CITATION: R. v. The National Post, 2008 ONCA 139
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COURT OF APPEAL FOR ONTARIO

LASKIN, SIMMONS and GILLESE JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Respondent
(Appellant/Respondent by way of Cross-Appeal)

and

THE NATIONAL POST, MATTHEW FRASER and
ANDREW MCINTOSH

Applicants
(Respondents/Appellants by way of Cross-Appeal)

and

BELL GLOBEMEDIA INC. and
CANADIAN BROADCASTING CORP.

Intervenors

Robert W. Hubbard for the appellant, respondent by way of cross-appeal

Marlys Edwardh and John Norris for the respondents, appellants by way of cross-appeal

Peter M. Jacobsen and Adrienne Lee for the intervenor Bell Globemedia Inc.

Daniel Henry for the intervenor Canadian Broadcasting Corp.

Heard: June 5 and 6, 2007

On appeal from the order of Senior Justice Mary Lou Benotto of the Superior Court of Justice dated January 21, 2004, with reasons reported at (2004), 69 O.R. (3d) 427, quashing a General Warrant and Assistance Order issued by Justice Ramez Khawly of the Ontario Court of Justice on July 4, 2002.

LASKIN and SIMMONS JJ.A.:

I. Overview

[1] The issues on this appeal concern the validity of a search warrant and assistance order. The main issue requires that we resolve a clash between two competing interests: the interest of the police and the Crown in investigating and prosecuting a serious crime; and the interest of the National Post and one of its journalists in protecting the identity of a confidential source.

[2] In 2001, a confidential source sent National Post reporter Andrew McIntosh a document that appeared to be a copy of a Business Development Bank of Canada (BDBC) loan authorization for a hotel in then Prime Minister Jean Chrétien's home riding. If genuine, the document could show that Mr. Chrétien had a conflict of interest in relation to the loan. However, BDBC officials claimed that the document was a forgery and complained to the police.

[3] The police obtained a search warrant and assistance order requiring the National Post to produce the document and the envelope in which it was sent. The police wanted these items to conduct forensic tests that might identify the person who sent them.

[4] On an application by the respondents, Benotto S.J. found: (i) the issuing judge made a jurisdictional error by issuing the search warrant and assistance order without notice to the National Post; (ii) the search warrant and assistance order violated the *Charter*; and (iii) the document and the envelope were protected by journalist-confidential source privilege. Accordingly, she quashed the search warrant and assistance order but dismissed the respondents' request for costs.

[5] The parties raise four issues on the Crown's appeal:

1. Did the reviewing judge err in holding that the issuing judge made a jurisdictional error by proceeding without notice to the National Post?

2. Did the reviewing judge err in holding that the assistance order issued with the search warrant was properly made?

3. Did the reviewing judge err in holding that there were reasonable grounds to believe the document was a forgery?

4. Did the reviewing judge err in holding that the search warrant and assistance order violated s. 2(b) of the *Charter* and that the document and envelope were privileged?

[6] The respondents cross-appeal, claiming that the reviewing judge erred in dismissing their request for costs. We did not call on the Crown to respond to the cross-appeal.

[7] For the reasons that follow, we allow the appeal, set aside the reviewing judge's order, and restore the issuing judge's order.

II. Background

(1) The story and the confidential source

[8] Andrew McIntosh is an award-winning investigative journalist who was employed by the National Post from August 1998 until February 2005. One of his first story ideas at the National Post concerned Prime Minister Jean Chrétien's investment in the Grand-Mère Golf Club located in Mr. Chrétien's home riding of St. Maurice, Quebec. During his investigation, McIntosh also became interested in Mr. Chrétien's involvement with a 1997 BDBC loan to the Auberge Grand-Mère, a hotel located next to the golf club, and with other federal grants in the riding.

[9] McIntosh's initial stories on these subjects were published in January 1999. According to the reviewing judge, they "sparked a national debate both in and out of the House of Commons" and prompted various people to contact McIntosh. Some of those people became confidential sources of information for him.

[10] As a senior investigative reporter, McIntosh had the authority to develop his own sources and to make promises of confidentiality to these sources as he deemed necessary. In 1999, McIntosh contacted X because he believed X would have the type of information he needed to continue his research into these stories. X was unwilling to provide McIntosh with information at that time, even on a confidential basis.

[11] In the fall of 2000, Y contacted McIntosh and indicated he or she had a matter of great public importance that he or she would only discuss if McIntosh gave an undertaking that Y would not be identified. After some discussion, McIntosh provided the undertaking.

[12] Y then told McIntosh that he or she had contacted him on X's behalf and that X was unwilling to speak to him directly because of a fear of reprisals. However, provided McIntosh gave a blanket, unconditional promise to protect the identities of both X and Y, X was willing to provide McIntosh with documents and information concerning the Auberge Grand-Mère loan. McIntosh gave the undertaking and subsequently received documents and information from Y, including what appeared to be copies of original documents from BDBC files.

[13] McIntosh used this material to confirm information that he had received from other confidential sources, in particular that Mr. Chrétien had called François Beaudoin, the president of the BDBC, and urged Beaudoin to approve the loan to Auberge Grand-Mère. On November 15, 2000, the National Post published McIntosh's story concerning these events. When asked by reporters to comment, Mr. Chrétien acknowledged that the story was accurate.

(2) McIntosh receives the document and envelope from X

[14] On April 5, 2001, McIntosh received a sealed plain brown envelope addressed to him from an anonymous sender in the daily mail delivery at the Ottawa Bureau of the National Post. The envelope contained a document that appeared to be a copy of a BDBC internal loan authorization for a $615,000 mortgage to Les Entreprises Yvon Duhaime Inc. (Auberge Grand-Mère) in August 1997. Significantly, the document indicated that, at the time it applied for and received the loan, Auberge Grand-Mère listed an outstanding debt of $23,040 to "JAC Consultants". J& AC Consultants Inc. is a Chrétien family holding company.[1] McIntosh realized that if the document were genuine, it could be proof of a serious conflict of interest on the part of Mr. Chrétien.

[15] In his efforts to check the authenticity of the document, McIntosh faxed copies to the BDBC, the Prime Minister's office, and David Scott, counsel to the Prime Minister. All three claimed that the document was a forgery. The BDBC sent two letters to the National Post on April 6, 2001. The first said that the document appeared to be a forgery, as the BDBC's records showed no indication of a debt to JAC Consultants. In the second letter, the BDBC claimed that the National Post was in possession of confidential bank documents, the contents of which should not be disclosed.

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[1] Although the loan document refers to "JAC Consultants", the name of the Chrétien family holding company appears to be "J& AC Consultants Inc."

[16] Since it was unable to confirm the authenticity of the document McIntosh had received, the National Post did not to publish details of the $23,040 loan. However, relying on the letter sent by the BDBC to the National Post claiming that the document was a forgery,[2] other news organizations published details about the leaked document and the reference to the $23,040 loan.

