CITATION: St. Elizabeth Home Society v. Hamilton (City), 2008 ONCA 182
DATE: 20080317
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COURT OF APPEAL FOR ONTARIO

SHARPE, CRONK and GILLESE JJ.A.

BETWEEN:

ST. ELIZABETH HOME SOCIETY (HAMILTON, ONTARIO)

Plaintiff (Respondent)

and

THE CORPORATION OF THE CITY OF HAMILTON, THE REGIONAL MUNICIPALITY OF HAMILTON-WENTWORTH, RUTH SCHOFIELD and MARILYN JAMES

Defendants (Respondents)

AND IN THE MATTER OF

THE CITATION OF KENNETH PETERS for contempt of court by the Honourable Mr. Justice David S. Crane, Ontario Superior Court of Justice

Appellant

Brian MacLeod Rogers for the appellant

Sara Blake, Robin Basu and Sophie Nunnelley for the Attorney General for Ontario, intervenor

Patricia D.S. Jackson and Charles W. Finlay for Canadian Newspaper Association, intervenor

John Norris for Canadian Association of Journalists and Canadian Journalists for Free Expression, intervenor

No one for St. Elizabeth Home Society (Hamilton, Ontario)

Heard: January 22, 2008

On appeal from the judgment of Justice David S. Crane of the Superior Court of Justice dated December 1, 2004.

SHARPE J.A.:

[1] This appeal raises important issues regarding the law of contempt and its application to a journalist who, subpoenaed to testify at a civil trial, refuses to answer questions that would reveal a confidential source.

FACTS

[2] The appellant Kenneth Peters was a municipal affairs reporter with *The Hamilton Spectator*. He wrote a series of three articles, published in April 1995, detailing various complaints and investigations by municipal authorities concerning health and safety practices at the plaintiff's lodging home for senior citizens. The appellant obtained documents from a confidential source who provided the key information for the three articles. The articles prompted the plaintiff to sue the defendant municipalities and municipal officials for various causes of action, including defamation, negligence, and abuse of public office for releasing confidential documents to the media.

[3] The plaintiff subpoenaed the appellant to testify at the trial of the action and the subpoena directed the appellant to bring all documents and records relating to the three newspaper articles. The identity of the appellant's confidential source had obvious relevance to the plaintiff's claim that the defendant municipalities had leaked the documents to the media.

Motion to Quash the Subpoena

[4] The appellant moved to quash the subpoena on the ground that it would require the disclosure of journalist work product, in violation of the appellant's common law and s. 2(b) *Charter* rights. The trial judge ruled that the protection of news sources was "a very important principle and deserving of court recognition and, on a case by case basis, worthy of protection." He suggested that the appellant's concerns might be resolved if the question was limited to whether any of the appellant's sources were employees of the defendants. The appellant declined to accept that suggestion. In the end, the trial judge dismissed the motion to quash the subpoena on the grounds that the appellant's evidence

as to the source of the documents was relevant and necessary to dispose of the case, and that the plaintiff had exhausted all reasonable means to obtain the information elsewhere. In the trial judge's view, the fair trial rights of the plaintiff therefore outweighed the appellant's claim of media privilege. No appeal is taken from that order.

[5] The trial judge directed that the examination of the appellant should proceed in three stages that he would closely monitor:

- First, the appellant would be questioned as to whether he gave an undertaking to obtain the subject information and as to what documents he received;
- Second, the court would permit examination pertaining to "evidence of communication of the defendants' employees with the *Spectator* … excluding evidence that pertains to [the appellant's] source";
- The trial judge reserved the third stage, stating that its character would depend "on the determination of the first and second stages."

