

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

B E T W E E N:

THE NATIONAL POST, MATTHEW FRASER and ANDREW McINTOSH

Appellants (Appellants)

- and -

HER MAJESTY THE QUEEN

Respondent (Respondent)

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF NEW BRUNSWICK,
ATTORNEY GENERAL OF ALBERTA, BELL GLOBEMEDIA INC., CANADIAN
BROADCASTING CORPORATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,
CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN NEWSPAPER ASSOCIATION,
ADIDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, CANADIAN JOURNALISTS FOR
FREE EXPRESSION, CANADIAN ASSOCIATION OF JOURNALISTS, PROFESSIONAL
WRITERS ASSOCIATION OF CANADA, RTNDA CANADA/ASSOCIATION OF ELECTRONIC
JOURNALISTS, MAGAZINES CANADA, CANADIAN PUBLISHERS' COUNCIL, BOOK AND
PERIODICAL COUNCIL, WRITERS' UNION OF CANADA and PEN CANADA

Interveners

FACTUM OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Professor Jamie Cameron

Osgoode Hall Law School, York University
4700 Keele Street
North York ON M3J 1P3

Tel.: 416.736.5033

Fax: 416.736.5736

Davies Ward Phillips & Vineberg LLP

44TH Floor, 1 First Canadian Place
Toronto, ON M5X 1B1

John McCamus
Matthew Milne-Smith

Tel.: 416.863.0900

Fax: 416.863.0871

Solicitors for Canadian Civil Liberties Association

Gowling Lafleur Henderson LLP

Suite 2600
160 Elgin Street
Ottawa, ON K1P 1C3

Ed Van Bommel

Tel.: 613.786.0212

Fax: 613.788.3500

Ottawa Agents for Canadian Civil Liberties
Association

TO: [TO BE FILLED IN BY GOWLINGS]

AND TO:

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Overview

1. The CCLA takes no position on the outcome of this appeal and limits its argument to the test for establishing a privilege for confidential journalist sources in light of the *Charter*. Newsgathering is at the core of s. 2(b)'s values, and confidential sources are an important newsgathering tool. As such, an order under the *Criminal Code* that would compel the disclosure of a confidential source – whether reasonable or not under s. 8 of the *Charter* – presumptively violates s. 2(b) of the *Charter* and must be justified under s. 1.

2. The CCLA proposes a straightforward test. If the target of a search warrant or assistance order can establish that (a) he or she is a journalist, and (b) execution of the order would likely result in a breach of source confidentiality, then the execution of the order violates s. 2(b) of the *Charter*. For the search to proceed, the

Crown must justify the breach of s. 2(b) using the *Dagenais/Mentuck* test to balance the interests at stake under s. 1 of the *Charter*.¹

Part I ~ Facts

3. The CCLA accepts the facts as set out in the appellants' factum.

Part II ~ Issues

4. The CCLA will address only the first four constitutional questions stated in Chief Justice McLachlin's Order dated November 17, 2008.

Part III ~ Argument

Newsgathering Is a Constitutionally Protected Activity

5. Newsgathering is protected by the *Charter* and is at the core of s. 2(b)'s values. In recognizing that a free and vigorous press plays a vital role in democratic self-government, this Court has held that s. 2(b) protects the right to gather as well as to disseminate information. As Justice La Forest stated in *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, "measures that prevent the media from gathering . . . information, and from disseminating it to the public, restrict the freedom of the press".²

6. In discussing the role of the press, the Court has recognized that access to news sources is a key element of the newsgathering function. It is in the public interest that the press have access to sources that enable timely reporting and commentary on public institutions and events. Indeed, the *Charter* must protect against laws that limit such access. When the press fulfills its newsgathering role, it promotes a well-informed public that is equipped to discuss and debate the issues of the day. The relationship

¹ *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442.

² [1996] 3 S.C.R. 480 at para. 26.

between democracy, a well-informed public, and a free press, the Court has stated, is "the *raison d'être* of the s. 2(b) guarantees".³

Compelling Disclosure of a Confidential Source Breaches Section 2(b)

7. As newsgathering lies at the core of s. 2(b), so too does a journalist's ability to gather news by entering into relationships that are based on a promise to protect the confidentiality of the source's identity. An order that effectively requires a journalist to disclose the identity of a confidential source threatens the integrity of this relationship between journalists and their sources. As the Ontario Court of Appeal recently recognized, the "likely effect of revealing a journalist's confidential source will be to discourage from coming forward other potential sources, who, for whatever reason, need to conceal their identity."⁴

8. To infringe on a journalist's ability to obtain confidential sources is to infringe on the newsgathering function, and therefore on s. 2(b). Any analysis of when and in what manner journalists can protect their sources must therefore accommodate the protections of s. 2(b).

