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Jamie Cameron

*Osgoode Hall Law School of York University, jcameron@osgoode.yorku.ca*

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# Of Scandals, Sources and Secrets: Investigative Reporting, *National Post* and *Globe and Mail*

Jamie Cameron \*

Everything you add to the truth subtracts from the truth.

— Alexander Solzhenitsyn, Novelist – Nobel laureate

## I. INTRODUCTION

Twice in recent years, vital information from confidential sources enabled investigative reporters to expose scandal at the highest reaches of federal politics in Canada. Starting in 1999, the *National Post* (“the Post”) began a series of reports on “Shawinigate” under Andrew McIntosh’s byline.<sup>1</sup> Then *The Globe and Mail* (“the Globe”) took the lead in detailing the Quebec sponsorship scandal through reports by Daniel Leblanc, who also published a book titled *MaChouette*.<sup>2</sup> Addressing different events, at different times and places, the two journalists uncovered evidence of questionable transactions, ethical violations, conflicts of interest, misappropriation and wrongdoing at the intersection

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\* Professor, Osgoode Hall Law School. This is the first of three articles for a newsgathering project I have undertaken as scholar-in-residence for the Law Commission of Ontario (January-June 2011). I owe great thanks to Faye Ling, J.D./M.B.A. 2013, for her research assistance on this article, and also to Holden Sumner, J.D. 2013. In addition, I would like to thank Professor Benjamin L. Berger and Simon Kupi, J.D. 2011, for perceptive comments on an earlier draft. Finally, it should be noted that I acted for the Canadian Civil Liberties Association (“CCLA”) in *R. v. National Post*, [2010] S.C.J. No. 16 (S.C.C.) (with John McCamus and Matthew Milne-Smith) and also in *Globe and Mail v. Canada (Attorney General)*, [2010] S.C.J. No. 41 (S.C.C.) (with Chris Bredt and Cara Zwibel).

<sup>1</sup> See online: <<http://news.nationalpost.com/2010/05/07/the-shawinigate-affair-a-timeline/>>; <<http://www.cbc.ca/news/background/chretien/beaudoin.html>> (providing timelines for the key events in the Shawinigate story and ex-BDBC president François Beaudoin’s lawsuit against the bank).

<sup>2</sup> See *Nom de Code: MaChouette: L’enquête sur le scandale des commandites* (Montreal: Libre Expression, 2006).

of the Prime Minister's Office, the Liberal Party and business interests in Quebec. Shawinigate and the sponsorship scandal rocked the nation, undermined public confidence in the integrity of government, and led to reforms, a judicial inquiry and criminal prosecutions.<sup>3</sup> In this way, watershed events in Canadian politics created a rare chance for the Supreme Court of Canada to consider newsgathering, investigative reporting and the status of confidential sources under the *Canadian Charter of Rights and Freedoms*.<sup>4</sup>

McIntosh and Leblanc both relied on information from unknown sources who stepped forward in the public interest, and at personal risk. In the course of his work on Shawinigate, McIntosh gained access to sources in the Business Development Bank of Canada ("BDBC"), as well as in former Prime Minister Chrétien's home riding of St-Maurice. Meanwhile, the foundation for Leblanc's reporting was a single source, "ma chouette" ("MaChouette"), who at the time of the sponsorship program was a federal government employee. Both men promised to protect the identity of individuals who would not have provided sensitive information without that guarantee.

Investigative reporting depends on relationships of trust with sources who agree to reveal information under a pledge of confidentiality. Individuals who expose the affairs of others are vulnerable, perhaps no more so than when revelations take the form of whistle-blowing.<sup>5</sup> Though most act in the public interest, some seek a platform to conduct a vendetta, plant false or misleading information, or advance interests that

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<sup>3</sup> Most notably, the sponsorship scandal led to the Commission of Inquiry into the Sponsorship Program and Advertising Activities [hereinafter "the Gomery Commission"], which was established in early 2004 and reported in two stages, in late 2005 and early 2006. See *Who is Responsible? – Phase 1 Report* (Ottawa: Public Works and Government Services Canada, 2005); *Restoring Accountability – Phase 2 Report* (Ottawa: Public Works and Government Services Canada, 2006).

<sup>4</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

<sup>5</sup> A whistle-blower is an individual who believes that a wrong or harm has been committed — in government, business, or other institutions — and who discloses the matter to authorities internally, or to outside agencies, including the media. Canada's statute law, provincial as well as federal, fails to give whistle-blowers adequate protection from reprisal and repercussions. See Amy Minsky, "Whistleblower protection laws are broken" *Postmedia News* (February 24, 2011), online: <[http://fairwhistleblower.ca/news\\_digest/2011/02](http://fairwhistleblower.ca/news_digest/2011/02)>. See also the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 (encouraging federal public sector employees to come forward where wrongdoing has occurred, and providing protection from reprisal against them, as well as a process to deal with those against whom allegations have been made).

are less than noble.<sup>6</sup> Whatever a source's motive may be, it is difficult to assess the reliability of information that is shrouded in secrecy, and that is where ethics play a central role. The unavoidable paradox is that journalists cannot tell some secrets without promising to keep others, and pursue objectives of transparency and accountability in their reporting, despite being neither transparent nor accountable for their own sources. From the outside looking in, investigative reporting provides the best that journalism has to offer, but only if it meets the standards of the profession. These are the underlying dynamics at play when the law is asked to decide whether to protect a journalist's promise of confidentiality or order the disclosure of confidential information that is sought — and needed — in legal proceedings.

The common law protects confidential relationships through the concept of privilege. This protection can take the form of a testimonial immunity that allows some secrets to be kept hidden, despite their relevance in criminal or civil proceedings.<sup>7</sup> In principle, immunity can be granted when the public interest in protecting a confidential relationship is strong enough to rebut the presumption that relevant evidence is compellable.<sup>8</sup> Because it is a form of special treatment, or exceptionalism, access to a privilege or testimonial immunity is carefully guarded. Not only is truth-seeking the justice system's unconditional goal, the courts must be careful, in advancing that objective, not to shield certain relationships from scrutiny or otherwise treat them as favourites of the law. The principle that the law is entitled to "every man's evidence" has

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<sup>6</sup> Questionable examples include *O'Neill v. Canada (Attorney General)*, [2006] O.J. No. 4189, 213 C.C.C. (3d) 389 (Ont. S.C.J.) [hereinafter "*O'Neill*"], where a government source leaked false and damaging information about Maher Arar; and *In re Grand Jury Subpoena, Miller*, 397 F.3d 964 (D.C. Cir. 2005), *cer. denied*, 125 S.Ct. 2977 (2005) [hereinafter "*Miller*"], where White House sources leaked the identity of Central Intelligence Agency agent Valerie Plame, ostensibly because her husband challenged President Bush's claim that Iraq was developing weapons of mass destruction; the investigation led to journalist Judith Miller's decision to spend 85 days in jail to protect her source.

<sup>7</sup> Documents can also be privileged and though *National Post* concerned a leaked bank document, the purpose of the privilege was to protect the document's source, and not to prevent its content from being disclosed. Analysis in all the courts proceeded under the common law Wigmore standard, which provides a four-part test for determining the availability of a privilege.

<sup>8</sup> See generally c. 13, "The Law of Privilege" in C. Hill, D. Tanovich & L. Strezos, eds., *McWilliams' Canadian Criminal Evidence*, 4th ed. (Aurora, ON: Canada Law Book, 2005) [hereinafter "*McWilliams, 'The Law of Privilege'*"].

presumptive force, and that makes it difficult to dislodge the general rule in favour of an exception.<sup>9</sup>

Against that understanding of privilege, *R. v. National Post*<sup>10</sup> and *Globe and Mail v. Canada (Attorney General)*<sup>11</sup> invited the Court to recognize confidential newsgathering sources under section 2(b) of the Charter. Key differences between the cases deepened the challenge, but also enriched the opportunity for critical reflection on an issue the Court had not squarely addressed before.<sup>12</sup> In *National Post*, the RCMP obtained coercive orders against McIntosh and the newspaper to search for an envelope and internal bank document that were the centrepiece in a forgery investigation. The question there was whether documents sent to the reporter by an unknown source were protected by a privilege. *Globe and Mail* arose from a federal government lawsuit to recover moneys that were misspent in the Quebec sponsorship program. Groupe Polygone wanted to question government employees to find out when the federal government discovered that the sponsorship program had gone awry, and determine whether the claim was time-barred.<sup>13</sup> During cross-examination on a motion brought by the *Globe*, Leblanc refused to answer questions that could compromise MaChouette's identity.

How the Court responded to journalist-source confidentiality in these cases was immensely important. Narrowly, the question was whether the identity of confidential sources would be protected under the prevailing common law, Wigmore test for privilege.<sup>14</sup> At the same time, the drama of Shawinigate and the sponsorship program could not be ignored; in

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<sup>9</sup> The famous quote is from Wigmore: "For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence." 8 *Wigmore on Evidence*, 3d ed. (John T. McNaughton Rev., 1961), at s. 2192.

<sup>10</sup> [2010] S.C.J. No. 16, [2010] 1 S.C.R. 477 (S.C.C.) [hereinafter "*National Post*"]. See S. Kupa, "Charter-ing a Course: *National Post*, Journalist-Source Privilege and the Future of Canada's Charter Press Clause" (2010) 69 U.T. Fac. L. Rev. 2 (forthcoming, 2011).

<sup>11</sup> [2010] S.C.J. No. 41, [2010] 2 S.C.R. 592 (S.C.C.) [hereinafter "*Globe and Mail*"]. See C. Leblanc, Marc-André Nadon & Emilie Forgues-Bundock, "The Journalist-Source Privilege in Quebec Civil Law: *Globe and Mail v. Canada (Attorney General)*" in J. Cameron & B. Ryder, eds. (2011) 54 S.C.L.R. (2d) 273.

<sup>12</sup> But see *Moysa v. Alberta (Labour Relations Board)*, [1989] S.C.J. No. 54, [1989] 1 S.C.R. 1572 (S.C.C.) (raising a claim which was dismissed by the Court without discussion of the Charter status of confidential sources). Important lower court decisions include *St. Elizabeth Home Society v. Hamilton (City)*, [2008] O.J. No. 983, 2008 ONCA 182 (Ont. C.A.); *Re Charkaoui*, [2008] F.C.J. No. 52, 2008 FC 61 (F.C.); and *O'Neill*, *supra*, note 6.

<sup>13</sup> *Infra*, notes 148 and 149 (explaining the proceedings and the way Leblanc became involved in a lawsuit between the federal government and Groupe Polygone).

<sup>14</sup> *Infra*, note 59 (setting out the elements of the test).

both instances, Canadians learned from the media how public officials had betrayed the public trust. From that perspective, the more urgent question of principle was whether the Court would recognize confidential newsgathering sources under section 2(b) of the Charter. For that to happen a sensibility of newsgathering and the role it plays in democratic governance was needed. The difficulty was that the pre-Charter Wigmore standard was not grounded in any theory of press function, and the Court's section 2(b) jurisprudence did not provide a strong foundation for a constitutional approach to this issue.<sup>15</sup> Unwilling to bridge the distance between a common law and constitutional conception of privilege, the judges rejected a Charter model and re-affirmed the status quo, common law test.

McIntosh's investigative reporting did not make a good impression, and the Court upheld the orders against him and the Post.<sup>16</sup> Though the judges assumed that the bank document was a forgery, rather than a leak, either way the reporter's source should have been protected. By focusing on the suspicious circumstances surrounding the document, the Court overlooked the richer narrative of Shawinigate. Doing so caused the judges to discount the section 2(b) value of McIntosh's investigative reporting, and led to a balancing of interests that impermissibly favoured law enforcement interests. Not only did this compromise the Shawinigate story, it placed a wider chill on investigative reporting.

That is why the Court's decision in *National Post* should be placed in perspective. Specifically, it should be read down and restricted in application to cases where a reporter is in possession of the "physical instrumentality" or *actus reus* of a criminal offence. The Court was deliberate and emphatic that *National Post* was more about real evidence than confidential sources, and *Globe and Mail* corroborated that view a few months later.<sup>17</sup> There, and on different facts, the judges adopted a more source-protective approach and suggested criteria to determine the question of privilege. That is why *Globe and Mail*, not *National Post*,

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<sup>15</sup> But see *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] S.C.J. No. 38, [1996] 3 S.C.R. 480 (S.C.C.) (recognizing the democratic role of newsgathering and its s. 2(b) status, in an open court setting).

