript, at p. 42). At that point, the CCLA submits, testimonial immunity against disclosure of the source is constitutionally guaranteed subject to the Crown being able to show a countervailing and fact-specific overriding public interest through what the CCLA called "a full press Section 1 analysis" (p. 45). Reliance is placed on *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, which recognized the importance of free expression even in the context of ensuring trial fairness. The BCCLA advances a similar series of propositions derived, it argues, from the dissent of McLachlin J. (now Chief Justice) in *Lessard*.

[38] The position of the CCLA and the BCCLA is built on the premise that protection of confidential sources should be treated as if it were an enumerated *Charter* right or freedom. But this is not so. What is protected by s. 2(*b*) is freedom of expression. News gathering, while not specifically mentioned in the text of s. 2(*b*) is implicit in news publication, but there are many

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

[39] The courts have leaned against conferring constitutional status on testimonial immunities. Even solicitor-client privilege, one of the most ancient and powerful privileges known to our jurisprudence, is generally seen as a "fundamental and substantive rule of law" (*R. v. McLure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at para. 17), rather than as "constitutional" even though solicitor-client privilege is supported by and impressed with the values underlying s. 7 of the *Charter*.

[40] There are cogent objections to the creation of such a "constitutional" immunity. As recently pointed out in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, the protection attaching to freedom of expression is not limited to the "traditional media", but is enjoyed by "everyone" (in the words of s. 2(*b*) of the *Charter*) who chooses to exercise his or her freedom of expression on matters of public interest whether by blogging, tweeting, standing on a street corner and shouting the "news" at passing pedestrians or publishing in a national newspaper. To 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 (or, as here, choose to amend it with the benefit of hindsight) would blow a giant hole in law enforcement and other constitutionally recognized values such as privacy.

[41] The law needs to provide solid protection against the compelled disclosure of secret source identities in appropriate situations but the history of journalism in this country shows that the purpose of s. 2(*b*) can be fulfilled without the necessity of implying a constitutional immunity. Accordingly, a judicial order to compel disclosure of a secret source would not in general violate s. 2(*b*). There is thus no need on this branch of the case to consider a s. 1 justification.

(2) Class Privilege Model

[42] At common law, privilege is classified as either relating to a class (e.g. solicitor and client privilege) or established on a case-by-case basis. In a class privilege what is important is not so much the content of the particular communication as it is the protection of the type of relationship. Once the relevant relationship is established between the confiding party and the party in whom the confidence is placed, privilege presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation. Class privilege necessarily operates in derogation of the judicial search for truth and is insensitive to the facts of the particular case. Anything less than this blanket confidentiality, the cases hold, would fail to provide the necessary assurance to the solicitor's client or the police informant to do the job required by the

administration of justice. The law recognizes very few "class privileges" and as Lamer C.J. observed in rejecting the existence of a class privilege for communications passing between pastor and penitent in *R. v. Gruenke*, [1991] 3 S.C.R. 263:

> Unless it can be said that the policy reasons to support a class privilege for religious communications are as compelling as the policy reasons which underlay the class privilege for solicitor-client communications, there is no basis for departing from the fundamental "first principle" that all relevant evidence is admissible until proven otherwise. [p. 288]

It is likely that in future such "class" privileges will be created, if at all, only by legislative action.

[43] Journalistic-confidential source privilege has not previously been recognized as a class privilege by our Court (*Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572), and has been rejected by courts in other common law jurisdictions with whom we have strong affinities. The reasons are easily stated. First is the immense variety and degrees of professionalism (or the lack of it) of persons who now "gather" and "publish" news said to be based on secret sources. In contrast to the legal profession there is no formal accreditation process to "licence" the practice of journalism, and no professional organization (such as a law society) to regulate its members and attempt to maintain professional standards. Nor, given the scope of activity contemplated as journalism in *Grant v. Torstar*, could such an organization be readily envisaged.

[44] A second problem arises in determining the respective rights and immunities of the journalist and the source to whom confidentiality has been promised. In the past, secret sources have voluntarily stepped out from the shadows to reveal themselves (as in the *St. Elizabeth Home*

case) with or without the journalist's consent. Is the journalist now to be given the right to object because, for example, disclosure might reveal "journalist methods" and "journalistic networks"? I do not think such a restriction would in general serve the public interest in the search for truth. On the other hand, the source cannot be said to be the holder of the privilege if, as here, the journalist reserves the right to "out" the secret source unilaterally if, in the journalist's personal view, the conditions on which anonymity were offered have not been met. In the case of solicitors and their clients, the privilege clearly belongs to the client. Are we to say that journalistic privilege attaches both to the journalist and the secret source? If so, what happens if they fall into disagreement? It is particularly important in the case of class privilege that the rules be clear in advance to all participants so that they may govern themselves accordingly.

[45] Thirdly, no one has suggested workable criteria for the creation or loss of the claimed immunity. The evidence shows that journalistic practice varies considerably as to when promises of confidentiality are properly made. Many news organizations require the journalist to consult with an editor before making such a promise. Others, including the *National Post*, do not. What would be the criteria for such a class privilege to apply? The various media codes of ethics are themselves in disagreement. In the present case, Mr. McIntosh's original "blanket, unconditional promise of confidentiality to protect the identity of both X and Y" (McIntosh Affidavit, at para. 156 (emphasis added)) became burdened with an important condition. It was retroactively modified by Mr. McIntosh to last only so long as Mr. McIntosh personally "believed that [X] had not provided the document to deliberately mislead me" (para. 227). Mr. McIntosh says his secret source agreed to this modification, but at that point he or she was not in much of a bargaining position having already delivered up the documents to the appellants. What are the limits to retroactive modification of

the journalist's undertaking? Must the secret source consent to the modification? The media argument raises more questions about the scope and operation of the claimed class privilege than it provides solutions.

[46] Fourthly, while the result of any privilege is to impede the search for truth, and thereby to run the risk of an injustice to the persons opposed in interest to the claimant, a class privilege is more rigid than a privilege constituted on a case-by-case basis. It does not lend itself to the same extent to be tailored to fit the circumstances.

[47] In the United Kingdom, no class privilege attached to journalists at common law: *Ashworth Hospital Authority v. MGN Ltd.*, [2002] UKHL 29, [2002] 1 W.L.R. 2033. The same is true in Australia, see *McGuinness v. Attorney-General of Victoria* (1940), 63 C.L.R. 73, and *John Fairfax and Sons Ltd. v. Cojuangco* (1988), 165 C.L.R. 346. In the United States, the concurring judgment of Powell J. in *Branzburg v. Hayes*, 408 U.S. 665 (1972), which from the media perspective put the best face on the majority's rejection of any First Amendment journalistic privilege, rejected a class privilege but held open the possibility of a case-by-case privilege:

> . . . if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reasons to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. <u>The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.</u> [Emphasis added; p. 710.]

[48] In the United Kingdom, journalistic-secret source privilege is now covered by the *Contempt of Court Act 1981* (U.K.), 1981, c. 49. The U.K. Parliament has created a presumptive immunity in defined circumstances, subject to being overridden on enumerated grounds. Section 10 provides that:

> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Statutes offering similar protections exist in a number of states of the United States. In Australia there exists a "shield law" both at the federal level and in New South Wales. New Zealand enacted such a law in 2006.

[49] In Canada a number of legislative proposals have been considered both at the federal and provincial level but none has received legislative approval.

(3) The Case-by-Case Model of Privilege

[50] The appellants themselves advocate a balancing of interests based on Professor Wigmore's criteria for establishing confidentiality at common law as set out in *McClure*, at para. 29; *M. (A.). v. Ryan*, [1997] 1 S.C.R. 157, at para. 30; *Gruenke*, at pp. 289-90; and *Slavutych v. Baker*, [1976] 1 S.C.R. 254, at p. 261, but is informed by the *Charter* guarantee of freedom of expression and the rights "of the press and other media of communication". It is well established

that the common law may properly be developed to reflect *Charter* values; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603, *Ryan*, at para. 21.

[51] As mentioned, *Gruenke* dealt with a claim for confidentiality for communications passing between priest and penitent or, more broadly, "religious communications" (p. 290). Just as the claim here is said to grow out of the s. 2(*b*) *Charter* guarantee of freedom of expression, the claim in *Gruenke* was said to be required by the s. 2(*a*) *Charter* guarantee of freedom of religion and conscience. Despite the constitutional protection for freedom of religion, the Court rejected the existence of a class privilege but adopted instead Professor Wigmore's distillation and synthesis of a wide range of situations where privilege has been recognized on a case-by-case basis. Here the law finds a mechanism with the necessary flexibility to weigh up and balance competing public interests in a context-specific manner.

