Court File No. 32601

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ONTARIO)

BETWEEN:

THE NATIONAL POST, MATTHEW FRASER and ANDREW McINTOSH

APPELLANTS (Appellants)

AND:

HER MAJESTY THE QUEEN

RESPONDENT (Respondent)

AND:

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

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PART 1 – OVERVIEW AND FACTS

1. This case is a test of our commitment to a free press, to which the law has always accorded special recognition and which is now specifically constitutionally protected under section 2(b) of the *Charter*. The facts of this case demonstrate why a free press was deemed by the *Charter*'s framers to be so fundamental to our free and democratic society as to merit explicit constitutional protection: the Appellants uncovered one of the most significant political scandals of the last few decades, and thereby sparked a vigorous national debate that deeply affected Canada's political landscape. It is very clear from the record in this case that much of the news the Appellants uncovered could not have been gathered but for promises not to reveal the identities of certain sources.

2. This case arises because one document (the loan authorization form) passed to the Appellants by a confidential source ("X") may or may not have been forged. The only evidence in this case is that X had received the document in the mail anonymously, and had passed it on to the Appellant Mr. McIntosh because of its evident importance. The document has not been proved to be forged, but the Courts below have found there are reasonable grounds to believe it was and a search warrant was issued to enable the police to obtain the document for the purpose of discovering the identity of X, and, perhaps, the identity of the document's original source. If the document was indeed forged, then it would amount to uttering a forgery in an attempt to use the media to discredit a sitting Prime Minister. Ultimately, the Appellants did not publish any story based on the document because they could not corroborate it.

3. It is commonsensical that, if the media's promises of confidentiality to their sources are breached, that there will be a chilling effect on such sources coming forward in the future, and accordingly the media's ability to gather news will be impaired. This appeal therefore raises the issue of when, if at all, the interest in investigating a crime will outweigh the harm caused by this chilling effect.

4. The Courts below have approached this problem through the lens of the common law of privilege, informed by the *Charter*. In the argument that follows, the Intervener, the BC Civil Liberties Association ("BCCLA"), will submit that, while the relationship between the Appellants and X is also privileged under the common law, there is no need to advert to the

common law because the police search directly engages the *Charter*. The proper framework was set out in *Lessard*[1] by McLachlin J. (as she then was), who dissented in the result but whose analysis was consistent with the majority's approach. The BCCLA will also submit that that analysis properly leads to the conclusion that the search warrant should not have been issued in this case.

PART 2 – POINTS IN ISSUE

5. The BCCLA advances two arguments, both of which relate to Issues (A) through (C) as stated in paragraph 27 of the Appellants' factum:

(a) The proper framework of analysis in this case is to apply the *Charter* directly, rather than by modifying the Wigmore analysis. A police search that interferes with the ability of the media to gather news breaches section 2(b). Accordingly, the search warrant ought not to be issued unless it can be justified under section 1. There is no need to advert to the common law of privilege in this case.

(b) On a proper *Charter* analysis applied to the amplified record, the search warrant should not have been issued as the breach of section 2(b) was not justified.

PART 3 – ARGUMENT

A. THE PROPER ANALYTICAL FRAMEWORK

(1) A State Intrusion into the Confidentiality of a Journalist's Source Violates Section 2(b)

6. In the proceedings below, both the reviewing judge and the Court of Appeal agreed that section 2(b) is engaged in this case, and that conclusion is clearly correct. Essentially, the search warrant will interfere with the media's newsgathering by discouraging, to some degree, future sources from coming forward with their information.

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[1] *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421, [1991] S.C.J. No. 87 (Q.L.); references to QL. Respondent's Authorities, Tab 8.

7. This Court has held, in *Lessard* and *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*,[2] that police searches of media premises raise section 2(b) issues that must be accounted for in the determination of whether or not to issue a warrant. The majority in both cases held that:

> The justice of the peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gather and news dissemination. It must be borne in mind that the media play a vital role in the functioning of a democratic society.[3]

8. La Forest J., in his concurring reasons, held that the freedom of the press guarantee "comprises the right to disseminate news, information and beliefs", but also includes the gathering of news: "the freedom to disseminate information would be of little value if the freedom under s. 2(b) did not also encompass the right to gather news and other information without undue governmental interference."[4] He found that the right to gather information could be "seriously inhibited if government had too ready access to information in the hands of the media",[5] such as by breaching the anonymity journalists sometimes promise to sources: "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."[6]

9. McLachlin J. dissented in the result but did not adopt an analytical approach different in principle from that of the majority. She likewise found that a police search of media premises may impinge on the values underlying the freedom of the press in a number of ways, one of which is that "confidential 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."[7]

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[2] [1991] 3 S.C.R. 459.