<sup>16</sup> Justice Abella agreed with Binnie J.'s discussion of the law but dissented, alone, from the conclusion that the envelope and document were not privileged in these circumstances; she would have recognized the privilege, and quashed the search warrant and assistance order.

<sup>17</sup> *National Post*, *supra*, note 10, at paras. 2, 3, 62 and 65 (emphasizing that this was "not the usual case of journalists seeking to avoid testifying about their secret sources" but was instead a physical evidence case); *id.*, at para. 3.

sets the standard and should be considered the Court's leading precedent on confidential newsgathering sources.

Going forward, sources can be protected by giving *National Post* a narrow scope and interpreting *Globe and Mail* generously. That said, the decisions represent a lost opportunity — after being invited to re-frame newsgathering and recognize its connection to core democratic values under the Charter, the Court sought refuge in the status quo. Technology has fundamentally altered the status quo and, in a world where “we’re all journalists now”, rendered prior conceptions of the press all but meaningless.<sup>18</sup> It has never been less clear who is a member of the press, whether for purposes of a privilege or otherwise. While a narrow view of journalism and newsgathering is underinclusive and would exclude bloggers, citizen journalists, and others who use non-traditional media, a generous definition would be overinclusive to the point of collapsing section 2(b)'s press and media guarantee into freedom of expression.

If technological change has now made it possible for any and all to “gather” news, it has also transformed the ways and means of information exchange. Transparency and accountability may be core values, but whether they can or should be pursued in any way, and at any cost, is another matter. One dynamic that poses serious issues is the rise of anonymity in the way information is obtained and proliferated on a no-name basis. Today, leaks are as commonplace as they are shocking, and anonymity has become ever more the chameleon — the indispensable condition of free debate and the free exchange of views in some settings, and an invitation to mischief in others. Anonymity and confidentiality are not the same and must be distinguished. Still, the paradox is that activity that promotes section 2(b)'s core values of transparency and accountability has opened up worrying questions about the transparency and accountability of the information itself.

The common law is versatile enough to serve as an engine of change or stand firm as the last bastion of yesterday's thinking. In this instance, the Court provided some protection for journalists and their confidential sources, but only within the confines of a common law conception that never anticipated the changes that would be wrought by technology and the arrival of constitutional rights. In the absence of judicial leadership,

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<sup>18</sup> See S. Gant, *We're All Journalists Now: The Transformation of the Press and Reshaping of the Law in the Internet Age* (New York: Free Press, 2007).

the policy questions raised by *National Post* and *Globe and Mail* must be taken up in an alternative forum.

## II. SHAWINIGATE, *NATIONAL POST* AND “X”

### 1. Forgery or Leak?

In comparison to the Quebec sponsorship scandal, which led to a judicial inquiry, prosecutions and innumerable consequences, “Shawinigate” lost momentum shortly after an internal bank document was leaked. Despite leading to important reforms, Shawinigate fell short of its investigative potential. Today, Andrew McIntosh’s exposé of Jean Chrétien’s dealings with St-Maurice businesses and businessmen might seem less like an instance of pioneering journalism and more like a cautionary tale. In this tale, an ambitious reporter misplaced his confidence in a mischievous source who either forged a document, or accepted a forged document in order to frame a sitting Prime Minister.<sup>19</sup> It is a shallow view — a view that obscures the critical narrative of Shawinigate and McIntosh’s role in exposing a system of political favouritism in the prime minister’s riding. Yet that is essentially the account the Supreme Court accepted in *National Post*.

On April 5, 2001, Andrew McIntosh received an envelope and document anonymously in the mail. By then, the Post reporter had been working for over two years on a series of stories about the flow of federal moneys to businesses and individuals in Prime Minister Chrétien’s riding.<sup>20</sup> Initially and throughout, his investigation centred on the tangled web surrounding the prime minister’s ownership interest in the Grand-Mère Auberge and Golf Club, including the role he played in the BDBC

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<sup>19</sup> According to the Court, this case was about an attempt to “dupe” the *National Post* into publishing an “allegedly forged document”; *National Post*, *supra*, note 10, at para. 4.

<sup>20</sup> Affidavit of Andrew McIntosh, at paras. 63-90 [hereinafter “McIntosh Affidavit”], Appellants’ Record, Volume 4 (electronic file available from author) (describing how his research and fact-finding began late in 1998, and led to publication of his first stories about the Auberge and the Prime Minister, in January 1999; *id.*, at para. 89). See Andrew McIntosh, “Into the Rough: In 1988, Prime Minister Jean Chrétien bought into a golf course. Now it’s a financial handicap and no one’s talking”, *National Post* (January 23, 1999), at B1; Andrew McIntosh, “Businessman who bought hotel from Chrétien given federal aid; \$665,000 awarded to Quebecker with criminal record” *National Post* (January 25, 1999), at A1.

loan.<sup>21</sup> Not only did McIntosh discover that Mr. Chrétien had an interest in the property, he also learned that the sale of that interest was not consummated when he became prime minister in 1993.<sup>22</sup> Though Mr. Chrétien's compliance with parliamentary rules on disclosure was one issue, the matter acquired added significance when the Auberge received a BDBC loan for \$615,000 in 1997.

Two years later, when McIntosh reported his findings and the Opposition began to ask questions, Mr. Chrétien told the House of Commons that his relationship with the Auberge was over; likewise, he maintained that he had had no personal interest in the property when the business received more than \$1 million from the government, including grants as well as the principal loan.<sup>23</sup> Faced nonetheless with ongoing demands for clarification and proof of these claims, the prime minister finally announced that he had been paid for his share of the business, but not until October of 1999.<sup>24</sup> The same year, Andrew McIntosh earned Story of the Year honours from the Canadian Association of Journalists for his investigative reporting on the prime minister's relationship with the Auberge and its access to federal funding.<sup>25</sup>

In addition to exploring the circumstances surrounding the prime minister's ownership interest, the reporter developed a network of contacts and sources who shared information about other irregularities around federal grants, loans and awards to businesses in the St-Maurice riding.<sup>26</sup> At the same time, McIntosh probed deeper into the circumstances surrounding the Grand-Mère's surprising success in obtaining a

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<sup>21</sup> In 1988 Jean Chrétien acquired an ownership interest in the Grand-Mère Golf Club, which included the assets, goodwill and ongoing business of the Grand-Mère Inn [hereinafter "Auberge"], but not the building. In 1994 the building was sold to Yvon Duhaime, the Grand-Mère's owner and principal in this time period. McIntosh Affidavit, *id.*, at paras. 67-76.

<sup>22</sup> *Id.*, at paras. 87-89.

<sup>23</sup> *Id.*, at para. 109. The BDBC rejected the first application for \$2 million, before approving a loan for a smaller amount of \$615,000. In addition to the BDBC loan, McIntosh reports that the Auberge received \$50,000 from a federal government regional development group, *id.*, at para. 77; job creation grants for \$188,799, *id.*, at para. 93; and \$161,000 from an HRDC Transitional Jobs Fund grant, *id.*, at para. 103.

<sup>24</sup> *Id.*, at paras. 120-121 (describing pressure on the prime minister to table an agreement which would prove that the shares had been sold), and para. 133 (providing the prime minister's verbal confirmation, in the House of Commons, that the shares had been sold).

<sup>25</sup> *Id.*, at para. 147.

<sup>26</sup> *Id.*, see paras. 63-153 (providing a detailed narrative of the details around various grants, awards and contracts in the Prime Minister's riding).

BDBC loan.<sup>27</sup> In chasing these stories, McIntosh made contact with and relied on confidential sources from the BDBC, as well as from St-Maurice. He approached one such source in 1999 and was told, at the time, that “X” would not share information with him “on any basis”.<sup>28</sup> The following year X had a change of heart and approached McIntosh; even so, X would only correspond through the agency of an intermediary, “Y”.<sup>29</sup> The information obtained from X through this go-between arrangement enabled the reporter to verify what he had been told by other sources: that the prime minister played an active role in securing the Grand-Mère’s loan.<sup>30</sup>

After 12 months of journalistic investigation, McIntosh broke the news that Mr. Chrétien had made repeated calls urging bank president François Beaudoin to approve the loan.<sup>31</sup> Over Mr. Chrétien’s earlier denials of involvement<sup>32</sup> the Post headline proclaimed, “Prime Minister Lobbied for Disputed Loan”.<sup>33</sup> That is how Canadians learned, in the middle of a federal election campaign, that their prime minister had used his office to help the Auberge get a loan which, in addition to being a questionable business risk, did not comply with internal bank procedure. To make matters worse, five RCMP investigations into the awarding of federal government contracts in Shawinigan were underway, the Grand-Mère was in default on its loan from the BDBC, and various liens were

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<sup>27</sup> *Id.*, at para. 84 (explaining McIntosh’s curiosity about how “a federal bank made such a large loan to a man with a criminal record and a history of failing to pay his income taxes and failing to meeting [*sic*] his other financial obligations”). Not only were internal procedures not followed, McIntosh uncovered troubling details about owner Yvon Duhaime’s sketchy past; see *id.*, at paras. 80-82 (discussing Duhaime’s criminal record, which was not disclosed to the bank, and status as the prime suspect in an arson at another hotel he owned prior to the Auberge), and para. 230 (describing some of the procedural irregularities and ways in which Duhaime received preferential treatment).

<sup>28</sup> *Id.*, at para. 154. Though it is unknown whether X is a “he” or “she”, the source is referred to as “he” in this article.

<sup>29</sup> *Id.*, at paras. 155-156.

<sup>30</sup> *Id.*, at paras. 158-159 (specifying what X gave him and how that enabled McIntosh to confirm the prime minister’s calls to the bank).

<sup>31</sup> This history is detailed in the affidavit, *id.*, at para. 95 (explaining that Confidential Source #1 was the first to tell him that the prime minister has “talked and even joked about having to make many phone calls to get Mr. Duhaime his loans and grants”); paras. 110-111 (describing the information volunteered by “Confidential Source #3”); para. 160 (explaining that McIntosh corroborated the information from three independent confidential sources); and paras. 158-161 (detailing the documents received from X on this issue).

<sup>32</sup> McIntosh Affidavit, *id.*, at para. 90 (stating that the prime minister’s Office denied any involvement in awards, grants and loans to the Auberge).

<sup>33</sup> *Id.*, at para. 162. See Andrew McIntosh, “PM lobbied for disputed loan” *National Post* (November 16, 2000), at A1.

registered against the property by governments and creditors.<sup>34</sup> Mr. Chrétien had little choice in the circumstances but to admit that he had called Beaudoin about the loan. Still, he insisted that there was nothing improper or unusual about that, because “[y]ou call who you know ... It’s the normal operation.”<sup>35</sup>

Though the Liberals won the election in fall 2000, the controversy did not abate. When Parliament reconvened in 2001, the Opposition peppered the prime minister and his government about Mr. Chrétien’s calls to the bank, and complained about the placement of Liberal Party operatives in key bank positions.<sup>36</sup> The brouhaha led the Ethics Counselor to recommend that the conflict of interest code be tightened to prevent the prime minister or members of Cabinet from lobbying the heads of Crown corporations.<sup>37</sup> Shortly before the leaked document arrived at the Post, McIntosh discovered that the corporate records for the Auberge continued to list the prime minister’s holding company, JAC Consultants, as the registered owner of 25 per cent of the business.<sup>38</sup>

Those were the stakes on April 5, 2001, when the reporter received a copy of an internal BDBC document in the mail that showed JAC Consultants as a creditor of the Auberge. It was dynamite because it appeared to confirm that the troubled inn owed him money at the time Mr. Chrétien urged the bank president to approve the loan. When the reporter and newspaper took steps to authenticate the document, the prime minister’s office, the lawyer for the Chrétiens, and the BDBC claimed in unison that the document had been forged.<sup>39</sup> Specifically, they alleged that it had been altered to add the name of JAC Consultants as a creditor. Though the Post decided not to run the story, other newspaper

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<sup>34</sup> *R. v. National Post*, [2004] O.J. No. 178, 69 O.R. (3d) 427, at para. 7 (Ont. S.C.J.) [hereinafter “*National Post* – warrant review”] (citing para. 157 of the McIntosh Affidavit, *id.*).

