

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and -

THE NATIONAL POST, MATTHEW
FRASER, and ANDREW McINTOSH

Applicants

- and -

BELL GLOBEMEDIA PUBLISHING INC.,
carrying on business as *THE GLOBE AND
MAIL*

Applicant
(Intervenor)

- and -

CANADIAN BROADCASTING
CORPORATION

Applicant
(Intervenor)

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) Scott C. Hutchison, Sarah Gray, William N.
) Rolls, for the Respondent
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) Marlys Edwardh and John Norris, for the
) Applicants
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) Peter Jacobsen, for the Intervenor, The
) Globe and Mail
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) Daniel Henry, for the Intervenor, Canadian
) Broadcasting Corporation
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) **HEARD:** September 8-11, 2003
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Senior Justice Benotto

[1] On April 5, 2001, a brown paper envelope arrived anonymously at the Ottawa office of the National Post. It was addressed to Andrew McIntosh, an investigative journalist who was working on a project concerning the Prime Minister's business dealings in his riding of St.Maurice, Quebec. Of particular interest was the involvement, if any, of the Prime Minister in the sale of the Grand-Mère Golf Club in St. Maurice. The document contained in the envelope purports to be a loan authorization for the golf club which provides for the repayment of debt owed to a Chrétien family holding company. This, if true, may have placed the Prime Minister in a conflict of interest.

[2] The RCMP applied for and obtained search warrants to compel production of the envelope and its contents: a general warrant pursuant to section 487.01 of the *Criminal Code* and an assistance order pursuant to 487.02. The National Post seeks to have the warrants quashed. It is supported by the Canadian Broadcasting Corporation (the CBC) and the Globe and Mail, which were granted intervenor status.

[3] There are several grounds relied on to challenge the warrants. The primary one is the fact that disclosure of the documents would reveal the identity of a confidential source. The media argue that the proposed search and seizure would constitute a serious and unjustifiable infringement of their rights to freedom of expression under the *Canadian Charter of Rights and Freedoms* and would breach a privilege at common law. The Crown argues that the documents are necessary for the investigation of a criminal offence.

FACTS

[4] Andrew McIntosh's first stories about the Prime Minister's investment in the golf club appeared in the National Post on Saturday, January 23, 1999 and Monday, January 25, 1999. He focused much of his investigation on the Prime Minister's financial interests in the Grand-Mère Inn and the Grand-Mère Golf Club and on the flow of federal loans, grants and contracts to businesses in the Prime Minister's riding of St. Maurice. Of particular interest to Mr. McIntosh

and importance to the development of the story was a \$615,000 loan given to the Grand-Mère Inn in September 1997 by the Business Development Bank of Canada (“the Bank”), a federal Crown corporation involved in financing small and medium-sized businesses across Canada. Mr. McIntosh first learned of the loan through a land registry search he conducted on the Grand-Mère Inn.

[5] As a result of these stories, Mr. McIntosh was contacted by people who became confidential sources of information. The stories sparked a national debate both in and out of the House of Commons, led the Prime Minister to write to the National Post, and caused Mr. McIntosh to continue investigating and publishing stories on the topic.

[6] During the fall of 2000, Mr. McIntosh was contacted by a confidential source “Y” who said he/she had a matter of great public importance to discuss provided a promise of confidentiality was given. Y said he/she was also speaking on behalf of another source “X” who did not want to speak directly, fearing reprisals. Mr. McIntosh gave a blanket, unconditional promise of confidentiality to protect the identity of both X and Y.

[7] At this time, there were five separate RCMP investigations ongoing into the awarding of federal government loans and grants in the riding of the Prime Minister, four regarding allegations of theft and fraud, and a fifth involving alleged unlawful lobbying by a lobbyist and unpaid aide to the Prime Minister. As well, the Grand-Mère Inn had defaulted on its loan repayments to the Bank and there were a growing number of liens for unpaid taxes and other debts registered against the Inn by governments and creditors.

[8] Pursuant to his promise of confidentiality, Mr. McIntosh received a number of documents. A private meeting was held at Y’s home. Mr. McIntosh was given some documents and only shown others. This information led him to other confidential sources from whom he received more information. The subsequent stories in the National Post gave rise to significant political controversy. There were calls in the media and in the House of Commons for the

resignation of the Prime Minister. The stories and the investigation continued. All of Mr. McIntosh's work was done with the support of the then Editor-in-Chief Kenneth Whyte.¹

[9] On the morning of April 5, 2001, Mr. McIntosh received a sealed, plain brown envelope addressed to him. It was in the daily mail delivery at the Ottawa Bureau of the National Post. The envelope bore no return address. It was a copy of a document that appeared to be an internal Business Development Bank of Canada loan authorization. It was signed by identifiable officers of the Bank. It related to the \$615,000 mortgage loan that the Bank had granted to the Grand-Mère Inn in August 1997. Of particular significance to Mr. McIntosh was a statement in the financial footnotes that the Inn was showing a debt of \$23,040 to "JAC Consultants." J. & AC Consultants Inc. is a Chretien family holding company.

