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Protection of Confidential Sources in Canada Is Not Absolute

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Media's confidential sources deserve protection, but that protection is not absolute. The Supreme Court of Canada recently held that the need for confidentiality must be balanced with other societal interests. The Supreme Court held that courts "should strive to uphold the special position of the media and protect the media's secret sources where such protection is in the public interest." However, there is no blanket immunity.

At the heart of the case was a "plain brown envelope" provided to a *National Post* journalist by a confidential source regarding the "Shawinigate" scandal. The scandal involved a Business Development Bank of Canada loan to the Auberge Grand-Mère in Shawinigan, Quebec, the home town (and political riding) of former prime minister Jean Chrétien. The envelope contained a document that could have taken the scandal much further, had it not been a forgery.

The police obtained a search warrant to seize the forged document from the *National Post*. The Court's recent decision ruled on the Post's application to quash the warrant. The Post was trying to protect its journalist's confidential source, relying on the *Charter* right of freedom of expression, which includes freedom of the press.

In its reasons, the Court rejected a blanket rule protecting journalistic sources. Instead, it adopted a balancing approach, in which a court must weigh the importance of the journalist-source relationship against "any countervailing public interest such as the investigation of a particular crime (or national security, or public safety or some other public good)." While the Court stated that "[t]he exercise is essentially one of common sense and good judgment," it also held that there were a number of different factors that ought to be considered and weighed against the public interest in respecting the journalist's promise of confidentiality. These factors include the nature and seriousness of the offence under investigation, the importance and type of the evidence sought and the underlying purpose of the investigation.

Although the Court ultimately found against the *National Post* and upheld the search warrant (in an 8-1 decision), it also confirmed the importance of journalistic sources to the public interest in free expression guaranteed by the *Charter*.

The case is important for any media who are considering making a promise of confidentiality to their sources. On the one hand, it is a helpful case, reiterating the obligation of the courts to protect those sources in the right circumstances. However, it also demonstrates that confidentiality, even if promised, cannot be guaranteed. **T**

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