

The Top Five 2010

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.



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

<http://scc.lexum.org/en/2010/2010scc16/2010scc16.html>

In this case, the Supreme Court of Canada (SCC) dealt with the issue of confidential sources in a news exposé and examined whether reporters should have to reveal anonymous sources.

Date Released: May 7, 2010

The Facts

A reporter from the *National Post* was investigating former Prime Minister Jean Chrétien following the sale of a golf course and a hotel by Mr. Chrétien in 1993. Soon after he sold the properties, Mr. Chrétien was elected Prime Minister and the man he sold the properties to applied for a loan from the Business Development Bank of Canada (BDC) in the hopes of expanding the property. Although the buyer's loan was rejected at first, it was later approved, leading reporters to investigate the circumstances surrounding the loan to see if Mr. Chrétien's involvement in it was improper.

In examining Mr. Chrétien's role in approving the loan, the *National Post* reporter received documents in the mail from a secret source containing evidence of possibly corrupt behaviour. The information was only disclosed in return for a full promise of confidentiality. The documents claimed that one of Mr. Chrétien's holding companies was owed a debt by the purchaser. If the documents were genuine, they could show that Mr. Chrétien had a conflict of interest in relation to the loan.

The *National Post* reporter proceeded to forward the documentation to the Prime Minister's Office, the Prime Minister's legal counsel and the BDC, in an attempt to assess their authenticity. All three claimed that the documentation was forged and the BDC complained to the RCMP. The RCMP then got a warrant for the documents implicating Mr. Chrétien, as well as an order compelling the reporter to assist the police in investigating these documents. The warrant and the order gave the *National Post* one month before the RCMP could search their premises. The RCMP claimed that there were reasonable grounds to believe that the documents used by the *National Post* were forged and would therefore be evidence of a crime.

The *National Post* did not want to give up its confidential source and tried to quash the warrant and the assistance order, arguing that the warrant and the order infringed ss. 2(b) and 8 of the *Canadian Charter of Rights and Freedoms*. The *National Post* also argued that the source should be protected by the common law of privilege.

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 and seizure.

The reviewing judge held that there was enough information to conclude the document was a forgery, but that there was only a remote possibility that disclosing the documents would move forward a criminal investigation. The trial judge set aside the search warrant and the assistance order. The Court of Appeal for Ontario reversed the trial level decision and reinstated the search warrant and the assistance order. The *National Post* appealed.

The Decision

The SCC dismissed the appeal brought forward by the *National Post* in an 8-1 decision, requiring the editor-in-chief and reporter to comply with the properly issued search warrant and assistance order, even if the result is to disclose the source's identity. This decision required them to hand over the documents to the police.

In its decision, the SCC had to decide whether a confidentiality privilege for journalists' sources existed under s. 2(b) of the *Charter* and whether such a privilege existed under the common law. If a confidentiality privilege for sources was found to exist, the Court would also have to decide how that privilege would be applied.

Constitutional Protection of Journalists' Sources Under s. 2(b) of the Charter

The majority acknowledged that freedom of expression does protect writers and speakers. They also noted that the public has an interest in being informed about matters of public importance that may only come to light through the cooperation of sources who will only speak if they can remain anonymous; however, the public also has an interest in effective law enforcement.

The majority found that the *National Post* made a convincing case that if they could not offer source anonymity, important stories would be left untold. This could affect the accountability of public institutions in Canada. Nevertheless, the Court noted that the police were unable to confirm the document's authenticity and had reasonable grounds to believe it was a forgery. Moreover, the Court observed that the documents the police were seeking in the *National Post's* offices were not merely evidence of the crime; if they were indeed forged, they represented the crime itself.

With respect to the *Charter* arguments made by the *Post*, the Court stated that although freedom to publish news necessarily involves the freedom to gather news, the many techniques of news gathering (including reliance on secret sources) are not constitutionally protected. The *Charter* does not provide for a confidentiality privilege for journalists' sources, because the journalistic profession is so diverse that it would be hard to determine whose actions are worthy of constitutional protection and whose are not.

Common Law Journalist-Source Confidentiality Privilege

Although the Court held that a confidentiality privilege for journalists' sources does not generally exist in the common law, a journalist's claim for protection of secret sources is to be assessed on a case-by-case basis. That is to say, it is up to the Court to decide on the facts of each case whether the journalistic sources in question should be protected.

In deciding whether the source's confidentiality should be protected in this particular case, the majority applied a set of criteria created by John Henry Wigmore, an American lawyer and expert in the law of evidence. The Court decided on the "Wigmore criteria" because of its flexibility and workability. According to the Wigmore test, a journalistic source should be protected when:

1. The communication originates in a confidence that the identity of the informant will not be disclosed;
2. The confidence is essential to the relationship in which the communication arises;
3. The relationship is one which should be fostered in the public good; and
4. The public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth.

In this case, the *National Post* ultimately "lost" even though the Court acknowledged the importance of anonymous sourcing in journalism. The majority held that while the first three Wigmore criteria were met, the *National Post* failed to establish the fourth criteria. Accordingly, this case establishes that the validity of journalistic source confidentiality is in the hands of the judges deciding the case, and that a promise of confidentiality may lose out to broader social considerations, such as a police inquiry into a serious crime.

Discussion Issues

1. Do you think the Court made the right decision here? Was it more important to determine whether the allegations against Mr. Chrétien were true or entrench confidentiality for journalists' sources in Canada?
2. This case established that confidentiality of journalistic sources is not constitutionally protected in Canada. What effect do you think this has, if any, on journalists' ability to report on news stories of public interest?
3. Do you think the result in this case would have been different if the allegations were against a private citizen and not the Prime Minister?
4. What do you think of having judges decide on a case-by-case basis whether a source will remain protected? Do you think this will lead to appropriate judgments or a lack of certainty in the law?