[52] When applied to journalistic secret sources, the case-by-case privilege, if established on the facts, will not necessarily be restricted to testimony, i.e. available only at the time that testimony is sought from a journalist in court or before an administrative tribunal. The protection offered may go beyond a mere rule of evidence. Its scope is shaped by the public interest that calls the privilege into existence in the first place. It is capable, in a proper case, of being asserted against the issuance or execution of a search warrant, as in *O'Neill v. Canada (Attorney General)* (2006), 213 C.C.C. (3d) 389 (Ont. S.C.J.). The scope of the case-by-case privilege will depend, as does its very existence, on a case-by-case analysis, and may be total or partial (*Ryan*, at para. 18).

[53] The "Wigmore criteria" consist of four elements which may be expressed for present

purposes as follows. First, the communication must originate in a confidence that the identity of the informant will not be disclosed. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good ("Sedulous[ly]" being defined in the *New Shorter Oxford English Dictionary on Historical Principles* (6th ed. 2007), vol. 2, at p. 2755, as "diligent[ly] . . . deliberately and consciously."). Finally, if all of these requirements are met, the court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth. See *Wigmore on Evidence* (McNaughton Rev. 1961), vol. 8, at § 2285; *Sopinka, Lederman and Bryant: The Law of Evidence in Canada* (3rd ed. 2009), at paras. 14.19 *et seq.*; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at pp. 163-67. Further, as Lamer C.J. commented in *Gruenke*:

> This is not to say that the Wigmore criteria are now "carved in stone", but rather that these considerations provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court. [p. 290]

[54] It is of passing interest that Professor Wigmore himself was not a supporter of journalistic-secret source privilege. He described an early legislative attempt to craft a shield law (Maryland, 1923) "as detestable in substance as it is crude in form". He predicted (wrongly) that it "will probably remain unique" (*Wigmore on Evidence* (2nd ed. 1923), vol. 5, at § 2286, n. 7).

[55] However, the world of journalism has moved on since Professor Wigmore's day. The role of investigative journalism has expanded over the years to help fill what has been described as a democratic deficit in the transparency and accountability of our public institutions. The need to

shine the light of public scrutiny on the dark corners of some private institutions as well is illustrated by Benotto J.'s reference to corporate delinquencies in the list reproduced above at para. 28. Professor Wigmore's criteria provide a workable structure within which to assess, in light of society's evolving values, the sometimes-competing interests of free expression and the administration of justice and other values that promote the public interest. This will provide the necessary flexibility and an opportunity for growth that is essential to the proper function of the common law.

C. *Proceeding on a Case-by-Case Basis, What Are the Elements That Must be Established, And Who Bears the Burden of Proof?*

[56] There is little disagreement about the first two Wigmore criteria. The media accepts that privilege can only be claimed where the communication is made *explicitly* in exchange for a promise of confidentiality. Wigmore was concerned with the confidentiality of the *contents* of the communication itself (which is not the issue here because it was the mutual intention of the journalist and the source to make the content of the communication public). However, I think the rationale underlying the Wigmore criteria may be applied equally to a new role, namely the maintenance of the confidentiality of the *identity* of the source. Secondly, the necessity for confidentiality is the *raison d'être* for the existence of the privilege. If the source does not insist on confidentiality as a condition precedent to the disclosure then no promise of confidentiality will be made and no privilege arises. Journalists prefer in any event to have a source on the record to enable their readers or listeners to evaluate its likely credibility.

[57] The third criterion (that the source-journalist relationship is one that should be

"sedulously fostered in the public good") introduces some flexibility in the court's evaluation of different sources and different types of "journalists". The relationship between the source and a blogger might be weighed differently than in the case of a professional journalist like Mr. McIntosh, who is subject to much greater institutional accountability within his or her own news organization. These distinctions need not be canvassed in detail here since the appellants have made out on their evidence, in my opinion, that in general the relationship between professional journalists and their secret sources is a relationship that ought to be "sedulously" fostered and no persuasive reason has been offered to discount the value to the public of the relationship between Mr. McIntosh and his source(s) in this particular case.

[58] The fourth Wigmore criterion does most of the work. Having established the value to the public of the relationship in question, the court must weigh against its protection any countervailing public interest such as the investigation of a particular crime (or national security, or public safety or some other public good).

[59] Underlying this analysis is the need to achieve proportionality in striking a balance among the competing interests.

[60] The appellants argue that once the first three Wigmore criteria are established the onus should switch to the Crown (or other party seeking disclosure) to show why, on a balance of probabilities, disclosure should be ordered (Factum, at para. 62). This is particularly so in the search warrant context, they argue, because the court is dealing with the state as a prosecutorial antagonist and the media as a bystander to the crime. Indeed, in this case, the media is in a sense the

intermediate *victim* of the alleged crime (but has made no complaint). The eventual intended victim was the then Prime Minister. This three steps forward one step backward argument with respect to onus is unpersuasive because it presupposes that a privilege arises after the third step and is then subject to rebuttal by the opposing party at the fourth step. However, this is not the case. Until the media have met all *four* Wigmore criteria no journalistic source privilege arises. The evidence is presumptively compellable and admissible. It is the media that advances the proposition that the public interest in protecting its secret source outweighs the public interest in the criminal investigation. The burden of persuasion therefore lies on the media. That said, I expect that onus will rarely play a pivotal role at the fourth step, where "[t]he exercise is essentially one of common sense and good judgment" (*Ryan*, at para. 32).

[61] The weighing up will include (but of course is not restricted to) the nature and seriousness of the offence under investigation, and the probative value of the evidence sought to be obtained, measured against the public interest in respecting the journalist's promise of confidentiality. The Crown argues that the existence of any crime is sufficient to vitiate a privilege but that is too broad a generalization. The *Pentagon Papers* case originated in circumstances amounting to an offence, yet few would now argue that the publication of the true facts in that situation was not in the greater public interest.

[62] The underlying purpose of the investigation, as inferred from the objective circumstances, is also relevant at the fourth stage. When investigative reporting strikes at those in power it would not be unexpected that those in power including the police may wish to strike back. There may be circumstances where the criminal investigation appears to be contrived to silence

improperly the secret source, and in such cases the court may decline to order production. Thus in *O'Neill*, an investigation was launched under the *Security of Information Act* to identify the secret source of a leak to a reporter for the *Ottawa Citizen*. The reviewing judge, Ratushny J. found that the RCMP sought the warrant with the intent to intimidate the reporter into giving up her sources. The result, the police might have expected, might well have been to disincline the journalist to publish further material on a story that was embarrassing to both the police and to the government (para. 154). In such a case, the demand to deliver up even physical evidence that would disclose the identity of the secret source might well be refused. That is not this case. The alleged forgery is distinct from whistleblowing. In terms of getting out the truth, the "leak" of a forged document undermines rather than advances achievement of the *purpose* of the privilege claimed by the media in the *public* interest.

[63] In a test of balancing the public interest in disclosure versus the public interest in confidentiality neither the journalist nor the secret source "owns" the privilege. Thus where a secret source decides for whatever reason to cast aside the cloak of anonymity the public interest no longer "sedulously fosters" the continuation of the confidential relationship in preference to openness and the search for the truth. In such a case the journalist would have no basis to seek to restrain the self-outing of the secret source. On the other hand, where a journalist decides that the confidentiality arrangement no longer binds (as for example, in this case, if Mr. McIntosh had concluded that the forged bank records had been provided by the source to mislead the *National Post* deliberately, and had thereby, in his view, forfeited its protection), the balance would again tilt in favour of disclosure. The role and function of the privilege is to facilitate the freedom of expression of the media and their readers and listeners. Where the journalist concludes that the relationship in a particular case should

no longer be "sedulously" fostered, the substratum of the claimed privilege is eliminated. The *public* interest would no longer be served in the particular case by suppression of the identity, but of course in the event of such disclosure, the source might have some sort of *private* law claim for breach of contract or breach of confidence or other private common law cause of action. Such private law remedies are not before us in this appeal.

[64] In summary, at the fourth stage, the court will weigh up the evidence on both sides (supplemented by judicial notice, common sense, good judgment and appropriate regard for the "special position of the media"). The public interest in free expression will *always* weigh heavily in the balance. While confidential sources are not constitutionally protected, their role is closely aligned with the role of "the freedom of the press and other media of communication", and will be valued accordingly but, to repeat, at the end of the analysis the risk of non-persuasion rests at all four steps on the claimant of the privilege.

