Supreme Court to Hear Case on Privilege for Confidential Media Sources

On May 22, 2009 the Supreme Court of Canada will hear oral arguments regarding the case of *National Post, et al v Her Majesty the Queen*.[1] The case will determine whether confidential media sources are covered by privilege, and whether that relationship is protected under section 2(b) of the *Canadian Charter of Rights and Freedoms* (freedom of the press).[2]

Journalist Andrew McIntosh, of the National Post, was investigating the business dealings of then Prime Minister Jean Chrétien in his home riding of St. Maurice, Québec.[3] On April 5, 2001, McIntosh received, from an anonymous source, a plain brown envelope containing internal authorization for a loan from the Business Development Bank of Canada (BDBC).[4] This document appeared to indicate a conflict of interest for Chrétien, as the loan was for a hotel that owed money to a Chrétien family holding.[5]

In order to determine the authenticity of the document, McIntosh faxed a copy of it to both the BDBC and the Prime Minister's Office. [6] The BDBC claimed that the document was a forgery and asked the Royal Canadian Mounted Police (RCMP) to investigate.[7] At some point during this time McIntosh meet up with the anonymous sender, who asked for a guarantee of confidentiality, and asked McIntosh to destroy the envelope and the document for fear of being identified.[8] McIntosh agreed to the guarantee of confidentiality. He did not agree to destroy the document and envelope, but promised to keep them in a safe place. McIntosh also stated that their confidentiality agreement stood as long as the source had not deliberately misled.[9] McIntosh maintains that either the document was not forged or that his source had no idea that the document was forged when he passed it to McIntosh.[10]

The RCMP applied for and was granted a warrant to seize the document and envelope on July 4, 2002.[11] The National Post applied for and was granted a writ of *certiorari* to halt the execution of the warrant on August 6, 2002.[12] On January 21, 2004, the reviewing judge of the Ontario Superior Court of Justice quashed the warrant and found that the journalist-source relationship was protected by privilege, and the original order a violation of the *Charter*.[13] On February 12, 2008, the Ontario Court of Appeal, finding that this journalist-source relationship was not privileged, reversed that ruling and restored the original

warrant.[14]

The Ontario Court of Appeal held that "Journalists can never guarantee confidentiality. There will be some cases – and this is one of them – where the privilege cannot be recognized."[15]

The National Post is supported by the Globe and Mail/Bell Global Media, and various civil liberties and journalism associations. The Government of Canada is supported by the governments of Alberta and New Brunswick.[16]

The federal Crown is arguing that while there is journalist-source privilege, it should be determined on a case-by-case basis, and that there are some cases in which that privilege simply does not apply.[17]Members of the media should be required to provide information and evidence to the police, just as other citizens and organizations are required to.[18]

The National Post is seeking to assure the confidentiality of the relationship between journalists and their sources.[19] It argues that the warrant was illegal as it violated the constitutionally protected right to freedom of the press, as well as the "case-by-case privilege that arose between McIntosh and [his source] at common law."[20] It seeks to ensure that the criteria for determining this privilege would be interpreted in "light of *Charter* values."[21]

A four-part test, the Wigmore test, is used by the courts to determine case-by-case privilege at common law. The first criteria of the test is to determine whether the communication was disclosed under confidence, the second is whether confidentiality is essential to the maintenance of that relationship, third is whether the relationship is for the public good, and fourth is whether injury that would occur from the disclosure is greater than the benefit gained by the disclosure.[22] If all four of these elements are present, then there is a privileged relationship at common law.[23]

The National Post argues that the document and the envelope were shared under a relationship of confidentiality, and that being required to share those pieces of evidence not only negated that confidence, but would discourage future sources from coming forward with sensitive but critical information.[24] It further argues that the confidential relationship between journalists and their sources does serve a public good. Stories that "would go untold in the absence of source confidentiality are likely to concern matters of significant public importance involving government or corporate wrongdoing."[25]

The National Post also argues that the burden of proving that the fourth criteria of the Wigmore test should fall on the Crown, as a way to ensure that the common law develops consistently with section 2(b) of the *Charter*.[26] Canada argues that

shifting this burden onto the Crown is a rejection of the Wigmore criteria.[27] The Crown contends that when the documents were originally sent to McIntosh there was no promise of confidentiality, and that there was no relationship of confidentiality until after the fact. Therefore, privilege cannot protect the documents.[28] The Crown also maintains that although "journalist-source relations have never been the subject of an absolute class privilege in Canada, sources have continued to come forward"[29] and therefore the concern that potential media sources would dry up in the absence of privilege, is unjustified.[30] The Crown further claims that no public good is served by allowing criminals to use media privilege to insulate themselves from criminal investigation;[31] rather, there is a "pressing need of law enforcement" to investigate in order to ensure "democratic stability" and the public's interest in the investigation and prosecution of crimes.[32]

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[1] Scheduled Hearings from April 14, 2009 to June 30, 2009 *Supreme Court of Canada* (accessed 19 May 2009).
[2] "*National Post, et al. v. the Queen: Case Summery*" *Supreme Court of Canada* (accessed 19 May 2009).
[3] *R v National Post* 2008 ONCA 139 at para 8.
[4]*Ibid* at para 14.
[5] *Ibid*.
[6] *Ibid* at para 14.
[7] *Ibid* at para 19.
[8] *Ibid* at para 17.
[9] *Ibid.*
[10] *Ibid* at para 18.
[11] *Ibid* at para 23.
[12] *Ibid* at para 24.
[13] *Ibid* at para 26; *R v National Post* (2004), 69 OR (3d) 427.
[14] *Supra* note 3 at paras 126 and 127.
[15] *Ibid.* at para. 94.
[16] *National Post, et al v the Queen: Parties Supreme Court of Canada* (accessed 20 May 2009).
[17] *Respondent's Factum* at paras. 16 and 17.
[18] *Ibid* at para 19.
[19] *Supra* note 3 at para 68.
[20] *Ibid* at para 69.
[21] *Ibid* at para 81.
[22] John Henry Wigmore, *A Trestise on the System of Evidence in Trials at*

Common Law Canadian Edition, vol. 4 (Toronto: Canada Law Book Company, 1905) at 2285.
[23] *Ibid*.
[24] *Supra* note 3 at para 86.
[25] Janice Tibbetts, "Press Freedom on Line at Supreme Court" *National Post* (20 May 2009).
[26] *Supra* note 16 at para. 32.
[27] *Ibid* at para 32.
[28] *Ibid* at para 62.
[29] *Supra* note 22.
[30] *Supra* note 16 at para. 63.
[31] *Ibid* at para 64.
[32] *Ibid* at para 66.