R. v. National Post (2010): Do Journalists Have a Right to Protect Sources?

On May 7, 2010, the Supreme Court ruled on the extent to which journalists may protect the identity of their confidential sources. A newspaper argued that freedom of expression, as guaranteed by section 2(b) of the*Canadian Charter of Rights and Freedoms*, allows journalists to withhold this information from police.[1]

The case arose from an investigation of a forged document that a National Post reporter received from a confidential source in 2001. The document, if real, would have implicated the then-Prime Minister in a conflict of interest. In the course of their criminal investigation for forgery, the police obtained a warrant to seize the document and the envelope in which it was sent. The National Post said that the warrant should not be permitted as journalists have a right to protect the identity of confidential sources.

Background

Andrew McIntosh, a journalist with the National Post, had been investigating the possibility that Jean Chrétien had a conflict of interest when he became involved in federal financing provided to a golf club located in his home riding.[2] In April of 2001, McIntosh received a sealed envelope containing what appeared to be a copy of a loan authorization for a mortgage to the golf club.[3] The document suggested that Chrétien had been involved in providing a government loan to the golf club to ensure that a debt to his family's investment company did not go unpaid.[4] To check the authenticity of the document, McIntosh contacted the loan provider, the Prime Minister's office, and a lawyer for the Prime Minster. All three said it was a forgery.[5]McIntosh then stored the document and its envelope at a secure location.[6] The week after McIntosh received the document, he met with a person identified as "X" who confirmed that he or she sent the envelope.[7] X explained that he or she received the document anonymously in the mail and believed it to be genuine, so he or she removed the document from its original envelope, placed it into another envelope, and forwarded it to McIntosh.[8] The same document had been forwarded to other individuals as well, so the story was reported by other newspapers and then by the National Post. The loan provider had, in the meantime, complained to the RCMP that the document was a forgery.[9] An officer met with McIntosh, but he refused to hand over the documents or reveal the source's identity.[10] The officer indicated that he intended to apply for a search warrant. The National Post expressed concern about whether a warrant to disclose a confidential source was constitutional. They asked to attend the hearing on the warrant application.[11] The officer applied for a warrant that would force McIntosh to provide the documents.[12] Though the judge was aware that the National Post wished to be present for the warrant hearing, he issued the warrant without giving them notice.[13] However, to

accommodate the special position of the media, the National Post was to be served with the orders immediately and then given a month before the officer could request the production of the documents.[14] In response, the National Post applied to have the warrant cancelled in order to prevent X's identity from being revealed.[15] The reviewing judge saw only a speculative possibility that any evidence obtained would identify the alleged forgerer, and so set aside the warrant.[16] The government appealed this decision and the case eventually came before the Supreme Court. The Court was faced with having to decide what protections exist for journalists to protect secret sources, and whether notice should have been given so that the National Post could present arguments against having the warrant issued in the first place. The National Post argued that in light of the constitutional protection for the media's freedom of expression, and the right to be free from unreasonable search and seizure, the existing law needed to be revised.[17] Three possible ways of protecting secret sources were presented to the court: a constitutionally entrenched right, a "class privilege" applying to all communications between journalists and their secret sources, or a "case-by-case privilege" that would apply in certain circumstances.

No Constitutional Right to Protect Confidential Sources

The Court first considered, and unanimously rejected, the idea that there is a constitutional right to protect confidential sources.[18] The Court acknowledged that freedom of expression is protected by the *Charter*, and that news gathering is implicit in news publication.[19] However, the Court pointed out that journalists use a variety of methods to gather news – including long-range microphones, telephoto lenses, and "chequebook journalism" – and it would go too far to suggest that all of these are constitutionally protected.[20] The Court also pointed out that Canadian courts have preferred not to confer constitutional status on privileges – that is, exceptions to the legal obligation to provide evidence. Even solicitor-client privilege, which ensures the confidentiality of communications between lawyers and their clients, is not constitutionally protected despite the fact that it is a fundamental legal principle.[21] Another concern of the Court was that freedom of expression applies to "everyone," not just the traditional media. Providing constitutional protection to such a broad and ill-defined group of people, and to any sources they promise confidentiality, would "blow a giant hole in law enforcement and other constitutionally recognized values such as privacy."[22] Finally, the Court pointed out, Canadian history shows that the purpose of freedom of expression can be fulfilled without providing constitutional protection to secret sources.[23]