<sup>35</sup> McIntosh Affidavit, *id.*

<sup>36</sup> *Id.*, at paras. 170-181. See Andrew McIntosh, “Tobin defends PM against loan queries: Grand-Mère Inn: Accuses Tories of engaging in ‘character assassination’” *National Post* (February 1, 2000), at A6; Robert Fife & Andrew McIntosh, “PM trying to silence me: Clark: Boudria denies threats: Tories allege Liberals vowed to cut caucus funding if questions on loans persisted” *National Post* (February 2, 2001), at A1.

<sup>37</sup> Andrew McIntosh, “Wilson targets cabinet’s lobbying: Fall-out from Grand-Mère: Ethics boss would bar PM, ministers from pressuring Crown corporations” *National Post* (February 9, 2001), at A1.

<sup>38</sup> McIntosh Affidavit, *supra*, note 20, at paras. 182-196 (describing the pressure on the prime minister in the winter and spring of 2001). See Andrew McIntosh, “PM kept stake in club: sources: Sold in ’93 PMO insists: ‘I was trying to clear him. Now, I can’t’, says Chrétien friend” *National Post* (March 23, 2001), at A1.

<sup>39</sup> McIntosh Affidavit, *id.*, at paras. 198-215 (describing those steps).

and media organizations gained access to the document and published the details.<sup>40</sup>

The amount in question was not significant, but that did not matter so much.<sup>41</sup> If the document was forged, it meant that someone had altered an internal bank form to frame the prime minister. And if the document was authentic, it meant that when Mr. Chrétien contacted BDBC's president he was also protecting his interest as one of the business's creditors.

Shortly after April 5, McIntosh learned that the document had been sent to him by X, his key source on the prime minister's role in the BDBC loan.<sup>42</sup> When the two met, X explained that he received the bank document anonymously, did not know where it had come from, and had simply passed it on.<sup>43</sup> The reporter refused to destroy the document and envelope but promised to protect X's identity, though only after taking steps to test X's integrity and ensure that he was not being misled.<sup>44</sup> McIntosh also told his source that he would keep the promise, unless he discovered that X had used him at which point, the reporter indicated, he would no longer regard his pledge of confidentiality as binding.<sup>45</sup>

Within days it became clear how much was at stake. Amid claims of partisanship on the part of the judge who heard the *ex parte* motion, the bank obtained an order to search Beaudoin's residence.<sup>46</sup> Far from being a coincidence, the ex-president's acrimonious relationship with the BDBC is an integral part of the back story. In 1999, Beaudoin left his position at the bank and then sued for wrongful dismissal. He claimed that he had been fired when he tried to recall the loan from the Auberge, and insisted that he had been the victim of political interference.<sup>47</sup> His

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<sup>40</sup> *Id.*, at para. 220.

<sup>41</sup> According to the leaked document, the Auberge owed JAC Consultants \$23,040. *National Post*, *supra*, note 10, at para. 12.

<sup>42</sup> See McIntosh Affidavit, *supra*, note 20, at paras. 221-227 for an account of this meeting.

<sup>43</sup> *National Post*, *supra*, note 10, at paras. 16-18; McIntosh Affidavit, *id.*, at para. 229.

<sup>44</sup> McIntosh Affidavit, *id.*, at para. 226 (explaining that X's request did not surprise him as he is often asked to destroy documents and other materials to protect the identity of the source). *Id.*, at paras. 228-229 (explaining the steps McIntosh took to authenticate the document).

<sup>45</sup> *National Post*, *supra*, note 10, at para. 17 (the "modified" undertaking of confidentiality); McIntosh Affidavit, *id.*, at para. 228.

<sup>46</sup> Campbell Clark & Daniel Leblanc, "Quebec judge in conflict, Alliance leader says" *The Globe and Mail* (April 10, 2001), at A1; Elizabeth Thompson, "Writ allowed raid on home of former BDC president; ex-partner in law firm that represented Grand-Mère golf course" *The Ottawa Citizen* (April 10, 2001), at A1.

<sup>47</sup> McIntosh Affidavit, *supra*, note 20, at para. 153. See Andrew McIntosh & Robert Fife, "Grand-Mère Inn at heart of dismissal lawsuit: Prime Minister denies involvement" *National Post*

premises were searched because this history pointed to him as the prime suspect for leaking the document to the press. When police failed to unearth the missing document, attention turned to a criminal investigation and orders against McIntosh and the *National Post*.<sup>48</sup> Though others were in circulation, the RCMP focused on McIntosh's copy because his document was the only one that had been handled by the source, and DNA testing could reveal that person's identity. The intrigue deepened once the press became part of the investigation, and comparisons between the bank's "true" copy and the alleged forgery raised key questions: was the document a forgery or a leak, and was the unknown source guilty of a criminal offence or was he simply a whistle-blower?

Although the threshold to obtain a search warrant is not high, whether and how different standards should apply to orders against the press was at the heart of *National Post*.<sup>49</sup> The theory of the investigation was that the internal bank document had been altered to add JAC Consultants as a creditor of the Auberge, and then leaked to McIntosh. That theory was challenged by the reporter and newspaper, who pointed to deficiencies in the RCMP materials that made it difficult to determine which document was authentic.<sup>50</sup> Irregularities and gaps in the evidence led the reviewing judge to remark that "[a] serious question was raised about the integrity of the Bank's files."<sup>51</sup> Though Benotto J. thought it inappropriate to substitute her views for those of the *ex parte* warrant judge, she quashed the search warrant and production orders.

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(November 15, 2000), at A1. Beaudoin went to trial and won the lawsuit in 2004 before settling his claim with the BDBC.

<sup>48</sup> *Id.*

<sup>49</sup> A search warrant can be obtained, under s. 487(1) of the *Criminal Code*, when there are reasonable grounds for authorities to believe that evidence relating to the commission of an offence will be found; *Criminal Code*, R.S.C. 1985, c. C-46, s. 487. In *Canadian Broadcasting Corp. v. Lessard*, [1991] S.C.J. No. 87, [1991] 3 S.C.R. 421, at 444 (S.C.C.) the Court held that "among commercial premises, the media are entitled to particularly careful consideration" and added that "[t]he media are entitled to this special consideration because of the importance of their role in a democratic society".

<sup>50</sup> McIntosh Affidavit, *supra*, note 20, at para. 231 (raising the issue of "possible file tampering within the BDC"), paras. 256-266 (explaining that the apparent signature of "Yvon Duhaime" was not the man's signature), and paras. 267-281 (detailing a range of other defects and deficiencies in the RCMP investigation).

<sup>51</sup> *National Post* – warrant review, *supra*, note 34, at para. 22. See also para. 21 (noting that the name "Yvon Duhaime" was handwritten as a signature though the RCMP later revealed that it was not a signature after all, but "a note mistakenly made by a Bank employee"), and para. 22 (also noting that a key page, which would have confirmed whether or not the document being searched was authentic or not, was missing and that although this was not explained to the warrant judge, it should have been).

After considering this issue, the Ontario Court of Appeal was not willing to decide which document was authentic.<sup>52</sup> As the decision pointed out, the evidence did not show that the BDBC document was not authentic, but nor did it establish that the copy in McIntosh's possession was the true, authentic version.<sup>53</sup> This stand-off led the court to reverse the reviewing judge's decision and uphold the orders.

These circumstances made it imperative for the Supreme Court to exercise caution before upholding the orders. Yet Binnie J., who wrote for the majority, showed little interest in comparing the documents, questioning the gaps in the investigation, or engaging the question of forgery versus leak. His opinion focused on the document in McIntosh's possession, the meeting between the reporter and his source, and the orders at issue. It leaves little doubt that the Court's decision turned on a single, compelling fact: that the purpose of the search was to gain access to the physical evidence, the physical instrumentality, the *actus reus* of an offence against the Prime Minister of Canada.<sup>54</sup> By a vote of eight to one, the judges held that McIntosh's confidential relationship with X was not privileged and upheld the orders against him and the *National Post*.<sup>55</sup>

## 2. Confidential Sources, the Wigmore Privilege and the Charter

Though *National Post* was not the Supreme Court's first Charter case on journalist-source privilege, *Moysa v. Alberta* offered little or no guidance.<sup>56</sup> There, the claim was so weak the Court dismissed the appeal without committing itself to a view of the privilege, whether at common law or under section 2(b) of the Charter.<sup>57</sup> Some 20 years later, the Court

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<sup>52</sup> *National Post v. Canada*, [2008] O.J. No. 744, 89 O.R. (3d) 1, at para. 66 (Ont. C.A.), per Laskin, Simmons, and Gillese JJ.A. [hereinafter "*National Post – OCA*"]. See generally paras. 59-66 (discussing the "forgery" status of the document leaked to the *National Post*).

<sup>53</sup> *Id.*, at para. 66 (stating, although the evidence does not establish "conclusively" that the document is a forgery, that it meets the reasonable and probable grounds threshold).

<sup>54</sup> *National Post*, *supra*, note 10, at para. 3 (stating that "this is a *physical evidence case*" and that "the media claim to immunity from *production of the physical evidence* is not justified" (emphasis added)), and at para. 65 (stating that there is a significant difference between "testimonial immunity against compelled disclosure of secret sources and *the suppression by the media of relevant physical evidence*" and that journalists have "no *blanket right* to suppress physical evidence of a crime" (emphasis added)).

<sup>55</sup> Justice Abella agreed with Binnie J.'s discussion of the law of privilege but dissented from his conclusion that the document and envelope were not privileged in these circumstances.

<sup>56</sup> *Moysa v. Alberta (Labour Relations Board)*, *supra*, note 12.

<sup>57</sup> The Wigmore-based privilege was unavailable because no confidence had been sought or given; more to the point, perhaps, the case involved a reversal of roles, in which a journalist had

had several options to consider in addressing the question of confidential newsgathering sources. From a constitutional vantage, the alternatives were a Charter model and a Wigmore-Charter hybrid;<sup>58</sup> within the framework of the common law, the Court could choose between a class privilege and Wigmore's default test for determining privilege on a case-by-case basis.<sup>59</sup> In principle, the key question was whether the common law could adequately protect the section 2(b) values at stake. If not, Wigmore would have to be abandoned, or modified, to accommodate the Charter.

At common law, a privilege to protect confidential relationships takes the form of immunity from testimonial compulsion, and operates as an exception to the rule that relevant evidence is compellable in a court of law.<sup>60</sup> As such, the exception is limited to private or confidential relationships that serve vital public interests. In building a doctrinal framework around that concept, the common law created a two-tier system or hierarchy between "class" and "case-by-case" privileges. The result is a double standard which separates relationships that are presumptively privileged from others that are not. For relationships with "class" status, a *prima facie* privilege attaches once the claimant establishes her membership in the class. Though class privilege is not absolute, the presumption of confidentiality is not displaced until the party seeking access to the evidence demonstrates that there are exceptional circumstances that justify a breach of the relationship. Key examples of

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supplied, not obtained, information and was trying to avoid disclosing the identity of the person to whom she had served as a source; *id.*, at para. 12. Justice Sopinka also found that there was no evidence to support a s. 2(b) claim that testimonial compulsion would affect newsgathering or cause news sources to "dry up"; *id.*, at para. 21. The Court noted, without comment, that the Alberta Labour Relations Board had applied the test from Powell J.'s concurrence in *Branzburg v. Hayes*, which essentially requires that the evidence be crucial to the party seeking it, relevant to the proceedings, and not available from any other source. *Id.*, at paras. 8 and 22. See *Branzburg v. Hayes*, 408 U.S. 665 (S.C. 1972).

<sup>58</sup> The appellants were joined in the proposal for a Wigmore-Charter hybrid along these lines by Bell Globemedia Inc., Canadian Broadcasting Corporation and the "Media Coalition". The Canadian Civil Liberties Association ["CCLA"] and British Columbia Civil Liberties Association ("BCCLA") both proposed a Charter approach to the question of privilege.

<sup>59</sup> The Wigmore criteria are as follows: (1) The communications must originate in a confidence that they will not be disclosed; (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. *R. v. McClure*, [2001] S.C.J. No. 13, [2001] 1 S.C.R. 445, at para. 29 (S.C.C.) [hereinafter "*McClure*"] (citing Wigmore's text).