The Journalist-Source Relationship Requires Charter Protection

9. The journalist-source privilege has traditionally been adjudicated according to the traditional common law "Wigmore" test.⁵ The Wigmore test predates the *Charter*, and applies to numerous relationships such as doctor-patient, psychiatrist-patient and family counsellor-client. While these relationships raise important issues, they do not necessarily or inevitably engage *Charter* rights.

10. However any other relationships may be characterized, those required for newsgathering involve constitutionally protected activity. As will be explained in the next section, the Wigmore test was never intended to, and does not, in fact, offer the

³ *Ibid* at para. 23.

⁴ *St. Elizabeth Home Society v. Hamilton (City)*, (2008), 89 O.R. (3d) 81 at para. 34 (Ont. C.A.).

⁵ *R. v. McClure*, [2001] 1 S.C.R. 445 at para. 29.

protections necessary for constitutionally protected activities. In this regard, the Ontario Court of Appeal erred in this case in concluding that the journalist-source privilege is governed by the common law Wigmore test.

The Proper Test Under the *Charter*

11. The Court of Appeal concluded that "both the section 2(b) analysis and the Wigmore analysis require the same balancing".⁶ This appears misconceived. Wigmore provides a common law approach which is inappropriate where *Charter* rights, such as the journalist-source privilege, are necessarily at stake.

12. As described above, the Wigmore test applies at common law to determine whether a relationship gives rise to a privilege in a variety of circumstances, some of which may not implicate the *Charter*. Under the Wigmore test those claiming the privilege have the burden to establish four criteria: they must establish the privileged nature of the relationship (*i.e.*, the first two steps of the test), and must also demonstrate that the interest in protecting the relationship outweighs the competing interest in disclosure (*i.e.*, the third and fourth steps of the test).

13. The Wigmore criteria do not distinguish between relationships that are constitutionally protected, and relationships that are not. Wigmore is not, and was never intended to be, a safeguard for *Charter* rights. Where the privilege in question is constitutional in nature, it is incompatible with the thrust of *Charter* jurisprudence to require the claimant to demonstrate that the entitlement outweighs the state's interest in disclosure. Throughout the *Charter*'s history, this Court has consistently held that once a party establishes a breach of the *Charter*, the burden shifts to the state to justify that breach.

14. The CCLA addresses these limitations of the Wigmore test by proposing a two-step, *Charter*-based approach to the question of journalist-source privilege. The first step requires a journalist to show that information was obtained (1) by a journalist, (2) in

⁶ Judgment of the Court of Appeal, *Appellants' Record*, Vol. I, para. 76.

the course of newsgathering activities, and (3) under a promise that the journalist will protect the confidentiality of the source. These three elements are derived from the *Charter's* protection of newsgathering, but are nonetheless analogous to the first two elements of the Wigmore test. If they are met, a s. 2(b) privilege arises.

15. Once the journalist establishes a *prima facie* privilege under s. 2(b), the burden shifts to the Crown to justify the breach under s. 1. Under the second step of the CCLA's approach, the government has the burden to demonstrate that the state's interest in gaining access to the privileged information outweighs the *Charter* interest in protecting the journalist-source privilege.

16. In the remainder of this factum, the CCLA will elaborate on the two steps of the test set out above. Before doing so, it should be noted that the CCLA does not consider who is a journalist, for purposes of a journalist-source privilege under section 2(b), as the issue does not arise here and it is unnecessary to address it in this appeal.

Section 2(b): Establishing the Privilege

17. As mentioned above, the constitutional status of newsgathering and the importance of journalist-source confidentiality to the newsgathering function make the journalist-source relationship a distinctive one for *Charter* purposes. *Charter* rights demand *Charter* protections.

18. Any attempt to violate the confidentiality of a source threatens newsgathering and therefore breaches s. 2(b). Every exposed source – no matter what the context is – will make the next source less willing to come forward. A breach of journalist-source confidentiality may still be justifiable in particular cases, such as where a confidential source in a position of power deliberately misleads a journalist in order to manipulate public opinion. However, that analysis must satisfy the requirements of s. 1 in order to protect the constitutional interests at stake.