[17] Sometime in the week after McIntosh received the document, X contacted him and requested a meeting. At their meeting, X asked for an undertaking of confidentiality, which McIntosh gave. X then admitted sending the document to McIntosh and asked that the envelope be destroyed. X explained that he or she was afraid that the authorities might try to use it to identify him or her through fingerprint or DNA analysis, and expressed concern that the envelope might link him or her to a document now alleged to be a forgery. McIntosh refused to destroy the envelope but told X that he had taken steps to secure both it and the document. McIntosh also told X that his undertaking of confidentiality would remain binding so long as he believed that X had not sent him the document to deliberately mislead him.

[18] As part of his investigation, McIntosh also questioned X to try to trace the origin of the leaked document. According to McIntosh, X told him that he or she had received the document in the mail anonymously and had passed it on to McIntosh in the belief that it was genuine and involved a matter of considerable public interest. McIntosh claims that, on one other occasion, he was able to confirm the authenticity of documents that X had received in the same way. In his evidence, McIntosh said he was satisfied that X was a reliable source and that the loan authorization was genuine. If the loan authorization was a forgery, he did not believe X knew that.

(3) The police investigation and search warrant application

[19] After receiving McIntosh's fax, the BDBC complained to the RCMP about what it alleged was a forged document. In May 2001, the RCMP assigned the investigation to Corporal Roland Gallant. On June 7, 2001, Gallant met with McIntosh, two senior editors of the National Post, and counsel for the National Post. At this meeting, McIntosh confirmed that he had received the document in a plain brown envelope with no return address and that he had "not destroyed any documents the [news]paper received." When asked if he had any idea who might have sent him the document, McIntosh declined to answer. Counsel for the National Post refused Gallant's request to produce the document.

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[2] The letter was filed as an exhibit in a Quebec civil proceeding involving the BDBC and Mr. Beaudoin.

[20] Before applying for a search warrant, Gallant and Crown counsel advising him met and corresponded with counsel for the National Post in an effort to determine the least intrusive way of obtaining the document and envelope. During these discussions, counsel for the National Post revealed that before becoming aware of the police investigation, McIntosh had placed the document and envelope in a secure location not on National Post premises.

[21] Following further investigation, Gallant applied for a search warrant and assistance order. In the information to obtain filed in support of the application, Gallant stated that he believed two offences had been committed – forgery (creation of a false document with the intent that it be acted upon as genuine) and uttering a forged document (attempting to cause McIntosh and the National Post to act on the forged loan authorization as if it were genuine).

[22] Gallant also stated that the evidence he wished to seize was not available from any other source because the document and envelope were the *actus reus* of these offences and would be required to substantiate any charges. In addition, Gallant stated that he wanted to submit the document and envelope for forensic testing to determine if they had "fingerprints or other identifying markings which might assist in identifying the source of the document." These other possible identifying markers included saliva, from which a DNA sample could be obtained.

(4) The search warrant and assistance order

[23] On July 4, 2002, Khawly J. issued a general warrant and assistance order *ex parte* under ss. 487, 487.01, and 487.02 of the *Criminal Code* directed to the National Post and its editor-in-chief. By their combined effect, the search warrant and assistance order required the editor-in-chief of the National Post to "take such steps as are necessary" to locate the document and envelope McIntosh had received and to make those items available for seizure at the Toronto office of the National Post on or before August 9, 2002. If the editor-in-chief failed to do so, the search warrant authorized police officers to search the Toronto office of the National Post.

(5) The application to quash

[24] After being served with the search warrant and assistance order, the respondents applied for a *certiorari* order to quash them and for a similar order under ss. 2(b) and 24(1) of the *Charter*. On August 6, 2002, the respondents obtained a consent order staying the execution of the search warrant and assistance order until their validity was finally determined in the Superior Court.

[25] Because of the nature of the issues raised by the respondents' application, the reviewing judge granted intervenor status to The Globe and Mail (Bell Globemedia Publishing Inc.) and the CBC (Canadian Broadcasting Corporation). In support of the application, the respondents and intervenors filed affidavits concerning the use of confidential sources from fifteen well-respected journalists.

III. The Reviewing Judge's Decision

[26] On January 21, 2004, the reviewing judge quashed the general warrant and assistance order. As we have said, she found that the issuing judge made a jurisdictional error by proceeding without notice to the National Post, that the order violated the *Charter*, and that the subject matter of the search warrant and assistance order was protected by journalist-confidential source privilege. She also found that there were reasonable grounds to believe that the assistance order was properly made and that the document was a forgery.

IV. Analysis

(1) Did the reviewing judge err in holding that the issuing judge made a jurisdictional error by proceeding without notice to the National Post?

(i) Background

[27] In the information to obtain filed in support of the search warrant application, Gallant noted that counsel for the National Post had "indicated a desire to have notice of, and to appear, on the consideration of this application." However, Gallant also said that, in his view, notice was unnecessary:

> In consultation with Crown counsel, and with reference to the judgment of the Ontario Court of Appeal in *R. v. Canadian Broadcasting Corp.* … I do not believe that it is necessary or proper to provide notice in this case. I am bringing the request of the National Post for notice to the attention of this Court as part of my duty to make full frank and fair disclosure.

[28] The basis for National Post's request for notice of the search warrant application is not apparent from the body of the information to obtain. However, statements in two letters from counsel for the National Post, attached as exhibits to the information to obtain, show that the National Post's concern was twofold: the purpose of the search warrant was to assist in identifying a confidential source, and this would amount to a violation of the *Charter*.

[29] In a letter to Crown counsel dated December 19, 2001, counsel for the National Post stated: “The search for this plain brown envelope is justified, if at all, by the belief that it could identify a confidential source … we are gravely concerned about the seriousness of the constitutional violation that is about to occur”.

[30] In a subsequent letter to Crown counsel dated April 9, 2002, counsel for the National Post repeated this concern:

> In December 2001 and early January 2002 I informed you, on behalf of The National Post, that they declined the invitation to assist in identifying and handing over the envelope. *Obviously, the concern of The National Post rests upon the fact that such assistance will inevitably cause them to be an essential piece in the chain of evidence identifying a confidential source.* [Emphasis added.]

[31] Although the search warrant and assistance order were issued without notice, they included relatively standard terms for search warrants of media premises. For example, they required the police to interfere as little as possible with the operations of the National Post and gave the National Post the right to request that items seized be sealed pending an application to determine the validity of the search warrant and assistance order. In addition, while the search warrant and assistance order were to be served on July 5, 2002, no search was to occur until August 9, 2002.

