The Free Press: No freedom without source protection

There is a dilemma created with respect to the use of certain sources by the press: how can the press truly be free to report, when their sources are not protected? Journalists contend that there cannot truly be a free press unless their sources are able to speak freely and more importantly, in confidentiality.[1]

Why should sources be protected?

Why should it matter if a journalist has to reveal the identity of their source? The problem is that disclosing this information targets the sources who speak out or share controversial stories and their willingness to share information.[2] This in turn compromises the ability of the press to get information that can then be reported on. The lack of protection for sources also makes those sources liable to any number of consequences: isolation in their communities or workplace, or retaliation from those upset about an exposé.[3]

Whether a story is coming from a gang member or a potential ISIS soldier, the duty of the journalist to inform the public about a specific event remains even where the source is controversial.[4] If sources are frequently outed in the courts, the public (who are potential sources) may lose their trust in approaching journalists with sensitive and important information. The press can only do their job of informing the public if their sources or whistleblowers know their confidentiality will be protected.[5]

Source protection at the Supreme Court

The Supreme Court of Canada has confined protection of a free press in the *Canadian Charter of Rights and Freedoms* to members of the press alone. Academics argue that freedom of the press has been interpreted as merely a category of freedom of expression instead of its own constitutional guarantee.[6] The Court has interpreted freedom of the press in the *Charter* to mean that it protects the *expression* of the press, but not the activities associated with being a journalist.[7]

Journalist activities can include how reporters gather information and obtain or protect the identities of their sources.[8] In the opinion of some critics, press freedom has "too often been overlooked by the Court" without a clear answer on whether freedom of the press is protected in its own right, or is merely a branch of expression, subject to the same tests and limits.[9]

Two recent decisions from the Supreme Court – *R v National Post*[10] and *Globe and Mail v Canada (AG)* – have dealt with how the sources of information for journalists can be protected, if at all.[11]

National Post

In *R v National Post*, a Supreme Court majority found that although collecting information is a necessary part of news publication, the relationship between a journalist and a source is not entitled to *Charter* protection.[12] The majority of the Court said that the *Charter* does not protect the act of news gathering and any risks involved, but only the act of *expressing* that information.[13]

In this case, Andrew McIntosh, reporter at the National Post, was asked to provide allegedly-forged documents that he had received as part of an investigation of then-Prime Minister Jean Chretien.[14] The forged bank documents would have implied that Chretien used his influence to ensure a bank loan for a hotel in his riding that owed his family money.[15]

The Court held that, while there was a need for law to protect the identity of confidential sources in some circumstances, the purpose of free expression guaranteed in section 2(b) of the *Charter* could be met *without* granting a broad constitutional immunity to journalistic sources.[16] They decided instead on a case-by-case approach, with four criteria that must be used to assess whether the identity of a source should be protected. This test balances the need for a free press with the interest in disclosure at trial.[17]

The four criteria are:

(1) that when the communication begins, there is an understanding of confidentiality between the journalist and source, and;

(2) that confidentiality is an essential condition to the relationship (the source would not otherwise share the information), and;

(3) the relationship and disclosure of information is clearly for the good of the public; and

(4) whether the public interest is better served by either protecting the identity of the source or revealing it.[18]

Globe and Mail

This case was different from *National Post* because it involved a confidential source disclosing information about civil litigation, not a criminal investigation. Even though the case involved private litigation, which does not usually trigger a discussion of *Charter* rights, the Court found that constitutional rights (by way of the *Charter*'s 2(b) protection), are "engaged by a claim of journalist-source privilege."[19] In the Court's opinion, "*some* form of legal protection for the confidential relationship between journalists and their anonymous sources is required" across different legal contexts, because of the importance of the section 2(b) guarantee.[20]

In this case, a Globe and Mail journalist wrote multiple articles exposing issues with the federal-government's "Sponsorship Program", after receiving information from a confidential source.[21] The articles exposed misuse of public funds and sparked a political backlash, including a Royal Commission to investigate.[22] In *Globe and Mail*, the Court

confirmed their four criteria (above) for the case-by-case analysis from *National Post*, applying it to the different context of private litigation, and confirming that, in the case of a source protection dispute, this criteria will always apply.

Should a source be protected, even if they are an alleged terrorist?

The issue of source protection is still a live one as is seen in the case of VICE Media staff writer Ben Makuch who corresponded with an alleged ISIS fighter in the Middle East, who is from in Calgary, over an Internet messenger service in order to write a story on ISIS and "homegrown" Canadian terrorists. The RCMP asked Makuch to provide his source materials, consisting of screenshots of Makuch's messenger conversations. Makuch appealed this application from the RCMP to the courts.[23]

In the Ontario Court of Appeal decision, the Court explained that both "a free and vigorous press" and "the protection of society from serious criminal activity" are equally important to maintain democracy. [24] When those two concerns come into conflict, it is up to the courts to decide which prevails.[25] In this case, the Court decided that the alleged criminal activity by VICE's source was of greater public concern than any effects on press freedom (for example, a "chilling" effect on sources that would make them fear coming forward).[26] The Court was aware of such chilling effects but distinguished this case from others because the source in question never asked for confidentiality.[27] The Court therefore agreed that Makuch needed to turn over his source material to the RCMP. [28] As of March 2017, VICE Media was considering a further appeal to the Supreme Court of Canada.[29]