[3] *New Brunswick* at p. 481, *per* Cory J. for the majority (emphasis added); quoted in *Lessard* at para 47, *per* Cory J. for the majority.

[4] *Lessard*, at para 2.

[5] *Ibid.*, at para 3.

[6] *Ibid.*

[7] *Ibid.*, at para 66.

10. Respectfully, it clearly must be correct that the state's interference in the confidentiality offered by journalists to their sources violates section 2(b). As the record in this case amply demonstrates, confidential sources are a common and important technique for gathering the news. Many times an undertaking of confidentiality will be essential to obtaining a source's information, and common sense suggests that is particularly so where, as in this case, the information impugns persons in authority. Regardless of whether the state is actually successful in obtaining a confidential source's identity, a police search conducted for that purpose can only tend to discourage future sources from coming forward. That chilling effect violates the freedom of the press under section 2(b).

11. A central question in this appeal is whether the *Charter* analysis can be accommodated within a common law privilege framework. The Court below decided the case on that basis, and it is largely being presented in this Court within that same framework. But privilege is an unnecessary distraction in this case because the search warrant authorizes state action that is subject to the *Charter*. The search warrant may only be issued if the breach of section 2(b) is justified under section 1, and the proper analytical framework is to address the *Charter* issues directly. The remaining sections under this issue will point out the flaws in adopting privilege as the analytical framework, and will set out the proper considerations on a *Charter* analysis.

(2) A Privilege Analysis Is Inappropriate

12. In the Court of Appeal, Laskin and Simmons JJ.A recognized that this case engages section 2(b), but they chose to address the case on the basis of privilege, which they assumed would satisfy the *Charter* analysis: "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."

13. With respect, the Court of Appeal got it wrong: in this case, *it is resort to the common law that is unnecessary*. Where state action would intrude on freedom of the press, section 2(b) is engaged and that state action cannot proceed unless justified under section 1. Privilege should be

left to a civil context, such as in *Saggu v. Canwest Publishing Inc.*,[8] a defamation case in which it was held that the identity of the defendant journalist's source was privileged and not subject to disclosure. Not only is privilege unnecessary, but a Wigmore analysis, even if modified in light of section 2(b), is inappropriate, for the reasons set out below.

14. First, as the Appellants have observed in their factum, the Wigmore test in large part reverses the onus of proof. On a *Charter* analysis, upon the media establishing a breach of section 2(b), the onus shifts to the Crown to prove that the search is justified because it has a pressing and substantial and is proportional in effect. The Wigmore test, on the other hand, places the whole onus on the party claiming the privilege, including at the fourth, balancing stage, which plainly invokes considerations that on a *Charter* analysis would be addressed under section 1.

15. The second point is related to the first. The balancing test under the fourth step of Wigmore tends to be less rigorous than the scrutiny under the *Oakes* test. In particular, the Wigmore test assumes that the disclosure will indeed yield "the benefit gained *from the correct disposal of the litigation*". On its face, the Wigmore test does not prompt the court to determine whether there is a *rational connection* between disclosure and the hoped-for benefit of finding the truth, and nor does it lead the court to define the actual benefit in some other more targeted way. The case at bar demonstrates the frailty of this assumption, as will be argued below.

16. The Appellants seek to address these shortcomings by modifying the Wigmore test accordingly. It may be that these two concerns could be addressed in that way, although the complexity involved quickly begins to outweigh the benefit of using a pre-existing test. However, merely modifying the test cannot solve the third and most significant problem with using a Wigmore test as a proxy for section 2(b). No matter how much a common law test is modified to "take account of the values underlying ss. (2) and 8 of the *Charter*",[9] it will tend to both marginalize and mischaracterize the constitutional dimension.

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[8] 2009 BCSC 362; Appendix A to this Factum.

[9] Judgment of the Court of Appeal, para 74.