[10] Mr. McIntosh testified that he and his colleagues at the National Post realized that if the document was genuine, it was extremely sensitive and its contents, if proven to be accurate, could have dire political and other consequences for the career of the Prime Minister. Mr. McIntosh forwarded a copy of the document to the Bank, to the Prime Minister's Office, and to David Scott, counsel for the Prime Minister, requesting their comments about its contents.

[11] The Bank stated that the document appeared to be a copy of part of the Bank's record. The Bank wrote two letters to the National Post on April 6, 2001. The first letter stated that the document was a forgery because there was no record of the \$23,040 debt owing to J&AC Consultants in the Bank's own records. The second letter stated that the National Post was in possession of a confidential Bank document, the contents of which could not be disclosed. The Prime Minister's Office and Mr. Scott also took the position that the document was a forgery. They specifically denied that the Prime Minister was ever owed any money by the Grand-Mère Inn. On April 7, 2001, the Bank contacted the RCMP and requested that it undertake an investigation into the origin of the document.

¹ At the time of the warrant and the institution of this application Kenneth Whyte was the Editor-in-Chief. It is now Matthew Fraser. Mr. Fraser adopted the evidence and position of Mr. Whyte. Thus, only the name of the applicant changed. The application has been amended accordingly.

[12] The National Post decided not to publish details of the purported \$23,040 debt referred to in the document. However, other news organizations published and broadcast details that purported to show that the Inn had an unpaid debt of \$23,040 to JAC Consultants in 1997. Questions raised in the House of Commons concerning the disputed loan authorization document made it clear that others had received copies of it as well.

[13] During the week following the receipt of the envelope by Mr. McIntosh, X contacted him requesting a meeting. This was Mr. McIntosh's first contact with X. At the meeting, X requested an undertaking of confidentiality. It was given even though that promise had already been given in the earlier discussions with Y. Confidential source X then revealed that he/she was the person who had mailed the loan authorization document. Mr. McIntosh satisfied himself that X was in fact the source. X asked him to destroy it so that he would not be identified through DNA or fingerprint analysis. Mr. McIntosh testified that he was told that X was concerned that he/she and his/her family might suffer if ever identified. Mr. McIntosh refused to destroy the document but took steps to secure it. Mr. McIntosh told X that as long as he believed he was not being misled, the undertaking of confidentiality would remain binding. Mr. McIntosh researched the origins of the document. He stated under oath that he is satisfied X is a reliable source. He was satisfied the loan authorization was genuine. If it is in fact a forgery, he has stated that he does not believe that X knew that. He, therefore, believes the promise of confidentiality remains binding.

[14] The police seek the documents to obtain information concerning possible offences under the *Criminal Code* and to conduct forensic examination of the items (including DNA analysis and fingerprinting) with a view to identifying the person who sent the loan authorization document to Mr. McIntosh. They need the documents to establish that the loan authorization document sent to Mr. McIntosh is a forgery.

[15] The RCMP investigation was assigned to Corporal Roland Gallant of the Montreal Commercial Crime Section². He spoke to counsel for the National Post about a search warrant. During these discussions, counsel for the National Post asked for an opportunity to appear at the application before the issuing Justice. She made the request because she was concerned about the constitutional violation resulting from the disclosure of a confidential source. Notice was not given to counsel.

[16] On July 4, 2002, the Honourable Mr. Justice Khawly of the Ontario Court of Justice issued a general warrant and assistance order. By their combined effect, the Editor-in Chief of the National Post was to locate the documents in question and make them available to Corporal Gallant. The general warrant and assistance order were served on the National Post on July 5, 2002.

[17] This application to quash the general warrant and assistance order was started on July 29, 2002. Both orders were stayed pending the determination of this application.

ANALYSIS

[18] The applicants challenge the validity of the search warrants on several grounds. The primary grounds are:

1. There was insufficient evidence of a forgery;
2. The use of the general warrant and assistance order goes beyond what was intended by the *Criminal Code*;
3. The effect of the warrant is to reveal a privileged confidential source which violates a *Charter* protection.