[65] At this point it is important to remind ourselves that there is a significant difference between testimonial immunity against compelled disclosure of secret sources and the suppression by the media of relevant physical evidence. If a client walks into a lawyer's office and leaves a murder weapon covered with fingerprints and DNA evidence on the lawyer's desk the law would not allow the lawyer to withhold production of the gun on the basis of solicitor-client confidentiality, notwithstanding the thoroughgoing protection that the law affords that relationship. In *R. v. Murray* (2000), 144 C.C.C. (3d) 289 (Ont. S.C.J.), the court affirmed this principle in the case of a lawyer charged with suppressing sexual abuse tapes. Journalists, too, have no blanket right to suppress physical evidence of a crime, even where its production may disclose the identity of a confidential

source. The immunity, where it exists, is situation specific.

[66] After the hearing of this appeal, counsel for the appellants provided us with a copy of the recent decision of the European Court of Human Rights in *Financial Times Ltd. v. The United Kingdom*, [2009] ECHR 2065 (BAILII), where a corporate plaintiff was ultimately denied access to confidential source documents. In that case the plaintiff Interbrew, a Belgian brewing company, brought civil proceedings in the United Kingdom to obtain from the media leaked documents that, it claimed, had been doctored with false information to suggest Interbrew was on the brink of making a takeover bid for South African Breweries. The allegedly misleading information was published by the media. Thereafter Interbrew suffered a drop in the value of its shares. Interbrew sought production of the documents from the *Financial Times* and other newspapers on the basis that it needed to identify the "source" in order to launch a proposed civil action for breach of confidence against the person or persons unknown. The English Court of Appeal upheld the disclosure order on the ground that the "relatively modest leak" ([2002] EWCA Civ. 274 (BAILII), at para. 54, leave to appeal denied, House of Lords, 9 July 2002, unreported) was nevertheless intended to "maximize the mischief" (para. 55) and thus fell within the "interests of justice" exception to journalistic source privilege under the U.K. *Contempt of Court Act 1981*. The European Court of Human Rights disagreed. Unlike the plaintiff in the earlier case of *Goodwin v. The United Kingdom*, judgment of 27 March 1996, *Reports of Judgments and Decisions*, 1996-II, Interbrew had not sought an injunction in the U.K. to prevent publication (i.e. did not avail itself of alternate means to avert the damage). Interbrew had also failed to demonstrate that information about the identity of the person who leaked the documents was unavailable from other sources (para. 69). The "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. See, e.g. *John v. Express Newspapers*, [2000] 3 All E.R. 257 (C.A.). It was not even clear in the *Financial Post* case that the leaked documents were, in fact, "doctored".

[67] On the other hand in *Sanoma Uitgevers B.V. v. The Netherlands*, E.C.H.R., judgment of 31 March 2009, Application No. 38224/03, the court upheld the police seizure of a CD-Rom from the Dutch magazine *Autoweek* which had photographed an illegal street race on a promise of confidentiality to the participants. The court recognized the potential chilling effect of the seizure and breach of confidentiality but said:

> . . . it does not follow *per se* that the authorities are in all such cases prevented from demanding such handover; whether this is so will depend on the facts of the case. In particular, the domestic authorities are not prevented from balancing the conflicting interests served by prosecuting the crimes concerned against those served by the protection of journalistic privilege; relevant considerations will include the nature and seriousness of the crimes in question, the precise nature and content of the information demanded, the existence of alternative possibilities of obtaining the necessary information, and any restraints on the authorities' procurement and use of the materials concerned. . . . [para. 57]

This all sounds very much like the fourth Wigmore step.

[68] Accordingly, in my view, the Strasbourg jurisprudence is not of much assistance to the appellants. Both *Goodwin* and *Financial Times* concerned a leak to the media by corporate whistleblowers of confidential internal documents. Neither involved criminal proceedings. Both involved private actions in the U.K. courts where the corporate plaintiffs, in the view of the European Court of Human Rights, had failed to demonstrate a public interest that outweighed the

public interest in free expression. *Sanoma* is closer to our case. It is true that the European Court locates journalist-source privilege in Article 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, but that is necessarily so because the Convention is the source of its jurisdiction. For the reasons already stated I would not locate journalist-source protection in s. 2(*b*) of the *Charter* but in the common law of privilege that is supportive of it.

[69] The bottom line is that no journalist can give a source a total assurance of confidentiality. All such arrangements necessarily carry an element of risk that the source's identity will eventually be revealed. In the end, the extent of the risk will only become apparent when all the circumstances in existence at the time the claim for privilege is asserted are known and can be weighed up in the balance. What this means, amongst other things, is that a source who uses anonymity to put information into the public domain maliciously may not in the end avoid a measure of accountability. This much is illustrated by recent events in the United States involving *New York Times*' reporter Judith Miller and the subsequent prosecution of her secret source, vice-presidential aide Lewis "Scooter" Libby, arising out of proceedings subsequent to his "outing" of CIA agent Valerie Plame: *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), at pp. 968-72. The simplistic proposition that it is always in the public interest to maintain the confidentiality of secret sources is belied by such events in recent journalistic history.

D. *Were the Elements of a Case-by-Case Privilege Established on the Expanded Record Placed Before the Reviewing Judge in Relation to Suppression of the Physical Evidence?*

[70] The evidence shows that the communication between Mr. McIntosh and source Y

respecting the relationship between the Prime Minister and the BDBC originated in confidence. Had confidentiality not been assured the initial information about Mr. Chrétien's contacts with the BDBC would not have been provided. Secondly, confidentiality was essential to the relationship because without the confidentiality there would have been no disclosure and no relationship. Thirdly, given the importance of investigative journalism in exploring potential conflicts of interest in decision making at the highest levels of government, the relationship between the appellants and their secret sources ought in general to be "sedulously fostered". Mr. McIntosh testified to a belief that his source is sincere in denying involvement in any offences. The transparency and accountability of government are issues of enormous public importance. The disclosures related to a public controversy over the Prime Minister's relationship to private promoters seeking loans from a federally funded bank. The public ventilation of this controversy, whatever its ultimate merits, was clearly in the public interest.

[71] Coming now to the "weighing up" at the fourth stage of the Wigmore analysis, the alleged crime was described by Mr. McIntosh himself as "serious". Certainly, the dissemination of forged bank entries designed to "prove" an egregious conflict of personal financial interest on the part of the Prime Minister involving public funds is of sufficient seriousness to justify amply the decision of the police to investigate the criminal allegations within the limits of their ability and resources.

[72] The real possibility of obtaining DNA evidence or other identification from the envelope was first raised as plausible by the source himself or herself in conversation with Mr. McIntosh. This suggests that even X believed that forensic testing could advance the investigation to his or her

detriment. Apart from anything else, we do not know what other evidence (if any) the police possess or to whom they are attempting to find a DNA match. While it is appropriate under the fourth Wigmore criterion to assess the likely probative value of the evidence sought, the reviewing judge ought not to have pre-empted the forensic investigation by seemingly prejudging the outcome when she wrote that "[d]isclosure of the document will minimally, if at all, advance the investigation" (para. 79) without first considering all the relevant factors in her assessment.

[73] My colleague Abella J. shares Benotto J.'s pessimism regarding the fruitfulness of forensic analysis in this case. However, the reviewing judge Benotto J. seemed to focus on fingerprint evidence and did not canvass the merits of DNA analysis, yet DNA analysis is capable of producing results even under exceptionally unpromising circumstances (as was shown in the exoneration of Guy Paul Morin). It cannot be correct that the RCMP forensic lab should be prevented from applying well-established modes of analysis to pieces of physical evidence that have been directly linked to a serious crime simply on the basis that in the end such analysis *may* prove to be unsuccessful. I agree with the Ontario Court of Appeal that the reviewing judge's exercise of discretion was, in these circumstances, unreasonable.

[74] Moreover, let us suppose that Benotto J. and my colleague Abella J. are correct in their scepticism about the outcome of the forensic analysis, and that the envelope is extremely unlikely to disclose the identity of Mr. McIntosh's secret source(s). The court in that event would have to balance the weak public interest in protecting an identity that is not likely to be disclosed against the strong public interest in the production of physical evidence of the offense. On this alternative view, as well, the injury that is likely to result from disclosure does not outweigh the public interest in

correctly disposing of the criminal investigation.