17. A test rooted in the common law cannot help but obscure the constitutional nature of the interest at stake, and thus overlook its true importance. But more importantly, the notion of privilege does not properly capture the nature of freedom of the press under section 2(b). Privilege, particularly one found on a case-by-case basis, is too bound up in the particular relationship between the parties. While certainly the Wigmore test incorporates a public benefit analysis, ultimately privilege is extended out of recognition of the privacy interests of the parties to the relationship. The focus is on *the interests of the parties to that relationship*. In contrast, freedom of the press is guaranteed not primarily out of concern for the press or their sources, but rather *because the press furthers Canadians' pursuit of truth and self-fulfillment*. It does so "by reporting on facts and opinions and offering its comment on events and ideas – activities vital to the functioning of our democracy, which is premised on the free reporting and interchange of ideas."[10] The press also "acts as the agent of the public in monitoring and reporting on governmental, legal and social institutions", as exemplified in the case at bar.[11] In the case of a confidential source, section 2(b) protects against disclosure of the identity of that source principally so as not to discourage other sources from coming forward with information in the future, and thereby deny the public access to the truth.

18. This distinction is far from academic. Indeed, the Respondent argues in his factum that the "easy answer" to this appeal is that even *class* privilege will not shield communications made in the furtherance of crime. But the exception to privilege exists because the public interest in fostering the solicitor-client relationship does not encompass communications in furtherance of crime. Society's interest in a free press, however, is in maintaining access to the truth, which requires that sources not be discouraged from coming forward for fear the police are able to obtain their identities. Whether or not the Respondent has an "easy answer" to the privilege argument, it does not address the full weight of the freedom of the press guarantee.

(3) The Proper Charter Analysis

19. In *Lessard* and *New Brunswick*, Cory J. for the majority set out nine factors to be taken into account in the balancing process to determine whether a search warrant of media premises

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[10] *Lessard*, *supra*, para 65 (per McLachlin J.).

[11] *Ibid.*

should be issued. As described above, one of those factors is that a balance be struck "between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination."[12] Another is that the affidavit should set out whether there are alternative sources from which the information may be reasonably obtained, although he noted that this is not a constitutional requirement.[13]

20. As discussed above, McLachlin J. dissented in the result, but her analytical approach was broadly similar to that of the majority. The advantage of McLachlin J.'s approach is that she sets out in more detail the conditions that may justify, under section 1, the issuance of a warrant for a search that will breach section 2(b):

> (1) The search/seizure is necessary because there are no alternative sources for the information required;
>
> (2) The importance of the search/seizure outweighs the damage to be caused by the infringement of freedom of the press; and
>
> (3) The warrant ensures that the search/seizure interferes with the press's freedom as little as possible.[14]

21. In many cases, as in this one, the second condition will be critical. Two points must be kept in mind when conducting that balancing process.

22. First, the court must fairly and realistically assess the importance of the search. It is not enough to assume that the interest in favour of the search is the "correct disposal of the litigation", in the words of the Wigmore test, or "investigating and prosecuting crime", as the Court of Appeal described it at one point.[15] Rather, the court must look to the *actual contribution* the search can fairly be expected to make to the investigation, and then assess society's interest in that contribution. The questions to ask are: *what might be discovered in the search? how important is that information to the investigation? what is the rough likelihood of the search yielding that information, or other information of value? how serious is the suspected crime? how likely is it that the investigation will lead to charges being laid?* The more

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[12] *Lessard, supra*, para 47, per Cory J.; this is the third factor.

[13] *Ibid.*; this is the fifth factor.

[14] *Lessard, supra*, para 74, per McLachlin J. (emphasis added).

[15] Judgment of the Court of Appeal, para 116.

significant the public's interest in the search, the more the balance weighs in favour of issuing the warrant.

23. The second point is that the court must properly assess the significance of the section 2(b) breach. The provision does not only protect against the *operations* of the press. Rather, it guarantees the press's *freedom* from the state. Almost any police search will tend to diminish that freedom.