19. Journalist-source privilege is therefore distinguishable from other cases where courts have ruled that Wigmore applies to the question of privilege. In *R. v. Gruenke*, for instance, this Court considered a claim to privilege by a woman who

confessed that she had committed murder to a lay counselor and a pastor.⁷ The Court held that the communications at stake in that case did not lie at the heart of s. 2(a)'s guarantee of religious freedom:

The extent (if any) to which disclosure of communications will infringe on an individual's freedom of religion will depend on the particular circumstances involved, for example: the nature of the communication, the purpose for which it was made, the manner in which it was made, and the parties to the communication.⁸

20. *Gruenke* itself illustrated the Court's point. The confession in question was made to relieve emotional stress, not for a religious or spiritual purpose.⁹ Certain communications between an individual and a religious officiant, even if intended to be confidential, may not warrant protection under s. 2(a). It is therefore unnecessary to place the burden on the government to justify invasion of the privilege under s. 1, and Wigmore can still apply.

21. The same cannot be said of journalist-source confidentiality and s. 2(b). Any attempt to violate the confidentiality of a source threatens newsgathering and therefore infringes s. 2(b). While a breach may be justifiable in an individual case, that justification must satisfy the requirements of s. 1.

22. The CCLA takes no position in this appeal on the reasonableness of the orders under s. 8, other than to observe that the expectation of privacy would be very high in any relationship where a source provides information to a journalist, under a promise that the journalist will protect the confidentiality of the source. The CCLA's position in this appeal is that, independently of section 8, an assistance order or search warrant that would compel the disclosure of a journalist's confidential source infringes s. 2(b) of the

⁷ [1991] 3 S.C.R. 263.

⁸ *Ibid* at 289.

⁹ *Ibid* at 292.

Charter and must be justified under s. 1. Simply put, in the context of this appeal s. 8 and s. 2(b) address complementary, but different rights. Just as s. 2(b) cannot determine the reasonableness of a search, s. 8 cannot protect s. 2(b) rights. Government actions that implicate both provisions, like searches of the media, must satisfy both tests.

23. This Court's earlier decisions about searches of media organizations¹⁰ do not govern in this appeal because the searches in those cases did not violate a privilege or infringe upon newsgathering. For example, *Lessard* involved a warrant for a videotape held by the CBC that allegedly recorded the commission of a crime. Forcing the CBC to disclose the tape had little or no effect on newsgathering. The videotape had already been aired twice, a factor that Justice Cory considered "a very important factor".¹¹ Nor did the search warrant prevent the CBC from airing the tapes in the future, or from filming video footage in the future. The search warrant was reasonable under s. 8, and s. 2(b) was not violated.

24. In this case, however, the relationship between journalists and their sources is at the heart of the newsgathering function and s. 2(b)'s guarantee of freedom of the press. Each disclosure of a confidential source could well deter future sources from stepping forward. This infringes the right of the press to gather and publish the news, and the public's right of access to news. Regardless of whether the Crown has satisfied s. 8, this infringement of s. 2(b) must be justified under s. 1.

The Section 1 Test

25. A journalist-source privilege which is protected by s. 2(b) can only be violated when it is justifiable to do so under s. 1. Both the common law and statutory law must be applied in a manner consistent with the *Charter*. This Court has established that the *Dagenais/Mentuck* test applies to determine whether the exercise of a judicial

¹⁰ *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 421; *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459.

¹¹ *Lessard*, *ibid* at 447.

discretion – at common law or under a statutory provision, as is the case in this appeal – is in compliance with the *Charter*.¹²

26. This same test applies to any assistance order or search warrant that would violate a journalist-source privilege protected by s. 2(b). Under the second step of the CCLA's proposed methodology in this appeal, confidential information obtained by a journalist in the course of newsgathering is protected from disclosure unless (1) disclosure is necessary to prevent a serious risk to the proper administration of justice and alternative means of obtaining the information are not available; and (2) the salutary effects of compelling disclosure outweigh the deleterious consequences for the journalist-source privilege and for newsgathering under s. 2(b) of the *Charter*.

27. This standard of justification has its origins in *Dagenais*, where it applied to balance the competing interests in the open court principle and the accused's right to a fair trial. Since *Dagenais*, this test has been applied, with slight modifications, to determine the permissibility of closing a courtroom under a provision of the *Criminal Code* (*Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*¹³), to test the constitutionality of a publication ban to protect information about undercover police operations (*R. v. Mentuck*;¹⁴ *R. v. O.N.E.*¹⁵), and to determine the status of a secret hearing under the Criminal Code's anti-terrorism provisions (*Re Vancouver Sun*¹⁶).