[75] In her reasons Abella J. refers to the "fatal disconnect between the envelope, the documents, the identity of X and the alleged forgery" (para. 134). This conclusion hinges on the credibility of X's story that he or she was not the perpetrator of the forgery, but an innocent recipient, who passed it on to Mr. McIntosh in good faith. I do not think the police are required to accept as true the version of events told by X as relayed through Mr. McIntosh, who has his own interest in the outcome of this litigation. The police believe, and all three courts below accepted, that there *are* reasonable grounds to believe that entries had been forged on the alleged bank document. In my view the police need not accept X's anonymous, uncorroborated and self-exculpatory statements as a reason to terminate their investigation of the physical evidence any more than they need accept the disclaimers of any other potential witness to a crime, especially when the witness may also be the perpetrator.

[76] I accept, of course, that the problematic transmission from X must be assessed in light of a history of providing information and documents that turned out to be authentic. Nevertheless, it appears from Corporal Gallant's statement in a passage cited by Abella J. (para. 137), that he had no reason to believe that what X said on this particular occasion was true. Nor was he obliged to proceed on the basis that it was true. A denial of criminal involvement, whether communicated directly or indirectly, is not a sufficient ground to put an end to a serious criminal investigation, even where the intermediate (though not the ultimate) intended victim of the alleged crime happens to be a media organization.

[77] Recognizing the seriousness of the situation Mr. McIntosh says he told the source that notwithstanding his earlier "blanket, unconditional promise of confidentiality to protect the identity of both X and Y" (McIntosh Affidavit, at para. 156), he would not now consider himself bound by that promise "should irrefutable evidence" emerge that the document had been provided "to deliberately mislead me" (para. 227). It is the courts, however, and not individual journalists or media outlets, that must ultimately determine whether the public interest requires disclosure. Mr. McIntosh's belief in the good faith of his source cannot prevent the courts from reaching a different conclusion. Moreover, as Laskin and Simmons JJ.A. noted, "[t]he document and the envelope are not merely pieces of evidence tending to show that a crime has been committed. They are the very *actus reus* [or *corpus delicti*] of the alleged crime" (para. 115). In such circumstances the identity of the individual who shipped Mr. McIntosh the forged document has no continuing claim to the protection of the law.

E. *Notwithstanding a Finding that the Appellants Have Not Established Secret Source Privilege on the Facts of this Case, Were the Court Orders Nevertheless "Unreasonable" Within the Meaning of Section 8 of the Charter?*

[78] Even where no privilege is found to exist, warrants and assistance orders against the media must take into account their "special position" and be reasonable in the "totality of circumstances" as required by s. 8 of the *Charter* ("Everyone has the right to be secure against unreasonable search and seizure"). It is not sufficient for the Crown to establish that the formal statutory requirements of ss. 487.01 and 487.02 were met. Physical searches of media premises may be highly disruptive. Searches may cause temporary or even permanent suspension of print publication or broadcasting. Search warrant cases like this one constitute a head-to-head clash

between the government and the media, and the media's ss. 2(*b*) and 8 interests are clearly implicated. As McLachlin J. observed in her dissenting reasons in *Lessard*:

> The ways in which police search and seizure may impinge on the values underlying freedom of the press are manifest. First, searches may be physically disruptive and impede efficient and timely publication. Second, retention of seized material by the police may delay or forestall completing the dissemination of the news. Third, confidential sources of information may be fearful of speaking to the press, and the press may lose opportunities to cover various events because of fears on the part of participants that press files will be readily available to the authorities. Fourth, reporters may be deterred from recording and preserving their recollections for future use. Fifth, the processing of news and its dissemination may be chilled by the prospect that searches will disclose internal editorial deliberations. Finally, the press may resort to self-censorship to conceal the fact that it possesses information that may be of interest to the police in an effort to protect its sources and its ability to gather news in the future. All this may adversely impact on the role of the media in furthering the search for truth, community participation and self-fulfillment. [p. 452]

[79] As previously observed, *Lessard* laid down nine conditions to provide a suitable framework to assess s. 8 reasonableness in a s. 2(*b*) context. The first requirement, of course, is that the statutory prerequisites of s. 487.01 are met. Here the issuing judge held, and both the reviewing judge (Benotto J.) and the Court of Appeal have affirmed, that the police established reasonable grounds to believe that criminal offences have been committed and that information relevant to those offences will be obtained through the use of the search warrant and the supporting assistance order. Nevertheless, the appellants have raised a number of issues in addition to journalistic-confidential source privilege which, they argue, are fatal to the reasonableness of the general warrant and assistance order.

(1) <u>The Issue of Notice to the Media</u>

[80] The reviewing judge, Benotto J., concluded that "[g]iven the public interest at stake, this is one of the rare instances where failure on the part of the justice to give notice amounts to a jurisdictional error" (para. 84 (emphasis added)). It is true that different standards govern before and after a warrant is issued. On the warrant application, the burden is on the police to show reasonable and probable grounds. Once the warrant has been issued, however, the burden shifts to the media applicant on the motion to quash to establish that there was no reasonable basis for its issuance. Moreover, the reviewing judge is generally bound, in deciding this issue, to afford a measure of deference to the determination of the issuing justice.

[81] In *R. v. Canadian Broadcasting Corp.* (2001), 52 O.R. (3d) 757 (Ont. C.A.), leave to appeal dismissed, [2001] 2 S.C.R. vii, Moldaver J.A. noted that failure to give notice to the media *could* constitute jurisdictional error in some instances, but he considered such a possibility to be "remote in the extreme" (para. 5).

[82] However, in *New Brunswick* the majority of this Court held that the special position of the media did not "import any new or additional [procedural] requirements" (p. 475). McLachlin J., dissenting in *Lessard*, observed that "in some cases", a justice *may* wish to hear from media representatives on whether a warrant should issue (p. 457). In her view, notice was a matter of discretion and did not rise to a constitutional requirement. See also *R. v. Serendip Physiotherapy Clinic* (2004), 73 O.R. (3d) 241 (C.A.).

[83] I agree with the appellants that the media should have the opportunity to put their case against the warrant at the earliest reasonable opportunity, but the timing is generally a matter within

the discretion of the issuing judge. There may be circumstances where the best course of action will be to proceed as Khawly J. did here. Given the broad definition of "media" and "journalists" covered by a potential claim for privilege, the issuing judge may conclude that an outstanding warrant will help ensure that the evidence is not made to disappear while the merits of issuing a warrant are debated. An issued and outstanding warrant may discourage such misconduct. There will be cases of urgency or other circumstances supporting the need to proceed *ex parte*. In the absence of such circumstances the issuing judge may well conclude that it is desirable to proceed on notice to the media organization rather than *ex parte*.

[84] Morever, where the issuing judge does proceed *ex parte*, adequate terms must be inserted in any warrant to protect the special position of the media, and to permit the media ample time and opportunity to point out why, on the facts, the warrant should be set aside. The warrant and assistance order made by Khawly J. in this case allowed a period of a month between its issuance and its execution to ensure the appellants' ability to move to quash it before any seizure occurred. This procedure allowed the appellants to assemble an evidentiary record more ample than would have been possible on short notice. The appellants took full advantage of the opportunity thus provided. The record in this case fills 16 volumes. The review procedure lasted from the filing of an application to quash the warrant dated July 30, 2002 until its disposition by Benotto J. by judgment dated January 21, 2004. In these circumstances I do not believe the issues of onus and deference can or should play a significant role in the outcome, especially given the court's concern for the special position of the media in the context of the public interest.

[85] The appellants contend that the secret source issue was not adequately brought to

Khawly J.'s attention. However, even a cursory reading of the affidavit and the attached correspondence included in the Information to Obtain made clear that the secret source issue lay at the heart of the controversy. In an appended letter to Crown counsel dated December 19, 2001, counsel for the *National Post* stated: "The search for this plain brown envelope is justified, if at all, by the belief that it could identify a confidential source . . . we are gravely concerned about the seriousness of the constitutional violation that is about to occur" (emphasis added). Counsel made similar statements in several of the other documents appended to the Information to Obtain. Given the disclosure of these facts, Khawly J. undoubtedly realized that his decision would simply be a stepping stone to a constitutional battle in the higher courts and proceeded accordingly.

[86] Khawly J. gave no reasons for proceeding *ex parte* but the appellants' position was fully protected by the terms of his order and they have not demonstrated any prejudice on that account. I agree with the Court of Appeal that the *ex parte* nature of Khawly J.'s order is not a ground for setting the warrant aside on the facts of this case.

(2) Other *Lessard* Conditions

[87] Apart from the issue of confidential sources, already dealt with, the general warrant in this case complied with other *Lessard* conditions designed to respect the special position of the media. A detailed affidavit established that the search of a newspaper office was a necessity of last resort, as required by *Re Pacific Press*; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, and the cases that followed. This affirmative finding under s. 487.01 established the grounds for the search and compelled the appellants to invoke confidential source privilege by meeting the Wigmore test,

which they failed to do, in my opinion. The order of Khawly J. set out conditions governing the search to ensure "that the media organization would not be unduly impeded [by a physical search] in the publishing or dissemination of the news" (*Lessard*, at p. 445). Perhaps most importantly, the order contained the usual clause directing that any documents seized be sealed on request.