24. More specifically, however, a police search aimed at uncovering the identity of a journalist's confidential source strikes at the very heart of the media's freedom to gather information. The evidence in this case demonstrates beyond doubt the importance of confidential sources. For obvious reasons, confidentiality will be particularly important to uncovering information that tends to impugn those in power, such as with a political scandal. In that context not only is the public interest in the information being revealed perhaps at its greatest, but also a police search can be expected to have the deepest chilling effect on sources coming forward. Whistleblowers with information damaging to government or other institutions of power will often not come forward without a guarantee of anonymity; the less secure they perceive that guarantee to be, the less likely the public will gain access to the information they hold.

25. The case at bar is not like *Lessard* and *New Brunswick*, where no promises of confidentiality had been made and the media had already published much of the material sought. In those cases the majority did not foresee any significant chilling effect, and consequently the state's interest in the search outweighed the interference with the freedom of the press. But the search in the case at bar would cause a very deep chilling effect. The search is intended to expose the identity of a confidential source for the purposes of a criminal investigation. That source has provided information relating to a political scandal at the highest levels of government in Canada.

26. In this case, the deep chilling effect on confidential sources coming forward in the future poses a serious intrusion in the freedom of the press, contrary to section 2(b).

B. THE SECTION 2(b) BREACH IS NOT JUSTIFIED IN THIS CASE

27. The police search is not justified in the circumstances of this case and the warrant ought not to have been granted. On balance, the expected contribution from the search is not sufficiently compelling to outweigh such a serious intrusion into freedom of the press.

28. The critical point is that there is little likelihood the search will actually yield useful results. The Respondent's suggestion that it needs the document because it is the *actus reus* of the suspected crime is unconvincing. There is no issue about the contents of the document – the Respondent has a copy of exactly what the Respondent suspects was forged. Rather, the Respondent wants the document in order to identify X. But the only evidence in this case is that X received the document in the mail from an unknown source, and that X, recognizing its obvious importance, forwarded it to Mr. McIntosh.[16] The document has since been extensively handled by the Appellants. The possibility that the search will actually turn up anyone's identity is, as the reviewing judge found, "remote and speculative".[17] The Court of Appeal attempted to turn this point around, saying that "then disclosing the document and envelope will not likely negate any confidence." With respect, that is well off the mark. Regardless of whether it is ultimately unsuccessful, the message to future sources would be that the police may search the media to try to obtain a source's identity. At least some sources will choose not to run that risk. As McLachlin J. emphasized in *Lessard*, it is the prospect of a police search and seizure in *future cases* which creates the chilling effect.[18]

29. There is no question that the crime as alleged by the Respondent is a serious one, but it is also true that it ultimately had little impact because the Appellants, unable to corroborate the document, decided not to publish the story. This case provides a striking illustration of how a free and independent press – motivated by integrity, reputation, market forces and the common law of defamation – works tirelessly to uncover news of public importance and interest while publishing only what is true. While there will undoubtedly be future cases that test the ambit of

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[16] Judgment of the Court of Appeal, paras 17-18.

[17] Judgment of the Superior Court, para 79.

[18] *Lessard*, para 67.

"the press" in section 2(b), there can be no doubt that the Appellants' conduct is entirely within what the framers of the *Charter* sought to protect.

30. Respectfully, the Court of Appeal erred in overturning the reviewing judge's finding that the search warrant ought not to have been issued. The state's interest in the search does not outweigh such a serious invasion of the freedom of the press.

PART 4 – SUBMISSION ON COSTS

31. The BCCLA does not seek costs, and it asks that costs not be awarded against it.

PART 5 – DISPOSITION OF THE ISSUES

32. The police search will constitute a breach of section 2(b) and that breach is not justified under section 1 in the circumstances of this case. Accordingly, the appeal should be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 20th day of April, 2009.

George K. Macintosh, Q.C.

Tim Dickson

PART 6 – TABLE OF AUTHORITIES

Case Law	**Para. No.**
Canadian Broadcasting Corp. v. Lessard, [1991] 3 S.C.R. 421; [1991] S.C.J. No. 87	4, 7, 8, 9, 17, 19, 20, 25, 28
Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1991] 3 S.C.R. 459	7, 19, 25
Saggu v. Canwest Publishing Inc., 2009 BCSC 362	13

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Saggu v. Canwest Publishing Inc.,***
2009 BCSC 362

Date: 20090318
Docket: S084570
Registry: Vancouver

Between:

Pritam Saggu

Plaintiff

And

**Canwest Publishing Inc. Publications Canwest Inc.,
Brooke Larsen, Harjit Gill,
Balwinder Tung and Gurmukh Bhogal**

Defendants

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for Plaintiff	R.R. Hira, Q.C.
Counsel for Defendants Canwest Publishing Inc. Publications Canwest Inc. and Brooke Larsen	B.T. Gibson, Q.C.
Date and Place of Hearing:	February 19, 2009 Vancouver, B.C.