(ii) The reviewing judge’s reasons

[32] The reviewing judge found that because the issuing judge proceeded without notice, he “did not have adequate information pertinent to the *Charter* issue … [and] failed to give adequate consideration to the pertinent factor of confidential sources.” Citing *R. v. Canadian Broadcasting Corp.* (2001), 52 O.R. (3d) 757 at 760 (C.A.) and *Descôteaux v. Mierzwinski* (1982), 70 C.C.C. (2d) 385 (S.C.C.), the reviewing judge concluded, “Given the public interest at stake, this is one of the rare instances where failure on the part of the justice to give notice amounts to a jurisdictional error.”

(iii) Discussion

[33] In our view, the reviewing judge erred in holding that the issuing judge committed a jurisdictional error by issuing the search warrant and assistance order without notice. The search warrant and assistance order fully recognized the respondents' rights because they ensured that, if requested by the respondents, the items sought by the police would not be disclosed until the validity of the search warrant and assistance order was determined on judicial review. Neither the decision of this court in *R. v. Canadian Broadcasting Corp.*, nor the decision of the Supreme Court of Canada in *Descôteaux* supports the reviewing judge's conclusion that the issuing judge committed jurisdictional error.

[34] In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* (1991), 67 C.C.C. (3d) 544, the Supreme Court of Canada set out a list of factors a judge must consider before issuing a search warrant for media premises. In *R. v. Canadian Broadcasting Corp.*, Moldaver J.A., writing for this court, rejected the argument that notice to the media should be added to this list of factors. Moreover, Moldaver J.A. determined that on the facts of *R. v. Canadian Broadcasting Corp.*, the judge who issued the search warrant against media premises did not lose jurisdiction by proceeding without notice. Although he acknowledged a theoretical possibility that failure to give notice could constitute jurisdictional error in some instances, Moldaver J.A. said he considered that possibility to be "remote in the extreme".

[35] Moldaver J.A. also expressed the view that "with the added safeguards enumerated in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* … the traditional model [of prior *ex parte* authorization for search warrants followed by a right of judicial review] provides adequate protection to ensure a strong, vibrant and independent media, free to carry out its important role in our society without unwarranted state intrusion."

[36] The respondents argue that this case is distinguishable from *R. v. Canadian Broadcasting Corp.* because, in finding that notice to the media was unnecessary, Moldaver J.A. relied on two key factors not present in this case: (i) the material sought was similar to material that had already been published; and (ii) there was no suggestion that the material sought "emanates from a confidential source or is otherwise the product of media research or investigation."

[37] The respondents argue that, in this case, their input on the search warrant application was essential because the search warrant and assistance order were aimed at identifying a confidential source. According to the respondents, by failing to direct that notice be given to them, the issuing judge deprived himself of important information concerning journalist-confidential source privilege and s. 2(b) of the *Charter* that he was required to consider and thereby committed jurisdictional error.

[38] We disagree. In *R. v. Canadian Broadcasting Corp.*, Moldaver J.A. said the two factors identified by the respondents made it especially clear that the issuing judge was not required to give notice. However, he did not say that failure to give notice where those factors were not present would give rise to jurisdictional error.

[39] In our view, although Moldaver J.A. recognized that cases concerning documents or information from confidential sources could raise different considerations from the specific fact situation before him, he nevertheless concluded that the prospect of an issuing judge losing jurisdiction by proceeding without notice was extremely remote and that the current model of *ex parte* authorization followed by judicial review was adequate to protect the media.

[40] Significantly, in this case, the terms of the search warrant and assistance order not only permitted the respondents to require that the items sought be sealed pending a court order, they also provided the respondents with sufficient time to obtain an order staying execution of the search warrant and assistance order pending further order. In our view, nothing about this case justifies the conclusion that it falls within the extremely limited category of cases Moldaver J.A. envisaged could theoretically give rise to jurisdictional error where an issuing justice proceeds without notice.

[41] We acknowledge that in *Descôteaux*, Lamer J. said that an issuing justice will exceed his or her jurisdiction by issuing a warrant under s. 487(1)(b) of the *Criminal Code* for privileged material or by issuing a warrant for search and seizure in a manner that interferes inappropriately with the freedom of the press. In relation to privileged material, this is because s. 487(1)(b) authorizes only seizure of material that is admissible as evidence; if a judge authorizes seizure of privileged material, the judge exceeds his or her jurisdiction. However, Lamer J. did not say that proceeding without notice, in itself, amounts to jurisdictional error. Moreover, he endorsed a procedure similar to the one used in this case in which a seized document was to be sealed and returned to the issuing justice to determine what, if any, portions were privileged.

[42] In any event, this case is distinguishable from *Descôteaux* because *Descôteaux* dealt with solicitor-client privilege. As solicitor-client privilege is a class privilege, communications subject to the privilege are presumptively inadmissible. This raises an issue concerning an issuing justice's jurisdiction to order seizure under s. 487(1)(b) of the *Criminal Code* from the outset. In contrast, journalist-confidential source privilege is not a class privilege, but rather must be established on a case-by-case by basis. Communications potentially subject to the privilege are presumptively admissible and become inadmissible only after the privilege is recognized. Accordingly, the same level of concern about the issuing justice acting without jurisdiction before the privilege issue is determined does not arise.

[43] In our view, although the issuing judge in this case certainly had the discretion to inquire further into the claim of journalist-confidential source privilege, he did not lose jurisdiction by issuing the search warrant and assistance order without notice, but on terms that would protect the items sought from external review until the privilege claim was determined.

[44] We add one final point. Even assuming the respondents had a valid claim for journalist-confidential source privilege to protect the identity of X, at best, they were entitled to an order restricting the use that could be made of material and information on the items sought. They were not entitled to an order that the search warrant and assistance order should not issue.

[45] We say this because shortly after receiving the document, McIntosh sent copies to several people in an effort to authenticate it. His conduct demonstrates that, at its core, the respondents' privilege claim relates to material and information on the document and envelope that might reveal the identity of the sender. Their claim does not relate to the communicative aspects of the document and envelope.

[46] In our view, since the original document and envelope could be required to prove an offence, the most the respondents could fairly ask for were terms addressing whether these items should be subjected to forensic testing or sealed. That request could properly be addressed following the execution of the search warrant and assistance order. This additional point reinforces our conclusion that the issuing judge did not lose jurisdiction by proceeding without notice.

(2) Did the reviewing judge err in holding that the assistance order was properly made?

(i) Introduction

[47] As we have said, during the discussions preceding the search warrant application, counsel for the National Post revealed to Crown counsel advising Gallant that before becoming aware of the police investigation, McIntosh placed the document and envelope in a secure location not on National Post premises or at his home.

[48] In the information to obtain filed in support of the search warrant application, Gallant stated that "The National Post has placed the evidence to be seized in a location outside its offices and outside the home office of … McIntosh. It will not disclose the location of the evidence." Gallant therefore asked for and obtained an assistance order requiring the editor-in-chief of the National Post to locate the document and envelope and make them available for seizure at the National Post's Toronto office.