<sup>60</sup> See *McWilliams*, "The Law of Privilege", *supra*, note 8.

this top-tier privilege include solicitor-client, police-informant, and spousal relationships.<sup>61</sup>

Otherwise, the status of confidential relationships is subject to Wigmore's four-step test for determining immunity on a case-by-case basis. Immunity is more difficult to establish under this model because there is a presumption against privilege that is only rebutted when the would-be privilege holder meets all parts of the test. A case-by-case or qualified privilege succeeds when a court decides that it is more important to protect the sanctity of a confidential relationship than to have access to relevant or probative evidence. Relationships that can ground a situational privilege include doctor-patient and priest-penitent, as well as treatment relationships and religious communications more generally.<sup>62</sup>

After 1982, the validity of a framework based on fundamental differences between class and case-by-case privileges could no longer be assumed.<sup>63</sup> Wigmore's rules were not based on constitutional considerations, and the Charter's arrival made it imperative for the courts to rethink the common law hierarchical distinction between the two types of privilege. It could be argued, for instance, that the Charter equalized Wigmore's confidential relationships by constitutionalizing all of them under section 7's protection of privacy.<sup>64</sup> Still, the common law had resisted a monolithic approach to evidentiary privilege, and nor was it obvious that all confidential relationships are equal under the Charter: the text references some Wigmore relationships, but not others.

Journalist-source privilege is a case in point. Prior to the Charter, immunity for confidential newsgathering sources was subject to the four-part test for case-by-case privilege. The question that arises under section 2(b) is whether that standard adequately protects the Charter's guarantee of press and media freedom. Under that provision, the relationship between a journalist and her source is not merely confidential in nature, but constitutional in scope as well.

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<sup>61</sup> *McClure*, *supra*, note 59, at para. 28 (identifying solicitor-client, spousal, and informer relationships as the three main class privileges in Canadian law).

<sup>62</sup> *Id.*, at para. 29 (identifying relationships which might be recognized under Wigmore's case-by-case test).

<sup>63</sup> *R. v. Gruenke*, [1991] S.C.J. No. 80, [1991] 3 S.C.R. 263, at 286 (S.C.C.) [hereinafter "*Gruenke*"] (describing the differences between a "blanket", *prima facie* or class privilege and case-by-case privilege).

<sup>64</sup> See *e.g.*, *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.) [hereinafter "*Mills*"] (discussing the privacy rights of complainants in sexual assault cases).

For these reasons the Charter claim was compelling in *National Post*. There, authorities conducting a criminal investigation obtained coercive orders against members of the press that violated section 2(b) and required justification under section 1. In place of Wigmore's four-part test, the Charter approach that was proposed set a threshold for *prima facie* breach under section 2(b), followed by section 1 review under the terms of *Dagenais/Mentuck*.<sup>65</sup> The constitutional model rested on a conception of the press that recognizes its vital role in promoting and preserving democratic governance. To play this role, the press and media must be free from coercive interference from the state, and nowhere is this more critical than when investigative reporting obtains compromising information about public officials through the use of confidential sources. In doctrinal terms, a claimant would have to establish her entitlement under section 2(b) by showing that information was obtained from a source, under a promise of confidentiality that was given in the course of newsgathering activity. At that point the burden would shift and the party seeking disclosure would have to justify the violation under section 1 pursuant to the terms of the *Dagenais/Mentuck* test.<sup>66</sup>

Re-styling Wigmore's balancing of interests to accommodate the Charter's underlying values and framework of analysis was well within the Court's reach in *National Post*. Justice Binnie not only rejected this approach, but in doing so but dramatized the implications of any Charter-based solution. He spoke first about the folly of recognizing newsgathering under section 2(b), fretting that a Charter approach would lead to the constitutionalization of every technique imaginable, including "cheque-book journalism", long-range microphones, telephoto lenses, or "electronic means to hear and see what is intended to be kept private".<sup>67</sup> Reading the issue "up" enabled Binnie J. to point to other newsgathering

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<sup>65</sup> This test prohibits discretionary orders which limit expressive freedom unless "(a) such an order is necessary to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and (b) the salutary effects of the [order] outweigh the deleterious effects on the rights and interests of the parties and the public, including the right to free expression. ...": *Re Vancouver Sun*, [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332 (S.C.C.) (combining *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.) [hereinafter "*Dagenais*"] and *R. v. Mentuck*, [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442 (S.C.C.) [hereinafter "*Mentuck*"] and applying the test to a closed investigative hearing under the *Criminal Code*'s anti-terror provisions).

<sup>66</sup> That was the CCLA's proposal in this appeal. The Court's breakthrough decision in *Dagenais* added that common law standards which do not protect constitutional entitlements must be modified to meet the Charter's requirements.

<sup>67</sup> *National Post*, *supra*, note 10, at para. 38.

practices — which admittedly can be offensive — in order to marginalize the question at stake in *National Post*. Finding fault with these newsgathering practices had little relevance in a case where an award-winning journalist relied on confidential sources while engaged in investigative reporting with undeniable links to core section 2(b) values.

Paradoxically, *Grant v. Torstar* also supplied an argument against a progressive approach to confidential sources.<sup>68</sup> In changing the law of defamation and introducing the concept of “responsible communication”, *Grant* created a defence that is not limited to journalists but is available to anyone who makes defamatory statements on matters of public interest.<sup>69</sup> This presented a problem in *National Post* because it suggested, by analogy, that testimonial immunity might be available to anyone who claims to be a journalist. From that perspective, privilege could encourage the unscrupulous to hide relevant evidence, wreak havoc on the privacy of others, and do so with a free pass to engage in mischief. This prospect moved Binnie J. to vent that “throwing a constitutional immunity around a heterogenous and ill-defined group of writers and speakers” would “blow a giant hole in law enforcement and other constitutionally recognized values such as privacy.”<sup>70</sup>

There, too, his analysis was not quite on point. The law of defamation applies to individuals and members of the media alike, and *Grant* simply recognized that the *Reynolds* defence of “responsible journalism” should not be available only to the media.<sup>71</sup> Unlike *Grant*’s defence, which can be invoked by any defendant who can establish a “public interest” in her defamatory statements, the concept of privilege is relational. Immunity can only be claimed by a person who obtains or receives confidential information in the course of newsgathering activities, and in direct exchange for a promise of confidentiality. Key differences between the two meant that *Grant*’s responsible communication defence did not provide principled grounds for rejecting a Charter model in *National Post*.

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<sup>68</sup> See *Grant v. Torstar Corp.*, [2009] S.C.J. No. 61, 2009 SCC 61 (S.C.C.) [hereinafter “*Grant*”].

<sup>69</sup> The defence of “public interest responsible journalism” is based on two key elements: statements on a matter of public interest, and compliance with a seven-step standard of “responsible communication”. See *id.*

<sup>70</sup> *National Post*, *supra*, note 10, at para. 40.

<sup>71</sup> See *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609 (H.L.) (introducing the “responsible journalism” defence in defamation litigation).

That said, technology has generated difficult questions that challenge conventional notions of who the media are and what role they play. It was clear that the Court was uneasy in the face of those concerns and, rather than assume the risks of change, sought refuge in the status quo. In *National Post*, though, the definitional quagmire-in-waiting had little to do with McIntosh or his newspaper, whose media credentials were beyond dispute.<sup>72</sup> As well, whether privilege is modelled on a common law or Charter doctrine, the Court in either case will have to decide who is a journalist and entitled, as a result, to claim a privilege. Once again, the issue did not provide Charter-specific reasons for rejecting a constitutional approach in this case.

As an alternative to the Charter, the Court could have accommodated section 2(b)'s values by treating the journalist-source relationship as a class privilege. Unlike Wigmore's case-by-case test, this approach focuses on the relationship, not its particulars. As noted, the claimant must show that she is a member of the class but once that is done, the privilege attaches. The details of confidentiality and whether they deserve the law's protection do not matter because the privilege has presumptive force. Though the privilege is not absolute and must yield in some circumstances, the burden to dislodge it shifts to those who seek access to confidential information. Functionally, this privilege bears close resemblance to the Charter model which was proposed: both rest on a concept of *prima facie* privilege or its equivalent of entitlement under section 2(b), both shift the burden to the party seeking access to confidential information, and both set a strict test for any derogation from the privilege.

The unstated equivalence between the two may explain why Binnie J. was just as stern in rejecting this option. Here, too, he found the scope of the privilege concerning, not only because the class lacks boundaries but because it lacks standards as well. After commenting on the variety and degrees of professionalism — *or lack of it* — among journalists, Binnie J. concluded that journalists cannot comprise a class because the

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<sup>72</sup> The Ontario Court of Appeal rejected the Crown's argument that there is no principled basis for determining who is a journalist and able to form a confidential source relationship, because the case-by-case approach did not require the Court to establish the boundaries of "legitimate journalism". As well, the court stated that it could "hardly be disputed" that a national news organization and respected journalist fall into the class of those who can claim journalist-source privilege. *National Post* – OCA, *supra*, note 52, at para. 99.

profession lacks licensing or regulatory oversight.<sup>73</sup> It also bothered him that key details of the relationship, such as the parameters of the promise and who the privilege belongs to, are uncertain.<sup>74</sup> Here, as well, *National Post* did not call for dispositive answers, as Andrew McIntosh was indisputably a journalist who was engaged in investigative reporting, and was *ad idem* with his source about the nature and scope of the promise of confidentiality. In combination, the Court's responses to these issues show how apprehensive the judges were about opening the concept of privilege up to an indeterminate class of journalists.

From a conceptual standpoint, a class privilege was attractive because a focus on the relationship — rather than its particulars — leads to a *prima facie* privilege that carries presumptive force. Though that is its merit, the Court also rejected this approach because it is more rigid than case-by-case decision-making.<sup>75</sup> A class privilege would be more source-protective, but a claimant seeking immunity would still have to establish that she belongs to the protected class. Recognizing a class privilege in *National Post* would not have prevented the Court from developing criteria to determine who is a journalist, on a case-by-case basis; as noted above, the issue is unavoidable, no matter which approach is taken.

Eliminating the Charter and class privilege left the Court with two options, both of which were tied to the four-part, case-by-case test; one was a Wigmore-Charter hybrid and the other, Wigmore *simpliciter*. In concept and design, the hybrid's aim was to retain the Wigmore test, but constitutionalize it by shifting the burden and incorporating the *Dagenais/Mentuck* test into the fourth step. Under this model, the claimant bears the onus on the first three elements of Wigmore before the burden shifts to the party seeking disclosure, for the fourth and final element of the test.<sup>76</sup>

Though it was a resourceful attempt to superimpose a constitutional solution on a common law framework, the Court did not seriously entertain this option. Justice Binnie questioned the coherence of an approach that would bisect the burden of proof and graft constitutional criteria onto a common law test. He was especially unwilling to split the

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<sup>73</sup> *National Post*, *supra*, note 10, at para. 43 (adding, also, that nor could such an organization be readily envisaged, “given the scope of activity contemplated as journalism in *Grant v. Torstar*”).

<sup>74</sup> *Id.*, at paras. 44-45.

<sup>75</sup> *Id.*, at para. 46.

<sup>76</sup> *Id.*, at para. 60 (describing this proposal).

onus between the parties, and made a point of stressing that the burden of persuasion to establish a privilege is on the media.<sup>77</sup> As he explained, “the risk of non-persuasion rests at all four steps on the claimant of the privilege.”<sup>78</sup> It was also unclear whether the Wigmore-Charter hybrid was specific to the journalist-source relationship or might apply to other case-by-case privileges. For these reasons, the Court found the proposal unsound.

That left the traditional test. The status quo was attractive because it had strong pedigree and did not require doctrinal changes to accommodate the Charter. Contextually, it was significant that the Court had already considered the Charter and upheld Wigmore’s case-by-case test in other settings. In *R. v. Gruenke*, for instance, the Court decided against a class privilege for religious communications and also rejected a *prima facie* privilege under section 2(a) of the Charter.<sup>79</sup> The Court addressed those questions in *Gruenke* even though the communications between a pastor and lay counsellor and the accused were not confidential and did not satisfy the first step of the test.