[1] This is an interlocutory application brought by the plaintiff Pritam Saggu to compel the defendants Brooke Larsen and Canwest Publishing Inc. Publications Canwest Inc. ("Canwest") (together, "the Canwest defendants") to answer questions and provide documentation and material requested at the examination for discovery of Brooke Larsen. The plaintiff seeks to compel Brooke Larsen to reveal the name of her source, and to compel the Canwest defendants to produce documents and materials without any redaction or editing on the grounds of "reporter privilege", and for costs.

[2] The central issue is whether Ms. Larsen, a newspaper reporter, ought to be compelled to reveal the name of the person who was a source of information that founded two articles that were published on March 15 and April 5, 2008 in a local Burnaby newspaper called "Burnaby Now", published by Canwest.

[3] The two articles form the basis of this action for defamation.

BACKGROUND

[4] Sometime prior to March 15, 2008 a group of residents of the City of Burnaby presented a petition to the City ("the Petition") which alleged that the plaintiff, as an appointed member of the City's Board of Variance, misconducted himself in that role. The Petition was signed by 26 members of the public. The Petition was addressed to the Mayor and Council of the City. It appears that most or all of the signatories to the Petition are members of Burnaby's Indo-Canadian community.

[5] The evidence on the application does not disclose precisely when the Petition was provided to the Mayor and Council of the City. The defendant Brooke Larsen, a reporter with "Burnaby Now", deposes that she received a phone call from an informant on March 11, 2008 apprising her of the existence of the Petition, which the informant indicated had been submitted to the Mayor and Council of the City.

[6] In the telephone conversation the informant stated that the Petition involved complaints by members of the public against the plaintiff, as a member of the Board of Variance of the City, and that the subject matter of the Petition raised serious issues of interest to the public. According to Ms. Larsen's affidavit, the informant would not give her specific details of the subject wording of the Petition, or information as to the signatories thereto. The informant offered to provide a copy of the Petition on the condition that Ms. Larsen not reveal the informant's identity to anyone outside the senior editorial staff of the Burnaby Now newspaper. Ms. Larsen agreed to this condition and later that day received a copy of the Petition by fax.

[7] The Petition, with some minor spelling corrections and as printed in the newspaper, in both of the articles, stated as follows:

> Dear Sirs,
>
> We, the undersigned, would like to bring to your attention that Mr. Pritam Saggu, a member of the board of variance, is influencing members of the public, especially naïve and innocent members of his own community, at every opportunity he gets by presenting himself with a business card issued under the letterhead of the City of Burnaby, claiming to be someone higher up in decision-making authority in the City of Burnaby, that he is very influential in the city and adding that to get in touch with him if in need of help in doing business with the city.
>
> We believe that a person appointed in a position of public trust should have some ethical obligations and not use one's position for personal gains, which appears to be the case in here.
>
> Very truly yours, members of the public.

[8] After receiving and reviewing the Petition, Ms. Larsen took steps to investigate the background of the Petition and Mr. Pritam Saggu's involvement with the City of Burnaby. She learned that Mr. Saggu had first been appointed by the City of Burnaby Board of Variance in or about 2003. She was given to understand that every incorporated municipality having zoning by-laws requires a Board of Variance to review and adjudicate property owners' applications for exemptions from or variance to by-laws that might otherwise restrict the size, type or placement of structures on property within the municipality.

[9] She then telephoned certain signatories to the Petition and spoke with other individuals who were referred to her by some of the signatories. She was unable to reach Mr. Saggu (who was out of the country on vacation). She spoke with the Mayor, Derek Corrigan, on March 13, 2008.