[49] Before the reviewing judge, the respondents argued that using an assistance order to effectively create the conditions to justify a search warrant was an improper use of an assistance order and inappropriately expanded the power to search. They also argued that the assistance order would make the editor-in-chief an arm of the government.

[50] Relying on the wording of ss. 487.01 and 487.02 of the *Criminal Code* and other cases where assistance orders were used in a similar way, the reviewing judge rejected these arguments.

[51] On appeal, the respondents make three submissions. First, they say that because the amplified record showed that only McIntosh knew where the items sought were stored, there was no basis for finding that the editor-in-chief could provide the required assistance. Second, they say that the assistance order violates their rights under s. 2(b) of the *Charter* because it conscripts the editor-in-chief into becoming an agent of the police and compels him to breach his ethical obligations. Third, they say that the assistance order is too vague because it does not define exactly what steps the editor-in-chief is required to take, or what he is to do if McIntosh does not comply with a request to produce the items sought.

(ii) Discussion

[52] We reject these submissions. The amplified record confirms that McIntosh is the only person who knows the location of the document and envelope. However, in the time leading up to the issuance of the search warrant and assistance order, both McIntosh and the National Post made statements suggesting that these items were subject to the control of the National Post.

[53] For example, when asked by Gallant at their June 7, 2001 meeting if he kept the envelope, McIntosh responded that he had "not destroyed any documents the [news]paper received." In a letter to Gallant dated December 13, 2001, counsel for the National Post stated, "the newspaper does not intend to deliver up to you the 'plain brown envelope with no return address' as referred to by Andrew McIntosh … at the Toronto meeting."

[54] Further, in a letter dated April 30, 2002 to Crown counsel advising Gallant, counsel for the National Post confirmed that during the course of their dealings relating to the proposed search warrant, "all officials at the National Post, including Mr. McIntosh, undertook to ensure that no steps would be taken to alter or destroy the documents in light of the allegation that the documents themselves were fraudulent."

[55] Given these statements, the ongoing discussions between the National Post, Gallant, and Crown counsel leading up to the issuance of the search warrant and assistance order, and the fact that during this period neither the National Post nor McIntosh informed Gallant that McIntosh alone knew the location of the document and envelope, we see nothing improper about directing the assistance order to the editor-in-chief of the National Post. If the respondents desire, the assistance order can be amended so that it is directed to both the editor-in-chief and McIntosh.

(3) Did the reviewing judge err in holding that there were reasonable grounds to believe that the document was a forgery?

(i) Introduction

[56] In the information to obtain, Gallant identified several factors that suggested the document was a forgery. On the application to quash the search warrant and assistance order, the respondents filed an affidavit challenging some of Gallant's evidence and cross-examined Gallant for several days. They used their affidavit and Gallant's cross-examination to amplify the record and then submitted to the reviewing judge that the amplified record fundamentally undermined Gallant's assertion that the document was a forgery.

[57] In her reasons, the reviewing judge referred to certain problems revealed on Gallant's cross-examination, but found that the issuing judge "had sufficient information to conclude the document was a forgery."

[58] On appeal, the respondents argue that the reviewing judge focussed improperly on the record before the issuing judge. They contend she failed to recognize that the amplified record showed the search warrant and assistance order could not have been issued because of problems with the integrity of the BDBC files.

(ii) Discussion

[59] We do not accept the respondents' contention. Even assuming that the reviewing judge erred by failing to focus on the amplified record, based on our review, the evidence remaining after consideration of the amplified record was sufficient to support the issuance of the search warrant and assistance order.

[60] In the information to obtain, Gallant relied on the following factors to support the claim that the document was a forgery:

- The police investigation revealed that BDBC loan applications are completed and filed with supporting documents at a local branch. After being recommended by the branch director, a copy of the loan authorization is e-mailed to the BDBC head office in Montréal and the original is forwarded by mail. Once on the internal network, the loan authorization can be accessed by all head office employees.

- The BDBC's file copy of the loan authorization contains a number of markings that are not on the National Post's copy, including: (i) a stamp on the upper right corner of the first page of the document, "Entered at H.O. 18 Aout 1997 566 Isabelle St-Hilaire"; (ii) what Gallant described as the "hand signature" of Yvon Duhaime, the principal of Auberge Grand-Mère, on the upper left corner of the fourth page of the document; and (iii) check marks in pen on the second page of the document in the section "Analyse des Garanties" beside the numbers $1,800,000 and (270,000) and additional check marks on the fifth page of the document.

- The sixth page of BDBC's file copy of the loan authorization does not refer to the debt to JAC Consultants.

- After receiving the fax from McIntosh, BDBC officials obtained a suppliers list from the Auberge Grand-Mère's accountant and confirmed that JAC Consultants was not on the Auberge Grand-Mère suppliers list.

- An RCMP computer crime specialist found no "traces" of the National Post copy of the document in the BDBC's electronic records.

- The BDBC claims the National Post copy of the document is a forgery.

[61] On the cross-examination of Gallant, the respondents established that: (i) the "hand signature" Gallant referred to as being on the BDBC file copy of the document was not the signature of Yvon Duhaime, but rather was a notation made by a bank employee; (ii) two pages had been deleted from BDBC's electronic version of the document, including the page on the National Post's copy of the document that referred to the debt to JAC Consultants; (iii) the BDBC file copy of the Auberge Grand-Mère suppliers list was missing the page that would have listed any debt to JAC Consultants; and (iv) the suppliers list BDBC officials obtained from the Auberge Grand-Mère's accountant was dated July 31, 1997 and was not identical to the suppliers list dated July 11, 1997 sent to the BDBC at the time of the loan application.

[62] In addition, the respondents established that before swearing the information to obtain, Gallant had not checked the authenticity of the stamp and other markings on the BDBC copy of the document and had not checked additional copies of the document in other BDBC files to see if they referred to the disputed debt. The respondents also established that some of Gallant's statements in the information to obtain concerning the BDBC file were either inaccurate or incomplete.

[63] As was observed by the reviewing judge, the amplified record raises concerns about the integrity of the BDBC's file relating to the Auberge Grand-Mère loan. However, although the record as amplified by the respondents undermines to some extent the strength of the evidence supporting an inference that the National Post copy of the document was a forgery, we are nevertheless satisfied that there remained sufficient evidence upon which the issuing judge could have issued the search warrant and assistance order.[3] We say that for three reasons.

[64] First, the remaining record still confirms that: (i) the paper copy of the loan authorization in the BDBC file does not include the reference to a debt to JAC Consultants; (ii) the suppliers list provided by the Auberge Grand-Mère's accountant does not refer to a debt to JAC Consultants; and (iii) the BDBC claimed that the National Post copy of the document was a forgery.

