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The Journalist-Source Privilege in Quebec Civil Law: *Globe and Mail v. Canada (Attorney General)*

Christian Leblanc, Marc-André Nadon and Émilie Forgues-Bundock

I. INTRODUCTION

Investigative journalism plays an important role in the preservation of democracy. In fact, the press has often been regarded and referred to as the “watchdog of democracy”. Behind reporters there are often anonymous sources, people who are not authorized to disclose certain information or documents to the press. History has shown that, in many cases, these sources are essential to the uncovering and reporting of matters of public interest such as the Watergate scandal during the 1970s and the sinking of the *Rainbow Warrior* in 1985.¹

More recently in Quebec, investigative journalism has brought to light flaws in municipal governments as well as questionable practices in the construction industry. Leading this wave of reports, the affair best known as the “Sponsorship Scandal” rocked the political and media landscape in Canada and confirmed the importance of investigative journalism in a free and democratic society. The leaking of confidential information to a reporter by anonymous sources had prompted then Prime Minister Paul Martin to order a public inquiry into the Sponsorship Program set up by the federal cabinet following the 1995 referendum on Quebec’s sovereignty.

It is in this context that the Supreme Court of Canada has examined the journalist-source privilege in Quebec civil law. In *Globe and Mail v.*...
Canada (Attorney General), the country’s highest court confirmed the mixed (civil law and common law) nature of Quebec’s civil procedure and evidence law and established an analytical framework to determine in which circumstances a journalist-source privilege will be recognized, reaffirming at the same time the essential role played by the media in the preservation of democracy.

This article analyzes the recognition of the journalist-source privilege in Quebec. Most jurisdictions offer some protection to journalist-source relationships; however, not all of them implemented the same model of protection. In order to better understand the context of this recognition, we begin with an overview of the law in a few foreign jurisdictions. Such an exercise gives us an opportunity to better situate the protection Canadian journalists now enjoy under the Court’s decision in Globe and Mail.

The complexity of this makes it unique and therefore worth looking at in more depth. The first difficulty that the Supreme Court of Canada faced was its own refusal to recognize a constitutionally entrenched privilege in National Post a few months ago. The second hurdle for the Supreme Court of Canada was the absence of a specific statutory provision that could incorporate a journalist-source privilege in the Canadian Charter of Rights and Freedoms or the Quebec Charter of Human Rights and Freedoms. The last and not least challenge for the Supreme Court of Canada was to reconcile the common law with the interpretation of the Civil Code of Quebec in order to apply a common law doctrine to Quebec civil cases.

In order to present a more in-depth analysis, this article will not deal with the validity of the publication ban, which was nonetheless a very important issue in this case. This article does not provide an exhaustive list of the circumstances that could require a journalist to disclose the identity of his or her source. Its purpose is to present the law in Quebec on the recognition of the journalist-source privilege in a civil case, as clarified by the Supreme Court of Canada in Globe and Mail.

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4 R.S.Q. c. C-12 [hereinafter “Quebec Charter”].
5 S.Q. 1991, c. 64 [hereinafter “Civil Code”].
II. FOREIGN LAW

Most jurisdictions offer some protection to journalist-source relationships; however, not all of them implemented the same model of protection. Among the available models, we selected examples that show the three main trends, namely: (1) a constitutionally entrenched privilege (Europe and the United Kingdom); (2) a specific statutory protection (American states, the United Kingdom and Australia to a certain extent); and (3) an implicit protection derived from the common law (as used to be the case in Australia).

1. European Union

Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms recognizes the journalist-source privilege:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Any order forcing a reporter to reveal the identity of a source in connection with a legal proceeding is prima facie a breach of a fundamental right. In Goodwin v. United Kingdom, the European Court of Human Rights held that the journalist-source privilege outweighed a company’s interests in protecting confidential information related to the preparation of its financial statements. In November 1989, Tetra Ltd. was experiencing serious financial problems due to major losses which, some believed,
could have been avoided. The company was about to take out a loan to offset a loss when confidential documents describing the situation were stolen and then given to a reporter from *The Engineer* magazine. Informed of the leak of information and the theft of the documents, Tetra Ltd. applied for and obtained an injunction to prevent publication of the article and any information related to the stolen confidential documents.

In resolving this matter, the European Court of Human Rights reviewed the applicable analytical framework to determine whether the setting aside of the journalist-source privilege is justified in a specific case. Referring to article 10(2) of the *European Human Rights Convention*, the Court noted that it was in the interest of a free and democratic society that freedom of the press be protected. To do so, a balance between competing interests must be sought, namely, those of Tetra Ltd. to prevent the damage it could incur due to the loss of investors’ confidence and to seek legal action against the person who leaked the confidential documents, and those of a free and democratic society in securing a free press. The Court held that, although the goal of the order was laudable, compelling the reporter to disclose the identity of his source was not an appropriate means of achieving it. The undermining of freedom of the press was too great and it was not necessary to protect Tetra’s rights under English law, despite the discretion member States enjoy in applying the *European Human Rights Convention* in their jurisdiction.

2. United Kingdom

As a party to the *European Human Rights Convention*, the United Kingdom recognizes the existence of a journalist-source privilege as set out in article 10 of the *European Human Rights Convention*, a principle also found in English law in article 10 of the *Contempt of Court Act 1981*:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in

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8 *Id.,* at paras. 39-40.
9 *Id.,* at para. 45.
10 *Id.,* at para. 46.
11 *Id.*
the interest of justice or national security or for the prevention of
disorder or crime.12

Article 10 of the Human Rights Act 1998 incorporates article 10 of the
European Human Rights Convention word for word.13 Ashworth Security
Hospital v. MGN Ltd.14 clarified the effect of incorporating this article
into domestic English law.15 In doing so, the House of Lords reiterated
the importance of freedom of expression, freedom of the press and the
journalist-source privilege in a free and democratic society.16 According
to the House of Lords, there is no doubt that this right includes the
freedom to receive or communicate information or ideas without interfer-
ence by public authorities, subject to certain exceptions in particular
circumstances.17

The facts of that case stem from the highly publicized story of the
serial killer Ian Brady, who was arrested for heinous murders committed
in the Greater Manchester area in England during the 1960s.18 Mr. Brady
was declared criminally insane in 1985. Incarcerated, he said several
times, through the media, that he did not wish to be released but that he
claimed at least the right to die. He went on a hunger strike. In its
December 2, 2009 issue, the Daily Mirror published an article that
contained extracts of Mr. Brady’s medical records when he was detained
at the Ashworth hospital. In exchange for the sum of £1,500, the Daily
Mirror had obtained this information from a secret intermediary source,
who had obtained it from a good source, probably someone working at
the hospital. In connection with legal proceedings related to Mr. Brady’s
mental health, the Court ordered the Daily Mirror to testify as to how it
had obtained the medical file and identify any person who had partici-
pated in collecting the information. The disclosure of the identity of the
intermediary source by the newspaper would clearly have allowed the
main source at the establishment to be identified. The Daily Mirror
therefore objected to the order.