[10] The uncontradicted evidence is that on that occasion the Mayor advised her that he was aware of the Petition, that any complaints to the City in the nature of those set out in the Petition would be dealt with by way of an in-camera meeting of the City Council, and that the first step in dealing with the Petition would be to allow Mr. Saggu an opportunity to respond, and City Council to consider his

response. As of Friday, March 14, 2008 she was not aware of any statement by the City of Burnaby that the Petition had been received, or that any investigation would be carried out as to the conduct of Mr. Saggu as alleged in the Petition. She satisfied herself that the Petition in her possession was genuine and had in fact been presented to the Mayor of the City of Burnaby. On March 15, 2008 she wrote an article that was published in the Burnaby Now newspaper on that date, headlined "Petition questions Board Member's ethics". The article carried a sub-headline: "26 name Petition to Mayor and Council alleges that Board of Variance Member has misrepresented himself to achieve 'personal gains' ".

[11] The March 15, 2008 article goes on to say that members of Burnaby's Indo-Canadian community are accusing a volunteer on the City's Board of Variance of using his position for "personal gains". The article describes the Petition's allegations and the conversation Ms. Larsen had with the Mayor about the Petition. The text of the Petition is published in full.

[12] The March 15 article makes no reference to Ms. Larsen's informant (the person who called her on March 11 and who subsequently faxed the Petition to her). Nothing in the article is attributed to the informant.

[13] After publication of the article in the newspaper on March 15, 2008, Ms. Larsen followed up with further interviews of the Mayor, another Board of Variance member, the City solicitor, a lawyer specializing in municipal law, and other individuals who had been referred to her. She wrote a second article published in the Burnaby Now newspaper on Saturday, April 5, 2008. The April 5, 2008 article is also the subject of this lawsuit. The article is headlined, "Mayor to 'encourage' Saggu to step down". The sub-headline says, "More allegations surface regarding Board of Variance member using his position on Board for 'personal gains' ". The April 5, 2008 article states that City staff are investigating the claims set out in the Petition. The article also sets out comments attributed to the defendants Harjit Gill, Balwinder Tung and Gurmukh Bhogal. The text of the Petition was again published. A companion article also published on April 5, 2008 describes the powers and functions of the City's Board of Variance.

[14] On April 26, 2008, Ms. Larsen wrote an article published in the Burnaby Now newspaper stating that Mr. Saggu has "stepped aside" while the City staff investigated his conduct. The plaintiff does not sue in respect of the April 26 article.

[15] The City solicitor prepared a report to the City Council dated May 20, 2008. At its Council meeting of May 26, 2008, the Mayor advised that after a thorough investigation by the solicitor for the City, the allegations against Mr. Saggu had not been substantiated and there was no reasonable basis to exclude Mr. Saggu from serving on the Board of Variance. The City refused to provide a copy of the City solicitor's report to Ms. Larsen and the newspaper. On May 28, 2008 the newspaper published an article written by a different reporter headlined "Report clears Saggu", sub-headlined "Mayor Corrigan says 'allegations have not been substantiated' ". That article is also not sued upon in these proceedings. In the article, the Mayor is reported to have refused to release the report on the basis of privacy concerns. He is quoted as saying, "We have no intention to release it. ... It has personal information, and it was discussed in-camera."

[16] On his examination for discovery, Mr. Bhogal testified that he took the original three-page Petition to the Mayor's office, but that he did not provide a copy of the Petition to Ms. Larsen. He also testified that he did not provide a copy of the Petition to Mr. Lee Rankin, a member of the Team Burnaby party, a political party in opposition to that of the Mayor and the majority of councillors, the Burnaby Citizens Association. Through subsequent correspondence from his legal counsel, Mr. Bhogal altered his evidence, and stated that he also provided a copy of the Petition to Lee Rankin, the then leader of the opposition Team Burnaby party. Several of the questions that Ms. Larsen has declined to answer relate to whether Lee Rankin was her informant.

[17] Leading up to publication of the March 15, 2008, Ms. Larsen learned that the plaintiff Pritam Saggu was also a member of the Burnaby Citizens Association.

PLEADINGS

[18] This action was commenced June 25, 2008. In addition to Ms. Larsen and Canwest, the defendants are Harjit Gill, Balwinder Tung and Gurmukh Bhogal. The plaintiff has settled his claims against Mr. Gill. The action is for defamation, on the basis of the Petition, and the March 15 and April 5, 2008 articles published in the Burnaby Now newspaper, and also on its website. The entire text of the Petition is alleged to be defamatory.