[88] The appellants have not established any deficiency in the procedure laid out in the order.

(3) The Assistance Order

[89] The appellants strongly object to the issuance of an assistance order that directed the editor-in-chief of the *National Post* "to take such steps as are necessary" to give effect to the search warrant (A.R., vol. 1, at p. 7). On the evidence before Khawly J., both Mr. McIntosh and other representatives of the *National Post* had made statements suggesting that while the items described in the search warrant had been deliberately hidden they were within the control of the *National Post*. For instance, on December 13, 2001 counsel for the *National Post* advised Corporal Gallant that "the newspaper does not intend to deliver up to you the 'plain brown envelope with no return address' as referred to by Andrew McIntosh . . . at the Toronto meeting" (A.R., vol. 2, at p. 27). Correspondence from counsel for the *National Post* treated the protection of the source's confidentiality as a *National Post* issue not just a McIntosh issue (A.R., vol. 2, at pp. 27-30). Given the concerted action between Mr. McIntosh and his editor-in-chief, it was entirely reasonable for the issuing judge to enlist the assistance of the editor-in-chief in locating and producing the concealed document.

[90] The appellants claim that the assistance order turns the editor-in-chief into an "agent of the police" in the collection of evidence. This is overly dramatic. Editors, journalists and sources do not, by reason of the important roles they play, cease to be members of the community in which they live. The claim for privilege in this case is rejected The editor-in-chief, as every other member of the community, is required in the ordinary way to respect the law. From the media perspective assistance orders requiring the surrender of the document are surely preferable to a physical search of the media premises. In my view, the assistance order was reasonable within the meaning of s. 8 of the *Charter*.

V. Conclusion

[91] I conclude that in the facts of this case the appellants have not established that the public interest in the protection of their secret source(s) outweighs the public interest in the production of the physical evidence of the alleged crimes. For this reason, and also because the warrant as issued was entirely respectful of the special position of the media, I conclude that the warrant and assistance order were properly issued and must be complied with even if the result is to disclose the identity of the "secret source" who, on the evidence, "uttered" a forged document. The appeal will therefore be dismissed without costs.

[92] The constitutional questions will be answered as follows:

1. In the context of a relationship between a journalist and a confidential source, when the state seeks to compel the production of information that could identify the source, does the common law Wigmore framework of case-by-case privilege infringe the principle of freedom of the press guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and*

Freedoms?

Answer: No.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

3. Does s. 487.02 of the *Criminal Code*, R.S.C. 1985, c. C-46, when employed to compel a media organization or journalist to assist in giving effect to an authorization, warrant or order, infringe the principle of freedom of the press guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

5. Does s. 487.02 of the *Criminal Code*, R.S.C. 1985, c. C-46, when employed to compel a media organization or journalist to assist in giving effect to an authorization, warrant or order, infringe s. 8 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

The following are the reasons delivered by

LEBEL J. —

[93] I have read the reasons of my colleagues Binnie and Abella JJ. I agree with Binnie J. that there should be no class privilege to protect communications between journalists and their sources, and that claims of journalist-source privilege should be resolved on a case-by-case basis applying the Wigmore criteria. I am in particular agreement with his weighing of the relevant rights and interests at the last stage of the Wigmore analysis.

[94] However, and with respect for the contrary view of Binnie J., I agree with Abella J. that notice should have been given to the National Post in this case. In my opinion, when an application for a search warrant is made, there should, as Abella J. recommends, be a presumptive requirement of notice to the affected media organization. While valid questions may remain as to what constitutes a media organization for the purpose of giving notice, there can be no dispute in the present appeal that a large news media business like the National Post belongs to this class.

[95] Even in the most traditional format, the print media, such organizations play a key role in disseminating information and triggering debate on public issues. The process of applying for a search warrant should be sensitive to the need to prevent undue or overly intrusive interference in their operations, regardless of whether the activity in question is investigation, reporting or commentary. The presumption of a notice requirement would allow media organizations to raise their concerns at the first opportunity, thereby precluding or minimizing unnecessary intrusions into their activities.

[96] I emphasize that this requirement should be presumptive. If the applicant feels that notice should not be given because the situation is urgent or because the information or documents

being sought might be lost, the application should state this and explain why the notice requirement should be waived. It would then fall to the authorizing judge to determine whether the requirement should in fact be waived and to craft conditions that would, so far as possible, limit interference with the operations of the affected media organization.

[97] In the circumstances of this case, however, I do not think that the lack of notice rendered the search unreasonable. Moreover, since the authorizing judge proceeded on the basis of established law, I would not quash the search warrant. For these reasons, I would dismiss the appeal.

The following are the reasons delivered by

ABELLA J. —

[98] The media's role in disseminating information is pivotal in its contribution to public debate and thoughtful decision-making. Where there is a potential impediment to the responsible performance of this role, a careful weighing of interests must be undertaken.

[99] It is also undisputed that the investigation of crime is an important public objective, and that the gathering of relevant evidence is integral to this pursuit. But our justice system has always recognized that not all evidence, however relevant, is necessarily available. The laws of hearsay, informer and solicitor-client privilege, as well as the constitutionally mandated exclusion of evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms*, are all examples of the way the legal system is engaged in a constant balancing of competing interests, eschewing absolutes

and mandating that in each case, a judgment must be made about which of several significant interests should prevail.

[100] In this case, the state seeks to obtain evidence that is of only questionable assistance in connection with a crime of moderate seriousness. It is information that could, theoretically, identify a journalist's confidential source, a person who may not even be in a position to provide information of any utility whatever to the investigation. When both sides of the scales are weighed in this light, there is, in my view, no contest. I would refuse to order disclosure and quash both the search warrant and assistance order.

Background

[101] In April 2001, Andrew McIntosh, an investigative reporter at the National Post, received a sealed brown envelope with no return address. Inside the envelope was a document which, Mr. McIntosh later confirmed, was sent to him by "X", a confidential source. X told Mr. McIntosh that the document was received in the mail from another person whose identity X did not know. X also said that he/she had discarded the envelope the document came in, then mailed the document to Mr. McIntosh in a fresh envelope.

[102] The document appeared to be a copy of a loan authorization prepared by the Business Development Bank of Canada in connection with a loan application by a hotel in Quebec, the Auberge Grand-Mère. One of the document's footnotes included a debt to "JAC Consultants", a Chrétien family investment company.

[103] Mr. McIntosh had taken an interest in the relationship between the then Prime Minister and the owner of the Auberge in the late 1990s. He wrote several articles about it in the National Post, relying heavily on confidential sources whose information he was able to authenticate.

[104] Mr. McIntosh contacted both the Prime Minister's office and the Bank to verify the latest document. Both said the document was a forgery, and the Bank complained to the RCMP about it. This launched an investigation into the forgery claim. At a meeting with Mr. McIntosh and senior National Post personnel on June 7, 2001, the RCMP, through Corporal Roland Gallant, asked for the document and the envelope it came in. Corporal Gallant also asked for the identity of the sender. These requests were refused.

[105] Without notice to the National Post or Mr. McIntosh, Corporal Gallant obtained a search warrant and an assistance order. Both were quashed by Benotto J. ((2004), 69 O.R. (3d) 427), but were subsequently reinstated by the Ontario Court of Appeal (2008 ONCA 139, 89 O.R. (3d) 1).

[106] With respect, I do not share the view of the majority that the Court of Appeal was correct in concluding that the documents should be disclosed. In my view, the harm caused by the possible disclosure of the identity of the confidential source in this case is far weightier than any benefit to the investigation of the crime. Moreover, unlike the majority, I am of the view that the National Post ought to have received notice of the application for a search warrant. As a result, I would allow the appeal.

Analysis

Journalist-Source Privilege

[107] While the nature and extent of a journalist-source privilege have received extensive judicial consideration in the United States, the United Kingdom, and Europe, they have received little evaluation in this Court (see *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572). It is, as a result, instructive to explore briefly how other jurisdictions have approached the issue.

[108] Its inherent complexity is perhaps best exposed by the opinions in *Branzburg v. Hayes*, 408 U.S. 665 (1972). In this landmark decision, the Supreme Court of the United States dealt with journalist-source privilege for the first time, refusing to recognize any constitutional or common law privilege that would allow a reporter to refuse to reveal confidential information to a grand jury. The grand jury in the United States reviews all relevant evidence to determine whether someone should be charged with a crime and, accordingly, has broad investigatory powers.