Appellant's Evidence at Trial

[6] The appellant testified immediately after the trial judge dismissed the motion to quash the subpoena. The appellant disclosed that when A, his confidential source, gave him the documents, another individual B was present. The appellant had given an undertaking of confidentiality to A but not to B. The appellant was asked to identify B. He refused to do so, explaining that identifying B would inevitably lead to identifying A. The trial judge initially suggested that plaintiff's counsel avoid the question of B's identity but counsel persisted in asking the appellant to identify B. The trial judge found that it could well be "that naming B will cause an inquiry to B and B may name A." He ruled, however, that the appellant should answer on the ground that no undertaking of confidentiality had been given to B nor had the appellant undertaken to A that he would not reveal B's identity. The appellant refused to answer the question: "With all due respect, Your Honour, I can't do that."

Initiation of Proceedings for Contempt

[7] The trial judge ordered the appellant to step down and immediately asked the appellant's counsel: "Is there any reason why Mr. Peters should not be held in contempt of this Court?" The trial judge again rejected the appellant's submission that he should not be required to identify B as doing so could have the effect of identifying A: "I do not do this lightly. To my mind the question should be answered—it is contempt—and I have directed him to answer it." The show cause hearing was scheduled for the next week.

Confidential Source Revealed

[8] One day before the show cause hearing, the *Spectator* published an article in which a city council member was quoted as stating that he knew A's identity. The show

cause hearing was adjourned and eventually Henry Merling, a former city alderman, came forward and testified that he was the appellant's confidential source and that he now released the appellant from his undertaking. Mr. Merling also identified B as David Wilson. However, when Mr. Wilson testified, he denied being present during or aware of the exchange of the confidential documents.

[9] The trial judge directed that the appellant complete his evidence the next sitting day and that the show cause hearing immediately follow. The trial judge stated that it would be "very relevant" if the appellant sought to purge his contempt when he testified. The trial judge acknowledged that "it appears at this point that there is not an issue going forward," that the appellant and the court were not "at loggerheads", and that "developments since [the appellant's refusal to answer] have a major bearing on where we are going with this." He also stated, however, that the proceedings were for criminal contempt in the face of the court.

The Show Cause Hearing

[10] The next sitting day, Merling's evidence was completed and the trial judge ruled that in the absence of any evidence that Merling was not the source, no further evidence was required from the appellant and his subpoena was terminated. The show cause hearing then commenced. The trial judge stated that he accepted that the appellant was "an honourable man, doing his job as a journalist as he honestly believes it should be done" and that he had been "at all times respectful, indeed polite to the Court and counsel." However, the trial judge expressed his concern over the appellant's refusal to answer what had been ruled to be a proper question, thereby presenting "defiance to the authority of the Superior Court and an obstruction to the administration of justice." The trial judge added: "No one in Canada is above the law. Mr. Peters' conduct cannot be passed off."

[11] In light of the nature of appellant's conduct and the fact that the required information had been obtained, the trial judge indicated that the matter would now proceed as a civil rather than criminal contempt.

[12] Appellant's counsel indicated that he had prepared his case on the basis that the appellant would be given a further opportunity to testify before the show cause hearing and on the basis that the hearing was to be for criminal rather than civil contempt. The matter was adjourned for one day to allow counsel to prepare his submissions in light of the changed circumstances.

[13] At the show cause hearing, the appellant explained that Merling gave him the documents on the basis that "they did not come from him." The appellant regarded the documents as "explosive" and discussed the confidentiality undertaking with his editor who concluded that given the nature of the documents, the confidentiality undertaking

was appropriate. The appellant testified that when he was asked to disclose B's identity, he was convinced that doing so would have the effect of disclosing A's identity as well. He further explained that to answer the question would effectively end his career as a journalist. He testified that after being cited for contempt, he approached Merling, who initially insisted that confidentiality be maintained but eventually agreed that the appellant could reveal that his source was a city employee. The next day, Merling came forward and identified himself as the appellant's source.