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[3] For the sake of completeness, we add that the Crown adduced evidence on the hearing before the reviewing judge that strengthens the inference that the document is a forgery. For example, in an affidavit filed before the reviewing judge, Gallant gave evidence supporting the authenticity of the stamp on the first page of the BDBC copy of the document. As it may not be appropriate to take account of such evidence when assessing whether the issuing judge could have issued the warrant, we have not done so.

[65] Second, even though Gallant had not investigated the authenticity of the markings on the BDBC copy of the document before swearing the information to obtain, the nature and presence of these markings still provides some support for an inference that the BDBC copy of the document is the document that was reviewed by bank employees and processed at head office. The National Post version of the document contains no markings that would support a similar inference.

[66] Third, even though the missing suppliers list and incomplete electronic version of the document raise concerns about the integrity of the BDBC files, those concerns are essentially neutral in relation to the issue of which version of the document is a forgery. They do not create an inference that the BDBC paper copy of the document is not authentic, nor do they support an inference that the National Post copy is authentic.

[67] Accordingly, although we do not consider that the evidence remaining in the record as amplified by the respondents establishes conclusively that the document is a forgery, we are satisfied that it meets the reasonable and probable grounds threshold and that it would have been open to the issuing judge to issue the search warrant and assistance order on the basis of that evidence.

(4) Did the reviewing judge err in holding that the search warrant and assistance order violated s. 2(b) of the *Charter* and that the document and envelope were privileged?

(i) The decision of the reviewing judge and the positions of the parties

[68] This is the critical question on the appeal. The National Post and McIntosh claim privilege over the document and envelope because they want to protect the identity of their confidential source. As we have said, they have no interest in the communicative aspects of the document, in the words on the pages. Copies of the document have been widely distributed and its contents extensively reported in the media. Instead, the respondents' concern is that forensic testing may reveal X's identity. Thus, at its heart, what the respondents seek to protect is the confidentiality of the relationship between McIntosh and his source.

[69] Before the reviewing judge, the respondents argued that the search warrant and assistance order requiring them to produce the document and envelope were unlawful for two reasons: they violated the respondents' constitutional right to freedom of the press under s. 2(b) of the *Charter*; and they violated the case-by-case privilege that arose between McIntosh and X at common law.

[70] The Crown responded that any confidentiality in the relationship between McIntosh and X – either under the *Charter* or at common law – must yield to the superior interest of getting at the truth, of investigating and prosecuting a serious crime. It contended that the document and envelope were the *actus reus* of the offences of forgery and uttering a forged document. Without both items there can be no further investigation and indeed no proof of these serious offences.

[71] The reviewing judge resolved this clash of competing interests in favour of the respondents on both branches of their argument. First, she concluded that the search warrant and assistance order violated s. 2(b) of the *Charter*. In her view, "the eroding of the ability of the press to perform its role in society cannot be outweighed by the Crown's investigation."

[72] Second, the reviewing judge concluded that because "the documents may reveal the identity of a confidential source, they are privileged." In so concluding, she applied the four criteria set out by Professor Wigmore and accepted by Canadian courts for determining the existence of a privileged communication or relationship on a case-by-case basis. On the fourth and critical Wigmore criterion, the reviewing judge found that the benefits of protecting the identity of McIntosh's source "outweigh the benefits of disclosure in the context of this investigation".

[73] In this court, the Crown focused on the reviewing judge's finding of privilege. The respondents, however, maintained that the Crown's appeal should be dismissed on the basis either of the reviewing judge's finding of privilege or her finding of a *Charter* violation.

[74] In our view, whether considered under the law of privilege or under s. 2(b) of the *Charter*, the analysis, with one caveat, is in substance the same. Both analyses require the court to balance the privacy interest of the press and the competing law enforcement interest of the state. The caveat – which the reviewing judge properly recognized – is that the application of the Wigmore criteria must itself take account of the values underlying ss. 2(b) and 8 of the *Charter*: see for example *A.(M.) v. Ryan*, [1997] 1 S.C.R. 157 at para. 30.

[75] We, of course, accept as did the reviewing judge that the gathering and dissemination of news and information without undue state interference is an integral component of the respondents' constitutional right of freedom of the press under s. 2(b) of the *Charter*: see *Canadian Broadcasting Corp. v. Lessard* (1991), 67 C.C.C. (3d) 517 at 522, 533. However, this does not mean that press organizations or journalists are immune from valid searches under s. 8 of the *Charter*. And s. 2(b) does not guarantee that journalists have an automatic right to protect the confidentiality of their sources. The court must ensure that the privacy interests of the press are limited as little as possible. But the court must also balance against the privacy interest of the press the state or other societal interests in getting at the truth.

[76] Equally, under the common law of privilege as reflected in the Wigmore criteria, the court must balance the privacy interest of the claimant against the state or societal interest in getting at the truth and correctly disposing of the litigation. Because both the s. 2(b) analysis and the Wigmore analysis require this same balancing, we consider it appropriate to address the competing arguments of the parties within the existing common law framework provided by the Wigmore criteria. Resort to *Charter* remedies is unnecessary. Understandably, the Wigmore criteria were not only the focus of the Crown's submissions, they were also central to the respondents' submissions.

(ii) Privilege under the Wigmore criteria

[77] Both this court and the Supreme Court of Canada have said that a "privilege" is an exception to the fundamental proposition that everyone has a general duty to give evidence relevant to a matter before the courts. A privilege is recognized only where required by an overriding societal interest: see *Reference re Legislative Privilege* (1978), 39 C.C.C. (2d) 226 (Ont. C.A.) and *Ryan* at para. 19. That is so because a privilege impedes the pursuit of truth. It means that the court must attempt to do justice in a case without potentially relevant and admissible evidence. Therefore, as a starting point, press organizations and journalists, like everyone else, owe a duty to give relevant evidence in a case before the courts.

[78] Nonetheless, Canadian courts have recognized two categories of common law privilege: class privilege and case-by-case privilege: see *R. v. Gruenke* (1991), 67 C.C.C. (3d) 289 at 303 (S.C.C.). A class privilege – sometimes aptly called a blanket privilege – carries with it a presumption of inadmissibility. Two well-known and well-established class privileges are solicitor-client and police-informer. Under the former, communications between lawyers and their clients are presumptively privileged; under the latter the identity of a police informant is also presumptively privileged. A party seeking disclosure or urging admissibility of solicitor-client communications or of the identity of a police informant must show why the privilege should not attach.

