A Theory of Newsgathering? Freedom of the Press at the Supreme Court

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

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A THEORY OF NEWSGATHERING?
FREEDOM OF THE PRESS
AT THE SUPREME COURT

A distinctive cluster of appeals has made its way to the Supreme Court of Canada in the last year or so. These cases raise a variety of issues under section 2(b) of the Charter, and while some relate specifically to freedom of expression, others present important questions about freedom of the press and the media. There are no less than six cases in a group which asks the Court to consider how newsgathering promotes the accountability and transparency of parliamentary government in Canada. Democratic self-government is indisputably at the core of section 2(b)'s underlying values, and newsgathering is likewise a core element of a free and vital press. For freedom of the press to have meaning, the newsgathering function must remain free from interference by the state.

Two of the appeals, Grant v. Torstar Corp and Cusson v. Quan, concerned the law of defamation, and resulted in the creation of a new defence which is styled "public interest responsible communication". When it introduced this defence, the Court acknowledged that Canada was out of step with other common law jurisdictions, and that the focus on "truth" in defamation law placed a burden on newsgathering which was unacceptable under the Charter. While Grant and Cusson mark a major step forward in the law of defamation, the next question is whether these decisions signal a willingness to enhance the status of newsgathering in other settings.

Two other appeals, yet undecided, present newsgathering issues in the context of information obtained by a journalist in exchange for a promise to protect the identity of a confidential source. These cases, R. v. National Post and Globe & Mail v. Canada (Attorney General), invite the Court to consider whether the common law Wigmore test — which determines the availability of a privilege — must be constitutionalized to give newsgathering the protection that is required by section 2(b) of the Charter.

Both cases raise prickly issues about how the balancing should be done; the proceedings in National Post arose under the criminal law and involve an allegedly forged bank document, which casts doubt on the integrity of former Prime Minister Jean Chrétien, and came into the possession of a reporter so that those doubts could be brought to light. Meanwhile, the Globe & Mail appeal is rooted in civil proceedings which were initiated by the federal government after the Quebec Sponsorship Scandal. In this instance, the question is whether the Globe reporter's confidential source should be protected in circumstances where the defendant seeks access to the informant to determine whether a limitations defence can be pleaded. Both cases are enormously important for two reasons: first, the Court will have to decide how to handle the journalist's privilege under the Charter; and, second, it will also have to explain how the interest in protecting newsgathering access to sources of information — and avoiding the chill factor — will be measured against the competing interests in a court order which will violate a promise of confidentiality.

In addition, the Court also reserved decision in the fall of 2009 in two important publication ban appeals. Again, the cases arise in different settings; one is criminal and the other, civil. In R. v. White and Toronto Newspapers v. Canada (Attorney General), the question is whether a Criminal Code provision making a publication ban mandatory in bail proceedings, at the request of the Crown or the defence, is unconstitutional. The other is the second part of the Globe & Mail privilege appeal. There, the question is whether it is improper and inappropriate for a judge to impose a publication ban, without conducting an inquiry under section 1 of the Charter to determine whether the requirements of the Dagenais test have been met. Each will test the Court's commitment to the open court principle; under the existing jurisprudence, limits on this principle must meet a strict standard of justification under section 1. From that perspective, any retreat from that approach, in either case, will be seen as a setback.

Together, this unusual group of cases gives the Court a rare opportunity to establish a strong theory of newsgathering under the Charter. It can be difficult to predict what the Court might do. Even so, following Grant and Cusson the mood is one of cautious optimism for court-watchers awaiting the Court's decisions.

Jamie Cameron
Professor of Law, Osgoode Hall Law School, member of the CCLA Board of Directors. Professor Cameron was part of the team that represented CCLA in both R. v. National Post and Globe and Mail v. Canada.