[19] Allegations are made against Mr. Gill, Mr. Tung and Mr. Bhogal based on comments attributed to them in the April 5, 2008 article.

[20] I note that the April 5, 2008 article says that the defendant Bhogal "organized the Petition", but the plaintiff does not allege that fact in the statement of claim. The statement of claim says that the defendant Gill caused the Petition to be printed and published.

[21] There are no allegations against any person for having signed the Petition.

[22] In summary, after the settlement with Mr. Gill, the claims that remain as set out in the statement of claim centre on the publication of the Petition itself, including innuendos therefrom, and the comments of Mr. Tung and Mr. Bhogal as attributed to them in the April 5 article.

[23] There is no claim specifically relating to the informant who called Ms. Larsen on March 11 and told her about the existence of the Petition, and no claim relating to the specific act of faxing the Petition to Ms. Larsen. The closest allegation that could be seen to be touching on the question of who provided the Petition to the newspaper is the settled claim against the defendant Gill, who allegedly "printed and published, or caused to be printed and published, the Petition".

[24] In their statement of defence, the Canwest defendants say that both the March 15 and April 5 articles were published without malice on an occasion of qualified privilege, based in part on the right of the citizens, property owners and residents of the City of Burnaby to be informed of a public allegation of wrongdoing by a member of a municipal board who is appointed by city council.

[25] There is also a plea that a qualified privilege applies on the basis of "responsible journalism in the public interest". It is pleaded that no damages flow from the publication of the articles, but rather that the damages flow from the allegations made by Gill in the Petition.

[26] The Canwest defendants submit that had the newspaper not published the Petition and the articles concerning the Petition, the citizens of the City of Burnaby would never have been made aware of the existence of the Petition, which alleged misconduct of a person in public office, and that there were 26 members of the public who were prepared to sign the Petition, and that the City was investigating.

[27] The defendants Tung and Bhogal also rely on qualified privilege. Mr. Bhogal claims to have been misquoted. There are also pleas of fair comment, and of truth.

[28] The allegedly defamatory words attributed to Mr. Tung as set out in the April 5, 2008 article are as follows:

> Balwinder Tung said he first met Saggu three years ago when Saggu walked into Tung walked into Tung's shop and introduced himself as a city inspector.
> "He recognised himself as the Burnaby City Hall inspector," Tung said through an interpreter.
> "I asked him to give me a card. He only gave me a phone number," he said.
> Tung said Saggu often came into his shop to buy food, each time reminding him of his affiliation with the City of Burnaby.
> Tung regularly gave Saggu discounts on his food because he feared Saggu would cause trouble for his business if he didn't.
> "He was pushing weight."

[29] The allegedly defamatory words attributed to Mr. Bhogal as set out in the April 5, 2008 article are as follows:

> Gurmukh Bhogal, a former board of variance member who organised the petition, said a

number of people have raised concerns about Saggu's conduct.

"This person goes around the community to portray himself as a somebody in the city, flashing his card," said Bhogal, who now sits on the city's planning advisory council.

ISSUES

[30] The issues on the application are as follows:

1. whether the questions asked and documents sought, in particular the questions relating to the identity of the informant and other questions about the informant, are relevant;
2. whether, if some or all of the information sought is relevant, I should exercise my discretion to refuse to order production on the basis of:
   (a) the discretion provided under Rules 26(1.2), 27(20) and 27(22); and/or
   (b) journalist-informant privilege.

SUBMISSIONS OF THE PLAINTIFF

[31] The plaintiff argues that Larson and Canwest are obliged to produce relevant documents under Rule 26 and Rule 27(20) of the ***Rules of Court***, and to answer the questions about the informant pursuant to Rule 27(22) of the ***Rules***. The plaintiff concedes that these Rules provide for judicial discretion in their enforcement. Rules 27(20) and 27(22) open with the words, "unless the court otherwise orders". The court may excuse a party from the obligation to produce documents under Rule 26(1.2).