[79] The journalist-confidential source relationship is not protected by a class privilege. However, in *R. v. McClure* (2001), 151 C.C.C. (3d) 321 at para. 29, the Supreme Court said that the confidentiality of the relationship between a journalist and the journalist's source may be protected on a case-by-case basis. Whether the privilege will be recognized in a given case must be determined by applying the four Wigmore criteria. These criteria are:

(i) The communications must originate in a confidence that they will not be disclosed;

(ii) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;

(iii) The relationship must be one which in the opinion of the community ought to be "sedulously fostered"; and

(iv) The injury to the relationship from the disclosure of the communications must be greater than the benefit gained from the correct disposal of the litigation.

See John Henry Wigmore, *Evidence in Trials at Common Law*, 4th ed. (Boston: Little, Brown, 1961) vol. 8 at 543; *McClure* at para. 29; and *Ryan* at para. 20.

[80] If necessary, these criteria may be modified to fit a particular case. Here, as we have said, they must be infused with the values underlying ss. 2(b) and 8 of the *Charter*.

[81] The reviewing judge applied Wigmore's criteria to the amplified record in the light of these *Charter* values, and found that the respondents had established each of the four criteria. The Crown submits that the reviewing judge erred in each of her findings. However, it devoted most of its argument to the third and especially the crucial fourth criterion. The Crown also submits that we should review her ultimate finding of privilege on a standard of correctness.

[82] Our overall conclusion, which we will elaborate on, is as follows. The reviewing judge's findings on the first two Wigmore criteria are findings of fact, which are reasonably supported by the amplified record. We therefore defer to these findings. See *H. L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401. The reviewing judge's finding on the third Wigmore criterion is likely a finding of mixed fact and law. Although we have some doubts about this finding, we need not interfere with it. There is no need to do so because in our opinion at bottom this appeal turns on the weighing of the competing press and state interests called for by the fourth criterion.

[83] That weighing calls for a measure of judicial discretion. Thus the reviewing judge's finding, which favoured confidentiality over disclosure, is entitled to deference from an appellate court. Even so, we consider her finding unreasonable. We consider it unreasonable because it rests on important inferences, which are not supported by the record, and on an inadequate regard for the important law enforcement interest at stake in this case. We therefore set aside the reviewing judge's determination that the document and envelope are privileged and restore the issuing judge's order that the editor-in-chief of the National Post produce them to the Crown.

(iii) The first Wigmore criterion: the communications must originate in a confidence that they will not be disclosed

[84] The reviewing judge found that this first criterion was met. The Crown disputes this finding for two reasons: first, it says that although X sent the document to McIntosh anonymously, X did so before McIntosh had given X any promise of confidentiality; and second, it says that the document and envelope are not "communications" but pieces of real evidence that existed independently of the relationship between McIntosh and X. We do not accept either argument.

[85] The reviewing judge found that McIntosh had promised X confidentiality before he received the document. That finding is grounded in the evidence. McIntosh received the document and envelope in early April 2001. However, the preceding fall – the fall of 2000 – McIntosh had been contacted by Y on X's behalf and at that time, in the reviewing judge's words: "Mr. McIntosh gave a blanket, unconditional promise of confidentiality to protect the identity of both X and Y." Therefore, contrary to the Crown's argument, X sent the document to McIntosh after the promise of confidentiality had been given.

[86] In one sense, as the Crown argues, the document and envelope are pieces of real evidence and not communications. However, the Crown's argument misunderstands the nature of the privilege asserted by the respondents. The journalist-confidential source privilege protects the identity of the source and any information that might identify the source. And one of the reasons the Crown wants disclosure of the document and envelope is precisely because they may reveal the identity of X or the forger. Accordingly, if the identity of the source is to be protected so too should any real evidence that may reveal the source's identity. Thus, as the respondents contend, and as the reviewing judge found: "To disclose the document, would be to negate the confidence." We agree. We therefore uphold the reviewing judge's finding on the first Wigmore criterion.

(iv) The second Wigmore criterion: the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties

[87] The reviewing judge also found that the second criterion – that the element of confidentiality be essential to the full and satisfactory maintenance of the relationship between the parties – was met. This criterion should be considered both in a narrow and a broad context. Narrowly, the focus is on the journalist and the confidential source, here McIntosh and X. More broadly, the focus is on the relationship between journalists and their sources.

[88] The reviewing judge not only found that confidentiality was essential to the maintenance of the relationship between McIntosh and X, she also concluded more broadly that without confidential sources the media could not function effectively. She put it this way at para. 48 of her reasons:

> Inherent in the concept of confidentiality is the ability of the media to protect the identity of the source. The evidence establishes that sources may "dry-up" if their identities were revealed. Without confidential sources, many important stories of considerable public interest would not have been published. Confidential sources are essential to the effective functioning of the media in a free and democratic society.

[89] The Crown contends that the reviewing judge had no basis to conclude the media require confidential sources to carry out its constitutionally protected activities. We disagree. Although the reviewing judge's strong conclusion may be somewhat overstated, the Crown's contention is refuted by the amplified record, case law, and common sense.

[90] First, the record. The respondents filed the affidavits of fifteen respected journalists. The reviewing judge fairly summarized their evidence in the following sentence: "The evidence demonstrates that the use of confidential sources is essential to the uncovering and reporting of matters of public interest." The Crown filed no contrary evidence.

[91] Second, case law. In *Lessard* at pp. 522 and 539 both La Forest J. in his concurring reasons, and McLachlin J. in her dissent, wrote that in some circumstances the press' ability to gather information and report on matters of public interest may be restricted if journalists cannot protect the confidentiality of their sources. Some sources may fear speaking to a journalist if their identity will be disclosed.

[92] Finally, common sense. Here we can do no better than quote what La Forest J. said in *Lessard* at p. 522: "That someone might be deterred from providing information to a journalist because his or her identity could be revealed seems to me to be self-evident." It seems self-evident to us as well.

[93] Thus, we accept the reviewing judge's finding that the respondents established the second Wigmore criterion. We do think, however, that her strong conclusion that media sources may "dry-up" unless the journalist-confidential source relationship is protected needs to be qualified to some degree. Here we make two points.

[94] First, although routinely ordering journalists to disclose their confidential sources may be likely to deter these sources from coming forward and may cause them to "dry-up", nonetheless, journalist-confidential source privilege is not a blanket privilege. Journalists can never guarantee confidentiality. There will be some cases – and this is one of them – where the privilege cannot be recognized. Refusing to recognize the privilege in appropriate cases will not, in our view, cause media sources to "dry-up".

[95] Second, many journalists have not needed to offer confidentiality to their sources to encourage them to come forward. Indeed, as the intervenors fairly pointed out, many journalists prefer to stay on the record, and will rely only on sources whom they can identify.

[96] Nonetheless, the Crown cannot deny the proposition that some sources will not come forward without a promise of confidentiality. And if they do not come forward some public interest stories will not be investigated and reported on. At least to that extent, the element of confidentiality is essential to the full and satisfactory maintenance of the journalist-confidential source relationship.