Forgery

[19] The evidence before Justice Khawly consisted of the Information to Obtain prepared by Corporal Gallant together with the exhibits. Corporal Gallant was cross-examined before me for

² Now Detective Gallant

several days.³ The applicants allege that there is insufficient evidence to show that a charge of forgery could be laid.

[20] There were differences between the document sent to the National Post and the Bank's document. A simple inspection of the Bank's documents and the document sent to the National Post seems to show that writing was added. The name "Yvon Dumaine" appears on the upper left corner of the Bank's document. It was later stated by Corporal Gallant that this was not a signature, but a note mistakenly made by a Bank employee.

[21] The National Post requested a copy of the Hotel's suppliers' list to determine if JAC Consulting was owed money. The suppliers' list omitted the page where JAC Consulting would have appeared alphabetically. This was not explained to Justice Khawly and should have been. However, I do not find the omission would denude the record of reasonable grounds to issue the warrant.

[22] A serious question was raised about the integrity of the Bank's files. However, I am not to substitute my views for that of the authorizing judge.⁴ Based on the record, Justice Khawly had sufficient information to conclude the document was a forgery.

[23] Suggestions were made about the good faith of the officer. I do not question his good faith or his approach to the pre-authorization process. Each step that he took has been subjected to microscopic scrutiny. In such a light, there are always matters that could, in retrospect have been differently done. I find that throughout, his conduct was respectful and professional.

Use of the General Warrant and Assistance Order

[24] The request to Justice Khawly was that he grant a general warrant and assistance order. This request was summarized by Corporal Gallant in the Information to Obtain as follows:

³ This cross-examination took place in open court in March and April, 2003, pursuant to my earlier order granting the applicants the right to cross-examine.

⁴ *R. v. Araujo* (2000), 149 CCC (3d) 449 (SCC)

I seek to engage in the following investigative procedure: to serve this warrant on the National Post Editor-in-Chief, to have an assistance order made to require him to cause the objects of seizure to be brought in safe condition to his offices, to subsequently re-attend at his offices to seize the things he has produced at that location and to then expose to those things to such forensic processes as may be appropriate. I propose that thereafter the usual terms and conditions governing media searches (noted below) apply to any object of seizure.⁵

[25] The Crown alleges that this technique was necessary because the document had been moved by Mr. McIntosh to an undisclosed location. The applicants allege that this unprecedented use of the warrant and assistance order inverts the proper relationship between these two orders.

[26] The applicants argue that the general warrant is really an anticipatory search warrant because the target of the search is not at the National Post at all. Thus, the preconditions to the issuance of a search warrant do not exist.⁶ The assistance order directs that the items be brought to the National Post thus effectively creating the condition that would justify the search. This, it is said, is not a legitimate use of the assistance order.

[27] It is further argued that this combination of general warrant and assistance order expands the power to search dramatically because the police could forego establishing reasonable grounds to show the target of the search was at a location as long as they could identify someone to deliver it for seizure. The applicants have also argued that this novel use of the warrant and assistance order makes the editor of the newspaper an arm of the government.

[28] Through sections 487.01 and 487.02 of the *Criminal Code*, Parliament has provided broad warrant granting power for any investigative techniques which can be brought within the Supreme Court of Canada's conditions for judicial pre-authorization.⁷ Section 487.01(1) provides:

⁵ Information to Obtain, para 47

⁶ *R. v. Noseworthy* (1997), 116 CCC (3d) 376

⁷ See *Hunter v. Southam Inc.* (1984), 14 CCC (3d) 97 which requires that a judicial officer pre-authorize investigative intrusions on reasonable expectations of privacy

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.

[29] While there are a number of limits on the broad words of this section, it authorizes virtually any investigative technique. The purpose of the section is to allow the investigators “to unearth and preserve as much relevant evidence as possible.”⁸

[30] The assistance order provision in section 487.02 provides:

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.

[31] The combination of a general warrant and assistance order was under consideration in *Canadian Imperial Bank of Canada v. The Queen*⁹. There, Justice Ewaschuk upheld the warrant and assistance order which required the Bank to locate cheques and provide them to the police.

⁸ *Canadian Oxy Chemicals v. Canada* (1999), 133 CCC (3d) 426 at para 22.