Non-Constitutional Protection of Journalists' Sources

The Court then considered whether it should recognize a common-law "class privilege" for journalists' secret sources. Class privileges apply to certain types of relationships and ensure the confidentiality of all communications that occur within that relationship.[24] Solicitor-client privilege is an example of a class privilege. Another example is the anonymity granted to police informants. While the Court had not previously recognized a journalist-source class privilege, the National Post argued that they ought to do so.[25] This argument was unanimously rejected.[26] A new class privilege was

dismissed for several reasons. First, the Court pointed out that class privileges seriously interfere with the judicial search for truth, so new class privileges will likely only be created, if at all, by legislatures – not the courts.[27] Second, the Court observed that other common-law jurisdictions have refused to recognize such a class privilege.[28] The Court then considered recognizing a narrower "case-by-case privilege." Unlike a class privilege, which is based on the relationship between the two parties, a case-by-case privilege is based on a specific communication and takes into account both the benefits and costs involved with maintaining confidentiality. Here the Court unanimously recognized that such a privilege for secret sources *does* exist.[29] The Court made a comparison with the existing case-by-case privilege for pastors and penitents, which is infused with the need to respect the constitutional protection for freedom of religion. Similarly, the case-by-case privilege for journalists and their sources is infused with respect for freedom of expression.[30] The Court stated that the privilege does not just apply to testimony that reveals the content of the communication or the identity of the secret source, but it also applies to search warrants that may reveal the identity of the source.[31] The Court set out four criteria that must be established for the privilege to apply: [32] (1) the communication is made *explicitly* in exchange for a promise of confidentiality; (2) confidentiality must be a pre-condition to the disclosure; (3) the relationship between the journalist and the secret source must be "sedulously" (that is, diligently, deliberately, and consciously) fostered in the public good; and (4) the public interest served by protecting the identity of the informant must outweigh the public interest in getting at the truth. The Court noted that the third requirement allows for flexibility in evaluating different sources and different types of journalists.[33] However, the Court also stated that the most important requirement is the fourth.[34]In weighing the competing interests, the Court indicated that it will be important to consider the nature and seriousness of the offence, how useful the evidence is to the case being investigated, and the public's interest in respecting the journalist's promise of confidentiality.[35] As well, the purpose of the police investigation is important. Courts may decline to order production of the evidence if it appears that the investigation is simply being used to silence a secret source.[36] As the Court indicated, this means that no source can be assured of complete confidentiality when they provide information to a journalist: 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.[37] The Court also stated that neither the journalist nor the source "owns" the privilege.[38] Either the journalist or the source may therefore decide to set aside the privilege, though the Court did recognize that doing so may sometimes lead to a claim that contract has been broken.[39]

Was There a "Case-by-Case" Privilege in This Case?

The Court then turned its attention to determining whether a privilege existed in this case. The Court unanimously agreed that the first three criteria were satisfied.[40] A majority of

the Court, however, concluded that the public-interest balance in the fourth criterion weighed in favour of issuing the search warrant.[41]These judges emphasized that forgery of documents in order to falsely "prove" a conflict of interest is a sufficiently serious act to justify a criminal investigation.[42] As well, while it is relevant to consider how useful the evidence would be to the investigation, the majority emphasized that judges should not pre-empt the investigation by presuming that the evidence will not be helpful.[43] Justice Abella dissented on this point. She argued that, given the important role of the media, when a journalist has made reasonable and good faith efforts to confirm the reliability of the information obtained from a source, that confidentiality ought to be protected.[44] She emphasized the importance of confidential sources for investigative journalism, and expressed concern that without adequate protection these sources may dry up.[45] As well, she considered the potential benefits of disclosing the evidence to be "speculative to negligible."[46] She saw a "fatal disconnect" in the logic that the warrant would lead to the forger: McIntosh testified, that X had claimed not to know the identity of the person who provided the document, so learning X's identity would not help.[47] As Justice Abella pointed out, X would not have to speak to the police (due to the right to remain silent), so the only evidence that would be available was McIntosh's testimony that X had said that he or she sent the document in a different envelope than he or she received it in.[48] Therefore the only possible evidence the envelope could yield was the identity of X.[49] Justice Abella concluded that the benefit to the forgery investigation was "at best, marginal," and so the only purpose in learning X's identity was to discover who created the public controversy.[50] In her opinion, the fourth criterion therefore weighed in favour of non-disclosure.[51] Justice Binnie, writing for the majority of the Court, rejected Justice Abella's view. He pointed out that the "fatal disconnect" she identified hinged on the credibility of X's story, as relayed by McIntosh.[52] The majority stated that the police do not need to accept the "anonymous, uncorroborated and self-exculpatory statements" of X.[53] As well, the majority pointed out that the documents are not just evidence that could lead to X's identity. They are also the physical evidence that a crime had been committed.[54]

Should Advance Notice Have Been Provided?