(v) The third Wigmore criterion: the relationship must be one which in the opinion of the community ought to be "sedulously fostered"

[97] In *Ryan* at para. 20, McLachlin J. interpreted this criterion to mean that the relationship must be one that should be "sedulously fostered" for the public good. "Sedulous" means diligent, painstaking, or persevering: see *Canadian Oxford Dictionary*, 2d ed., *s.v.* "sedulous". Thus, the third Wigmore criterion requires that the relationship in question be diligently fostered for the public good. The reviewing judge found at para. 61 that the journalist-confidential source relationship should be fostered:

> The importance of the journalist-informant relationship is established by the evidence. If the journalist-informant relationship is undermined, society as a whole is affected. It is through confidential sources that matters of great public importance are made known. As corporate and public power increase, the ability of the average citizen to affect his or her world depends upon the information disseminated by the press. To deprive the media of an important tool in the gathering of news would affect society as a whole. The relationship is one that should be fostered.

[98] The Crown submits that in so finding the reviewing judge made two errors. First, it contends that in today's society we have no principled basis to distinguish between those journalists who are entitled to confidential source relationships and those who are not. Today, many persons, especially by using the internet, may be called "journalists" or "the press" because they disseminate information to the public, yet may not merit the journalist-confidential source privilege. Second, the Crown contends that we should not sedulously foster a relationship that the respondents are using to shield a possible wrongdoer from investigation and prosecution for a serious criminal offence. Promoting this relationship between McIntosh and X does not advance the public good; indeed the Crown says that doing so is antithetical to the core values underlying s. 2(b) of the *Charter* – using the constitutional guarantee of freedom of the press not to get at the truth, but to subvert it.

[99] We reject the Crown's first contention. The case-by-case approach to privilege does not require us to establish the boundaries of legitimate journalism. The National Post is a recognized national news organization and McIntosh is a respected journalist. It can hardly be disputed that they fall within the class of persons who may be entitled to the benefit of journalist-confidential source privilege.

[100] The Crown's second contention raises a difficult question, but one that we do not need to resolve to decide this appeal. Essentially, the question under the third Wigmore criterion is whether the relationship should be characterized broadly as a journalist-confidential source relationship, or more narrowly as a journalist-criminal wrongdoer relationship. The reviewing judge used the broad approach; the Crown advocates the more narrow one.

[101] When viewed at a broad level, we agree with the reviewing judge that the relationship between a journalist and a confidential source should be diligently fostered for the public good. As we have said, some matters of public interest could not be thoroughly investigated or investigated at all without confidential sources of information. Moreover, the reviewing judge's approach finds support in two Supreme Court of Canada decisions. In *Slavutych v. Baker*, [1976] 1 S.C.R. 254 at 261, the court characterized the relationship as one between "colleagues" at a university; in *Ryan* at para. 25, McLachlin J. characterized the relationship as one between psychiatrists and patients seeking treatment from harm resulting from sexual abuse.

[102] On the other hand, some comments of this court in *Reference re Legislative Privilege* suggest that in an appropriate case we should look at the third Wigmore criterion through a narrower lens. For example at p. 236, Lacourcière J.A. did not characterize the relationship broadly as one between a member of the Assembly and an informant; instead he characterized it more narrowly as one between a member of the Assembly and an informant with knowledge of criminal wrongdoing:

> In brief, there is no reason under the third condition propounded by Wigmore for the recognition of a privilege, to say that the relation between members of the Assembly and informants "ought to be sedulously fostered". On the contrary, we believe the opinion of the community would be that informers with relevant information of criminal wrongdoings should be encouraged to go to the police, who are charged with the responsibility of investigating suspected crimes and breaches of statute law. The informer is then, regardless of his motive, acting in the public interest, to protect society from wrongdoers.

[103] The United States Supreme Court took a similar approach in its important decision, *Branzburg v. Hayes*, 408 U.S. 665 (1972). There, the court concluded that requiring journalists to appear and testify before state or federal grand juries did not abridge their freedom of speech and press guaranteed by the First Amendment. White J., writing for the court, in words that might well apply to the third Wigmore criterion, said at p. 696: "More important, it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy".

[104] For the purpose of this appeal, we need not resolve this debate nor interfere with the reviewing judge's finding. Even if we accept her finding that the third Wigmore criterion has been met because the relationship between journalists and their sources, broadly speaking, should be diligently fostered for the public good, the narrower or more specific focus urged on us by the Crown is still very relevant to the crucial balancing under the fourth Wigmore criterion. We now turn to that balancing.

(vi) The fourth Wigmore criterion: the injury to the relationship from the disclosure of the communications must be greater than the benefit gained from the correct disposal of the litigation

[105] The reviewing judge found that the benefit from protecting the identity of McIntosh's source outweighed the societal interest in getting at the truth and correctly disposing of the litigation. She therefore concluded that because the document and envelope may reveal the identity of X they were privileged. She set out the grounds for her finding and conclusion at paras. 78 to 80 of her reasons:

> [78] The Wigmore criteria, applied to this case, demonstrate an overwhelming interest in protecting the identity of Mr. McIntosh's source. But more is required. It must also be demonstrated that the benefit that inures from privilege outweighs the interest in the correct disposal of the litigation. As Chief Justice McLachlin stated, this exercise is "essentially one of common sense and good judgment." [Footnote omitted.]
>
> [79] The balancing of these competing interests leads me to confirm the privilege. Here, the document is required as part of an investigation, not the defence of an accused. There is evidence that the document was probably extensively handled. There is only a remote and speculative possibility that the fingerprints were those of the alleged forgerer. Disclosure of the document will minimally, if at all, advance the investigation while at the same time damage freedom of expression.
>
> [80] There are unique factors here, including, the confidential relationship between X and Mr. McIntosh: the fact that he was promised confidentiality; the politically charged nature of the information obtained; the importance of informing Canadians with respect to the most powerful political figure in the country; and the vast body of evidence and jurisprudence produced which show the importance of confidentiality in the news gathering role of the press. All these factors outweigh the benefits of disclosure in the context of this investigation.

[106] The Crown submits that these paragraphs reveal two significant errors. First, the Crown submits that the reviewing judge erred in inferring in para. 79 that "[t]here is only a remote and speculative possibility that the fingerprints were those of the alleged forgerer" and that "[d]isclosure of the document will minimally, if at all, advance the investigation". Second, the Crown submits that she erred in para. 80 by almost entirely disregarding the important law enforcement interest at stake in this case. Thus she unreasonably skewed the careful balancing required by the fourth Wigmore criterion. We agree with the Crown's submissions.

[107] We begin with the two related inferences drawn by the reviewing judge: the "remote and speculative possibility" inference and the "minimally, if at all" inference. These inferences caused her to seriously diminish the importance of the law enforcement interest in the document and the envelope.