According to the House of Lords, a privilege for journalists’ sources
is an essential aspect of freedom of expression and freedom of the press:

15 Id., at paras. 37-40.
16 Id., at paras. 37-38.
17 Id., at para. 37.
18 These killings are commonly referred to as the “Moors murders”.
The fact is that information which should be placed in the public domain is frequently made available to the press by individuals who would lack the courage to provide the information if they thought there was a risk of their identity being disclosed. The fact that journalists’ sources can be reasonably confident that their identity will not be disclosed makes a significant contribution to the ability of the press to perform their role in society of making information available to the public. It is for this reason that it is well established now that the courts will normally protect journalists’ sources from identification.\textsuperscript{19}

Accordingly, the House of Lords reiterated the risks of an order forcing a reporter to disclose the identity of his or her source, namely it would discourage certain sources from confiding in reporters and thus jeopardize to a certain extent freedom of expression, freedom of the press and the public’s right to information.\textsuperscript{20} However, the House of Lords recognized that the journalist-source privilege cannot be absolute, and that circumstances may, according to the context, justify the disclosure of the identity of a confidential source.\textsuperscript{21} In the \textit{Ashworth} case, their lordships were of the view that an order of disclosure was necessary, proportionate and justified. The care of patients in this particular situation was already a challenge and was aggravated by the disclosure of confidential information.\textsuperscript{22} The “pressing social need” in this case was to preserve the confidentiality of patients’ notes and records, thus guaranteeing the relationship of fundamental trust between therapists and patients.\textsuperscript{23}

In conclusion, in the United Kingdom, there is a journalistic privilege recognized as a corollary of freedom of expression, which may nonetheless be set aside in certain circumstances following an analysis which takes into account particular circumstances of each situation.

3. United States

No provision of the U.S. Constitution recognizes a journalist-source privilege that would prevent a reporter from being compelled to disclose the identity of a secret source. However, the United States Supreme
Court considered recognizing a journalist-source privilege under the U.S. Constitution in connection with a criminal trial in Branzburg v. Hayes. Branzburg v. Hayes dealt with the publication of two articles in the Courier-Journal. On November 15, 1969, the Courier-Journal published an article by Paul Branzburg in which the reporter described in great detail a scene he had witnessed himself, the manufacturing of hashish from marijuana by two residents of Jefferson County. The article was accompanied by a photograph showing a pair of hands holding the illegal substance. According to the article, the two protagonists earned approximately $5,000 in three weeks from this business. It also said that the reporter had promised to maintain the anonymity of the people he met for the purpose of the article. The second article, published on January 10, 1971, was a summary of the reporter’s observations during the two weeks he had spent visiting drug addicts in Kentucky. The reporter was called to testify before the Jefferson County grand jury, which was set up to discover who had committed the crimes he had reported about. The reporter refused to identify those associated directly or indirectly with his articles under the First Amendment, which explicitly guarantees freedom of speech and freedom of the press.

The Court refused to recognize a First Amendment privilege that would allow a reporter to refuse to answer a question that could identify a secret source, unless the legal process is tainted by bad faith. The Court held that the public interest in adjudicating crimes outweighs the need for reporters to guarantee the confidentiality of relationships with their sources, even when it undermines freedom of the press. The U.S. Supreme Court also held that nothing prevents a state legislature from fashioning its own standards and rules to deal with the journalist-source privilege.

Recognizing both the importance of promoting free speech and freedom of the press, and that freedom of the press includes the freedom to gather information without disruption, 33 American states as well as the District of Columbia have enacted “shield laws” setting out a reporter’s privilege that protects the relationship between a reporter and his or her sources.

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24 408 U.S. 665 (1972) [hereinafter “Branzburg”].
25 U.S. Const. Amend. I: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”
26 Branzburg, supra, note 24, at 707.
27 Id., at 706.
source and sometimes extends to the very protection of the information
communicated.28 In 16 other states, the case law recognizes such a
privilege.29 Only Wyoming has not ruled on this issue so far.30

4. Australia

There is no provision enacting a journalist-source privilege in An Act
to Constitute the Commonwealth of Australia.31 Such privilege is,
however, codified in the Evidence Act 199532 and this codification
reflects the recognition of a journalist-source privilege by the courts.

Before the codification of the journalist-source privilege, in The
Commonwealth of Australia v. John Fairfax and Sons Ltd.,33 the High
Court of Australia quashed an injunction aimed at preventing the publica-
tion of a controversial book in which the authors had reproduced extracts
of confidential government documents concerning the country’s defence
and foreign policy from 1968 to 1975. The book’s editors had agreed
with two newspapers, the Sydney Morning Herald and The Age, on the
publication of a series of articles presenting extracts of the book for
promotional purposes. The confidential documents examined included,
among other things, memos, studies and reports about the East Timor
crisis, the negotiations surrounding the establishment of American bases
on Australian territory, Australia’s support of the Shah of Iran, security at
the Butterworth base in Malaysia, information about the British and
American secret service and the military alliance between Australia, New
Zealand and the United States (the A.N.Z.U.S. Treaty).

Although the publication of this information represented at first
glance a risk to the country’s national security, the High Court of Austra-

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28 U.S., Congressional Research Service (CRS) Report for Congress, Journalists’ Privilege to
Withhold Information in Judicial and Other Proceedings: State Shield Statutes (Order Code RL32806),
updated June 27, 2007 (by Henry Cohen, Legislative Attorney, American Law Division) [hereinafter
“CRS Report”]. The 33 states are: Alabama, Alaska, Arizona, Arkansas, California, Colorado,
Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Michigan,
Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North
Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee and
Washington. See also Kathleen Ann Ruan, Legislative Attorney, Journalists’ Privilege: Overview of the
Law and Legislation in Recent Congresses (January 19, 2011).
29 CRS Report, id., at CRS-1 (Hawaii, Idaho, Iowa, Kansas, Maine, Massachusetts, Missis-
sippi, Missouri, New Hampshire, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia and
Wisconsin).
30 CRS Report, id., at CRS-1.
31 (July 9, 1900) (Cth.).
33 (1980), 147 C.L.R. 39 [herinafter “Australia v. John Fairfax and Sons Ltd.”].
lia found nothing in the book that would justify restraining freedom of the press. Despite the security code in the classification of the documents, the Court noted that the extracts presented in the book did not disclose any information about military techniques or technology or the weapons, logistics or organization of the Australian or foreign armed forces. Accordingly, although the publication of certain extracts could be embarrassing for the Australian government and said publication might put a damper on diplomatic relations involving the sharing of military information or foreign affairs, the country’s national security was not jeopardized. Also, as copies of the book had already been distributed in Indonesia and the United States, an injunction would not have prevented the alleged harm in the two countries that were the most targeted by the contents of the book and newspaper articles. The Court therefore held that restraining freedom of the press was not warranted.

Now that we have completed our overview, we turn to the issue of the protection of journalistic sources in Canada and, more specifically, in Quebec.

III. THE MIXED ORIGINS OF PROCEDURE AND EVIDENCE IN QUEBEC LAW: CONTROVERSY OVER THE EXISTENCE OF A JOURNALIST-SOURCE PRIVILEGE PRIOR TO THE GLOBE AND MAIL CASE

The origin of the debate surrounding the recognition of the journalist-source privilege in civil law lies in the cultural particularities of Quebec law, namely, the mixed nature of its sources. Professor Daniel Jutras describes Quebec’s legal culture as follows:

In Quebec, the political culture of litigation and its economy is undeniably North American. Today it fits in somewhat uncomfortably between, on the one hand, the culture of legal protagonist, which is found in the realm of common law, and, on the other hand, a normative culture which affirms that sources of Quebec’s civil procedure are associated with the civil law tradition.