In *M. (A.) v. Ryan* the defendant in civil proceedings sought access to documents that were generated during the course of a confidential relationship between the plaintiff and her psychiatrist.<sup>80</sup> Justice McLachlin thought that the common law approach to privilege should be retained, though with modifications that would update the test to reflect emerging social realities, including Charter values.<sup>81</sup> Though taking sections 8 and 15 into account in A.M.’s case pointed to a compelling interest against disclosure, she concluded that the “occasional injustice” was too high a price to pay for confidentiality. Instead, she settled on a “partial privilege” that represented a compromise between protecting the treatment relationship and compelling relevant documents to be disclosed.<sup>82</sup>

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<sup>77</sup> *Id.* (describing this as a “three steps forward one step backward argument” which was unpersuasive because it “presupposes that a privilege arises after the third step and is then subject to rebuttal by the opposing party at the fourth step”).

<sup>78</sup> *Id.*, at para. 64.

<sup>79</sup> *Supra*, note 63.

<sup>80</sup> [1997] S.C.J. No. 13, [1997] 1 S.C.R. 157 (S.C.C.) [hereinafter “*Ryan*”].

<sup>81</sup> *Id.*, at para. 23.

<sup>82</sup> *Id.*, at paras. 32-33 (suggesting that not all documents should be disclosed, that editing should be done to remove non-essential material from disclosed documents, and that restrictions should be placed on who can see or copy the documents, to “ensure the highest degree of confidentiality and the least damage to the protected relationship, while guarding against the injustice of cloaking the truth”). See J. Ross, “Partial Privilege and Full Disclosure in Civil Actions: *M. (A.) v.*

If *Gruenke* and *Ryan* made it unlikely that the Court would adopt a more favourable approach to journalist-source relations, solicitor-client privilege provided a closer analogy. *National Post* barely mentioned this privilege, though the Court has considered solicitor-client relations extensively and singled this relationship out for special treatment under the Charter. In *National Post*, Binnie J. noted that “[e]ven solicitor-client privilege” is generally seen as a substantive rule of law “rather than as ‘constitutional.’”<sup>83</sup> The purpose of this remark was to downplay the Court’s solicitor-client jurisprudence and make the section 2(b) claim seem more radical than it was. In doing so, he drew attention to an analogy that should have been considered in *National Post*, but was not.

Twice, in *R. v. McClure*<sup>84</sup> and *Lavallee, Rackel & Heintz v. Canada*,<sup>85</sup> the Court all but constitutionalized the relationship between a lawyer and her client. In *McClure*, Major J. declared that the solicitor-client relationship is a fundamental legal right that “commands a unique status within the legal system”, and “is integral to the workings of the legal system itself”.<sup>86</sup> His opinion also maintained that the privilege “must be as close to absolute as possible”, and indicated that it “will only yield in certain clearly defined circumstances”.<sup>87</sup> Justice Major accepted that an exception can arise where core issues about an accused’s guilt are at stake and there is a genuine risk of wrongful judgment unless solicitor-client communications are disclosed.<sup>88</sup> Even so, full answer and defence only overrides the privilege where the accused is able to show that the information is not available from any other source and that there is no other way to raise a reasonable doubt as to guilt.<sup>89</sup>

The other key decision is *Lavallee*,<sup>90</sup> which invalidated a *Criminal Code* provision that authorized law office searches. In doing so, Arbour J. confirmed that “solicitor-client privilege must remain as close to

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*Ryan*” (1997) Alta. L. Rev. 1067 (commenting on the apparent contradiction between the privacy rationale for protecting a privilege and the conclusion that a significant part of the records must be disclosed).

<sup>83</sup> *National Post*, *supra*, note 10, at para. 39.

<sup>84</sup> *Supra*, note 59.

<sup>85</sup> [2002] S.C.J. No. 61, [2002] 3 S.C.R. 209 (S.C.C.) [hereinafter “*Lavallee*”]; See Adam M. Dodek, “Reconceiving Solicitor-Client Privilege” (2010) 35 Queen’s L.J. 493, at 495, fn 4 (providing a list of 11 decisions since 1999) [hereinafter “Dodek”].

<sup>86</sup> *McClure*, *supra*, note 59, at paras. 25 and 31.

<sup>87</sup> *Id.*, at para. 35.

<sup>88</sup> *Id.*, at para. 47.

<sup>89</sup> *Id.*, at para. 48.

<sup>90</sup> *Lavallee*, *supra*, note 85.

absolute as possible if it is to retain relevance”, described it as a principle of fundamental justice under section 7,<sup>91</sup> and found that a search under section 488.1 would violate section 7 as well as section 8 of the Charter.<sup>92</sup> Together, *McClure* and *Lavallee* established that solicitor-client privilege is practically inviolable and, in doing so, effectively treated the relationship as a Charter entitlement.<sup>93</sup>

It is debatable whether lawyer-client communications deserve such singular protection, and the Court has been chastized for granting special status reflexively, without studying the basis of privilege or considering the complex and diverse nature of lawyer-client relations.<sup>94</sup> Of greater interest here is an institutional comparison of solicitor-client and journalist-source relations. Specifically, the privilege in *McClure* rested on the proposition that solicitor-client relations are integral to, and at the core of, the justice system. Earlier, in *Gruenke* the Court relied on the institutional role of solicitor-client communications to distinguish that relationship from others that are purely private in nature.<sup>95</sup> In like manner, this logic applies to journalists and their confidential sources; simply put, that relationship is as vital to newsgathering and section 2(b)’s democratic values as the solicitor-client relationship is to the integrity of the justice system. Albeit in different ways, both relationships support the cornerstones of our system of government: while solicitor-client relations are the foundation of a justice system that is open and accessible to all, the journalist-source relationship — while admittedly more exceptional — plays a key role in advancing the transparency and accountability of our representative institutions.

Journalists, the press and the media promote and protect the integrity of the democratic system. Their role is institutional and structural in

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<sup>91</sup> *Lavallee, id.*, at para. 24. In this she echoed *McClure, supra*, note 59, at para. 41 (declaring that “[s]olicitor-client privilege and the right to make full answer and defence are principles of fundamental justice”).

<sup>92</sup> *Lavallee, id.*, at para. 35 (stating that an unreasonable search and seizure under s. 8 does not comply with s. 7’s principles of fundamental justice).

<sup>93</sup> See B. Morgan & M. Jamal, “The Constitutionalization of Solicitor-Client Privilege” in P. Monahan, ed. (2002) 20 S.C.L.R. (2d) 213, at 223 and 227 (claiming that solicitor-client privilege “crossed the Rubicon into constitutional territory” in *McClure*, and passed “another important milestone” in *Lavallee*).

<sup>94</sup> Dodek, *supra*, note 85.

<sup>95</sup> *Gruenke, supra*, note 63, at para. 32 (stating that although solicitor-client communications are *prima facie* protected because they are “essential to the effective operation of the legal system”, religious communications — though of social importance — are not “inextricably linked” to the justice system in the same way).

nature, and has been recognized by the Supreme Court as well as by courts around the world.<sup>96</sup> This insight explains why confidential newsgathering sources should be recognized and protected by section 2(b) of the Charter — the democratic function distinguishes confidential *newsgathering* relationships from the confidential communications that were considered in *Gruenke* and *M. (A.)*. Unlike newsgathering relationships, which advance democratic values like transparency and accountability, religious and therapeutic relationships serve private, rather than public, purposes. Those relationships can give rise to a privilege because public policy protects purely private relationships in at least some circumstances. By contrast, newsgathering and investigative reporting are core functions of section 2(b)'s public purposes, and are vitally linked to the guarantee's democratic values. That is why the relationship between a journalist and her source rests on a distinctive rationale that is grounded in the Constitution and cannot be equated with others that are concerned with privacy.

The record in *National Post* offered ample evidence of the role confidential newsgathering sources have played in promoting and protecting Canada's democratic values.<sup>97</sup> Despite acknowledging the special position of the press and the need for "solid protection" for secret sources, the judges rejected the Charter argument and even refused to modify the common law.<sup>98</sup> The conceit of *National Post* is that section 2(b)'s values are not at risk when a privilege is claimed, because the Wigmore test incorporates those values in balancing confidentiality against disclosure.<sup>99</sup> Yet rhetoric is no substitute for structured criteria or bright line tests that are designed to protect constitutional entitlements. Nor can a balancing of interests that is based on "common sense and

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<sup>96</sup> *National Post*, *supra*, note 10, at paras. 33, 65 and 70 (recognizing the importance of confidential sources and their need to be protected from disclosure); see also para. 48 (describing statutory protection for confidential sources in other jurisdictions), and para. 66 (discussing U.K. case law on this issue).

<sup>97</sup> *Id.*, at para. 28 (providing a list of important stories which were brought to light by investigative reporting).

<sup>98</sup> *Id.*, at para. 41. See also paras. 30, 31 and 33 (recognizing that "[t]he appellants and their experts make a convincing case that unless the media can offer anonymity in situations where sources would otherwise dry-up, freedom of expression in debate on matters of public interest would be badly compromised" and "[I]mportant stories will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment").

<sup>99</sup> *Id.* (claiming that "the history of journalism in this country shows that the purpose of s. 2(b) can be fulfilled without implying a constitutional immunity").

good judgment” satisfy the standard of rigour required by the Charter.<sup>100</sup> Of equal concern is Binnie J.’s assertion that the onus “will rarely play a pivotal role at the fourth step”.<sup>101</sup> To the contrary, the burden of proof can be determinative, as here, where the Court held that McIntosh and the *National Post* failed to prove that the protection of confidentiality outweighed the production of the envelope and bank document.<sup>102</sup> It is not so clear that authorities would have been able to justify the violation of the confidential relationship under a standard for class privilege or the *Dagenais/Mentuck* test.<sup>103</sup>

### 3. Wigmore Balancing

In undertaking the balancing of interests under Wigmore’s fourth step, Binnie J. recognized that the criminal investigation could be “contrived to silence improperly the secret source”, but rejected that possibility in *National Post*, because “[t]he alleged forgery is distinct from whistleblowing.”<sup>104</sup> In making that remark he assumed the question at issue, which was whether the Crown had sufficiently established a *bona fide* forgery investigation to justify coercive orders against members of the press. Moreover, though the threshold is low for search warrants, it is accepted that special considerations apply when members of the press or media are targeted.<sup>105</sup> A press-sensitive approach to the orders was *a fortiori* essential in *National Post*, where authorities sought access to a document implicating the prime minister in unethical conduct. The stakes were high, and not as one-sided as the majority opinion suggested.

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<sup>100</sup> *Id.*, at para. 60.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*, at para. 91.

<sup>103</sup> One example, among several, is *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.D.C. 1998) (finding in favour of a privilege for the “Drudge Report” because the party seeking access to a confidential source did not meet its burden to justify disclosure and therefore disprove the privilege).

<sup>104</sup> *National Post*, *supra*, note 10, at para. 62 (citing *O’Neill*, *supra*, note 6). The difference, in his view, is that “[i]n terms of getting out the truth, the ‘leak’ of a forged document undermines rather than advances achievement of the purposes of the privilege claimed by the media in the public interest” (emphasis in original). *Id.* That view presupposes the question in issue, which was whether or not the document was a forgery, for if it was not, the leak fell squarely within the purposes of the privilege.

<sup>105</sup> *Lessard*, *supra*, note 49, at 444 (itemizing nine factors that must be considered before a search warrant can be ordered against a member of the press).

The probative value of the evidence was a key point in the balancing of interests here. If disclosure is compelling when the evidence has strong probative value, it follows that confidentiality should be protected when the information at stake is of little or no probative value. Parenthetically, this is precisely why the onus matters in these cases.<sup>106</sup> In this instance the record showed that X did not know where the document came from or who had sent it, in which case DNA testing might reveal X's identity but would leave the remote source of the document unknown.<sup>107</sup> This did not deter Binnie J., who found little reason to take X's claim of ignorance at face value. As he explained, the police are "not required to accept as true the version of events told by X as relayed through Mr. McIntosh, who has his own interest in the outcome of this litigation"<sup>108</sup>.

It is a fair point, as X could have hoped to steer suspicion away from himself by pointing to a remote source. Yet X was not the only one who had an interest in self-serving claims. By alleging forgery, the prime minister became the victim of wrongdoing and was able to deflect attention from a scandal that had provoked raucous exchanges in the House of Commons, and was still front-page news a few days before the leak.<sup>109</sup> In addition, the record contained at least some evidence that the true purpose of the search was to find the leak, and concerns about the integrity of the bank's documents cast further doubt on the legitimacy of the search.<sup>110</sup> As Abella J. observed, if the envelope would not expose the forger, "the only purpose for learning the confidential source's identity is to discover who had created this public and awkward controversy".<sup>111</sup>

In any case, the documents were of questionable probative value because they had been extensively handled and it was doubtful that they

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<sup>106</sup> It is the difference between imposing a burden on the evidence-seeking party to establish that the information has sufficient probative value to defeat a presumption of confidentiality, and requiring the privilege holder to rebut a presumption in favour of disclosure, by showing that the evidence does not have sufficient probative value to warrant the breach of a confidential promise.