[14] The appellant's editor, Dana Robbins, testified as to the undertaking of confidentiality given in this case and the importance of confidential sources to the practice of news gathering in general. He stated that if confidential sources knew "they ran a very real risk of being 'outed' at some point down the road … many of our sources would dry up" and that this would undermine "the service we do every day in trying to keep the public informed." Vincent Carlin, a veteran journalist and associate professor of journalism at Ryerson, was qualified as an expert witness. Carlin explained the importance of confidential sources as "the lifeblood" of the media's watchdog function and that if journalists did not maintain confidentiality and protect their sources, the sources would "dry up." Carlin testified that in his opinion, after the court had directed the appellant to answer the question about B's identity, the appellant and his editor had observed the standards of responsible journalism and taken appropriate steps to see whether there was some other way to deal with the problem. He stated that a "chilling message" would be sent by punishing a journalist who had followed "the normal guidelines of his craft", who had done "his best to avoid the confrontation", and who was involved in a case where the required information had come out in some other way.

[15] Neither party to the action sought a finding of contempt or made submissions on the show cause hearing.

Contempt Ruling

[16] The trial judge ruled that "respect for the *Charter* values of freedom of expression and of the press" had led him to "[m]ake all reasonable efforts to avoid a direct confrontation" with the appellant, namely by offering to allow the appellant to identify his unnamed source as a city employee or to identify a witness to the transaction who was not a confidential source. The appellant had chosen not to answer and that amounted to contempt of court. The fact that there had been no ruling requiring the appellant to disclose his confidential source and the fact that the appellant had gone to the source to discuss the undertaking were mitigating factors. The trial judge found that the "culture of the newsroom" was that journalists had "to break the law and endure the punishment." He described this culture as "oppressive" and found that it had caused the appellant great turmoil by presenting him with a choice between a career-ending decision and possibly being sentenced to a lengthy term of imprisonment.

[17] The trial judge found that the appellant's refusal to answer put the trial into a "crisis".

> The plaintiff was being denied the opportunity to attempt to prove a vital element of its case. … The administration of justice had been denied. The authority of the court had been refused. I find on all the evidence, that the offence is proven beyond a reasonable doubt.

[18] The trial judge expressed sympathy for the appellant who he saw as "a pawn in a much larger game". He indicated that he was not inclined to imprison the appellant and invited submissions on the appropriateness of an order that the appellant pay the parties costs for matters flowing from his refusal to answer.

[19] After a further hearing as to the penalty for the appellant's contempt, the trial judge ordered that the appellant pay the parties $31,600 as costs "thrown away" as a result of his refusal to answer questions deemed proper by the court and the related proceedings that ensued.

ISSUES

[20] The appellant asks this court to set aside the finding of contempt and the penalty imposed. None of the parties to the main action responded to this appeal. The Attorney General for Ontario, the Canadian Newspaper Association, and the Canadian Association of Journalists together with Canadian Journalists for Free Expression, intervened. None of the intervenors supported the finding of contempt.

[21] The following issues arise:

1. Did the trial judge err by citing the appellant for contempt immediately upon his refusal to identify B?
2. Did the trial judge err by finding the appellant in contempt after the confidential source had been revealed?
3. Did the trial judge undermine the appellant's procedural rights on the show cause hearing?
4. Did the trial judge err by imposing the penalty of $31,600 in costs?

ANALYSIS

Protection of Journalists' Confidential Sources

[22] Before considering the specific issues I have identified, I believe that it will be helpful to place those issues in their proper legal context by examining the law relating to the protection of journalists' confidential sources.

[23] To obtain controversial information, a journalist may have to promise confidentiality to his or her source. In exchange for giving the information, the confidential source gains the right to insist that the journalist maintain confidentiality. However, a right of confidentiality, by itself, is not sufficient to protect against compelled disclosure should the confidential information be required in a court of law or other legal proceeding.

[24] In some situations of confidentiality—most notably communications between solicitor and client—the public interest in protecting the integrity of the relationship is so strong that the common law provides for a blanket or class privilege that shields all confidential information from disclosure. However, for most relationships—doctor-patient, priest-penitent, journalist-informant—the interest in confidentiality must be balanced against the interest in the proper administration of justice, and claims to privilege are resolved on a case-by-case basis.