⁹ *Canadian Imperial Bank of Canada v. Canada* [1997] OJ. No. 5573

[32] In *Canada Post Corp. v. Canada (Attorney General)* Justice O’Driscoll held that section 487.2 could properly be used to compel employees of Canada Post to locate and gather things, and give them to the police.¹⁰

[33] More recently, Justice LaForme held that ss. 487.01 and 487.02 can be used together to compel an unwilling non-target party to obtain things and produce them to the police for seizure.¹¹

[34] Justice LaForme was considering an application by the Crown for a *mandamus* to require a provincial judge to exercise his jurisdiction to consider a warrant and assistance order similar to that issued by Justice Khawly here. The provincial judge had declined to issue the general warrant and assistance order holding they were not authorized by sections 487.01 and 487.02. Justice LaForme considered the “novel and creative use of” the sections and the lack of judicial authority directly on point. He concluded that s. 487.01 is remedial in its character and should not be narrowly construed. “Rather, it must be read with an appreciation for its purpose, namely, the enhancement of law enforcement and the protection of *Charter* values.” He concluded that the ss. 487.01 and 487.02 can be used together to compel an unwilling non-target third party to obtain things and produce them to the police for seizure.

[35] Justice LaForme found that the learned Justice was in error when he concluded that he did not have the jurisdiction to consider the application. He required the judge to reconsider the warrant application.

[36] I agree in principle with the reasoning of Justice LaForme. The general warrant and assistance order can be used in combination to effectively require a third person to deliver items to police. However, there remains the issue, which is the primary one relied upon by the applicants: the effect of the warrants would cause the media to indirectly identify a confidential source. This issue was not considered by Justice LaForme and it is to that issue I now turn. Once

¹⁰ *Canada Post Corp. v. Canada (Attorney General)* (1995), 95 CCC (3d) 568

the requirements of section 487 are met, that is not the end of the matter. There begins “a difficult and complex” process to determine if the warrant should be issued.¹²

Confidentiality

[37] The fundamental attack on the general warrant and assistance order is constitutional. The applicants say that the proposed search and seizure are directed to the identification of a journalist’s confidential source. This, it is argued, violates freedom of expression guaranteed by the *Charter*. The media’s ability to effectively gather and disseminate news would be undermined if source confidentiality were not protected.

[38] The Crown argues that the warrant and order are simple and unremarkable. The Crown seeks only real evidence of a serious offence and the media should not be allowed to expand the current law to create an unprecedented form of privilege.

[39] These two positions summarize the important conflicting interests that must be balanced. The balancing, mandated by the Supreme Court of Canada, is neither simple nor unremarkable. It involves an examination of issues that go to the core values of our society.

[40] The analysis will consider *Charter* guarantees and privilege in the context of a police investigation.

The Charter

[41] Even before the *Charter*, the importance of the protection of source confidentiality was recognized in the jurisprudence. Where the execution of a search warrant interferes with “rights as fundamental as freedom of the press” the justice of the peace exceeds jurisdiction *ab initio*.¹³

¹¹ Re:General Warrant and Assistance Order April 4, 2003

¹² *CBC v. Lessard* [1991]3 S.C.R.421

¹³ *Descoteaux v. Mierzwinski* [1982] 1 SCR 860 at 891

[42] Section 2(b) of the *Canadian Charter of Rights and Freedoms* guarantees the “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” The importance of these freedoms has been recognized by the Supreme Court of Canada:

- “It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions.”¹⁴
- “The liberty to criticize and express dissentient views has long been thought to be a safeguard against state tyranny and corruption.”¹⁵
- Freedom of the press is “an important and essential attribute of a free and democratic society.”¹⁶

[43] The activities protected by s.2(b) include the gathering and dissemination of information. This freedom of expression given to the media “would be of little value if the freedom under s.2(b) did not also encompass the right to gather news and information without undue governmental interference.”¹⁷

[44] Section 2(b) also encompasses the receipt of information by members of the public. Listeners and readers have a right to information pertaining to public institutions. It is only through the press that most individuals can learn of what is transpiring in government and come to their own assessment of the institution and its actions. By protecting the freedom of expression of the press, s.2(b) thereby guarantees the further freedom of members of the public to develop, put forward and act upon informed opinions about government and other matters of public interest.

¹⁴ *Edmonton Journal v. Alberta (Attorney-General)* (1989), 45 C.R.R. 1 at 11 (S.C.C.) per Cory J.

¹⁵ *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* (1996), 110 C.C.C. (3d) 193 per LaForest J. at 202 (S.C.C.)