<sup>107</sup> *National Post*, *supra*, note 10, at paras. 135-139 (*per* Abella J., pointing out that the documents were marginal, at best, in advancing the forgery investigation).

<sup>108</sup> *Id.*, at para. 75.

<sup>109</sup> *Supra*, note 38 ("PM kept stake in club").

<sup>110</sup> McIntosh Affidavit, *supra*, note 20, at paras. 248-249 (deposing, at para. 248, that the RCMP officer stated that "there are confidential documents circulating and my job is to put a stop to it").

<sup>111</sup> *National Post*, *supra*, note 10, at para. 140 (also stating that "[c]uriosity about the identity of a confidential source may be understandable, but is never, by itself, an acceptable basis for interfering with freedom of the press").

would identify the source.<sup>112</sup> Justice Binnie addressed that concern by pointing to X's fear of being discovered, as though it demonstrated guilt and improved the probative value of the evidence.<sup>113</sup> In fairness to X, there is little reason to suppose that X had any idea what DNA testing might find, and it is well known that confidential sources live in fear of being found, whether or not discovery is likely. A *bona fide* whistleblower would be just as terrified of being discovered as a person who forged a document to mislead the public about the prime minister's ethics.

It is even more remarkable that Binnie J. would have upheld the orders even if the search was "*extremely* unlikely" to yield the evidence being sought.<sup>114</sup> Translated, this means that law enforcement prevails even when the probative value of the evidence approaches the vanishing point. To explain, Binnie J. reasoned that while confidentiality needs no protection when a source's identity will not be disclosed, the interest in "correctly disposing" of an investigation is constant and remains high — regardless and in spite of the evidence.<sup>115</sup> In other words, the relative weakness of the evidence does not lower the balance on law enforcement's side of the scale. Yet there surely is no balancing when one side of the equation is fixed to win, and is unmovable in the face of the evidence.

Nor did Binnie J. hesitate to make adverse comments about McIntosh's relationship with X. Though it had little to do with the question of probative value, he faulted McIntosh for giving X a "binding" promise of confidentiality; he unquestionably thought it unwise for the reporter to do so without knowing the identity of the source, or whether the document had been forged.<sup>116</sup> In fairness, the reporter's affidavit had simply explained, from a journalist's perspective, why the

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<sup>112</sup> *Id.*, at para. 136 (*per* Abella J.).

<sup>113</sup> *Id.*, at para. 72 (stating that "even X believed that forensic testing could advance the investigation to his or her detriment"); see also *National Post – OCA*, *supra*, note 52, at para. 109 (stating that "[a]t the very least, X's request [that McIntosh destroy the documents] shows that X believed disclosure ... would advance the investigation").

<sup>114</sup> *National Post*, *id.*, at para. 74 (emphasis added).

<sup>115</sup> *Id.*

<sup>116</sup> As he explained, "[t]he bottom line is that no journalist can give a source a total assurance of confidentiality", and "a source who uses anonymity to put information into the public domain maliciously may not in the end avoid a measure of accountability." *Id.*, at para. 69.

promise was made and how it would be affected were he to discover that he had been misled.<sup>117</sup>

In commenting on the relationship between McIntosh and his source, Binnie J. made it very clear that a journalist cannot give promises that have the force of law.<sup>118</sup> Though correct in law, his scold missed the point of a journalist's undertaking, which is to build trust and encourage sources to release information that is in the public interest. As a matter of professional practice, journalists are entitled to make and keep promises to their sources; such promises will be honoured unless the journalist is ordered, in a legal proceeding, to break that pledge and reveal confidential information. At that point the journalist must decide whether to comply with the order or keep the promise and go to jail.<sup>119</sup>

The low probative value of the evidence provided reason enough for the Court to quash the orders, but there is more. In “weighing up”, Binnie J. indicated that the nature and seriousness of the offence should be measured against the value of a promise of confidentiality.<sup>120</sup> The Court was so concerned about the document as *actus reus* that the offence, its roots in political scandal and the irregularities in the evidence hardly mattered at all. The Ontario Court of Appeal had described the forgery as “an especially grave and heinous crime”, and accused the reporter and newspaper of “shielding a potential wrongdoer from prosecution for a serious crime”.<sup>121</sup> Justice Binnie went a step further in explaining, by way of analogy, how the law would deal with a lawyer who purported to claim a privilege after hiding a murder weapon or suppressing tapes of violent sexual crimes.<sup>122</sup> It was not fair to compare murder weapons and violent sex tapes to the alleged forgery in this case, which did not involve physical harm, engage safety or security interests, or pose any threat of violence. As Abella J. observed, it was fundamentally unhelpful, “[o]n a continuum of serious criminality”, to compare “a possible forgery of a possible debt” with the Paul Bernardo murder scenario.<sup>123</sup>

<sup>117</sup> *Id.*, at paras. 16-18 (summarizing paras. 221-229 in the McIntosh Affidavit, *supra*, note 20).

<sup>118</sup> *Id.*, at para. 77 (stating that “[i]t is the courts” ... and not individual journalists or media outlets, that must ultimately determine whether the public interest requires disclosure”).

<sup>119</sup> See, e.g., Judith Miller, “Why Confidential Sources are Important and Why I Would Go to Jail to Protect Them” (Winter 2005) Communications Lawyer, at 8-9.

<sup>120</sup> *National Post*, *supra*, note 10, at para. 74.

<sup>121</sup> *National Post* – OCA, *supra*, note 52, at paras. 117-118.

<sup>122</sup> *National Post*, *supra*, note 10, at para. 65 (citing the example of Ken Murray and the Bernardo-Homolka tapes).

<sup>123</sup> *Id.*, at para. 141.

On the other side of the balance, the Court paid little attention to the “deleterious” consequences of violating a confidential newsgathering relationship. The evidence showed that X was skittish from the outset and only came forward, after initially refusing to assist, through an intermediary. Not only would DNA testing potentially show who sent the envelope and bank document, in doing so it would also disclose who McIntosh’s source was in reporting on the prime minister’s lobbying with the bank. At the very least, the Court should have considered the totality of McIntosh’s relationship with X, including the whistle-blowing information he provided on Mr. Chrétien’s interference with BDBC decision-making.<sup>124</sup> In this instance, evidence that had little to offer the truth-seeking function seriously compromised a confidential newsgathering source who played an important role in the Shawinigate stories *prior to the leak*. In such circumstances, the balance unquestionably favoured confidentiality over disclosure.<sup>125</sup>

Also missing from the Court’s consideration of the interest in protecting confidentiality was a broader perspective on the issues at stake. Though the bank document surfaced at a critical moment in the Shawinigate saga, it constituted one piece, albeit a dramatic one, of a larger story. The Court’s focus on the forgery and the imperative to investigate placed McIntosh’s use of confidential sources — both before and after the leak — at risk. His investigative reporting produced a series of stories that were based on information obtained from a variety of sources. The Court’s failure to consider the broader context of investigative reporting on Shawinigate skewed the analysis by shortchanging the privilege-protecting side of the ledger and giving the advantage to law enforcement’s concerns.

In broader compass, the use of coercive orders to deter investigative reporting of a scandal then in progress could only have enormous consequences for section 2(b)’s pursuit of transparency and accountabil-

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<sup>124</sup> Despite noting that “the problematic transmission from X must be assessed in light of a history of providing information and documents that turned out to be authentic”, Binnie J. either overlooked X’s earlier whistle-blower status or did not consider it relevant in determining whether the envelope and loan document were privileged. *Id.*, at para. 76.

<sup>125</sup> *Id.*, at para. 74 (stating that even if the envelope is “extremely unlikely” to disclose the identity of the source(s), the court would still balance the *weak public interest* in protecting an identity that is not likely to be disclosed against the strong public interest in the production of physical evidence of the offence (emphasis added)). See also *National Post – OCA*, *supra*, note 52, at para. 111 (stating that “[i]f it is a remote and speculative possibility that forensic testing will reveal the identity of the person who sent the document, then disclosing the document and envelope will not likely negate any confidence”).

ity in public affairs. As Benotto J., the reviewing judge, recognized, “society as a whole is affected” when the journalist-source relationship is undermined, and that is because it is through “confidential sources that matters of great public importance are made known”.<sup>126</sup>

Finally, the Court’s analysis also lacked an element of proportionality. The allegation of forgery should have been considered against the backdrop of an award-winning investigation that exposed the prime minister’s interference with BDBC operations, as well as a pattern of irregular loans, grants, and awards to businesses and individuals in the St-Maurice riding. McIntosh’s work fuelled debates in the House of Commons and the public domain, which led to important reforms.<sup>127</sup> Even before the Quebec sponsorship scandal, Shawinigate called attention to the need for monitoring, oversight, and reform on questions of ethics and conflict of interest in parliamentary and government affairs.

Andrew McIntosh’s legacy is not that of a zealot reporter who misplaced his confidence in a rogue informant and brought the coercive power of the state down on himself and his newspaper. If the leaked document was authentic, the source was a whistle-blower who took significant risks in sharing important information about the prime minister. Had the reporter and his newspaper not taken the lead, the complex of events and transactions that constitute Shawinigate might not have been flushed out and brought to the public’s attention. This is precisely the kind of public interest newsgathering that should be protected by the courts.<sup>128</sup>

On the other hand, granting a privilege in these circumstances might mean that a forgerer would go unpunished, with adverse implications for the prime minister’s reputation. Even then, the public interest in knowing of the circumstances surrounding the BDBC’s loan to the Auberge, not to mention the other details of Shawinigate, outpoints the interest in prosecuting the offender. From that perspective, there is no contest when an investigation into the use of public moneys to support a system of

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<sup>126</sup> *National Post* – warrant review, *supra*, note 34, at para. 61.

<sup>127</sup> The BDBC’s rules were changed, and the government took steps to prevent ministers from using their influence with or seeking favours from Crown corporations: McIntosh Affidavit, *supra*, note 20, at paras. 239 and 241.

<sup>128</sup> “The remote possibility of resolving the debt forgery is far from sufficiently significant to outweigh the public benefit in protecting a thorough and responsible press”: *National Post*, *supra*, note 10, at para. 141 (*per* Abella J.).

patronage and favours is measured against the alleged commission of one offence.<sup>129</sup>

Once the Court decided against McIntosh and the *National Post* on the question of privilege, there was little chance the orders would be found unreasonable under section 8 of the Charter.<sup>130</sup> Still, the burden of proof could have made a difference in this case: whereas the would-be privilege holder must establish the claim under Wigmore's four-step test, the burden is on the authorities to show grounds for a search warrant. This part of the case also brought the relationship between sections 2(b) and 8 into the forefront again. Several years earlier, the Court upheld search warrants against members of the press in *Lessard* and *New Brunswick* without finding a breach of section 2(b).<sup>131</sup> In lieu of finding a violation in those cases, the Court prescribed additional section 8 criteria for searches against members of the press.<sup>132</sup>

Unlike *National Post*, in which the target of the search was a confidential source, *Lessard* and *New Brunswick* concerned police access to CBC video evidence, much of which had already been broadcast. Though it upheld the warrants, members of the Court took care to acknowledge the implications of these decisions for other newsgathering practices, such as reliance on confidential sources.<sup>133</sup> Justice McLachlin, who was the only member of the Court to participate in the earlier cases and *National Post*, wrote vigorous dissents that explained why it was imperative to find a violation of section 2(b) when search warrants are ordered against the press.<sup>134</sup>

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<sup>129</sup> The prime minister would not be without a remedy because he could sue in defamation for any actionable damage to his reputation. There, a journalist's attempt to avoid liability by taking cover behind a confidential source would be less compelling. Jean Chrétien threatened litigation at one point but has not brought any proceedings in defamation against Andrew McIntosh or others who wrote and commented on Shawinigate. See *Globe and Mail*, *supra*, note 11, at para. 61.

<sup>130</sup> *National Post*, *supra*, note 10, at paras. 78-88 (dealing mainly, though not exclusively, with the requirement of notice to the media).