Having decided that there was no journalistic privilege in this case, the Court next considered whether notice of the warrant application should have been provided to the National Post. Advance notice would have allowed the National Post to present arguments against the warrant being issued, rather than requiring them to challenge the warrant after it was issued. The majority of the judges accepted that media should be allowed to present their case against the warrant at the earliest opportunity, yet stated that the timing is at the discretion of the judge issuing the warrant.[55] They observed that in some situations, issuing a warrant immediately will help to ensure evidence "is not made to disappear" while arguments are heard about whether or not the warrant should be executed.[56] As well, they pointed out that there may be urgent situations that preclude having the media's arguments heard before the warrant is issued.[57] The majority emphasized that the delay of more than one month between the warrant being issued and the date it was to be executed gave the National Post enough time to present arguments against the warrant.[58]

Justices Abella and LeBel dissented on this point. Both judges felt that while there may be circumstances that justify issuing a warrant without providing notice, the presumption should be that notice is given.[59]They emphasized the important role of the media, the fact that the media is usually an innocent third party in connection with the crime being investigated, and the significant effect that seizures of press materials can have on media operations.[60] Justice LeBel, however, concluded that the warrant was not unreasonable simply because of the lack of notice. As a result, he agreed with the majority that the warrant should not be invalidated.[61] Justice Abella, on the other hand, would have invalidated the warrant. She emphasized that the media is always in the best position to provide relevant information, such as whether the search will reveal the identity of a confidential source.[62] She also pointed out that some important information was not presented at the application for the warrant because the National Post did not have the opportunity to cross-examine the officer who was applying for the warrant. In her view, if this information had been available, the warrant might never have been issued in the first place.[63] This illustrated the importance of having the media's position presented from the beginning. She disputed the majority's position that the one-month delay was adequate, calling this "an untimely – and needless – public expense."[64] It would be better, in her opinion, to simply have had the National Post present at the initial application, rather than having two hearings: one to issue the warrant, and then one the hear arguments from the National Post as to why the warrant should be cancelled. Adam Badari (May 18, 2010)

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[1] *R. v. National Post*, 2010 SCC 16. [2] *Ibid.* at para. 8. [3] *Ibid.* at para. 12. [4] *Ibid.* at para. 4. [5] *Ibid.* at para. 13. [6] *Ibid.* [7] *Ibid.* at para. 16. [8] *Ibid.* at para. 18. [9] *Ibid.* at para. 19. [10] *Ibid.* [11] *Ibid.* at para. 20. [12] *Ibid.* at para. 21. [13] *Ibid.* at para. 22. [14] *Ibid.* at para. 23. [15] *Ibid.* at para. 24. [16] *Ibid.* [17] *Ibid.* at para. 32. [18] *Ibid.* at paras. 37-41, 93, 114. [19] *Ibid.* at para. 38. [20] *Ibid.* [21] *Ibid.* at para. 39. [22] *Ibid.* at para. 40. [23] *Ibid.* at para. 41. [24] *Ibid.* at para. 42. [25] *Ibid.* at para. 43. [26] *Ibid.* at paras. 42-49, 93, 114. [27] *Ibid.* at para. 42. [28] *Ibid.* at para. 43, 47, citing: *Ashworth Hospital Authority v. MGN Ltd.*, [2002] UKHL 29, [2002] 1 W.L.R. 2003 (United Kingdom); *McGuinness v. Attorney-General of Victoria* (1940), 63 C.L.R. 73 (Australia); *John Fairfax and Sons Ltd. v. Cojuangco* (1988), 165 C.L.R. 326 (Australia); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (United States). [29] *Ibid.* at paras. 50-69, 93, 114. [30] *Ibid.* at paras. 51, 115. [31] *Ibid.* at para. 52. [32] *Ibid.* at paras. 53, 56-58. [33] *Ibid.* at para. 57. [34] *Ibid.* at para. 58. [35] *Ibid.* at para. 61. [36] *Ibid.* at para. 62. [37] *Ibid.* at para. 69. [38] *Ibid.* [39] *Ibid.* [40] *Ibid.* at paras. 70, 93, 115. [41] *Ibid.* at paras. 71-77, 93. [42] *Ibid.* at para. 72. [43] *Ibid.* [44] *Ibid.* at para. 117. [45] *Ibid.* at paras. 121-122. [46] *Ibid.* at para. 131. [47] *Ibid.* at para. 131. [48] *Ibid.* at para. 139. [49] *Ibid.* at para. 140. [50] *Ibid.* at paras. 139-140. [51] *Ibid.* at para. 143. [52] *Ibid.* at para. 75. [53] *Ibid.* [54] *Ibid.* at para. 77. [55] *Ibid.* at para. 83. [56] *Ibid.* [57] *Ibid.* [58] *Ibid.* at paras. 84-86. [59] *Ibid.* at paras. 94-96, 144, 147-148. [60] *Ibid.* at paras. 95, 147-148. [61] *Ibid.* at para. 97. [62] *Ibid.* at para. 156. [63] *Ibid.* at paras. 145-154. [64] *Ibid.* at para. 158.