¹⁶ *Canadian Newspapers Co. v. Canada (Attorney General)*

¹⁷ La Forest J. in *Canadian Broadcasting Corp. v. Lessard*,

[45] It is because of the fundamental importance of a free press in a democratic society that special considerations arise in applications to search media premises or to seize material from journalists, pursuant to powers granted to the police under the *Criminal Code*. The effect of the search and seizure on the ability of the press to fulfill its function must be considered by the justice of the peace before issuing the order. Moreover, the overall reasonableness of the search is protected by s. 8 of the *Charter*. In this regard, the damaging effect of the search on the freedom and functioning of the press is highly relevant to the assessment of the reasonableness of the search. It is essential that flexibility in the balancing process be preserved so that all the factors relevant to the individual case may be taken into consideration and properly weighed.¹⁸

[46] Here, there was much evidence filed which described the functioning of the press. Fifteen well-respected journalists swore affidavits¹⁹. The evidence demonstrates that the use of confidential sources is essential to the uncovering and reporting of matters of public interest.

[47] Confidential sources were relied on in:

1. The Watergate story which led to the resignation of President Richard Nixon. (Washington Post reporters Carl Bernstein and Bob Woodward relied extensively on anonymous sources, the most famous of whom became known as “Deep Throat.”)
2. The tainted tuna scandal, that led to the resignation of the Minister of Fisheries in Canada.
3. The story that Airbus Industrie paid secret commissions in the sale of Airbus aircraft.
4. 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.”
5. Stories dealing with the City of Toronto's health inspection system for restaurants.

¹⁸ *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* at 556-558

¹⁹ They include John Sawatsky, Vincent Carlin, David Stewart-Patterson, Robert Cribb, Peter Desbarats, Robert Tripp, Harvey Cashore, Arnold Amber, Tony Burman, Jeff Sllot, Martin Mittelstaedt, Jacquie McNish, Edward Greenspon

6. A story describing the operation of an illegal slaughterhouse in Vaughan.
7. Stories about the fall of Nortel Networks that contrasted optimistic public forecasts by Nortel executives with internal Nortel discussions warning of potential devastating market downturn.
8. 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 Quebec, illegal wiretaps in Vancouver, pin-registers.
9. A story about a briefcase containing highly classified material that was stolen from the car of a CSIS intelligence agent.
10. The uncovering of US companies dumping hazardous waste in Canada because of lax environmental laws.

[48] Inherent in the concept of confidentiality is the ability of the media to protect the identity of the source. The evidence establishes that sources may “dry-up” if their identities were revealed. Without confidential sources, many important stories of considerable public interest would not have been published. Confidential sources are essential to the effective functioning of the media in a free and democratic society.

[49] Sources want confidentiality for a variety of reasons. They may, themselves, be breaching a duty of confidentiality. They may have stolen the information. They may fear economic reprisals. They may lose their jobs. They may fear for their safety. They may fear for the safety of their families.

[50] The Crown argues that the actions of these sources should not be encouraged. I disagree. If employee confidentiality were to trump conscience, there would be a licence for corporations, governments and other employers to operate without accountability. Lord Denning stated that newspapers should not be compelled to disclose sources because:

Their sources would dry up. Wrongdoing would not be disclosed. Charlatans would not be exposed. Unfairness would go unremedied. Misdeeds in the

corridors of power, in companies or in government departments would never be known.²⁰

[51] To compel a journalist to break a promise of confidentiality would do serious harm to the constitutionally entrenched right of the media to gather and disseminate information. The reasonableness of the search will be considered in the context of these *Charter* values. A Justice of the Peace considering a search warrant application must undertake a careful weighing of the privacy interests of individuals in a democratic society against the interest of the state investigating and prosecuting crimes. This weighing and balancing will vary with each case. The media are entitled to this “special consideration because of the importance of its role in a democratic society.”²¹

[52] Justice Cory’s often-quoted nine criteria for the granting of a warrant against the media include these comments:

- 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.
- If, subsequent to the issuing of a search warrant, it comes to light the authorities failed to disclose pertinent information that could well have affected the decision to issue the warrant, this may result in a finding that the warrant was invalid.²²

[53] In my view, the issuing justice did not have adequate information pertinent to the *Charter* issue. The warrants violate the *Charter*. In this case, the eroding of the ability of the press to perform its role in society cannot be outweighed by the Crown’s investigation. Mr. McIntosh is a well-respected journalist working for a major national newspaper on an important story.

²⁰ *British Steel Corporation v. Granada Television Ltd.*, [1981] 1 All E.R. 417 at p. 441, per: Lord Denning (H.L.)

²¹ *CBC v. Lessard*, *supra*, at p. 533

²² *CBC v. New Brunswick #1*, *supra*, at pp. 560-561

Society's interest here, in protecting the confidentiality he promised, outweighs the benefits of disclosing the document.