<sup>131</sup> *Lessard*, *supra*, note 49; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] S.C.J. No. 88, [1991] 3 S.C.R. 459 (S.C.C.).

<sup>132</sup> *Lessard*, *id.*, at 445.

<sup>133</sup> *Id.*, at 452 (*per* McLachlin J., explaining the ways — including consequences for confidential sources — in which search warrants impinge on the underlying values of freedom of the press, and at 430 (*per* La Forest J., concurring, but voicing concerns about the implications for newsgathering and access to sources).

<sup>134</sup> *Id.*, at 449 (stating that “[b]y specifically referring to freedom of the press, s. 2(b) affirms the special position of the press and media in our society” and adding that “[t]he history of freedom of the press in Canada belies the notion that the press can be treated like other citizens or legal entities when its activities come into conflict with the state”).

Though *Lavallee* was decided in the interim, *National Post* failed to reconsider the relationship between sections 2(b) and 8. Failing to do so underscored the double standard between journalist-source relations and the solicitor-client relationship which, as discussed above, has been singled out by the Court for special treatment. Though also a section 8 search case, *Lavallee* found that section 488.1 of the Code violated section 7, and stated that the need for the full protection of the privilege is “activated” when the privilege holder — the solicitor’s client — is the target of a criminal investigation.<sup>135</sup> Justice Arbour spoke for all members of the Court in declaring that “any information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice”.<sup>136</sup> Despite *Lavallee*’s conclusion that the search violated section 7’s unenumerated principles of fundamental justice, the Court did not even discuss whether a search of the press violated section 2(b)’s express guarantee.<sup>137</sup> Though the search in *National Post* was more intrusive, the McLachlin dissent in the earlier cases was all but forgotten, and the Chief Justice silently joined the majority opinion.<sup>138</sup>

Otherwise, the *Lessard* criteria did little in *National Post* to provide meaningful protection for the press. Under *Lessard*’s mini-press doctrine, a warrant that does not violate section 2(b) must nonetheless comply with prescribed criteria. One of its nine elements states a requirement that there be “sufficient detail” to support a warrant where press freedom is at stake.<sup>139</sup> A standard of vigilance was especially needed in *National Post*, given irregularities in the evidence, the history of Shawinigate, and the impact of the orders on confidential newsgathering sources. Where circumstances called for a close and probing look at the evidence, the Court instead took the orders at face value and assumed that their purpose was to investigate a forgery, not to find and

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<sup>135</sup> *Lavallee, supra*, note 85, at para. 23.

<sup>136</sup> *Id.*, at para. 24.

<sup>137</sup> Despite recognizing that there was a “head-to-head clash between the government and the media”, which implicated the media’s s. 2(b) and s. 8 interests, the Court bypassed the s. 2(b) issue and went straight to the s. 8 criteria for reasonableness in a s. 2(b) context. *National Post, supra*, note 10, at paras. 78-79.

<sup>138</sup> *Id.* (citing McLachlin J.’s reasons in *Lessard*, without addressing the question of a s. 2(b) breach).

<sup>139</sup> *Lessard, supra*, note 49, at 445.

halt a whistle-blower.<sup>140</sup> Despite recognizing the “special position” of the media<sup>141</sup> the majority opinion was oblivious to the risk that the state might have exercised its coercive powers improperly, to expose a whistle-blower. Finally, the availability of alternative sources was another issue that was not adequately considered by Binnie J.’s majority opinion.<sup>142</sup> Though it is an important factor in any decision, the search could still have been found unreasonable, even if the information was not available from other sources.

A second, critical issue concerned the *ex parte* nature of the proceedings and whether the targets of the orders should have received notice and granted a right to appear. Denying the reporter and newspaper status in the proceedings here — where the state sought access to a source who had revealed damaging information about the country’s highest elected officer and a Crown corporation — makes it difficult to imagine when the press would ever be entitled to procedural justice. Only LeBel J. and Abella J. found that McIntosh and the *National Post* should have had notice and an opportunity to appear at the warrant hearing.<sup>143</sup>

The Court’s discussion of Wigmore balancing and the *Lessard* press doctrine shows how poorly the judges responded to the issues at stake in *National Post*. At the level of principle, the judges formed a line of resistance against a concept of newsgathering that would support and protect democratic values. That intransigence was reinforced by the Court’s disregard of the power dynamics at work in the search warrant contest, and of Shawinigate’s central contributions to values of transparency and accountability.

Despite claiming that section 2(b)’s values would inform the balancing between confidentiality and disclosure, the Court took a negative

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<sup>140</sup> Note that Binnie J. compared the circumstances of this case to those of *O’Neill* and *Miller*, *supra*, note 6. In discussing *O’Neill*, where an anonymous government source leaked false and damaging information about Maher Arar to a reporter, he commented, though *O’Neill* was not about whistle-blowing, that “[t]he alleged forgery is distinct from whistleblowing”; *National Post*, *supra*, note 10, at para. 62. Then he drew an analogy to *Miller* to explain that “a source who uses anonymity to put information into the public domain maliciously may not in the end avoid a measure of accountability”; *id.*, at para. 69.

<sup>141</sup> *Id.*, at paras. 30, 31 and 33.

<sup>142</sup> *Lessard*, *supra*, note 49, at 445 (stating that although it is not a constitutional requirement, the availability of alternative means is an important consideration in determining reasonableness under s. 8). Though it was discussed obliquely, there was a difference of opinion on this issue in *National Post*; while Binnie J. stated that the document offered evidence that would not be available from any other source, Abella J. maintained that the police had not established the unavailability of alternative sources of evidence. *National Post*, *supra*, note 10, at paras. 21 and 149-151.

<sup>143</sup> *Id.*, at paras. 94-97 (*per* LeBel J.) and 149-158 (*per* Abella J.).

view of McIntosh's newsgathering practices and his handling of X. This led to a formalistic and uneven balancing of interests. By focusing on the possible commission of an offence, the Court discounted the public interest in the larger story of Shawinigate. From the outset, that story was grounded in McIntosh's relationships with confidential sources, and the trust he carefully built in the course of investigative reporting that began in 1999 and continued through 2002. Not only did the orders against the reporter and newspaper place X at risk, they jeopardized McIntosh's network of sources and the entire Shawinigate investigation.

In the end, the salutary benefits of the search warrant and production order were open to question while the deleterious consequences, not only for McIntosh and his sources but for the practice of investigative reporting, were unquestionably serious.<sup>144</sup> Contrary to the conclusion of the Court, the public did not have a strong interest in a clumsy investigation of a leaked document that might not have been forged, and in any case was unlikely to reveal the identity of the wrongdoer. By contrast, McIntosh would not have been able to tell the Shawinigate story without protecting his sources. It is clear, in such circumstances, that protecting those sources so that Shawinigate could be revealed was a higher priority than investigating the alleged forgery.

### III. MACHOUETTE AND THE QUEBEC SPONSORSHIP SCANDAL

*Globe and Mail v. Canada* was the other bookend in an extraordinary year at the Court for confidential newsgathering sources.<sup>145</sup> There, the question of protecting a source arose from Daniel Leblanc's investigative reporting on the Quebec sponsorship program. In this instance, the civil setting of this case generated a different dynamic and a more positive outcome for confidential newsgathering sources. By its own terms, *National Post* is limited to its particular circumstances, and the Court

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<sup>144</sup> *Id.*, at 142 (*per* Abella J., explaining how the investigation offered no more than "the slightest possible benefit to an investigation of an alleged forgery", but would cause a "far weightier injury to the press interests at stake", and concluding that "[t]he major demonstrable harm, with no countervailing benefit, is to the ability of the press to carry out its public mandate").

<sup>145</sup> *Globe and Mail*, *supra*, note 11. The Court heard two appeals arising from these events at the same time; the second concerned a publication ban that was imposed on Leblanc and prohibited him from reporting "anything whatsoever" about the litigation (*id.*, at para. 73), including settlement discussions between the federal government and Groupe Polygone.

confirmed that view of the forgery case in *Globe and Mail*.<sup>146</sup> *National Post* stated its support for confidential newsgathering sources, in principle, but left it to *Globe and Mail* to propose source-protective criteria. That is why *Globe and Mail* will be the more influential of the two decisions, over time.

By appearances, the sponsorship program, undertaken following Quebec's near-miss sovereignty referendum in 1995, was a colossal misadventure. This regrettable narrative featured Liberal Party operatives, the veneer of a government-sanctioned sponsorship program, and federal moneys flowing to Quebec businesses under a scheme involving fraud and kickbacks. These tawdry transactions led to a public process that culminated in the Gomery Report and several criminal prosecutions, after which the federal government commenced civil proceedings in Quebec to recover moneys paid for work that was not done.<sup>147</sup> One of the defendants in this litigation was Groupe Polygone ("Polygone"), which raised a limitation claim that threatened Leblanc's relationship with the confidential government source known as MaChouette.<sup>148</sup> Though the issue arose through Polygone's attempt to question government employees, the *Globe* sought a revocation order, and on cross-examination Leblanc refused to answer questions that might compromise MaChouette. The issue before the Supreme Court was whether the reporter was entitled to a testimonial privilege or immunity in these circumstances.<sup>149</sup>

After rehearsing the Court's earlier decision, including its rejection of a constitutional model, LeBel J.'s majority opinion reintroduced the constitutional considerations at stake and placed them in the forefront of his reasons. Not only did he refer to the constitutional status of newsgathering several times, he incorporated Charter-like criteria into *Globe and Mail*'s standard to determine immunity for a confidential source.<sup>150</sup>

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<sup>146</sup> *Id.*, at para. 25 (confirming key differences between the cases to determine "how, and to what extent, the majority reasons in *National Post* are equally applicable" to the sponsorship appeal).

<sup>147</sup> *Supra*, note 3.

<sup>148</sup> Polygone sought to examine several federal employees in an attempt to learn when the federal government first became aware of problems with the sponsorship program. The government's action could be time-barred if Polygone could show when it first discovered those problems.

<sup>149</sup> The motion judge rejected the privilege and an unsuccessful appeal from that order led the *Globe* to seek a discontinuance of the revocation proceedings, which was also refused. It meant that Leblanc would have to testify, and the appeal came to the Supreme Court on that issue: *Globe and Mail*, *supra*, note 11, at paras. 8-9 (summarizing the proceedings on the privilege issue).

<sup>150</sup> *Id.*, at paras. 28, 29, 31 and 48 (stating, in para. 28, that "[t]his is also an area of the law which is influenced by constitutional and quasi-constitutional instruments"; adding, in para. 29 that the Charter and Quebec Charter, *infra*, note 151 "protect several important rights that may be at

In spirit if not in form, the Court adopted a constitutional or near-constitutional approach to confidential newsgathering sources.

The case posed a delicate issue about the relationship between the common law and the law of Quebec, including the Quebec *Charter of human rights and freedoms*<sup>151</sup> and the civil law. In addressing the status of Wigmore in Quebec, LeBel J. joined up the common law, police-informer privilege, and the relationship between a journalist and her source.<sup>152</sup> He invoked the example of an informer's privilege to show that the common law is a vital part of Quebec law that does not threaten the civil law tradition.<sup>153</sup> In addition, the analogy between informers and newsgathering sources further distinguished the sponsorship case from *National Post* and enabled LeBel J. to propose a more protective approach to journalist-source relations.

While the police-informer relationship is protected as a class privilege, the relationship between a journalist and her source is a case-by-case privilege. Despite that difference between the two, LeBel J. equated the exclusionary rule for evidence protecting police informants with the issue that arises when journalists seek protection for confidential sources.<sup>154</sup> In due course that brought him to the question of relevance and the role it plays as a check on fishing expeditions.<sup>155</sup> There, LeBel J. found that the general rule that applies to litigation under the Quebec *Civil Code* applies equally to evidentiary privilege and the protection of confidential relationships.<sup>156</sup>

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stake in a claim of journalist-source privilege"; commenting, in para. 31, on the "complex environment" surrounding journalist-source privilege, including "[g]eneral principles and rules that belong to other areas of law, particularly constitutional law"; and declaring, in para. 48, that "constitutional rights under the *Canadian Charter* and quasi-constitutional rights under the *Quebec Charter* are engaged by a claim of journalist-source privilege").

<sup>151</sup> R.S.Q. c. C-12 [hereinafter "Quebec Charter"].