The issue of whether the common law plays a suppletive role in Quebec civil law was at the heart of the debates surrounding the recognition of a journalist-source privilege in Quebec. Although article 1206 of the

34 Id., at para. 10.
35 Id., at paras. 35-37.
former Civil Code of Lower Canada explicitly allowed Québec judges, in commercial matters, to resort to common law rules and principles of evidence when there was otherwise no applicable Quebec provision on point, the Civil Code of Quebec did not reproduce this provision or anything like it. Moreover, the Supreme Court of Canada had previously held that the Civil Code constitutes in and of itself a set of complete and autonomous rules and that systematically importing common law principles should be avoided. Thus, since the Civil Code came into force, there has been uncertainty as to whether the common law can be used to fill a legal void in Quebec civil law. Both the doctrine and Quebec courts have examined this issue, without providing a clear answer. The case law in recent years shows that courts may be leaning, more receptively, to foreign sources. Indeed, the growing influence of cross-border sources on civil procedure and evidence law is notable in the common law provinces, Quebec and Canada.

In Wightman v. Widdrington, the Quebec Court of Appeal noted the common law’s influence on Quebec’s civil procedure, particularly when the Code of Civil Procedure does not provide a solution to the issue and Quebec courts have not ruled on it. Writing for the Court, the Honourable Yves-Marie Morissette stated as follows:

No judgment published in Quebec involves facts similar to those which gave rise to the application for disqualification in the Superior Court. It is therefore up to the Court to examine Canadian and foreign jurisprudence on this issue. Although the jurisprudence from these other legal systems should be followed with caution, it is nonetheless relevant when the applicable fundamental principles are substantially the same as those admitted in Quebec law.

What we see from this brief review of case law is essentially what the Supreme Court of Canada held in Lac d’Amiante du Québec Ltée v.  

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37 1866 (C.C.L.C.).
38 Globe and Mail, supra, note 2, at para. 41.
39 Prud’homme v. Prud’homme, [2002] S.C.J. No. 86, [2002] 4 S.C.R. 663 (S.C.C.), where LeBel J. held that libel cases should be analyzed and decided based on the Civil Code of Quebec and civil liability in conjunction with the Charters, and that the fair comment defence should not be applied mechanically in civil law, but aspects of it may be considered in analyzing fault.
41 Quebec Code of Civil Procedure, R.S.Q. c. C-25 [hereinafter “C.C.P.”].
42 Supra, note 40, at para. 58 (translation).
2858-0702 Québec Inc.\textsuperscript{43} regarding the mixed sources of Quebec private law. In that case, the Supreme Court of Canada was asked to determine whether or not there was an implied rule of confidentiality under Quebec civil law. After a thorough review of the evolution of the rules relating to examinations on discovery in Quebec law, the Supreme Court of Canada held that, although no provision of the C.C.P. expressly provided for it, such a rule:

may … be found in Quebec procedural law, based on the changes that have taken place in the institutions of the civil procedure and on privacy principles. The rule of confidentiality, the effects of which are analogous to the principles developed by the common law, may be recognized in Quebec in accordance with the techniques of civil law analysis, based on the fundamental principles around which the civil law and judicial procedure are organized.\textsuperscript{44}

Thus, although it is not always advisable to import a common law rule into civil law, common law rules may nonetheless influence the analysis of a question to which the C.C.P. does not seem to provide a clear answer. Furthermore, we note that, in several respects, the rules of Quebec civil procedure and evidence are similar to those of the other Canadian provinces as the civil law and common law traditions share certain fundamental principles.\textsuperscript{45}

IV. STRIVING FOR A LEGAL FOUNDATION SUPPORTING THE RECOGNITION OF A JOURNALIST-SOURCE PRIVILEGE IN QUEBEC CIVIL LAW

1. Canadian Charter of Rights and Freedoms

In the absence of a provision that explicitly recognizes the journalist-source privilege, we should determine whether the recognition of such a privilege can be inferred from other constitutional provisions.

Section 2(b) of the Canadian Charter entrenches freedom of expression:

Everyone has the following fundamental freedoms:

\begin{itemize}
  \item \textbf{Freedom of Expression}:
\end{itemize}


\footnotesize\textsuperscript{44} \textit{Id.}, at para. 79 (emphasis added).

\footnotesize\textsuperscript{45} \textit{Id.}, at paras. 56-61, 78.
freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; …

Significantly, LaForest J. noted in Canadian Broadcasting Corporation v. Lessard that section 2(b) of the Canadian Charter, which recognizes freedom of expression and its corollary, freedom of the press, also covers the right to gather news without disruption.46

In R. v. National Post,47 the Supreme Court rejected the position of the Canadian Civil Liberties Association and the British Columbia Civil Liberties Association built on the premise that protection of confidential sources should be treated as if it were encompassed in the Canadian Charter, as a corollary of section 2(b). Drawing an analogy to solicitor-client privilege, the Supreme Court stated that, even though solicitor-client privilege is supported by and impressed with the values underlying section 7 of the Canadian Charter, it is generally seen as a “fundamental and substantive rule of law” rather than as “constitutional”.48

Referring to one of its recent decisions, the Supreme Court stated that freedom of expression is not limited to the traditional media, but is enjoyed by “everyone” (using the term in section 2(b) of the Canadian Charter) who chooses to exercise his or her freedom of expression on matters of public interest, whether by blogging, tweeting, standing on a street corner and shouting the “news”, reporting, or any other means.49 The Supreme Court found that this group of writers and speakers is too heterogeneous to offer constitutional immunity for communications between its members and “sources” who are promised confidentiality, since such immunity would significantly undermine law enforcement and other constitutionally recognized values such as the right to privacy.50 According to the Supreme Court, it is very possible and desirable to provide solid protection from the compelled disclosure of secret source identities without recognizing a general constitutional immunity for this type of communication.51

It should be noted that the Court’s decision in R. v. National Post was rendered before the decision at the heart of this article. For some, R. v.

51  Id., at para. 41.
National Post predicted how the Court would rule on the issue of the privilege of journalists’ sources in the Globe and Mail case. However, it is important not to lose sight of the particular legal context of the National Post case. There, the Court was concerned with the production of documents or other evidence in connection with a criminal investigation in a common law province. The scope of that case is therefore limited and only applies when a reporter has material evidence necessary to prove the existence of a crime. In that case, the Supreme Court held that a journalist’s refusal to turn over such material evidence on the grounds that it could reveal the identity of a confidential source was not justified, at least in the case of serious crimes. The Globe and Mail case raised a different issue, which was whether a journalist-source privilege should be recognized in Quebec civil law in connection with a commercial dispute.

2. Charter of Human Rights and Freedoms

In the absence of a provision in the Quebec Charter that explicitly recognizes the journalist-source privilege, it is appropriate to examine the scope of other provisions of the Quebec Charter that could give the status of quasi-constitutional privilege to the confidentiality of journalistic sources in Quebec.

Section 3 of the Quebec Charter is the equivalent of section 2(b) of the Canadian Charter:

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

Given the resemblance between these provisions and the decision in R. v. National Post, it would have been difficult for the Court to recognize a quasi-constitutional journalist-source privilege in Quebec pursuant to section 3 of the Quebec Charter.

Section 9 of the Quebec Charter protects professional secrecy:

9. Every person has a right to non-disclosure of confidential information.

No person bound to professional secrecy by law and no priest or other minister of religion may, even in judicial proceedings, disclose confidential information revealed to him by reason of his position or
profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law.

The tribunal must, *ex officio*, ensure that professional secrecy is respected.