[54] The issuing justice was not alive to these complex issues and thus not able to perform the balancing required. By proceeding on an *ex parte* basis, he precluded a complete analysis of the confidentiality issue. I find that he failed to give adequate consideration to the pertinent factor of confidential sources. This would have affected his decision to issue the warrant and results in a finding that the warrant was invalid and should not have been issued.²³

Privilege

[55] The applicants claim that the documents received by the National Post are protected by the common law of privilege. The Crown contends that no privilege attaches because the documents are physical evidence of crime sent anonymously without a promise of confidentiality.

[56] The starting point for the consideration of privilege is that "everyone owes a general duty to give evidence relevant to the matter before the Court so that the truth may be ascertained."²⁴ Exceptions are permitted where the "public good" transcends this principle. Chief Justice McLachlin restated the test for consideration and referred to Wigmore's four criteria:

While the circumstances giving rise to a privilege were once thought to be fixed by categories defined in previous centuries ... it is now accepted that the common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate...

First, the communication must originate in a confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.²⁵

²³See Moldaver J.A. in *R. v. Canadian Broadcasting Corp.* (2001) 52 O.R. (3d) 757 at 772

²⁴*A.M. v Ryan* (1996) 143 DLR (4th) 1

[57] Rules of privilege by their very nature, work at cross-purposes to the quest for the truth. They are therefore strictly construed and recognized only where there are important social values implicated.

[58] The law of privilege “may *evolve* to reflect the social and legal realities of our time.”²⁶ This statement was made in the context of victims of sexual abuse. The reality here is no less socially significant. We are concerned with the media’s ability to gather news so that the public is informed.

[59] The Wigmore criteria operate to guide the evolution of privilege which must reflect the social and legal context of our time. That context includes the possibility of sophisticated DNA testing to establish identity and the increasingly important role of the press.

[60] The consideration of privilege must start with an analysis of the relationship in question. The relationship here, while not protected by a class privilege, is one that may, on a case-by-case basis, be protected. Examples of such relationships include “doctor-patient, psychologist-patient, journalist-informant and religious communications.”²⁷

[61] The importance of the journalist-informant relationship is established by the evidence. If the journalist-informant relationship is undermined, society as a whole is affected. It is through confidential sources that matters of great public importance are made known. As corporate and public power increase, the ability of the average citizen to affect his or her world depends upon the information disseminated by the press. To deprive the media of an important tool in the gathering of news would affect society as a whole. The relationship is one that should be fostered.

²⁵ Ibid at 20

²⁶ *Ryan* at pgh 24, emphasis added

²⁷ *R.v.McClure* [2001] S.C.R. 445 per Major J. at 457

[62] The Wigmore criteria are not “carved in stone”. Rather, they “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.”²⁸ This is understandable since they were formulated in a social context different from ours. Also, they are meant to apply to a wide variety of circumstances and may require modification depending upon the nature of the relationship involved.

[63] Justice Major, in referring to the possibility of a journalist-informant privilege forecast the broadening scope of the first Wigmore criterion. The nature of the privilege is with respect to the identity of the informant, not the content of the communication. Indeed, the relationship is entered into precisely so that some communications be made public. The confidentiality relates to the source of the information and any information that may tend to reveal it.

[64] It is clear on principle and on authority that what is protected is the identity of the informant. In a libel action the so called “newspaper rule” has protected documents from disclosure which would reveal a confidential source.²⁹

[65] The first criterion requires that the communication originated in a confidence that the communication would not be disclosed. The Crown states this requirement has not been met. The Crown asserts that the document came from an anonymous source in a brown envelope. Thus, no expectation of confidentiality could arise. It is suggested that the promises of confidentiality given to X before and after the receipt of the document cannot cloak the anonymous delivery with an expectation of privacy. Also, physical evidence is not privileged.³⁰

[66] This is, with respect, too narrow a view. The receipt of the document cannot be considered in isolation. Rather it was part of an ongoing relationship. It was a relationship founded upon an expectation of confidentiality. It was in the expectation of that confidentiality

²⁸ *R. v. Gruenke* (1991), 67 C.C.C. (3d) 289 at 306 (S.C.C.)

²⁹ *Reichmann v. Toronto Life Publishing Co.* (1988) 28 CPC (2nd) 11

³⁰ *R. v. Murray* (2000) 144 CCC 289

that X revealed he was the source of the document. The identity of the source of the document should be protected. If this identity is privileged, then to allow production of a document that would effectively negate the privilege, makes no sense.