[25] In *R. v. McClure*, [2001] 1 S.C.R. 445 at para. 29, the Supreme Court of Canada recognized that where a journalist can show that his or her relationship with a confidential source meets a four-part test—drawn from J.H. Wigmore, *Evidence in Trials at Common Law*, vol. 8 at 527 (J.T. McNaughton rev. 1961), and known as the "Wigmore criteria"—the relationship will enjoy the protection of privilege.

[26] The four criteria are:

1) The communications must originate in a confidence that they will not be disclosed.
2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Charter Rights and Values

[27] Freedom of expression and freedom of the media, protected by s. 2(b) of the *Charter*, have a direct bearing on a journalist's claim to confidentiality. The media has a vital role in gathering and disseminating information in a free and democratic society and, as the Supreme Court of Canada held in *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)* (1996), 139 D.L.R. (4th) 385 at para. 26, "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press." Canadian courts have recognized that

journalist-informant confidentiality is important for effective news gathering. In *Canadian Broadcast Corporation v. Lessard*, [1991] 3 S.C.R. 421 at 430, La Forest J. stated:

> I have little doubt … that the gathering of information could in many circumstances be seriously inhibited if government had too ready access to information in the hands of the media. 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. As Stewart J. (dissenting) stated in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), at p. 572:
>
> > It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows that, despite the journalist's assurance, his identity may in fact be disclosed.

[28] Although dissenting in the result, McLachlin J. expressed similar views as to the importance of journalist-informant confidentiality at p. 452:

> [C]onfidential sources of information may be fearful of speaking to the press, and the press may lose opportunities to cover various events because of fears on the part of participants that press files will be readily available to the authorities.

[29] In *Goodwin v. United Kingdom* (1996), 22 E.H.R.R. 123 at para. 39, the European Court of Human Rights, interpreting the protection of freedom of expression in Article 10 of the *European Convention on Human Rights*, recognized that the "[p]rotection of journalistic sources is one of the basic conditions for press freedom" and that if sources are not protected from disclosure, they "may be deterred from assisting the press in informing the public on matters of public interest." The result, according to the court, would be that "the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected."

[30] In the light of these authorities, I am unable to accept the submission of the Attorney General for Ontario urging us to decide this case without reference to the

Charter. To understand fully the rules relating to journalist-informant confidentiality and the proper application of the law of contempt, I find it helpful—indeed necessary—to consider the import of the constitutionally guaranteed rights of freedom of expression and freedom of the media. I fail to see any reason to ignore this vital component of the appellant's case that informs the procedural rights to which he is entitled. In my view, there can be no doubt that when applying the four-part Wigmore test to journalist-informant confidentiality and assessing the weight to be given to protecting confidentiality, courts must take into account relevant *Charter* values, even though the *Charter* does not directly apply: see *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. The National Post*, 2008 ONCA 139 at para. 74; *A.(M.) Ryan*, [1997] 1 S.C.R. 157 at para. 30.

[31] I am also unable to accept the submission of the Attorney General for Ontario that we should exclude consideration of the *Charter* on the ground that there is insufficient evidence to support the claim that disclosing the identity of the source would have a "chilling effect" on journalists' sources and the gathering of news. As I have noted, there was some evidence to this effect provided at the show cause hearing by the appellant's editor and the expert witness. For the following reasons, it is my view that no more was required.

[32] Courts routinely craft legal rules without the need for elaborate empirical evidence. They instead employ their judgment as to the likely impact rules will have on human behaviour, particularly where the issue is encouraging the free flow of information. The "chilling effect" of the common law of defamation has been recognized by this court and other courts around the common law world without empirical evidence: see *Cusson v. Quan* (2007), 87 O.R. (3d) 241 (C.A.) at para. 83. The entire law of solicitor-client privilege is built upon the empirically unproven yet surely sound judgment that a client not given an iron-clad guarantee of confidentiality will tend to be unwilling to disclose all the relevant facts to his or her lawyer and will therefore be unable to secure proper legal advice: *R. v. McClure, supra* at para. 33. The rule that jury deliberations must remain secret is based upon the empirically unproven yet surely sound judgment that confidentiality promotes among jurors candour, full and frank debate, and the free exchange of all views without fear of exposure to public ridicule: see *R. v. Pan; R. v. Sawyer*, [2001] 2 S.C.R. 344 at para. 50. Informer privilege rests upon the empirically unproven yet surely sound judgment that its protection "encourages cooperation with the criminal justice system for future potential informers": *Named Person v. Vancouver Sun Re Application to Proceed In Camera*, 2007 SCC 43 at para. 16.