According to several authors, professional secrecy only applies to professionals who have a statutory duty to respect it, and its application is limited to professional bodies governed by the *Professional Code*, which does not cover the profession of reporter. The legislator had considered including the profession of reporter in the list of professional bodies governed by the law when the *Professional Code* was adopted but, in the end, the National Assembly rejected this proposal.53

Contrary to the Canadian Charter, which does not explicitly recognize a right to information, section 44 of the Quebec Charter clearly provides that “[e]very person has a right to information to the extent provided by law”. However, the Supreme Court stated that the rights set out in Chapter IV entitled “Economic and Social Rights”, including section 44 of the Quebec Charter:

are limited in such a way as to put the specific legislative measures or framework adopted by the legislature beyond the reach of judicial review. These provisions require the state to take steps to make the Chapter IV rights effective, but they do not allow for the judicial assessment of the adequacy of those steps.54

Thus, the Quebec Charter recognizes a positive right to information, worded in limited terms, the scope of which seems rather restrictive.


Professor John Henry Wigmore, an author highly recognized in common law for his doctrine on the law of evidence, developed a methodology that would recognize certain relationships as privileged, on


53  Québec, *Journal des débats : Commissions parlementaires*, 3d Sess., 30th Leg., No. 6 (January 22, 1975), at B-322.

a case-by-case basis. Although at the time Professor Wigmore was not a
supporter of a privilege for secret sources, the Supreme Court acknowl-
edged the existence of a journalist-source privilege by applying the
“Wigmore Doctrine” to communications between a reporter and his or
her secret source in *R. v. National Post*.56

The origins of *R. v. National Post* lie in what is better known today
as “Shawinigate”. The appellant Andrew McIntosh, a journalist at the
*National Post* (“National Post”), took an interest in then Prime Minister
Jean Chrétien’s involvement with the Grand-Mère Golf Club located in
Mr. Chrétien’s home riding of St-Maurice, Québec. A few years later, at
the National Post, Mr. McIntosh received a sealed plain brown envelope
that contained a document that appeared to be a copy of a Business
Development Bank of Canada (“BDBC”) internal loan authorization for
a $615,000 mortgage to Auberge Grand-Mère. Mr. McIntosh forwarded
the document to the Prime Minister’s Office, the Prime Minister’s legal
counsel, and the BDBC to assess their validity. All claimed the document
was a forgery. Following a complaint from the BDBC, the RCMP met
with Mr. McIntosh, who declined to identify his source. Mr. McIntosh
told the RCMP, however, that the document and envelope were kept at
the National Post. The RCMP applied to the Ontario Court of Justice for
a warrant and assistance order stating that the evidence it wished to seize
was not available from any other source. The RCMP intended to submit
the document and envelope for forensic testing to determine if they
contained anything that could help to identify the source. Mr. McIntosh
and the National Post applied to quash the warrant and assistance order.

The Supreme Court of Canada ruled that, although journalists’
sources should receive evidentiary protection in a criminal investiga-
tive process, the judicial search for truth outweighed the protection of the
journalist’s source in this case. By extending the application of the
“Wigmore Doctrine” to that case, the Supreme Court of Canada ac-
knowledged that the role of investigative journalism has expanded over
the years to help fill what has been described as a democratic deficit in
the transparency and accountability of our public institutions, and the
need to respect journalist-source confidentiality in certain specific
circumstances to ensure the vitality of investigative journalism.57

56 *Supra*, note 48.
57 *Id.*, at paras. 54-55.
The “Wigmore Doctrine” consists of four elements which the Supreme Court of Canada restated in the particular context of journalists’ sources as follows: (1) the communication must originate in a confidence that the identity of the informant will not be disclosed; (2) the confidence must be essential to the relationship in which the communication arises; (3) the relationship must be one which should be “sedulously fostered” in the public good; and (4) if all of these requirements are met, the court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth.58

In R. v. National Post, the Supreme Court refused to recognize that journalist-source protection falls within the grasp of section 2(b) of the Canadian Charter, which is a conclusion that constitutes a significant ruling in and of itself. However, the facts and context of R. v. National Post prevents the decision from standing out as a complete precedent on the question of journalists’ sources in Canada. R. v. National Post involved the production of documents in a criminal investigative process, and did not raise any issue about the interaction of the common law and civil law. Therefore that decision has limited value as precedent in other cases of journalist-source privilege in Canada. As we will see, Globe and Mail continued the analysis that began in R. v. National Post.

(a) Application of the “Wigmore Doctrine” in Quebec Civil Law: A Doctrinal Debate

Professors Léo Ducharme and Jean-Claude Royer adopted diametrically opposed views of the influence of the common law on Quebec law of evidence and civil procedure since the Civil Code came into force. Both view differently the effect of the disappearance of the legislative provision codifying the suppletive role of common law rules in Quebec civil law.

Professor Ducharme argues that, in the case of a fact which occurred after the Civil Code came into force, “the coming into force of the Code had the effect of repealing the former French and English laws as suppletive law regarding evidence”.59

58 Id., at para. 53.
However, according to Professor Royer’s thesis, the legislator’s failure to include a provision similar to article 1206 of the C.C.L.C. in the Civil Code does not change the fact that French law and common law remain the foundations of the Civil Code. 60 Accordingly, there is nothing to prevent the use of common law rules to interpret Quebec civil law. Professor Royer adds, regarding the rules concerning investigations and testimonial evidence, that

[m]ost of these rules stem from the common law. As a result, English law should generally be used to interpret it. Furthermore, the legislator did not adopt a code of civil procedure which includes a complete and exhaustive enumeration of all the rules relating to evidence and the administration of evidence. This could justify the maintaining of certain common law privileges, which are related to the accusatorial and contradictory nature of a trial, even if they are not formally recognized in the provisions of the Code of Civil Procedure. 61

On the more specific issue of privileges recognized in common law, Professor Royer notes that several privileges created by common law were introduced into Quebec civil law. 62 Still, the courts have sometimes refused to use common law rules to make up for a certain deficiency in Quebec law, causing the uncertainty to continue. Professor Royer believes that the common law will continue to influence the interpretation of certain rules codified in Quebec law that stem from the common law. 63 Regarding the issue of whether the common law could be used to justify a privilege not explicitly recognized in a legal text, he says “the power of the courts to rule outside of written codes and legislation, when deficiencies appear, is still much more limited in the civil law tradition than in the common law”. 64

(b) Application of the “Wigmore Doctrine” in Quebec Civil Law: a Jurisprudential Debate

When they have not applied the “Wigmore Doctrine”, the courts have generally based their reasoning on the Civil Code and the applicable rights guaranteed by the Quebec Charter, given the nature of the

60 Jean-Claude Royer & Sophie Lavallée, La preuve civile, 4th ed. (Cowansville, Que., Yvon Blais, 2008) at 73 [hereinafter “La preuve civile”].
61 Id., at 74 (translation) (emphasis added).
62 Id., at 1042.
63 Id., at 1043 (translation).
64 Lac d’Amiante, supra, note 43, at para. 39 (translation).
case.\textsuperscript{65} Although refusing to turn to the “Wigmore Doctrine” to support their analysis, Quebec courts are not diametrically opposed to recognizing a journalist-source privilege, as witnessed by this extract of Biron J.’s reasons in \textit{Jacques Drouin v. La Presse}:

\begin{quote}
In short, although the information sought may be interesting, it is not necessary to maintain the fairness of the trial. It appears, in the final analysis, that only freedom of the press would lose, without the Plaintiff gaining anything. Our legal system is based on the search for the truth but it should not be overly curious.\textsuperscript{66}
\end{quote}