[67] The applicants compare the situation to that of the police informers. While they are protected by a class privilege (which is not the case here) the nature of the privilege is analogous. As stated by Cory J.A. (as he then was):

It was also obvious to the courts from very early times that the identity of an informer would have to be concealed, both for his or her own protection and to encourage other to divulge to the authorities any information pertaining to crimes.³¹

[68] As recently stated by the House of Lords in relation to journalists' confidential sources:

... if the identity of (police) informers were too readily liable to be disclosed in a court of law the sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. Ordering journalists to disclose their sources can have similar consequences. The fact is that information which should be placed in the public domain is frequently made available to the press by individuals who would lack the courage to provide the information if they thought there was a risk of their identity being disclosed. The fact that journalists' sources can be reasonably confident that their identity will not be disclosed makes a significant contribution to the ability of the press to perform their role in society of making information available to the public. It is for this reason that it is well established now that the courts will normally protect journalists' sources from identification.³²

[69] The Crown resists this analogy, referring to one author who stated:

Are these arguments equally valid in connection with media sources? The role of the media with society is quite distinct from that of the police. It follows that a distinction must be drawn between those who inform to the media, and those who assist in law enforcement. The police informer privilege is designed to further the public interest in the effective investigation and prosecution of criminal offences. A privilege attaching to media sources would advance different interests, and might ultimately *hinder* effective law enforcement, by barring disclosure of information which is required for full police or judicial inquiry into alleged

³¹ *R. v. Hunter* (1987) 34 CCC (3d) 14 at 18

³² *Ashworth Hospital Authority v. MGN Ltd.*, [2002] 4 All E.R. 193 (H.L.) at p. 210

crimes. In other words, the public interest in maintaining a free and independent press, while important, will not always supersede other compelling societal interests. As held by the United States Supreme Court in *Branzburg v. Hayes*, it is not necessarily better to write about crime than to prosecute it.³³

[70] This position underscores the complexity of the analysis and the difficulty of balancing the interests when matters of grave public interest are engaged. The same author stated, later:

Finally, it is apparent that the nature of the relationship between a reporter and his or her source is not unique within Canadian society. There are any number of important professional relationships which are premised upon an underlying expectation of confidentiality. Consider, for example, the relationships between priest and penitent, and therapist and patient. It might equally be argued in these contexts that the threat of disclosure inhibits the free and frank exchange necessary for the relationships to achieve their objects. Moreover, at least within the religious sphere, a constitutional dimension might be injected by virtue of section 2(a) of the *Charter*. Yet, neither a confession offered to a priest, nor a highly intimate disclosure offered to a therapist, is presumptively protected by privilege. Viewed against this backdrop, it becomes difficult to justify extension of the privilege doctrine to communications between reporters and their sources.

[71] I agree with the author up to the last quoted sentence. The fact that there is no presumption and the fact that other relationships may adopt the argument, are not reasons to avoid the difficult balancing of interests. These factors merely highlight the need for an in depth case by case considerations of the respective interests involved. The costs of disclosure in light of the injury to the relationship must be weighed. As one commentator stated in connection with a religious communication: "... the balancer must take into account the long-term effects of disclosure on the practice of religion and the benefits the community derives from clergy's contributions to the health of many citizens."³⁴

[72] Viewed in this context, Wigmore's first test is met. The communication and the document are inextricably tied together. To disclose the document, would be to negate the

³³ R. Pomerance, "Compelling the Message from the Medium: Media Search Warrants, Subpoenas and Production Orders" (1997), 2 Can. Crim. L. Rev. 5, at 24 to 26

³⁴ Mitchell, "Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and the Free Exercise of Religion", 71 Min. L.R. 723 at 767-68 (1987)

confidence. Sopinka, Lederman and Bryant³⁵ in discussing the distinction between fact and communication highlighted the risk of indirectly eroding the privilege: “The distinction between “fact” and “communication” is often a difficult one and the courts should be wary of drawing the line too fine *lest the privilege be seriously emasculated.*” (*Emphasis added*)

[73] The Courts have, in other contexts, applied this approach so as not to undermine a privilege. McLachlin J. (as she then was) referred to Cory J.A.’s police informant analogy and stated that, in connection with police informants, privilege:

... prevents not only disclosure of the name of the informant, but of any information which might implicitly reveal his or her identity. Courts have acknowledged that the smallest details may be sufficient to reveal identity.³⁶

[74] I conclude that the identity of the source was given pursuant to a promise of confidentiality. This communication arose in confidence and is privileged. Disclosure of the document would negate that privilege. The first Wigmore criterion is met.