[33] The chilling effect of disclosing journalists' sources was recognized by La Forest and McLachlin JJ. in *Canada Broadcasting Corporation v. Lessard*, *supra*, by the

European Court of Human Rights in *Goodwin v. United Kingdom*, *supra*, and by this court in *R. v. The National Post*, *supra*, at paras. 89-96. Similarly, in *Ashworth Hospital Authority v. MGN Ltd.*, [2002] 4 All E.R. 193 at para. 61, the House of Lords stated that routinely ordering journalists to disclose their sources would cause the sources to "dry up" and hinder journalists' news gathering capacities to the detriment of the public:

> The fact is that information which should be placed in the public domain is frequently made available to the press by individuals who would lack the courage to provide the information if they thought there was a risk of their identity being disclosed. The fact that journalists' sources can be reasonably confident that their identity will not be disclosed makes a significant contribution to the ability of the press to perform their role in society of making information available to the public. It is for this reason that it is well established now that the courts will normally protect journalists' sources from identification.

[34] In my view, it is sufficiently apparent that 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.

[35] I do not read *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572, as precluding me from reaching this conclusion in the absence of elaborate empirical evidence. That case involved the question of whether a journalist could be compelled to testify before the Alberta Labour Relations Board. While the journalist raised the issue of confidential sources, it is clear from Sopinka J.'s judgment, at p. 1579, that the primary focus of the questions related to *information the journalist gave to company officials*. Sopinka J. held that the appeal could be resolved without dealing with the broad constitutional question of the protection of confidential sources under s. 2(b) of the *Charter*. It was in that context that Sopinka J. stated that evidence would be required to demonstrate "that compelling journalists to testify before bodies such as the Labour Relations Board would detrimentally affect journalists' ability to gather information": p. 1581. I see no reason to extend that statement beyond the specific circumstances of *Moysa* and instead would follow *Canada Broadcasting Corporation v. Lessard*, *Goodwin v. United Kingdom*, and *Ashworth Hospital Authority v. MGN Ltd.*, which appear to me to deal more directly with the specific issue of journalists' sources.

[36] It is against this general background that I turn to the specific issues raised on this appeal.

1. Did the trial judge err by citing the appellant for contempt immediately upon his refusal to identify B?

[37] The trial judge did not explicitly address the issue whether the appellant's relationship with his confidential source satisfied the Wigmore test. When he ordered the appellant to identify B, he appears to have done so on the basis that this was a way around the problem of the appellant's privilege claim, as the appellant owed no duty of confidentiality to B and was not being asked directly to identify A. However, as the trial judge himself seems to have recognized, revealing B's identity was tantamount to revealing A's identity and forcing the appellant to reveal B's identity would therefore fail to avoid the problem.

[38] Before being directed to reveal his confidential source, whether directly or indirectly, the appellant was entitled to have his claim for privilege tested against the Wigmore criteria. He should not have been faced with a contempt citation without a clear ruling from the trial judge that his claim of privilege failed and that he was legally bound to breach his undertaking of confidentiality. That said, it is apparent from the trial judge's ruling on the motion to quash the subpoena that if he had addressed the Wigmore test, he would have rejected the claim for privilege.

[39] The appellant does not appeal the ruling on the motion to quash and does not ask this court to rule on the privilege claim. Accordingly, I need say no more about the Wigmore test and its application to this case. For the purpose of what follows, I will assume, without deciding, that had the trial judge applied the Wigmore test, he would have concluded that the claim of privilege failed and that the identity of the confidential source had to be revealed. For reasons I will explain, such a determination should not have ended the matter.