[109] In the context of this mandate, White J. unequivocally favoured protecting the ability to investigate crime over protecting the media (p. 695). In concurring reasons, Powell J. qualified White J.'s reasons by advocating a more nuanced approach that would require the examination of each case on its own merits (pp. 709-10).

[110] Stewart J. wrote strong dissenting reasons that reflect unambiguous and overriding

support for the protection of an independent media and its ability to disseminate news, including the protection of a journalist's confidential sources (p. 725). His three-part test (at p. 743) for deciding whether such a source should be disclosed can be paraphrased as follows:

- Is there probable cause to believe that the journalist has information that is clearly relevant to a specific probable violation of law;

- Can the information be obtained by alternative means that are less destructive of First Amendment rights; and

- Is there a compelling and overriding interest in the information.

[111] American cases decided after *Branzburg* appear to have preferred Stewart J.'s case-by-case approach, balancing the interests of the press against other societal interests such as crime prevention, prosecution and investigation (see *In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005); *The New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006); Eric M. Freedman, "Reconstructing Journalists' Privilege" (2008), 29 *Cardozo L. Rev*. 1381, at pp. 1384-85; Joel M. Gora, "The Source of the Problem of Sources: The First Amendment Fails the Fourth Estate" (2008), 29 *Cardozo L. Rev.* 1399, at p. 1405).

[112] This balancing is the approach that has been adopted by the Department of Justice in the United States in its policy on the issuance of subpoenas to the news media, as codified in the Code of Federal Regulations:

> . . . the approach in every case [of determining whether to request issuance of a subpoena to a member of the news media] must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice. [28 C.F.R. § 50.10(a) (2009)]

[113] The United Kingdom, Europe, Australia and South Africa are at various stages of development in terms of recognizing a journalist-source privilege but, like the United States, appear to apply a balancing approach (see *X Ltd. v. Morgan-Grampian Ltd.*, [1991] 1 A.C. 1 (H.L.); *Ashworth Hospital Authority v. MGN Ltd.*, [2002] UKHL 29, [2002] 1 W.L.R. 2033; *Goodwin v. The United Kingdom*, judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II; Peter Bartlett, "Australia", in Charles J. Glasser Jr., ed, *International Libel and Privacy Handbook* (2nd ed. 2009), 66, at p. 77; South Africa, *Criminal Procedure Act*, No. 51 of 1977, ss. 189 and 205; Janice Brabyn, "Protection Against Judicially Compelled Disclosure of the Identity of News Gatherers' Confidential Sources in Common Law Jurisdictions" (2006), 69 *Modern L. Rev*. 895, at pp. 925-27).

[114] This international perspective leads me to agree with Binnie J. that journalist-source privilege should be assessed on a case-by-case basis. I accept the criticism that this approach can create some imprecision, but judges rarely have the luxury of applying absolute rules and adjudicate of necessity in fields of law bounded by designated borders within which discretion is exercised based on the particular circumstances of the case. In other words, balancing competing interests, with all its inherent nuance and imprecision, is a core and routine judicial function.

[115] Like Binnie J. too, I think that this balancing should be done in accordance with the four Wigmore criteria infused with *Charter* values (*Slavutych v. Baker*, [1976] 1 S.C.R. 254; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 30). And finally, I agree that the first three Wigmore criteria are met in this case.[1]

[116] Where I respectfully part company with Binnie J. is at the fourth and final stage of the Wigmore test. This is the step at which the claimant has the burden of demonstrating that "[t]he *injury* that would inure to the [relationship] by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of the litigation" (p. 527 (emphasis in original)).

[117] This means looking first at what injury is caused by disclosing the material and potentially the identity of the confidential source. The context for considering the *particular* harm in this case is the role of confidential sources generally in the responsible performance of the media's role. In my view, those sources represent a significant and legitimate journalistic tool, and where reasonable, good faith efforts have been made to confirm the reliability of the information from those sources, their confidentiality ought to be protected.

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[1] The first three Wigmore criteria are:

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

(*Wigmore on Evidence* (McNaughton Rev.1961), vol. 8, at § 2285 (emphasis in original))

[118] In *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, this Court recognized that the use of confidential sources could be an integral part of responsible journalism in communicating matters of public interest:

> It may be responsible to rely on confidential sources, depending on the circumstances; a defendant may properly be unwilling or unable to reveal a source in order to advance the defence. [para. 115]
>
> (See also *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 230 C.C.C. (3d) 199.)

[119] In the United States, approximately three dozen states have enacted press "shield laws" protecting the relationship between a news reporter and his or her source. All but one of the remaining states judicially recognize some form of journalist-source privilege. While the scope of the protection varies from state to state, most of these protective laws offer some form of qualified privilege to reporters consistent with the three-part test suggested by Stewart J. in *Branzburg*, that is, source information is protected unless the party seeking disclosure can establish that (i) the information is relevant; (ii) the information is unavailable through other sources; and (iii) a compelling public interest exists for the disclosure of the information (CRS Report for Congress, *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes*, June 27, 2007, at pp. CRS-1 and CRS-2). A bill to provide such protection at the federal level (the *Free Flow of Information Act of 2009*, H.R. 985) was passed by the House of Representatives in March 2009 and is currently before the Senate. Similar legislative protection exists in the United Kingdom, Australia, Austria, France, Germany, Japan, Norway and Sweden (see Kyu Ho Youm, "International and Comparative Law on the Journalist's Privilege: The *Randal* Case

as a Lesson for the American Press" (2006), 1 *J. Int'l Media and Ent. L.* 1; Article 19 and Interights, *Briefing Paper on Protection of Journalists' Sources: Freedom of Expression Litigation Project*, May 1998 (online)).

[120] The importance of confidential sources has also been judicially recognized in *John v. Express Newspapers*, [2000] 3 All E.R. 257 (C.A.), at p. 266; *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 (H.L.), at p. 200; *Ernst v. Belgium* (2004), 39 E.H.R.R. 724, at pp. 756 and 758-59; *Voskuil v. Netherlands* (2007), 24 B.H.R.C. 306 (E.C.H.R.), at para. 65; *Prosecutor v. Brdjanin and Talic*, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-99-36-AR73.9, 11 December 2002, at paras. 43-44; *Van den Biggelaar/Dohmen en Langenberg*, Hoge Raad der Nederlanden (Supreme Court of the Netherlands), 10 May 1996, NJ 578; Bartlett, at p. 77; *Goodwin*; and *Ashworth*.

[121] In the case before us, the information provided by X — and other confidential sources — was crucial to Mr. McIntosh's ability to write about the relationship between the then Prime Minister and the Auberge. And the record in the case before us contains affidavits from several journalists stressing the importance of protecting confidential sources in their ability to gather and report the news. Peter Desbarats, former Dean of the Graduate School of Journalism at the University of Western Ontario, stressed the importance of such sources to "investigative journalists [in seeking] to serve the public interest by bringing to public attention matters that people in authority are less than anxious to have subjected to public scrutiny". In his view:

> Given my experience in the world of journalism, it is my opinion that the interests of a free press require the court to recognize the special relationship between a journalist

> and a confidential source who has been given a promise of secrecy. The giving of promises of secrecy is essential to a free and vigorous press, which in turn is essential to ensuring a well informed citizenry and a vibrant democracy.

As Mr. McIntosh himself stated in his affidavit, echoing the experiences expressed by other journalists in the various affidavits submitted in these proceedings:

> . . . sometimes a source will share either confidential information and/or documents with me for use in a story on the explicit condition that under no circumstances is their identity as the source of the information or documents ever to be publicly disclosed to anyone, particularly in the event of a legal proceeding, public hearing or official inquiry of any kind that may result from the publication of the subsequent story. ...
>
> . . .
>
> . . . my effectiveness as an investigative reporter would be seriously impaired because key sources would no longer trust me to keep their identities confidential, thereby preventing me from getting the sensitive information I need to do my job and reveal matters of public interest that might otherwise remain unknown to the Canadian public.