Quebec courts have therefore dismissed an application for the disclosure of a reporter’s source a few times, without referring to the “Wigmore Doctrine”. This was the case in \textit{Centre de réadaptation en déficience intellectuelle de Québec v. Groupe TVA Inc.}\textsuperscript{67} when the Superior Court had to determine whether or not it should allow the application of the plaintiff, which requested the name of a reporter’s source. During a news story, reporter Nicolas Vigneault had questioned the source of reporter Pierre Jobin about the plaintiff’s mission to take charge of and socially integrate approximately 100 people who were still at the public establishment due to mental impairment. Rather than use the “Wigmore Doctrine”, the Court weighed the two fundamental rights of the parties, namely, “[f]irstly, freedom of expression which covers freedom of the press and the public’s right to information and, secondly, the right of all citizens to put forward all their grounds of defence during a hearing before an independent court.”\textsuperscript{68} The Court also held that the plaintiff could exercise its right without having to know the identity of the source.\textsuperscript{69} Regarding the consequences of such a decision on the plaintiff imposing disciplinary measures on the source, the Court held that it was minimal compared to what the reporter Pierre Jobin would suffer if he were forced to identify his source. Such an order could irrevocably affect Mr. Jobin’s ability to obtain information from a confidential source in the future.\textsuperscript{70}

\begin{thebibliography}{99}
\item \textsuperscript{66} \textit{Jacques Drouin v. La Presse ltée}, id., at 3030.
\item \textsuperscript{68} Id., at para. 113 (translation).
\item \textsuperscript{69} Id., at para. 114.
\item \textsuperscript{70} Id., at paras. 115-116.
\end{thebibliography}
In *Tremblay v. Hamilton*, the Superior Court applied the “Wigmore Doctrine” and recognized a privilege by assessing the particular circumstances of the situation. The Court also noted that

the particular role of the press, the importance of freedom of the press guaranteed in section 2(b) of the *Canadian Charter of Rights and Freedoms* as well as the requirement set out in Article 2858 of the *Civil Code of Québec* should be weighed with a view to the other party’s right to obtain the disclosure it is seeking by taking legal action.\(^1\)

It took 16 years for the Supreme Court’s decision in *Globe and Mail* to put an end to the doctrinal and jurisprudential debate regarding the recognition of a journalist-source privilege in Quebec civil law.

V. THE MATTER OF *GLOBE AND MAIL*

1. The Facts

After the results of the 1995 referendum on Quebec sovereignty, the federal cabinet created the Sponsorship Program to counter the sovereignty movement and increase the federal government’s visibility in Quebec. Based mainly on information received from a confidential source, journalist Daniel Leblanc from *The Globe and Mail* (“the Globe”) wrote a series of articles on the program. These articles reported various dubious activities surrounding the program’s administration and management. His most significant allegations targeted the misuse and misdirection of public funds. Throughout the course of his communications with his source, whom he later identified as “MaChouette”, Daniel Leblanc agreed to protect her confidentiality and anonymity.

The articles published by Daniel Leblanc and others who picked up the story drummed up considerable media and public interest in the Sponsorship Program. A scathing report from the Auditor General on the federal government’s dubious management of the Sponsorship Program as well as the “leaks” of privileged information to the press forced Paul Martin, who was then Prime Minister, to order a commission of inquiry into the Sponsorship Program, the highly publicized Gomery Inquiry, to shed light on what had become known colloquially as the “Sponsorship

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\(^2\) Tremblay v. Hamilton, id., at 2444 (translation).
Scandal”. In 2006, Daniel Leblanc published a work entitled *Nom de code : MaChouette. L’enquête sur le scandale des commandites.*

In March 2005, the Attorney General of Canada brought proceedings before the Superior Court of Quebec against several companies, including Groupe Polygone Éditeurs Inc., in order to recover the over $60 million that had been paid by the federal government under the contested program.

The defendant Groupe Polygone advanced, among other things, a defence of prescription to have the Attorney General’s claim dismissed, alleging that the Canadian government knew of the scandal before 2002. It argued that the action brought by the Attorney General of Canada was statute-barred. At trial, and in support of its defence of prescription, Groupe Polygone requested the court to order certain people, specifically several employees of the federal government, to answer questions aimed at identifying Daniel Leblanc’s secret source. In a series of orders, the Superior Court instructed the individuals identified by Groupe Polygone to answer the questions in writing and to keep the matter confidential.

When it received news of these orders, the Globe filed a motion for revocation of the orders issued by the court along with a sworn statement of the journalist maintaining that the orders violated Daniel Leblanc’s and the Globe’s freedom of expression, which encompasses journalist-source privilege. Before the Superior Court, Daniel Leblanc testified that the identity of his source, MaChouette, was confidential, and that a relationship of trust based on anonymity had developed between them over time. During the cross-examination led by Polygone’s attorney, the Globe’s counsel raised objections to the many questions asked of Daniel Leblanc, alleging that the questions were irrelevant and that answering them would constitute a breach of the journalist-source privilege. The trial judge dismissed these objections orally without any in-depth analysis and refused to recognize the existence of the privilege.

Leave to appeal this decision was dismissed by a single judge of the Court of Appeal on the basis that the court lacked jurisdiction. Rather than have its reporter answer the questions, the Globe tried to discontinue its motion for revocation, but the trial judge refused and the Quebec Court of Appeal dismissed the appeal of this decision. The Globe finally appealed the Court of Appeal’s decision before the Supreme Court of Canada.

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73 (Montreal: Libre Expression, 2006).
2. Allegations of the Parties

For the sake of this discussion, we provide the reader with a short summary of the allegations of the main parties and interveners in Globe and Mail: the Globe, Groupe Polygone, the Attorney General of Canada, the Québec Federation of Professional Journalists and the Canadian Civil Liberties Association.

(a) The Globe and Mail

Relying on foreign case law acknowledging a journalist-source privilege built over the foundations of constitutional protection afforded to freedom of expression and its corollary, freedom of the press, the appellant the Globe argued before the Supreme Court that a journalist-source privilege exists in Quebec law. It argued that there can be no freedom of the press unless the confidentiality of journalists’ sources receives maximum protection. Indeed, without the assurance of such a protection, gathering controversial information that is already difficult to access would become virtually impossible; the fear of being unmasked and exposed to sanctions would discourage secret sources from disclosing certain information to journalists, thus creating a chilling effect. As can be seen from a number of scandals revealed by investigative journalism in the United States, Europe and Canada, the disclosure of public interest information to journalists by secret sources is crucial to safeguarding the press’s ability to gather information and, consequently, the public’s right to access information.

According to the Globe, the right not to disclose the identity of a secret source stems from section 3 of the Quebec Charter in that it is a corollary of the freedom of expression, but is not a full blanket protection. As is the case with any constitutional or quasi-constitutional protection, it must be assessed and weighed to ensure that it is exercised with “a proper regard for democratic values, public order and the general well-being of the citizens of Quebec”, as stipulated in section 9.1. of the Quebec Charter.

The Globe argued that nothing prevents Quebec courts from applying the “Wigmore Doctrine”. Although it agreed with the general principle of the autonomy of the civil law system, the rules of evidence in Quebec reflect the mixed sources of Quebec civil law, which is greatly influenced by principles inherited from the common law system.
(b) Groupe Polygone

The respondent Groupe Polygone argued that there is no absolute privilege in cases of communications between journalists and secret sources.