The Contempt Power: Restraint and Minimal Interference

[40] I agree with the appellant's submission that even after it has been determined that the rights of the litigants trump a journalist's claim of confidentiality, it is a mistake to cite the journalist for contempt immediately. The court should first explore other means of proceeding that would be less intrusive to the journalist-informant relationship of confidentiality. I also agree that even if a proceeding reaches the point where the court must use the contempt power, its deployment should always be tempered with a proper regard for the important values at stake.

[41] I reach these conclusions on two grounds. First, quite apart from the *Charter*, it is well-established that the contempt power is one to be used cautiously and only as a last resort. Implicit in its proper exercise is the principle of least intrusive means. Second, as the confidentiality of a journalist's sources implicates *Charter* rights and values, every effort should be made to minimize the impact upon those rights and values.

[42] I turn first to the law of contempt. It is well-established that judges should resort to citations for contempt in the face of the court only as a last resort. Proportionality and the least intrusive means principle are inherent aspects of the law of contempt. In *R. v. B.K.*, [1995] 4 S.C.R. 186 at para. 13, Lamer C.J.C., quoting *United States v. Wilson* 421 U.S. 309 at 319 (1975), stated that "a court's exercise of its contempt power should be restrained by the principle that 'only the least possible power adequate to the end proposed should be used.'" Similarly, in *R. v. Cohn* (1984), 48 O.R. (2d) 65 (C.A.) at 76, leave to appeal to S.C.C. refused, [1985] 1 S.C.R. vii, this court held that the contempt power is to be exercised "with the greatest of caution", and cited with approval *In re Clements v. Erlanger* (1877), 46 L.J. Ch. 375 (Eng. C.A.) at 383, where Jessel M.R. said that the use of contempt "should be most jealously and carefully watched and exercised … with the greatest reluctance and the greatest anxiety on the part of Judges to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject."

[43] In its publication *Some Guidelines on the Use of Contempt Powers* (2001) at pp. 35-6, the Canadian Judicial Council admonishes judges to use the power to cite for contempt in the face of the court only as a last resort. The *Guidelines* do not address journalist-informant confidentiality, but they do specifically address, at p. 37, the difficult issue of the witness who refuses to testify or to answer proper questions:

> Probably the most difficult question of contempt that is likely to arise in the course of a trial is the witness who refuses to be sworn or to testify. Often they are persons who subjectively may have a very good reason not to give evidence. There is no doubt, in view of *Vaillancourt* [*R.* v. *Vaillancourt*, [1981] 1 S.C.R. 69], that the refusal of a witness to give evidence is a criminal contempt. A judge dealing with such a problem must be firm, particularly if the evidence is important to one party or another and the reluctant witness must be made to understand that he or she must answer all proper questions. If the witness refuses or pretends not to know the answer, he or she may be taken into custody or otherwise be given an opportunity to consider his or her position. *This can be done one or more times without making a finding of contempt, but eventually it may be necessary to allege contempt and to conduct a hearing if the party seeking the evidence will not withdraw. Sentencing should be put off, if possible, to the end of the trial (if it is not too long a trial), and the contemnor may be released or kept in custody as circumstances may require.* [Emphasis added]

[44] This restrained approach to the use of contempt is particularly apt where journalist-informant confidentiality is at stake. As Saunders J. put it in *Crown Trust Co. v. Rosenberg*, [1983] O.J. No. 511 (H.C.J.) at para. 6, the court should take steps to respect journalist-informant confidentiality "as much as possible." A rigid or categorical approach is to be avoided. A court should instead prefer to "proceed carefully and in a step-by-step fashion … in the interest of preserving the confidentiality of the sources if it is at all possible to do so": *id.* at para. 7.