[122] Nor can the chilling effect that could result from the compelled disclosure of confidential journalistic sources be ignored as a consequential harm. This concern was expressed nearly three decades ago by the House of Lords in *British Steel Corp. v. Granada Television Ltd.*, [1981] 1 All E.R. 417 (H.L.):

> [T]he newspapers should not in general be compelled to disclose their sources of information. Neither by means of discovery before trial. Nor by questions or cross-examination at the trial. Nor by subpoena. The reason is because, if they were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. ... Misdeeds in the corridors of power, in companies or in government departments would never be known. Investigative journalism has proved itself as a valuable adjunct of the freedom of the press. [p. 441]

[123] Similarly, in the recent case of *Financial Times Ltd. v. United Kingdom*, [2009] ECHR 2065 (BAILII), the European Court of Human Rights warned:

> While . . . the applicants in the present case were not required to disclose documents which would directly result in the identification of the source but only to disclose documents which might, upon examination, lead to such identification, the Court does not consider this distinction to be crucial. In this regard, the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources. In the present case, it was sufficient that information or assistance was required under the disclosure order for the purpose of identifying X. [Emphasis added; para. 70.]

[124] There is no doubt that caution must be exercised in ensuring the quality and veracity of the confidentially received information (see David Abramowicz, "Calculating the Public Interest in Protecting Journalists' Confidential Sources" (2008), 108 *Colum. L. Rev*. 1949, at pp. 1966-70), but in the case before us, Mr. McIntosh had a sound basis for his confidence in X's reliability.

[125] Although this was X's first direct contact with Mr. McIntosh, X's reliability had been previously confirmed. Through another confidential source, "Y", Mr. McIntosh had ascertained that the Prime Minister had made several telephone calls to the Bank in connection with loans to the Auberge. Y had received this information from X, including:

- a letter from the manager of the Trois-Rivières Bank branch to a senior vice-president of the Bank expressing concern about the risky nature of the loan applied for by the Auberge and recommending the application's referral to a credit committee at the Bank;

> • a letter from the owner of the Auberge to the Prime Minister urging him to intervene to ensure he got the loan he needed; and
>
> • a Bank document containing "media lines" — "politically acceptable" responses — to respond to anticipated questions from reporters about the Prime Minister's telephone calls to the Bank to ensure the approval of the loans to the Auberge.

Y also showed Mr. McIntosh documents detailing the dates of telephone calls by the Prime Minister to the Bank.

[126] Several separate and independent confidential sources provided information to Mr. McIntosh that corroborated these telephone calls, both before and after Mr. McIntosh viewed the documents shown to him by Y. And despite originally denying any involvement in the Bank's decision to grant a loan to the Auberge, the Prime Minister later confirmed that he had indeed made the telephone calls to the Bank, but denied that there was anything improper or unusual about requesting the Bank to "settle" a file that "was not moving".

[127] In addition to relying on this prior and positive experience with X, Mr. McIntosh explained in his affidavit that he sought to test X's credibility in connection with this latest document by asking for an affidavit from him/her:

> I asked X whether he/she would be prepared to swear a confidential affidavit confirming that he/she did not alter or forge the loan authorization document. I used this approach to test X's integrity. As X agreed without hesitation to swear such an affidavit, I did not proceed further with this request.

[128] And to protect his own integrity, Mr. McIntosh told X that he would only protect his/her confidentiality if he were satisfied that he was not being misled:

> I stated to Confidential Source X that as long as I believed that he/she had not provided the document to deliberately mislead me, my undertaking of confidentiality would remain binding. I also told Confidential Source X that should irrefutable evidence to the contrary emerge, our agreement of confidentiality would become null and void. X agreed to these terms.

[129] Given Mr. McIntosh's reputation, it strikes me as counterintuitive to conclude that he would protect the identity of a source whom he suspects of *knowingly* providing him with false information. Mr. McIntosh should not be taken to have intended to risk his reputation or his livelihood so easily.

[130] Where, as here, the journalist has taken credible and reasonable steps to determine the authenticity and reliability of his source, one should respect his professional judgment and pause, it seems to me, before trespassing on the confidentiality which is the source of the relationship.

[131] Having identified what I see as demonstrable and profound injury to the journalist/source relationship resulting from disclosure of the documents and potentially the identity of the source in this case, the other side of the Wigmore balancing exercise requires consideration of the countervailing benefits of disclosure. For the reasons that follow, I see those benefits as ranging from speculative to negligible.

[132] Corporal Gallant said that he wanted the loan authorization document as well as the envelope it came in, in the hopes that these materials would reveal the identity of the source of the

alleged forgery. As he said in his Information to Obtain:

> The brown envelope that contained the documents and that was received by the National Post can contain information. I wish to submit it for forensic examination to determine whether it, or the false document, has fingerprints or other identifying markings which might assist in identifying the source of the document. As the forged object it will be required as evidence to substantiate any charge arising out of this investigation.

[133] Corporal Gallant had consulted a document examiner at the RCMP Central Forensic Laboratory in Ottawa to determine what forms of evidence an examination of the materials could yield:

> She . . . confirmed for me that it may be possible to acquire biological material (saliva) left on a stamp or seal of an envelope, if the person placing the stamp or closing the seal licked the stamp/seal to engage the adhesive. Finally, she confirmed that it may be possible to fingerprint the documents to identify who had handled them. [Emphasis added.]

[134] At best, then, "it may be possible" to acquire identifying information. Based on the record, however, there is a fatal disconnect between the envelope, the documents, the identity of X and the alleged forgery, regardless of the fruits of the forensic testing.

[135] As previously noted, X told Mr. McIntosh that he/she received the document anonymously in the mail, had discarded the envelope, and forwarded the document to Mr. McIntosh in a different envelope. It also appears from the record that X did not know the document might be a forgery when it was sent to Mr. McIntosh. Since X did not know the identity of the person from whom he/she had received the document, learning X's identity would yield virtually no evidence

that could assist in determining who was responsible for the alleged forgery.

[136] Secondly, Corporal Gallant said in cross-examination that "[t]he more documents are manipulated, the least likely the chances of getting fingerprints off of it", and acknowledged that there was a "far more remote and speculative possibility that that same document [had] the prints of the forger". Both the document and the envelope had been extensively handled. Mr. McIntosh took the document and envelope with him from Ottawa to Toronto, where they were handled by the lawyer for the National Post, the editor-in-chief and the deputy editor. It is therefore possible that even forensic testing, including DNA testing of the materials, would not be of any assistance in identifying the alleged forger.

[137] And this brings us to another factor limiting the benefit to the criminal investigation of learning X's identity. On cross-examination, Corporal Gallant explained that he wanted to learn X's identity because he wanted to question X about X's source, whose identity, it should be remembered, was unknown to X:

> A We knew that that person could potentially open other avenues for the investigation, and we could possibly determine from where that person obtained that information. So our role in this was in fact to find this person, but also to speak to this person to see if we could find - - to go backward in order to find the person that might have sent the document in the first place, and this person could potentially help us in our investigation, and this person could potentially be considered as a suspect or a witness, but at that time we did not know.
>
> Q And assuming if you accept what Mr. McIntosh has said, and you don't have evidence to the contrary, "X" who sent the document to Mr. McIntosh also received the document anonymously; isn't that correct?
>
> A That is in fact what Mr. McIntosh wrote, but, myself, I have not had an opportunity to speak to that person.

Q And you have no information to the contrary that would indicate other than what Mr. McIntosh has said?

A No, Your Honour.

Q So, do you agree, Corporal Gallant, that as the matter is now known to stand, the person who sent the document is not – there is no evidence that that person is the forger? No suggestion that he or she is the forger?

A Yes, Your Honour. Well, to date, Your Honour, I had not had an opportunity to speak to that person, and to date I have no reason to believe or evidence to support that what Mr. McIntosh writes on that would be true.

[138] But in light of the right to remain silent, X, even if identified, would be under no legal obligation to speak to the police, a critical fact which was acknowledged by the Crown (*R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. Chambers*, [1990] 2 S.C.R. 1293, at pp. 1315-16; and *R. v. Turcotte*, 2005 SCC 50, [2005] 2 S.C.R. 519, at paras. 41-46).

[139] Since X is under no obligation to respond to questions from the police, since the evidence is that X received the document from an anonymous source whose identity he/she did not know, and since the envelope in which X received the document is not the envelope in the National Post's possession, the benefit *to the forgery investigation* of getting the documents is, at best, marginal. Based on all of this, it seems to me to be clear that X is in no position to provide any information of assistance in the investigation of the alleged forgery, even if he/she agreed to be questioned by the police.

[140] The only possible evidence the envelope could yield, and that only remotely, is the identity of X, not of the alleged forger. This would mean that the only purpose for learning the confidential source's identity is to discover who had created this public and awkward controversy.

Corporal Gallant's Information to Obtain appears to confirm this purpose when he says:

> . . . this investigation seeks to determine the identify [*sic*] of someone who has maliciously attempted to mislead the press with a view to the publication of false information. It is not intended to identify a person providing truthful information to a news outlet.