Moving Forward: hope for protecting journalists' sources

Freedom of the press is critical but it clearly faces its limits. A new shield law, proposed in the Senate, could alleviate some of these limits. Canada does not currently have laws to protect the sources of journalists, but it relies instead on the case-by-case criteria outlined in *National Post* and *Globe and Mail*.[30]

The proposed shield law in Canada was tabled by Senator Claude Carignan in November 2016.[31] If the law is passed, it will allow journalists to refuse to disclose materials that identify or could identify a journalistic source, unless 1) the information cannot be obtained by any other reasonable means, and 2) the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source.[32]

This law would provide more widespread protection for sources in Canada because the new law would remove the requirement to show that confidentiality is a necessary part of the relationship between the journalist and source. This protection of sources will not only give journalists more freedom to access information that allows them to report on controversial emerging issues, but it will also provide the public with greater freedom to provide controversial or potentially dangerous information to the press.

The Senate unanimously passed Bill S-231 in April 2017, and in June 2017, the Liberals announced they would support the bill in the House of Commons.[33] However, the bill

failed to pass through the House before the summer break, which means that its progress has been stalled indefinitely until Parliament resumes in the fall.[34]

Bill S-231 would be a major change to the developing law of source protection in Canada. With the importance of press freedom to an informed citizenry, this Bill may assist journalists in following their pursuits.

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[1] Tom Henheffer & Shawn McCarthy, "Henheffer and McCarthy: Helping journalists protect confidential sources is in the public interest", Editorial, *The Ottawa Citizen* (15 February 2017), online: <ottawacitizen.com/opinion/columnists/henheffer-and-mccarthy-helping-journalists-protect-confidential-sources-is-in-the-public-interest>.

[2] *Ibid.*

[3] Tom Henheffer & Shawn McCarthy, "Press Shield Law Needed to Help Journalists Protect Confidential Sources", *Canadian Journalists for Free Expression* (15 February 2017), online: <www.cjfe.org/time_for_a_press_shield_law_to>.

[4] *Ibid.*

[5] Sylvia Stead, "Groundbreaking journalism needs confidential sources", *The Globe and Mail* (24 April 2012), online: <www.theglobeandmail.com/community/inside-the-globe/ground-breaking-journalism-needs-confidential-sources/article1390985/>.

[6] Benjamin Oliphant, "Freedom of the Press as a Discrete Constitutional Guarantee" (2013) 59:2 McGill LJ 283 [Oliphant].

[7] *R v National Post*, 2010 SCC 16 at para 38 .

[8] Oliphant, *supra* note 6 at 288.

[9] *Ibid* at 291.

[10] *National Post*, *supra* note 7.

[11] *Globe and Mail v Canada (Attorney General),* 2010 SCC 41 .

[12] *National Post, supra* note 7 at para 38.

[13] *Ibid* at para *38.*

[14] *Ibid* at paras 9-12.

[15] *Ibid.*

[16] *Ibid* at para 41.

[17] *Ibid* at paras 52-59.

[18] *Ibid.*

[19] *Globe and Mail, supra* note 11 at para 48.

[20] Ibid. The Court held that the source protection framework should be used in constitutional cases (where there was a direct challenge to an alleged 2(b) infringement as in *National Post*), in private litigation cases (as in Globe and Mail), and across both common law and civil law (such as Quebec) jurisdiction.

[21] *Ibid* at paras 4-5.

[22] *Ibid* at paras 5-6.

[23]*R v Vice Media Canada Inc*, 2017 ONCA 231.

[24]*Ibid* at 1.

[25]*Ibid.*

[26]*Ibid* at paras 32-35.

[27] *Ibid* at paras 38-39.

[28] Ben Makuch, "We Spoke to the Canadian ISIS YouTube Star Who Burned his Passport", *Vice Motherboard* (23 June 2014), online: <motherboard.vice.com/en_us/article/8qx8xv/a-chat-with-the-canadian-isis-member-who-burned-his-passport-on-youtube>.

[29] Colin Perkel, "Vice Media reporter must turn over materials to RCMP: court", *CBC News* (22 March 2017), online: <www.theglobeandmail.com/news/national/vice-media-reporter-must-turn-over-materials-to-rcmp-appeal-court-rules/article34381284/>.

[30]*National Post*, *supra* note 7 at paras 53-64.

[31]Colin Freeze, "Senator tables bill to protect confidentiality of journalists' sources", *The Globe and Mail* (22 November 2016), online: <www.theglobeandmail.com/news/politics/senator-tables-private-members-bill-to-protect-sources-whistleblowers/article32986293/>.

[32]Bill S-231, *An Act to amend the Canada Evidence Act and the Criminal Code (protection of journalistic sources),* 1st Sess, 42nd Parl, 2016.

[33]Tonda MacCharles, "Journalist shield law could soon become reality in Canada", *The Toronto Star* (8 June 2017), online: <www.thestar.com/news/canada/2017/06/08/journalist-shield-law-could-soon-become-reality-in-canada.html>.

[34] Canadian Journalists for Free Expression, News Release, “Press Defenceless: House Fails to Pass Shield Bill”, (21 June 2017), online: <www.cjfe.org/press_defenceless_as_house_fails_to_pass_shield_bill>.