[75] I turn to the second and third Wigmore criteria. Clearly in light of the comments throughout, the element of confidentiality is essential to the maintenance of the relationship and is one which the community wishes to sedulously foster. The public relies on the watchdog role of the press to be informed about their political leaders.

[76] The fourth requirement is that the interests served by protecting the communications from disclosure outweigh the interest of pursuing the truth and disposing correctly of the litigation. It is an analysis that must be infused with *Charter* values.

[77] Freedom of expression is a cornerstone of our society. The ability of the public to know what its elected leaders are doing is fundamental to a democracy. We rely on the news media to provide us with this information. The expectation that a source will remain confidential is often the very reason people feel free to go to the press. Often the more explosive the story is, the

³⁵ The Law of Evidence in Canada, 2nd ed. Toronto: Butterworths 1999 at pg 734

greater the risk to the informant if he or she is exposed. Reputations, livelihoods and security may be at stake. Without confidentiality the press would not receive some information. Protection of the confidentiality serves the interests of the informant. In serving the interests of the informant, the interests of society are served to an even greater degree.

[78] The Wigmore criteria, applied to this case, demonstrate an overwhelming interest in protecting the identity of Mr. McIntosh's source. But more is required. It must also be demonstrated that the benefit that inures from privilege outweighs the interest in the correct disposal of the litigation. As Chief Justice McLachlin stated, this exercise is "essentially one of common sense and good judgement."³⁷

[79] The balancing of these competing interests leads me to confirm the privilege. Here, the document is required as part of an investigation, not the defence of an accused. There is evidence that the document was probably extensively handled. There is only a remote and speculative possibility that the fingerprints were those of the alleged forger. Disclosure of the document will minimally, if at all, advance the investigation while at the same time damage freedom of expression.

[80] There are unique factors here, including, the confidential relationship between X and Mr. McIntosh; the fact that he was promised confidentiality; the politically charged nature of the information obtained; the importance of informing Canadians with respect to the most powerful political figure in the country; and the vast body of evidence and jurisprudence produced which show the importance of confidentiality in the news gathering role of the press. All these factors outweigh the benefits of disclosure in the context of this investigation.

[81] Insofar as the documents may reveal the confidential identity of a source, they are privileged.

³⁶ *R. v. Leipert* (1997), 112 C.C.C. (3d) 385 at 390, 393 (S.C.C.)

[82] I have been urged to develop guidelines for the production of journalistic information. This would be contrary to the approach which I believe is mandated by the law: a case-by-case balancing of respective interests.

[83] The issuing justice was required to ensure that there was a sufficient evidentiary basis before him upon which he could exercise his discretion. The issuing justice failed to give adequate consideration to the pertinent issue of confidentiality because adequate information was not before him. This had to affect the decision to issue the warrant and results in a finding that the warrant is invalid and should not have been issued.

[84] The applicants requested several times of the Crown and the police that they be provided with notice so that they could attend before the issuing justice. In proceeding *ex parte*, the issuing justice precluded a thorough analysis of the significant constitutional issues raised. Given 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.³⁸

[85] The unique circumstances here required a balancing of interests that could not take place in the absence of the applicants. The justice could therefore not strike a justifiable balance between the interest of the State, the target of the search and society at large.

Conclusion

[86] The application is about confidentiality. No other case in Canada involves a search warrant coupled with an assistance order aimed at identifying a journalist's confidential source.

[87] The matter requires a balancing of the important competing societal interests: freedom of expression and investigation of crime. It involves an analysis of the *Charter of Rights and*

³⁷ Ryan pgh 32

³⁸ See: *R. v. Canadian Broadcasting Corp.* (2001) 52 O.R. (3d) 757 per Moldaver J.A. at pg 760, *Descoteaux v. Mierzwinski* [1982] 1 S.C.R. 860

Freedoms and the common law of privilege. These issues were not fully considered by issuing justice. He was therefore deprived of jurisdiction.

[88] The application is allowed and the general warrant and assistance order are quashed.

[89] The issue of costs remains outstanding. Counsel should let me know convenient dates for argument of this issue.

Benotto J.

Released: January 21, 2004

COURT FILE NO.: M86/02

DATE: January 21, 2004

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and -

THE NATIONAL POST, MATTHEW FRASER,
and ANDREW McINTOSH

Applicants

- and -

BELL GLOBEMEDIA PUBLISHING INC.,
carrying on business as *THE GLOBE AND MAIL*

Applicant
(Intervenor)

- and -

CANADIAN BROADCASTING CORPORATION

Applicant
(Intervenor)

REASONS FOR JUDGMENT

Benotto J.

Released: January 21, 2004