Curiosity about the identity of a confidential source may be understandable, but is never, by itself, an acceptable basis for interfering with freedom of the press (*O'Neill v. Canada (Attorney General)* (2006), 213 C.C.C. (3d) 389 (S.C.J.)).

[141] And that brings us to consider the seriousness of the crime at issue in this case, a factor that seems to me to be relevant in balancing the competing interests. As Professor Gora argues:

> Have we solved or deterred important crimes that would not have been otherwise interdicted by law enforcement? Have journalists ever provided the smoking gun to help catch a killer or a terrorist, or just a leaker? . . . Has the gain to law enforcement been worth the loss to the First Amendment? A proper respect for the First Amendment requires that we at least ask these questions. [pp. 1420-21]

We must remember that what we are dealing with here is an alleged forgery. On a continuum of serious criminality, it strikes me as unhelpful to compare a possible forgery of a possible debt, as in our case, with the Paul Bernardo murder scenario the majority's reasons invoke by relying on *R. v. Murray* (2000), 144 C.C.C. (3d) 289 (Ont. S.C.J.). The remote possibility of resolving the debt forgery is far from sufficiently significant to outweigh the public benefit in protecting a rigorously thorough and responsible press.

[142] So on one side of the balance we have the slightest possible benefit to an investigation of an alleged forgery, and on the other we have the far weightier injury to the press interests at stake in revealing X's identity. Even if there is only a remote prospect of being able to identify X from the documents, the remoteness of this possibility hardly argues for disclosure, as the majority suggests. There may be no consequential harm to X, but neither will there be any consequential benefit to the investigation. This means that the harm and benefit of disclosure *in this particular case* is speculative at best. The major demonstrable harm, with no countervailing benefit, is to the ability of the press to carry out its public mandate.

[143] The fourth and final Wigmore criterion for protecting the confidentiality of Mr. McIntosh's source has therefore been satisfied and the documents should not be disclosed.

Notice

[144] I have a remaining concern about the procedure followed in this case, namely, the failure to give notice to the National Post that a search warrant was being requested. The operating presumption should be that the media's unique institutional character entitles it to notice when a search warrant is sought against it. A search warrant of media premises is a particularly serious intrusion, and a decision should not be made about its propriety without submissions from the party most affected.

[145] The Crown informed the Justice of the Peace that the National Post had requested notification of the application, but he decided to proceed without notice. This is regrettable, since

there were serious informational gaps in the Information to Obtain that were substantially narrowed by the National Post after the search warrant had been issued. Had the fuller record and arguments been known, the outcome of the hearing might well have been different.

[146] In *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 421, and *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, this Court dealt with search warrants involving the media. As Cory J. stated for the majority in *Lessard*, these are circumstances that warrant caution and accommodation:

> . . . the media are entitled to particularly careful consideration, both as to the issuance of a search warrant and as to the conditions that may be attached to a warrant to ensure that any disruption of the gathering and dissemination of news is limited as much as possible. The media are entitled to this special consideration because of the importance of their role in a democratic society. [p. 444]

[147] In her dissenting reasons in *Lessard*, McLachlin J. was alert to the potential for interference with freedom of the press. She pointed out that the "prospect of seizure of press material in future cases without the imposition of conditions to protect press freedom and the identity of informants ... creates the chilling effect" (p. 453). Her proposed approach, like the balancing suggested by Stewart J. in *Branzburg* and in complete harmony with the fourth criterion in Wigmore, required that there be an absence of available alternative sources for the required information sought, and sufficient significance to that information to justify the interference with press freedom.

[148] Cory J. recognized that the media was usually an innocent third party in connection with a crime being investigated, and that the supporting affidavit should therefore contain the appropriate

information, including whether alternative sources for obtaining the information sought by the warrant had been reasonably investigated and exhausted (*Lessard*, at p. 445; see also La Forest J.'s concurring reasons at pp. 431-32, and *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C.S.C.), at p. 495). He warned that search warrants could be invalidated if it subsequently came to light that pertinent information that could have affected the decision to issue the warrant was not disclosed. The absence of such relevant information, it seems to me, is precisely what happened in the case before us.

[149] On the cross-examination of Corporal Gallant, for example, it emerged that alternative sources of the document had not been seriously investigated, despite Corporal Gallant's statement in his Information to Obtain, that:

> The evidence I wish to seize — the forged document and the envelope in which it was delivered — is not available from any other source. This evidence is unique and central to this investigation. The evidence is the *actus reus* of the offence.

[150] He confirmed that the Bloc Québecois had anonymously received a document identical to the one the National Post had, yet said he had not been able to get forensic evidence from it because the Bloc had distributed several copies of the document to members of the party and it was unclear which of them was the original.

[151] Nor did Corporal Gallant inquire into whether any other members of Parliament or other media outlets may have received the document:

Q . . . did you make inquiries of the other political parties, such as the Conservative party and the Alliance party, because they clearly were reviewing the document? Did you make such inquiries before you got the search warrants in this case?

A At this time, no, Your Honour. I have not started anything with respect to political parties, whether it be the PC or the Alliance.

. . .

Q And just to complete this area, I also understand that you made no inquiries of other major media outlets like the Canadian Broadcasting Corporation or The Globe and Mail, to see whether they received such a document?

A No. That's correct, Your Honour. The complaint we got here at the RCMP related to The National Post, and we have not directed our attention to other media organizations.

[152] And although the information he gave in the Information to Obtain was that there was no outstanding debt from the Auberge to JAC Consultants, Corporal Gallant admitted on cross-examination that he had not examined the books of JAC Consultants prior to filing his request for the search warrant. This was of some significance because the cross-examination also revealed that there were problems with some of the corroborating documents provided by the Bank.

[153] The original suppliers' list that the Bank gave to Corporal Gallant, which he had reviewed at the start of the investigation, was missing the page where, alphabetically, "JAC Consultants" would have appeared. The Bank requested and received a new suppliers' list from the accountant for the owner of the Auberge, which did not show any debt to JAC Consultants. Through the cross-examination of Corporal Gallant, it was revealed that these two lists had different dates on them, and that they differed in some of the supplier names and amounts. By itself, this information might not have made a difference in the outcome, but when blended with the other missing pieces in the Information to Obtain, it arguably assumes some potential relevance.

[154] But the most notable fact missing from the narrative that was revealed by the cross-examination of Corporal Gallant, was that the document came from a confidential source:

> Q From your perspective, did you or did you not believe it was important to tell the judge that the material you sought may have emanated from a confidential source?
>
> A Well, the information I had at the time ... was that the documents we were seeking came from an anonymous source. It was not described to us as a confidential source.

Counsel for the National Post then drew Corporal Gallant's attention to a letter he had received prior to seeking the warrant, in which the National Post had voiced its concern that what was being sought emanated from a confidential source:

> Q And I take it, sir, that at no time did you draw, especially to the Justice of the Peace, that the document and envelope that you sought from the Post's perspective emanated from a confidential source? You did not draw that to his attention? Beyond putting this letter in the appendix?
>
> A No. That is not included in the search warrant ... except for the fact that it's written here.

This information, if disclosed, would logically have led to an inquiry into whether the confidentiality of the source ought to be protected.

[155] It seems logical to me that given the inherent legal complexities in authorizing a search warrant against the media, any problems with the Information to Obtain should be canvassed *prior* to deciding whether to issue the warrant. The National Post lost the opportunity to make *timely*

submissions not only on the confidential nature of the source, but also about the deficiencies in the information. Taken together, the information elicited through cross-examination might well have resulted in the search warrant not being issued at all.

[156] The media will always be in the best position to provide relevant information about the particular context, including whether a confidential relationship is at stake. As a general rule, therefore, it is entitled to notice of a request for a search warrant unless there are exceptional and urgent circumstances justifying an *ex parte* hearing.

[157] Here there were no such circumstances. The Bank complained to the RCMP about the forgery by telephone on April 7, 2001, and formally complained by letter on April 11, 2001. Mr. McIntosh was interviewed on June 7, 2001, and the search warrant was issued over a year later on July 4, 2002. Clearly there was ample time for the National Post to receive notice of the application for a search warrant, to cross-examine Corporal Gallant, and to make its submissions.

[158] The Crown argued that the one-month delay between the granting of the search warrant and its execution gave the National Post time to respond to the issuance of the warrant with a *certiorari* application. This, with respect, is an untimely — and needless — public expense. The National Post should have had the opportunity to make its submissions *before* the warrant was issued.

Conclusion

[159] I would therefore allow the appeal, set aside the judgment of the Ontario Court of Appeal, and restore the judgment of Benotto J. quashing the search warrant and the assistance order.

Appeal dismissed, ABELLA J. *dissenting*

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