First, the Constitution does not recognize any journalistic privilege. The fundamental principles holding that no one is above the law and that anyone can be compelled to disclose relevant information for the purposes of justice are two arguments against recognizing a general privilege. Testimonial immunity is the exception. The constitutional principle of freedom of the press can, however, help the court strike a balance among the interests at stake when determining if testimonial immunity should apply to a particular case where protection of a source’s confidentiality is invoked.

Polygone also maintained that the courts should use the “Wigmore Doctrine” or a similar civil law test, specifying that it is up to the journalist to show why protecting the source’s identity outweighs the quest for truth.

According to Polygone, unless the journalist revealed the identity of his or her source, it would be unable to present a full defence against the government’s action.

(c) Attorney General of Canada

The respondent the Attorney General of Canada contended that the issue in dispute must be resolved based solely on the rules of Quebec civil law. It is the Civil Code that is the “jus commune” of Quebec and governs, in harmony with the Quebec Charter, relations between individuals. This is why the Attorney General rejected the application of the “Wigmore Doctrine” by the Quebec courts.

The Attorney General did not take a position on the final outcome of the appeal, proposing instead an analysis of the civil law principles applicable in Quebec respecting the privilege of excluding media evidence.

At the very heart of the Attorney General’s presentation lies the argument that there is no hierarchy between freedom of expression, freedom of the press, the right to an impartial hearing, the right to privacy and the administration of justice. These rights are protected by the Quebec Charter. The Attorney General of Canada maintained that
such a right can only be recognized on a case-by-case basis, pursuant to section 9.1 of the Quebec Charter.\textsuperscript{74}

The Attorney General of Canada noted that, in Quebec civil matters, the question of whether or not a journalist-source privilege exists generally arises in defamation suits and can be resolved. The courts generally try to strike a balance between freedom of the press and the right of those being tried to obtain disclosure of evidence crucial to their case. The Attorney General of Canada pointed out that the solution adopted must take into consideration the ultimate purpose of a civil action, namely, the quest for truth.

The Media Coalition\textsuperscript{75} argued that the Canadian Charter and the Quebec Charter both protect freedom of the press through freedom of expression. Case law has also recognized that the right to freely gather information without undue restriction is a corollary of the freedom of the press and is fundamental to news publishing.\textsuperscript{76} To preserve the vitality of investigative journalism, journalists must be able to guarantee the confidentiality of their sources so that they may gather the information needed to publish news stories. Refusing to recognize this privilege under these circumstances would have a disastrous effect on the vitality of the press and, as a result, on democracy itself.

The Media Coalition also argued that the Canadian Charter and the Quebec Charter applied to the case. In fact, it is not only the rights of the journalist and parties involved in the dispute that are at issue here, but freedom of expression and the public’s right to information.

Moreover, when the Canadian government itself is a party to the dispute and is directly involved in the examination of a journalist who is being asked to reveal his or her source, such implication of governmental authorities justifies in and of itself the application of the Canadian Charter.

\textsuperscript{74} Quebec Charter, s. 9.1 provides:
In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Quebec.
In this respect, the scope of the freedoms and rights, and limit to their exercise, may be fixed by law.


The Media Coalition further argued that the “Wigmore Doctrine” is not incompatible with Quebec law and must lead the case-by-case analysis of the issue in dispute, under both the Canadian Charter and the Quebec Charter. Hence, the suppletive role of common law in Quebec civil law, and the application of the “Wigmore Doctrine”, has been confirmed by the Supreme Court of Canada. The Media Coalition also pleaded that the Court has the power to create an independent privilege, as was the case with the assertion of the police-informer privilege in Quebec.

Furthermore, the Media Coalition contended that the “Wigmore Doctrine” should be amended by integrating the *Dagenais/Mentuck* test,\(^{77}\) which is used to determine whether a court should exercise its discretionary power to restrict freedom of expression and freedom of the press in judicial proceedings. The *Dagenais/Mentuck* test, which is mechanically similar to the *Oakes* test,\(^{78}\) is a two-prong test and provides that a publication ban may only be issued: (1) where it is necessary to prevent a serious risk to the proper administration of justice, because reasonable alternative measures will not prevent that risk; and (2) when the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to freedom of expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

In this case, the Media Coalition showed that the first three factors of the “Wigmore Doctrine”, adapted to the context of journalism, were met. Consequently, communications between Leblanc and MaChouette were transmitted confidentially with the assurance that MaChouette’s identity would not be disclosed; the anonymity of this source is essential to the preservation of the relationship; and the relationship between the journalist and his source MaChouette was sedulously fostered. Under the fourth factor of the Wigmore Doctrine, the Media Coalition argued that Polygone must demonstrate that the necessity and benefit of disclosing the source outweigh the deleterious effects on the right to freedom of expression and the public’s right to information. The Globe’s objection to the questions asked of the journalist Daniel Leblanc should therefore have been sustained.


(d) Canadian Civil Liberties Association ("CCLA")

Along with the Media Coalition, the CCLA argued that the right to freely gather information is part of freedom of expression and freedom of the press, and that confidential sources are an essential newsgathering tool. The CCLA did not address the particular issue of the Quebec civil law culture, however, pointing out that the Supreme Court of Canada should adopt a uniform approach to journalist-source privilege.

According to the CCLA, a court order that would compel the disclosure of a confidential source violates section 2(b) of the Canadian Charter and must be justified under section 1; in Quebec, such an order violates section 3 of the Quebec Charter and must be justified under section 9.1.

The CCLA argued that since the Wigmore test was not intended to protect constitutional entitlements, it cannot safeguard Charter rights. According to the CCLA, the Wigmore test is inadequate to protect Charter rights, and therefore could not be used to determine whether or not a judge should order the disclosure of a confidential source. The CCLA therefore proposed a two-step test:

Step one: To establish a *prima facie* privilege the claimant must show that (a) he or she is a journalist, (b) who is engaged in newsgathering, and (c) acquired information in exchange for a promise of confidentiality, and

Step two: Once a privilege is established, the burden shifts, and the party seeking disclosure of a confidential newsgathering source must justify the violation of a journalist-source privilege under the *Dagenais/Mentuck* test.79

The CCLA's test originates in the approach the association first presented to the Supreme Court of Canada in *R. v. National Post*. The CCLA argued that the proposed test should replace the common law Wigmore test, and apply whenever a judge is asked to compel disclosure of a confidential source.

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3. Reasons for Judgment

Picking up where it had left off in R. v. National Post, the Supreme Court of Canada, led by LeBel J., concluded that journalistic sources are protected in Quebec under civil law, and developed a clear test to determine whether or not journalists are required to reveal the identity of a secret source in disputes before a civil court.

(a) Legal Underpinnings of the Journalist-Source Privilege

First, the Supreme Court of Canada specified that the Quebec Charter applies in this dispute. Based on an analysis it had developed to assess whether or not a journalist-source privilege exists and may apply in the context of adducing documents or other physical evidence in a criminal investigation process in a common law province, the Supreme Court concluded that there is no quasi-constitutional basis for recognizing a journalist-source privilege.