[45] To these legal considerations I would add a practical concern. Precipitous resort to the contempt power may be in the end counter-productive. By raising the stakes and presenting the journalist with an immediate all-or-nothing choice, there is a risk that the court's actions will foreclose the exploration of alternative means of securing the information. This does not assist the litigant who seeks the information and runs the risk of making a martyr of the defiant journalist, all to the detriment of the integrity of the court and the administration of justice.

The Dagenais/Mentuck *Test*

[46] The second reason for adopting a cautious and restrained application of the contempt power is that *Charter* rights and values are at stake. I agree with the appellant that the approach taken to the reconciliation of freedom of expression and fair trial rights in *Dagenais v. Canadian Broadcasting Corp.*, *supra* and *R. v. Mentuck*, [2001] 3 S.C.R. 442, provides a useful analogy, one that is entirely consonant with the law of contempt just discussed.

[47] The *Dagenais/Mentuck* test, developed to deal with publication bans, requires courts to do their best to avoid a hierarchical approach that sacrifices one *Charter* right or value to another. Rather than viewing the matter as a direct clash or head-on conflict between two *Charter* rights or values, courts are required to explore alternative measures and to minimize the impact upon the rights and values affected, essentially incorporating the proportionality and minimal impairment principles enshrined in s. 1 of the *Charter*.

[48] The test has been applied to a wide variety of discretionary decisions restricting freedom of expression and freedom of the press. *Re Vancouver Sun*, [2004] 2 S.C.R. 332 at para. 31, holds that the *Dagenais/Mentuck* test is "equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings." *Toronto Star Newspapers Ltd. v. Ontario* (2005), 197 C.C.C. (3d) 1 (S.C.C.) at para. 7, similarly holds that the test "applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings."

[49] I see no reason, therefore, why the *Dagenais/Mentuck* test should not apply to the matter of journalist-informant confidentiality. I note that several trial courts have reached

the same conclusion. In *Fullowka v. Royal Oak Mines Inc.*, 2001 NWTSC 4 at para. 48, after reviewing the pertinent case law, Vertes J. identified "three broad propositions: first, the media occupies a special position before the courts; second, the exercise of a discretion, whether it is based on a common law or statutory power, must be exercised in accordance with *Charter* values; and third, there must be a balancing of interests done within a contextual framework." Similarly, in *R. v. Hughes (Ruling No. 3)*, [1998] B.C.J. No. 1694 (B.C.S.C.) (followed in *Re Zündel*, [2004] FC 798), where an accused sought the production of a journalist's notes, Romilly J. held at para. 60 "that where members of the media are called to give evidence, it is incumbent upon courts to balance the necessity of having the evidence before the court against the special position and role of the media as recognized by s. 2(b) of the *Charter*" in accordance with *Dagenais*. Romilly J. identified, at para. 66, the need to consider, *inter alia*:

> whether the evidence is available through any other means and if so, whether reasonable efforts have been made on the part of the [party] to obtain the evidence from that other source …
>
> whether the necessity of the evidence in the case at hand outweighs the impairment, if any, of the role of the media; and
>
> whether the impairment of the media's function can be minimized by confining the evidence adduced to only that which is necessary to the [party's] case and his right to make full answer and defence.

Application to the Case at Bar

[50] The trial judge struck the right note in his initial ruling on the motion to quash the subpoena. At that point, he recognized the need to proceed incrementally. Unfortunately, he appears to have lost sight of that important principle as the matter proceeded to the point at which he directed the appellant to identify B, the alleged witness to the handover of the documents by the appellant's confidential source. In my respectful view, the trial judge's use of the contempt power in the case at bar failed to comply with the principles that arise under both the common law of contempt and under the *Dagenais*/*Mentuck* test.

[51] First, as I have already stated, before citing the appellant for contempt, it was incumbent upon the trial judge to make an express ruling on the claim for privilege under the Wigmore test.