<sup>152</sup> The key decision on police-informer privilege is *Bisaillon v. Keable*, [1983] S.C.J. No. 65, [1983] 2 S.C.R. 60 (S.C.C.) [hereinafter "*Bisaillon*"], which held that the common law rule on this privilege applies in the province of Quebec.

<sup>153</sup> *Globe and Mail*, *supra*, note 11, at paras. 49-53 (explaining, by reference to *Bisaillon*, that there is a basis for applying the common law in Quebec to questions of journalist-source privilege).

<sup>154</sup> *Id.*, at para. 51.

<sup>155</sup> *Id.*, at para. 56.

<sup>156</sup> *Id.* (citing art. 2857 of the *Civil Code*, S.Q. 1991, c. 64, which states "[a]ll evidence of any fact relevant to a dispute is admissible ...", and adding that "if the party seeking disclosure of the identity of the source cannot establish that this fact is relevant, then there will be no need to go on to consider whether the privilege exists" (emphasis added)). Though he did not refer to them, the cases and rules that govern access to third party records, and the relevance threshold that applies in those circumstances, are clearly analogous; *Mills*, *supra*, note 64.

As noted above, *National Post* stoutly resisted the suggestion that the access-seeking party has any onus to justify the violation of a confidential relationship. In highlighting relevance and its gatekeeping role, *Globe and Mail* qualified that monolithic view of the burden; rather than change the law, LeBel J. simply emphasized that to be admissible, evidence must be relevant and that the burden to show relevance is on the party who places reliance on the evidence. Significantly, he treated this routine principle of civil litigation as a threshold and an important check on any unnecessary interference with the constitutional rights of the press.<sup>157</sup> As he explained, this step “constitutes an *added buffer* against any *unnecessary intrusion* into aspects of *the s. 2(b) newsgathering rights of the press*”.<sup>158</sup>

Justice LeBel also discussed the criteria that must be addressed under Wigmore’s open-ended balancing where, as he put it, the “grunt work” is done.<sup>159</sup> When disclosure is sought in the proceedings and whether the information is central to the dispute are important variables in determining the question of privilege. In functional terms, each criterion speaks to the relevance and necessity of the evidence in the truth-seeking process. As LeBel J. explained, disclosure will be less compelling when the information is not vital, either because it is not essential at a particular stage, or because it is not essential at all.<sup>160</sup> He indicated that whether a journalist is a party to the litigation will also have a bearing on the question of confidentiality versus disclosure.<sup>161</sup>

In addition, LeBel J. emphasized that evidence that is available by other means cannot be compelled by violating a confidential relationship. In his view, access to such information should only be granted when other means have been unsuccessfully attempted and exhausted. Once

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<sup>157</sup> In this the analysis bears resemblance to the relevance threshold in the cases on third party production. *Mills, id.*; R. Pomerance, “Compelling the Message from the Medium: Media Search, Warrants, Subpoenas and Production Orders” (1997) 2 Can. Crim. L. Rev. 5, at 29 (considering whether the Court’s decision in *O’Connor* might apply to questions of disclosure arising in the media).

<sup>158</sup> *Globe and Mail, supra*, note 11, at para. 56 (emphasis added).

<sup>159</sup> *Id.*, at para. 57.

<sup>160</sup> Though the identity of a confidential source might be relevant under the broad definition of relevance in civil proceedings, “that fact may nevertheless be so peripheral to the actual legal and factual dispute between the parties that the journalist ought not to be required to disclose the source’s identity”. *Id.*, at para. 60.

<sup>161</sup> When a journalist is a party to the litigation, the identity of the source may be a core issue; when she is a third party witness, it may be more difficult to establish that the journalist’s source is central to the dispute.

again, he emphasized that the requirement of necessity acts as “a further buffer against fishing expeditions and any unnecessary interference with the work of the media”.<sup>162</sup> By focusing on necessity and alternative means, he adopted criteria that are derived from the *Dagenais/Mentuck* test, and essentially finessed the Charter by adopting its criteria without creating a constitutional framework.<sup>163</sup> Unlike *National Post*, which presented journalist-source privilege as an exception that was subject to an unremitting burden of proof, *Globe and Mail* proposed a standard that would ensure that “[r]equiring a journalist to breach a confidential undertaking with a source *should only be done as a last resort*”.<sup>164</sup> The shift in approach from one case to the next could hardly have been more dramatic.

The Court’s approach to the publication ban reinforced the protective tone of its discussion of confidential newsgathering sources. In the court below, the judge issued the order in a peremptory manner, though no request was made, evidence heard or submissions allowed.<sup>165</sup> He was openly annoyed that Leblanc had published reports about confidential settlement negotiations between the parties that he had learned about from a confidential source.<sup>166</sup> On its face the ban appeared impossible to justify under *Dagenais/Mentuck*, though the Court’s earlier decisions on bail hearing bans made its response in this case slightly more difficult to predict.<sup>167</sup>

Justice LeBel strongly defended the reporter’s right to report confidential settlement discussions, and was emphatic that Leblanc could publish any information he obtained by legal means. Initially, he found that the appeal should be allowed simply because the judge imposed the ban without hearing submissions from the parties.<sup>168</sup> From there he went on to make revealing comments about Leblanc’s entitlement. Specifically, he held that Leblanc was free to use the information, even if his

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<sup>162</sup> *Id.*, at para. 63.

<sup>163</sup> *Id.*, at paras. 62-65.

<sup>164</sup> *Id.*, at para. 63 (emphasis added).

<sup>165</sup> *Id.*, at para. 73.

<sup>166</sup> *Id.*, at para. 73 (*per de Grandpré J.*, stating that “[w]hat I don’t want to hear and what I don’t want to read in the newspapers is an article like the one that appeared in *The Globe and Mail* on October 21”).

<sup>167</sup> *Toronto Star Newspapers Ltd. v. Canada*, [2010] S.C.J. No. 21, [2010] 1 S.C.R. 721 (S.C.C.) (upholding the *Criminal Code*’s publication ban provision for bail hearings).

<sup>168</sup> *Globe and Mail*, *supra*, note 11, at para. 75 (stating that a ban, which “by its very nature infringes the constitutional rights of the party against whom it is imposed, cannot, absent extraordinary circumstances not present here, be imposed *ex proprio motu*”).

source violated a legal obligation to his employer, because “there are sound policy reasons for not automatically subjecting journalists to the legal constraints and obligations imposed on their sources”.<sup>169</sup> In language that could readily apply to confidential newsgathering sources, he added that to bring “stories of broader public importance” to light, “sources willing to act as whistleblowers and bring these stories forward may often be required to breach legal obligations in the process”.<sup>170</sup>

Justice LeBel went on to declare that the law cannot impose any obligation on a journalist “to act as a legal advisor to his or her sources of information”, as to do so would be a “dramatic interference with the work and operations of the news media”.<sup>171</sup> Not only was this a key point in the context of the ban, the same reasoning can apply to the question of privilege; a journalist who can publish information that a source passed along in breach of a legal obligation should in principle also be able to protect that source’s confidentiality.

Justice LeBel then gave the *Dagenais/Mentuck* test a complete airing, and found the publication ban wanting at every stage. Of particular interest is the attention he gave to the ban’s deleterious consequences. In terms of the litigation, he remarked that “[t]here is clearly an overarching public interest in the outcome of this dispute” and stated that upholding the ban would “stifle the media’s exercise of their constitutionally mandated role”.<sup>172</sup> That led him to return, in conclusion, to the issue of the source who acts illegally in revealing information to a member of the press, and to reiterate three key points: that journalists are not obligated to assess the legality of a source’s information; that such an obligation would invite considerable interference with the workings of the media; and that the source’s breach of duty is “often the only way that important stories, in the public interest, come to light”.<sup>173</sup> Just as imposing a ban would be contrary to those interests, violating the relationship between a journalist and her source would undermine the same interests.

To the extent *National Post* and *Globe and Mail* read as dissonant decisions, it is clear that the search warrant case is context-specific. That is why *National Post* should be interpreted, and read down, by the Court’s later decision in *Globe and Mail*. In the end, though the sponsor-

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<sup>169</sup> *Id.*, at para. 85.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*, at para. 97.

<sup>173</sup> *Id.*, at para. 98.

ship decision is more protective of confidential sources and of newsgathering more generally, the question that remains is whether the common law adequately protects newsgathering and the core section 2(b) values at stake when investigative reporting relies on confidential sources.

#### IV. CONCLUSION

On journalist-source privilege, as on other issues affecting section 2(b), the Court has spurned Charter solutions in favour of common law compromises that feature case-by-case decision-making.<sup>174</sup> Under the terms of *National Post* and *Globe and Mail*, the law remains substantially the same, though section 2(b) values more overtly infuse the balancing under Wigmore's fourth step. It is helpful that the decisions open up space for journalist-source privilege, and can be given an interpretation that affords confidential newsgathering sources a broader scope of protection. Still, it must be emphasized that the question is not simply whether confidentiality out-points the argument for disclosure in particular circumstances. Access to confidential sources, as a core element of newsgathering, is threatened whenever legal process is invoked to compel disclosure. The relationship between a journalist and her source is systemic or institutional in nature, and that is why the analysis must transcend the details, even or especially where the source has committed a wrong in passing information along, as is invariably the case.

The discussion has shown that the Wigmore test cannot adequately protect section 2(b)'s interests, and the net gains achieved by these decisions, while welcome, remain insufficient. As Binnie J. emphasized in *National Post*, the burden of proof throughout the four steps of the test remains on the party claiming the privilege. Though *Globe and Mail's* focus on relevance served to ease the burden, it did not alter the Wigmore rule, which requires the privilege holder to prove that the confidential relationship should be protected. Contrary to the claim made in *National Post*, the burden of proof does determine the outcome, and it does matter whether the presumption is for or against the protection of confidentiality. On this point the Supreme Court acknowledged being out of step

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<sup>174</sup> See, e.g., *WIC Radio Ltd. v. Simpson*, [2008] S.C.J. No. 41, [2008] 2 S.C.R. 420 (S.C.C.) and *Grant, supra*, note 68 (rejecting Charter-based solutions in favour of incremental changes to the common law).

with other jurisdictions that require a breach of journalist-source confidentiality to be justified.<sup>175</sup>

Moreover, though *Globe and Mail* proposed source-protective factors, the balancing of interests under Wigmore's fourth step remains open-ended. As such, it fails to set structured requirements that must be met before a confidential relationship can be violated. Hortatory appeals to section 2(b)'s values are no substitute for constitutionally inspired, bright line standards, and investigative reporting cannot be effectively conducted under the uncertainty of a regime that places confidentiality at the mercy of *ad hoc*, case-by-case decision-making. Wigmore provided a generic test that applies to various relationships, and neither incorporates nor reflects the values that define the role of a constitutionally protected free press in a democratic society. This standard was not designed to protect freedom of the press, and is not capable of doing so.

In revealing the limits of judicial initiative and the common law's capacity for reform, these decisions invite a broader process of debate. Leaks are commonplace and information is widely circulated under cover of anonymity. At the same time, the definitional boundaries of the press and media have all but evaporated and what newsgathering is, not to mention who is a journalist, have been thrown into doubt. In this setting it is not surprising that the Court sought refuge in an *ad hoc*, case-driven response. From that perspective, *National Post* and *Globe and Mail* provide the impetus for a broader-based examination of who comprises the press, why its function is valued in democratic society, and how it should be protected by statute, the Charter and the common law.<sup>176</sup>

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<sup>175</sup> *National Post*, *supra*, note 10, at para. 48. Wigmore's apparatus of class and case-by-case privilege has no influence in the analysis of this question in the United States. There, the journalist-source relationship is protected by 49 out of 50 states, as well as by the District of Columbia and federal common law. Though standards vary across jurisdictions, the burden to meet a standard of justification is routinely placed on the party seeking access to confidential, privileged information. In Commonwealth countries, statutory provisions create a *prima facie* privilege and place the onus of justification on those who seek access to confidential information.

<sup>176</sup> The follow-up to this article is a proposal for legislation that would define the privilege and the circumstances in which it would be protected from disclosure. Unlike a case-to-case approach, a statutory privilege can establish definitions to determine who can claim a privilege, when it can arise, whether there are exceptions and what they are, and what criteria should be applied to determine whether a promise of confidentiality will be protected or broken in particular instances.