As for the possibility of finding a quasi-constitutional basis under section 3 of the Quebec Charter, the Supreme Court examined the similar wording of section 2(b) of the Canadian Charter in R. v. National Post, namely, use of the words “every person” much in the same way as “everyone”. It is precisely because defining the group that would be protected by quasi-constitutional immunity is so difficult (due, among other reasons, to the heterogeneous nature of the group) that the Court refuses to recognize a generic and quasi-constitutional privilege protecting the secrecy of journalists’ sources. The Court specified, however, that the constitutional rights and values guaranteed under the Canadian Charter and the quasi-constitutional rights guaranteed under the Quebec Charter are engaged by claims of journalist-source privilege and must therefore be considered in the analysis.

As for the possibility of broadening the notion of professional secrecy to include communications between journalists and their secret sources, the Court concluded that there is no basis for drawing an analogy between professional secrecy and journalist-source privilege. In fact, not only does section 9 of the Quebec Charter apply to the professions governed by the Professional Code, to which the profession of journalism is not subject, the relationship between journalists and their

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80 Supra, note 47.
81 Globe and Mail, supra, note 2, at para. 33.
82 Id.
secret sources is not the type of relationship conceivably contemplated by section 9 of the Quebec Charter. Indeed, Quebec doctrine identifies two conditions that are crucial for recognizing relationships bound by professional secrecy: (1) professions governed by the Professional Code; and (2) an obligation of silence that is rooted in a relationship where the beneficiary of the privilege seeks out the professional for help. The Supreme Court concluded that the relationship between journalists and their secret sources is not a helping relationship.

As to the possibility of section 44 of the Quebec Charter being a source of a quasi-constitutional right, the Court believed that, while it is true that the right to information favours the protection of confidential relations between journalists and their sources, it cannot constitute the basis for recognizing journalist-source privilege. Indeed, this privilege is not a fundamental right, but belongs to a class of social and economic rights.

Since the Court concluded that a journalist-source privilege does not exist under the Quebec Charter, it turned to the Quebec rules of procedural and evidentiary law set forth in the Civil Code and the C.C.P. in order to determine whether it contained a basis for recognizing this right.

(b) Quebec, a Mixed Jurisdiction

Before beginning its analysis of testimonial privilege under Quebec civil law, the Court first looked at the mixed sources of Quebec’s procedural law. Globe and Mail thus gave the Supreme Court of Canada an additional opportunity to recognize the mixed nature of Quebec civil law, in this particular case, evidentiary law. In light of the mixed nature of procedure and evidence in Quebec, and especially since the judiciary system was greatly inspired by common law, the legal principles of common law naturally play a suppletive role in the evolution of Quebec procedural law. In the words of the Court, “Québec is, after all, a mixed jurisdiction.”

After discussing Lac d’Amiante, the Court emphasized that Quebec courts do not enjoy the same freedom as their neighbouring common law
provinces when it comes to ruling above and beyond the written codes and legislation when they need to fill certain gaps or resolve certain controversies. With regard to excluding evidence, Civil Code article 2858 is the only provision on which the discretionary power of a judge may be based, and even then it is a discretion which remains limited:

The court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are breached and that its use would tend to bring the administration of justice into disrepute.

The latter criterion is not taken into account in the case of violation of the right of professional privilege.

The Court, having already concluded that a journalist-source privilege is not quasi-constitutional, concluded at this stage of the analysis that a judge cannot exempt a journalist from testifying as to the identity of a confidential source under this discretionary power. Aware of the doctrinal and case law controversy surrounding the application of the “Wigmore Doctrine” by Quebec courts, the Supreme Court insisted on the residual role played by common law rules in the development of evidentiary law. Given that a journalist-source privilege exists in common law provinces, as confirmed by R. v. National Post, the Court explained why the common law could play a role in clarifying Quebec law on this issue. After stating that a mechanical incorporation of a common law rule or principle should be avoided, the Court made clear that any reliance on this law must comply with the overarching principles set out in the Civil Code and the Quebec Charter. Justice LeBel repeated that not everything on civil procedure is found in the C.C.P., leaving room for rules of practice. The Code of Civil Procedure, continued the Court, also allows tribunals to intervene on a case-by-case basis, and confers the power to issue orders adapted to the particular context of the cases of which they are apprised, specifically under articles 20 and 46 of the C.C.P.

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90 Id.
91 Id., at para. 45.
92 Id., at para. 46.
93 Id., at para. 45.
The Court thus confirmed that there is a basis in Quebec civil law for recognizing a journalist-source privilege or an exemption from the general obligation to give evidence in civil cases. The application of the “Wigmore Doctrine” by Quebec courts in compliance with the overarching principles set out in the Civil Code and the Quebec Charter provides an analytical framework for recognizing, on a case-by-case basis, whether it is expedient to exempt journalists from answering questions that would force them to disclose the identity of their sources.

(c) Application of the “Wigmore Doctrine” to the Journalist-Source Privilege in Quebec Law

The Supreme Court of Canada’s reasoning in this case is consistent with Bisaillon v. Keable’s94 decision on the police-informer privilege under Quebec law. In the Court’s opinion, this would be the best approach to adopt for journalists’ sources, given the similarity between the outcomes of both measures. In Bisaillon v. Keable, the Supreme Court ruled that because the origin of police-informer privilege is the common law, the rule remained a part of Quebec law unless it was overturned by a validly adopted statutory provision:

Unless overturned by validly adopted statutory provisions, these common law rules must be applied in an inquiry into the administration of justice, which is thus a matter of public law. Moreover, the point at issue concerns the power to compel a witness to answer, by contempt of court proceedings if necessary, the source for which is also the common law.95

Therefore, in the absence of any rule to the contrary in the Civil Code or C.C.P., Quebec courts are entirely justified in applying common law rules.

Drawing inspiration from Beetz J.’s reasons in Bisaillon v. Keable and taking R. v. National Post into account, the Court proposed a four-pronged analytical framework (inspired by the “Wigmore Doctrine”) for recognizing a journalist-source privilege or an exemption from the general obligation to provide evidence or testify in civil cases. To borrow the words of LeBel J., “[d]espite its common law origins, the use of a Wigmore-like framework to recognize the existence of case-by-case

95 Id., at 98 (emphasis added).
privilege in the criminal law context is equally relevant for civil litigation matters subject to the laws of Québec. 96

Even if section 2(b) of the Canadian Charter and section 3 of the Quebec Charter alone cannot be used as grounds for recognizing a journalist-source privilege, it goes without saying that the values they convey necessarily inform the analysis. 97 The Court also mentioned the powers granted to the Superior Court under article 46 of the C.C.P., which appears to provide judges with the authority needed to issue such exemptions to journalists on a case-by-case basis. 98 Consequently, the Wigmore-like framework is not divorced from the rules of Quebec civil law; quite the contrary, it reflects the rules’ principles and essence.

Before applying the four-pronged analytical framework to compel journalists to answer questions likely to reveal the identity of a confidential source, the party seeking to reveal the identity of the source must first demonstrate the relevance of the questions. The goal of this condition is to ensure compliance with the evidentiary rules in Quebec civil law, more specifically article 2857 of the Civil Code, which provides that “[a]ll evidence of any fact relevant to a dispute is admissible and may be presented by any means.” If relevance is not demonstrated, the analytical framework need not be applied since the questions obviously will not be allowed.