[108] We see four problems with these inferences. First, in inferring that the document would be of little value in identifying the forger, the reviewing judge referred only to the unlikely possibility of fingerprints on the document. The police, however, were not just interested in fingerprints. The evidence showed that they were also interested in the saliva on the envelope, which through DNA testing may well identify the forger or the person who sent the forged document. The reviewing judge failed to take account of this evidence.

[109] Second, the reviewing judge failed to take account of McIntosh's evidence, which she had referred to earlier in her reasons, that X asked him to destroy the document and the envelope because X was concerned that forensic testing would identify him or her. At the very least, X's request shows that X believed disclosure of the document and envelope would advance the investigation.

[110] Third, in drawing these inferences, the reviewing judge implicitly relied on McIntosh's beliefs about the genuineness of the document and the reliability of X. McIntosh believes that the document is genuine, but if it is not, he believes that X did not know it was a forgery. Yet, on the amplified record, the reviewing judge sustained the issuing judge's conclusion that there are reasonable and probable grounds to believe the document is a forgery. Having upheld this conclusion, the reviewing judge should not have deferred to McIntosh's beliefs. Like her, we accept the sincerity of his beliefs. But the police, not McIntosh and not the court, should determine whether the document and envelope will provide evidence to identify either the forger or the person who uttered the forged document.

[111] And last, the inferences drawn by the reviewing judge under the fourth Wigmore criterion are inconsistent with her finding under the first Wigmore criterion, which we quoted earlier: "To disclose the document, would be to negate the confidence." If it is a remote and speculative possibility that forensic testing will reveal the identity of the person who sent the document, then disclosing the document and envelope will not likely negate any confidence.

[112] Thus we conclude that the two inferences drawn by the reviewing judge – there is only a remote and speculative possibility that disclosure of the document and envelope will identify the forger; and disclosure of the document and envelope will minimally, if at all, advance the investigation – are unsupportable. We approach the balancing on that basis.

[113] We will now address the Crown's second argument – that the reviewing judge disregarded the importance of the law enforcement interest in this case. In setting out the press interest in confidentiality at para. 80 of her reasons, the reviewing judge properly took account both of considerations specific to the case before her and broader societal considerations. She also recognized at para. 78 of her reasons the important point McLachlin J. made in *Ryan* at para. 31: to establish a case-by-case privilege the respondents have to make out more than a compelling case for confidentiality; they also have to show that the benefit from privilege, no matter how great, outweighs the law enforcement interest in disclosure.

[114] Therefore, in weighing the competing interests, as well as addressing the considerations favouring confidentiality, the court must also address the considerations – both specific to the case and societal – favouring disclosure. Unfortunately, the reviewing judge did not do so. We therefore will set them out here. As will become evident, the considerations favouring disclosure of the document and the envelope sharply outweigh those favouring confidentiality. Indeed, as we view the case, the law enforcement interest in disclosure is overwhelming.

[115] The document and the envelope are not merely pieces of evidence tending to show that a crime has been committed. They are the very *actus reus* of the alleged crime. For the purpose of demonstrating that a crime was committed – the crime of uttering a forged document to the National Post – evidence is not available from another source. Gallant so testified in the information to obtain, and the respondents did not suggest otherwise. Moreover, nothing in the amplified record points to any other avenue of investigation of this discrete offence. Therefore, without the document and the envelope and the ability to conduct forensic testing of them there can be no further investigation, no ability to get at the truth.

[116] We do not diminish the press' important role in uncovering and reporting an alleged wrongdoing. But in our society it is the police who are charged with the crucial role of investigating and prosecuting crime. And, to paraphrase what White J. said in *Branzburg v. Hayes* at p. 692, it is not necessarily better to write about crime than to do something about it.

[117] And this is no ordinary crime. This is an especially grave and heinous crime. Assuming the document was forged, either the forger or some other person sent it to the National Post to create controversy and undermine the authority of a sitting Prime Minister of Canada. The National Post itself admitted that if the document was forged, it would be evidence of a criminal conspiracy to force a duly elected Prime Minister from office.

[118] Moreover, while the law enforcement interest is overwhelming, the press' legitimate interest in confidentiality is attenuated. Although, in pursuit of their constitutional right to gather and disseminate the news, journalists are entitled to protect their sources, that entitlement loses much of its force when journalists use it to protect the identity of a potential criminal or to conceal possible evidence of a crime. The press, like any one else, should have "an interest in seeing that crimes are investigated and prosecuted": see *Lessard* at 535. Society expects as much. Instead of furthering that interest, however, the respondents are shielding a potential wrongdoer from prosecution for a serious crime by refusing to deliver to the authorities the items representing the *actus reus* of the offence.

[119] McIntosh himself recognized that there must be at least some limits on the press' entitlement to protect the confidentiality of its sources. That is why he told X that his promise of confidentiality would remain binding only so long as he believed that he was not being misled. However, once the court concluded that there were reasonable and probable grounds to believe the document was a forgery, McIntosh could not arrogate to himself the right to decide whether X was a wrongdoer.

[120] Therefore, we conclude that the respondents' claim of privilege over the document and envelope fails on the fourth Wigmore criterion. The Crown urged us to go farther and say that the law enforcement interest in disclosure will always trump the media's claim to a journalist-confidential source privilege. We decline to do so because the Crown's position is antithetical to the recognition of a case-by-case privilege.

[121] We leave to another day and another case whether on different facts a privilege may be recognized. In the case before us, we set aside the reviewing judge's holding that the document and envelope are privileged and order them to be produced to the Crown.

V. Conclusion

[122] This appeal raised four issues.

[123] On the first issue, we conclude that the reviewing judge erred in holding that the issuing judge made a jurisdictional error by proceeding without notice to the National Post.

[124] On the second issue, we conclude that the reviewing judge did not err in holding that the assistance order issued with the warrant was properly made.

[125] On the third issue, we conclude that the reviewing judge did not err in holding that there were reasonable grounds to believe that the document was a forgery.

[126] And on the fourth issue, we conclude that the reviewing judge did err in holding that the search warrant and assistance order violated s. 2(b) of the *Charter* and that the document and envelope were privileged.

[127] Because of our conclusions on the first and fourth issues, we allow the appeal, set aside the order of the reviewing judge, restore the search warrant and assistance order issued by the issuing judge, and order that the editor-in-chief of the National Post produce the document and envelope to the Crown. As we have said, if requested by the respondents the assistance order may be amended so that it is directed to McIntosh and the editor-in-chief of the National Post.

[128] Although we did not call on the Crown to respond to the respondents' cross-appeal on costs, because of our decision on the appeal, the cross-appeal is effectively moot.

Signed: "John Laskin J.A."
"Janet Simmons J.A."
"I agree E.E. Gillese J.A."

RELEASED: "JL" February 29, 2008