[52] Second, and assuming that the trial judge would have rejected the claim of privilege, before invoking the full force of the law of contempt and putting the integrity

of the court on the line, the trial judge should have given the appellant and the parties an opportunity to explore other avenues that could produce the desired information. At a minimum, the appellant should have been afforded the opportunity to consider his position in light of the fact that he had been ordered to disclose the confidential information. The appellant also should have been given the opportunity to consult with the confidential source to determine whether, in light of the court's order, the source still insisted that the confidentiality be maintained.

[53] As I have noted, the confidential source came forward and disclosed his identity. That almost certainly would have occurred even if the appellant only faced an order to answer and the threat of contempt proceedings if he did not. Had the trial judge taken a more restrained approach, the desired information would have been obtained and the entire issue of contempt could have been avoided.

[54] It seems to me, therefore, that the preferable course would have been to postpone the contempt hearing until the conclusion of the trial. This would maintain the force of the order that the witness answer, but leave the ultimate sanction of contempt to be dealt with at the end of the case when the impact, if any, of the witness's refusal was clear.

2. Did the trial judge err by finding the appellant in contempt after the confidential source had been revealed?

[55] I can see no justification for continuing with the contempt proceedings once the required evidence had been provided to the court. The appellant had remained polite and cooperative at all times. He had declined to answer out of a *bona fide* conviction that his promise of confidentiality and the ethics of his profession required him to take that position. The information having been provided to the court, the demands of the judicial system had been met. The problem posed by the appellant's refusal to answer was not defiance of the court's authority but how best to find a way to get the evidence the court needed to decide the case. The trial judge partially recognized this by converting a criminal proceeding for contempt in the face of the court into a proceeding for civil contempt. Civil contempt is coercive rather than punitive in nature. It is essentially a matter as between the parties and is aimed at enforcing the court's orders for the benefit of the party in whose favour the order was made. Here, neither party initiated proceedings for contempt. As the evidence had been provided, there was no reason to enforce the order requiring the appellant to identify B and it is difficult to see why it was necessary to continue with any contempt proceedings, whether civil or criminal.

3. Did the trial judge undermine the appellant's procedural rights on the show cause hearing?

[56] By changing the rules for the show cause hearing at the last moment, and refusing to allow the appellant to testify any further at the trial proper, the trial judge deprived the appellant of the opportunity to purge his contempt. This was compounded by the last-minute change from criminal to civil contempt, a move undoubtedly prompted by the trial judge's appreciation of mitigating factors favouring the appellant, yet a move that caught the appellant by surprise and compounded his difficulties in responding to the citation for contempt.

[57] In my view, it was inappropriate in the circumstances of this case for the trial judge to initiate contempt proceedings on his own, whether civil or criminal. This was not a situation of open defiance of a court order requiring an immediate sanction to uphold the court's integrity. Moreover, as the Canadian Judicial Council suggests in its *Guidelines*, *supra* at 21, "[i]n most cases, it will be the wise course for the judge to leave the initiation of proceedings to the parties or to the Attorney General."

4. Did the trial judge err by imposing the penalty $31,600 of costs?

[58] Even if this were a case for finding the appellant in contempt and assuming that it was open to the court to make a costs award against him, the penalty imposed by the trial judge, measured by the costs to the parties to the litigation, was excessive in the circumstances. As I have already mentioned, the trial judge proceeded on the basis of civil, not criminal contempt and recognized that the appellant was respectful and his conduct was motivated by a genuine belief in the need to protect his source. The parties did not initiate contempt proceedings nor did they take any position on whether the appellant should be found in contempt. The evidence they needed had been provided and no sanction was required to ensure compliance with the court's order. In these circumstances, there was no justification for the imposition of a substantial penalty and the appellant should not have been ordered to pay over $30,000 in costs.

CONCLUSION

[59] For these reasons, I would allow the appeal and set aside both the finding of contempt and the penalty imposed by the trial judge. Given the positions taken by the parties and the intervenors, there should be no order as to costs.

"Robert J. Sharpe J.A."
"I agree E.A. Cronk J.A."
"I agree E.E. Gillese J.A."

RELEASED: March 14, 2008