If the questions are deemed relevant, the four following factors are applied:

(1) the relationship must originate in a confidence that the source’s identity will not be disclosed;
(2) anonymity must be essential to the relationship in which the communication arises;
(3) the relationship must be one that should be sedulously fostered in the public interest; and
(4) the public interest served by protecting the identity of the informant must outweigh the public interest in getting at the truth. 99

The fourth factor of the analysis is the most important one, since the court is called upon to strike a balance between (1) the importance of the disclosure to the administration of justice; and (2) the public interest in

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96 Globe and Mail, supra, note 2, at para. 53.
97 Id.
98 Id.
preserving the confidentiality of the journalist’s source.\textsuperscript{100} The court must weigh a certain number of elements, the list of which is not exhaustive, before drawing its conclusion; these factors include what procedural stage the case is at (examination in chief or discovery) and whether or not the question is essential in the context of the dispute between the parties (whether or not the journalist is part of the case).\textsuperscript{101} This exercise of balancing the interests at hand requires the court to determine whether the facts, information or evidence can be obtained by other means. According to the Court:

If relevant information is available by other means and, therefore, could be obtained without requiring a journalist to break the undertaking of confidentiality, then those avenues ought to be exhausted. The necessity requirement, like the earlier threshold requirement of relevancy, acts as a further buffer against fishing expeditions and any unnecessary interference with the work of the media. Requiring a journalist to breach a confidentiality undertaking with a source should be done only as a last resort.\textsuperscript{102}

The analysis is thus carried out based on context, since what needs to be determined is whether the journalist-source privilege should be recognized in a particular case; the privilege is not generic. The court will therefore evaluate the relevant elements of a situation as it presents itself. It is up to the party invoking the privilege to demonstrate that the interest of preserving the confidentiality of the journalist’s source outweighs the public’s interest in disclosure.

The Court concluded its analysis with the following:

For example, at the far end of the spectrum, if Mr. Leblanc’s answers were almost certain to identify MaChouette then, bearing in mind the high societal interest in investigative journalism, it might be that he could only be compelled to speak if his response was vital to the integrity of the administration of justice.\textsuperscript{103}

In our view, in light of the foregoing, the Supreme Court has established a highly stringent criterion, precisely that it is only when it is “vital” to the “integrity of the administration of justice” that a court will order a journalist to answer a question that will entail the disclosure of the identity of his or her source.

\textsuperscript{100} Globe and Mail, id., at para. 58.
\textsuperscript{101} Id., at paras. 58-61.
\textsuperscript{102} Id., at para. 63.
\textsuperscript{103} Id., at para. 69 (emphasis added).
(d) What about MaChouette?

Once again, here is a brief look at the context in which *The Globe and Mail* invoked journalist-source privilege. Having been informed of the orders issued by Hébert J. instructing the individuals identified by Groupe Polygone Éditeurs Inc. to answer questions aimed at identifying Daniel Leblanc’s secret source, *The Globe and Mail* presented a motion to revoke the orders, arguing that the orders violated journalist-source privilege and infringed the freedom of expression of Leblanc and *The Globe and Mail*. During Groupe Polygone’s cross-examination, *The Globe and Mail*’s lawyer objected to numerous questions on grounds that they were irrelevant and would breach journalist-source privilege. The trial judge dismissed these objections orally (without performing a complete analysis) and refused to recognize the existence of that privilege.

The Supreme Court concluded that the trial judge committed an error by reaching a hasty conclusion, orally at that, without weighing whether that disclosure would be in the public interest. It held that Leblanc was entitled to have the questions put to him challenged for relevancy. The trial judge should have taken his claim seriously and performed the four-pronged analysis, based on the Wigmore Doctrine as proposed earlier, to determine whether or not there was a journalist-source privilege in this case. In the Court’s opinion:

> if Grandpré J. concluded that the first three factors favoured disclosure, he was then required to ask whether, on balance, the public interest in maintaining journalist-source confidentiality outweighed the importance of disclosure to the administration of justice.

In this case, since the parties were not authorized to make comments or adduce evidence on the issue of journalist-source privilege before the Supreme Court of Canada, the latter chose to refer the matter to the Superior Court for a new hearing as to whether the questions should be put to the journalist Daniel Leblanc, in light of the four-pronged analytical framework developed by the Supreme Court.

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104 *Id.*, at para. 68.
105 *Id.*
106 *Id.*, at para. 69.
VI. CONCLUSION

_Globe and Mail_ involves civil litigation, not the criminal investigative process. It involves testimonial compulsion, and not the production of documents or other physical evidence. The parties’ dispute is subject to the laws of Quebec. These elements make the case distinct from _R. v. National Post_. However, in _Globe and Mail_, the Supreme Court of Canada recognized that a journalist-source privilege exists under Quebec civil law, putting an end to the controversy over whether the Wigmore Doctrine can be applied under Quebec civil law. It thus completes the analysis that began in _R. v. National Post_, in which the court recognized a journalist-source privilege in the context of criminal proceedings before a common law court. _Globe and Mail_ therefore stands out as a milestone Supreme Court of Canada decision that comes as a relief to the media community across Canada, clarifying the protection of journalists’ sources, and providing investigative journalism with tools to properly accomplish its goal.

The Supreme Court concluded that neither the Civil Code nor the C.C.P. explicitly recognize a journalist-source privilege. Nor does the Quebec Charter. Even so, the constitutional rights guaranteed under the Canadian Charter and the quasi-constitutional rights guaranteed under the Quebec Charter are engaged by a claim of journalist-source privilege.

That said, the Supreme Court strongly emphasized that the identity of a confidential journalistic source may only be revealed “if his response was vital to the integrity of the administration of justice”.107

Quebec’s rules of procedure and evidence reflect the mixed sources of Quebec civil law. Its procedural and evidentiary rules do not give Quebec tribunals a discretionary power equal to that of the common law tribunals in the rest of Canada when it comes to filling the existing gaps in the law. When confronted with gaps in Quebec’s codified laws, it is entirely appropriate that Quebec tribunals turn to common law rules, which are one of the legal sources of Quebec civil law. If they believe that transplanting a common law rule into Quebec civil law is warranted, the courts must still respect the fundamental principle that the interpretation and articulation of such a rule would not otherwise be contrary to the overarching principles set out in the Civil Code and the Quebec Charter. In addition, the common law appears to recognize a journalist-source privilege based on a Wigmore-like framework.

107 _Id._
The Supreme Court concluded that there is a foundation in Quebec civil law supporting the recognition of a journalist-source privilege or an exemption from the general obligation to provide evidence or testify in a civil case. The application of the Wigmore Doctrine by Quebec courts, in compliance with the overarching principles of the Civil Code and the Quebec Charter, provides an analytical framework for determining whether it is expedient, in a given case, to exempt journalists from answering a question that would force them to identify their sources.

In *Globe and Mail*, the Supreme Court of Canada developed a clear analytical framework for recognizing a journalist-source privilege on a case-by-case basis. To compel journalists to answer questions likely to reveal the identity of a confidential source, the courts must perform the four-pronged analysis developed by the Supreme Court of Canada in *Globe and Mail*, inspired by the “Wigmore Doctrine”. Once it is found that the questions are relevant, journalists must answer whether: (1) the relationship originated in a confidence that the source’s identity would not be disclosed; (2) anonymity was essential to the relationship in which the communication arose; (3) the relationship was one that was sedulously fostered in the public interest; and (4) the public interest that would be served by protecting the identity of the informant outweighed the public interest in getting at the truth.

By recognizing the existence of a journalist-source privilege under Quebec civil law, the Supreme Court of Canada confirmed the central role that investigative journalism plays in preserving a free and democratic society. The confidentiality of journalists’ sources is a crucial factor allowing journalists to obtain unfettered public interest information and to continue to play a key role in monitoring public and democratic institutions.