28. The test which the Court introduced in *Dagenais* and modified in *Mentuck* provides a versatile way to balance freedom of expression and other important rights and interests because it "reflects the substance of the *Oakes* test"¹⁷ and incorporates "the

¹² *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)* (1996), *supra*.

¹³ *Ibid.*

¹⁴ [2001] 3 S.C.R. 442.

¹⁵ [2001] 3 S.C.R. 478.

¹⁶ [2004] 2 S.C.R. 332.

¹⁷ *Dagenais*, *supra* at 878.

essence of the balancing of the *Oakes* test".¹⁸ For that reason, the Court has indicated that the test is not limited to the open court principle but can apply to many other rights and interests.

29. The *Dagenais/Mentuck* standard is appropriate for the journalist-source privilege, for two reasons. First, the test incorporates the *Oakes* criteria that require the government to justify an interference with the journalist-source privilege. The privilege must be protected unless the Crown can prove that alternative means of obtaining the information are not available, and disclosure is necessary to prevent a serious risk to the proper administration of justice. The court must also balance the salutary effects for the administration of justice against the deleterious consequences of compelling disclosure, for newsgathering and freedom of the press.

30. The first element in the test requires the Crown to demonstrate that the disclosure is necessary and rationally connected to a concrete investigative purpose. It is not sufficient to show that obtaining this information would be a logical step in the investigation. The necessity of obtaining the information must be based on more than mere speculation and possible utility, and alternative means of acquiring it must be unavailable.

31. The second reason that the *Dagenais/Mentuck* standard is appropriate is that the balancing that takes place under the second branch of the test reflects the third and fourth requirements of the Wigmore test, but properly places the burden of justifying the breach of a journalist-source privilege on the government. The competing interests on both sides must be carefully weighed in this balancing exercise.

32. For instance, in assessing the salutary benefits for the administration of justice, the seriousness of the matter under investigation should be a factor. At a minimum, the Crown should demonstrate that the government is addressing a serious threat to life, limb, liberty, health, or the physical safety and defense of the state itself.

¹⁸ *Re. Vancouver Sun, supra* at para. 28.

Then, in addressing the deleterious consequences for expressive freedom, the court must take into account the chilling effects of any government interference with the most private and in many ways most distinctive tool of newsgathering — the journalist's access to confidential sources of information.

33. Another important issue in the balancing analysis is that it is not sufficient for the government to show that the information provided by the source was false, evidence of a distinct crime, or even criminal itself. Whistle blowers might be breaking laws when they disclose confidential information, but if that were enough to overcome the privilege, the protection would be eliminated in some of the most important instances. Similarly, the falsity of the information should not vitiate the protection. If the source has knowingly misled the journalist, this could be a relevant factor in the balancing analysis. If, however, there is no evidence to suggest that the source knew the information was false or intentionally manipulated the journalist in an attempt to publish misleading information, the privilege should not be undermined because the information the source passed on in good faith was ultimately false.

Part IV ~ Submissions on Costs

34. The CCLA seeks no costs and asks that no costs be awarded against it.

Part V ~ Order Requested

35. The CCLA takes no position on the outcome of this appeal.

April 20, 2009

ALL OF WHICH IS RESPECTFULLY SUBMITTED

John McCamus

Jamie Cameron

Matthew Milne-Smith

Counsel for the Canadian Civil Liberties
Association

Part VI ~ List of Authorities

1. *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 421
2. *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459
3. *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480
4. *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 442
5. *R. v. Gruenke*, [1991] 3 S.C.R. 263
6. *R. v. McClure*, [2001] 1 S.C.R. 445
7. *R. v. Mentuck*, [2001] 3 S.C.R. 442
8. *R. v. O.N.E.*, [2001] 3 S.C.R. 478
9. *Re Vancouver Sun*, [2004] 2 S.C.R. 332
10. *St. Elizabeth Home Society v. Hamilton (City)* (2008), 89 O.R. (3d) 81 (Ont. C.A.)

Part VII ~ List of Legislation and Constitutional Provisions

Updated on January 25, 2007
R.S.C. 1985, Appendix II, No. 44, Schedule B, s. 2

Constitution Act, 1982

1982, c. 11, Schedule B (U.K.)

[Reprinted in R.S.C. 1985, App. II, No. 44, Schedule B]

Part I

Canadian Charter of Rights and Freedoms

Fundamental Freedoms

SECTION 2.

Fundamental freedoms

2. Everyone has the following fundamental freedoms:
- (a) freedom of conscience and religion;
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 - (c) freedom of peaceful assembly; and
 - (d) freedom of association.

1982, c. 11, Schedule B (U.K.), s. 2, effective April 17, 1982.