[32] It was argued that the identity of the informant, and questions and documents about the informant would be relevant to matters in question in the action, and specifically to the following questions:

a. Whether the "source" believed the accusations in the Petition were true or valid;

b. Who was circulating the Petition;

c. How many copies of the Petition were made;

d. When copies of the Petition were forwarded and to whom;

e. Why a copy or copies of the Petition was forwarded to the media;

f. Why copies of the Petition were being forwarded and published and whether or not this was done with malice;

g. Whether or not the "source" knew the City of Burnaby had initiated an investigation into the allegations and whether the source was involved with that investigation;

h. Whether Larsen and Canwest were acting responsibly in their investigation and publishing;

i. Whether the "source" is a potential witness in this action;

j. Whether the "source" is a potential defendant in this action.

[33] The plaintiff argues that historically British Columbia law did not recognize the concept of privilege as between a reporter and the reporter's informant or source: ***McConachy v. Times Publishers Ltd. et al.***, [1964] B.C.J. No. 205, 49 D.L.R. (2d) 349 (C.A.); ***Charman v. Canadian Newspapers Co.***, [1991] B.C.J. No. 2625.

[34] However the plaintiff conceded that a case by case journalist-informant privilege, utilizing the

four criteria set out in the text by ***Wigmore on Evidence***, vol. 8 (McNaughton rev. 1961), at p. 527, was recognized by the Supreme Court of Canada in ***R. v. McClure***, [2001] 1 S.C.R. 445.

[35] The cases use varying terms to describe this "privilege", such as "reporter", "newspaper" and "source". I favour the term "journalist-informant" as used in ***McClure***.

[36] In that decision Mr. Justice Major, for the Court, stated:

> 29 Other confidential relationships are not protected by a class privilege, but may be protected on a case-by-case basis. Examples of such relationships include doctor-patient, psychologist-patient, journalist-informant and religious communications. The *Wigmore* test, containing four criteria, has come to govern the circumstances under which privilege is extended to certain communications that are not traditionally-recognized class privileges (*Wigmore*, *supra*, at p. 527):
>
> > (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. [Emphasis deleted.]

[37] The plaintiff also relies upon ***Bouaziz v. Ouston***, 2002 BCSC 1297, where, in the part of the decision rendered orally, Madam Justice Brown, after a review of the authorities, stated:

> 22 Whether the question here is framed as a residual discretion pursuant to Rule 27 (unless the Court otherwise orders), or a general communications privilege, I am bound by the decisions to which I have referred. In weighing the competing interests, it is the public interest in correctly decided litigation which prevails.

[38] The plaintiff argues that the reporter and publisher are relying upon the defence of qualified privilege based on "responsible journalism", a defence which has been recognized recently by the Ontario Court of Appeal in ***Cusson v. Quan***, 2007 ONCA 71. (An appeal from this decision was argued at the Supreme Court of Canada on February 17, 2009. The decision is currently under reserve.) With respect to application of this defence, questions concerning the source of the information may be relevant. In ***Cusson***, the Court applied what it referred to as the ***Reynolds-Jameel*** public interest responsible journalism defence, first enunciated by the House of Lords in ***Reynolds v. Times Newspapers Ltd.*** (1999), [2001] 2 A.C. 127 (U.K. H.L.), and further explained in ***Jameel v. Wall Street Journal Europe SPRL (No. 3)*** (2006), [2007] 1 A.C. 359 (Eng. H.L.). The Court referred to and quoted from ***Reynolds*** as follows:

> 89 Emphasizing the "elasticity" of the common law principle of qualified privilege in relation to matters of public interest and the undesirability of developing a subject-specific qualified privilege, Lord Nicholls held that the "responsible journalism" standard "enable[d] the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern" (at p. 204H). He then provided a non-exhaustive list of ten factors to be taken into account in determining whether the defendant had conducted itself in accordance with the standards of responsible journalism:
>
> > 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
> >
> > 2. The nature of the information, and the extent to which the subject-matter is

a matter of public concern.

3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.

4. The steps taken to verify the information.

5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.

6. The urgency of the matter. News is often a perishable commodity.

7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.

8. Whether the article contained the gist of the plaintiff's side of the story.

9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.

10. The circumstances of the publication, including the timing.

[emphasis added]

SUBMISSIONS OF THE CANWEST DEFENDANTS

[39] The primary submission of the Canwest defendants is that the information sought is not relevant to the case, as pleaded. Examples of cases where similar information was found not to be relevant are ***Belzberg v. Jackson*** (1981), 31 B.C.L.R. 140 (B.C.C.A.), ***Charman***, and ***Parlett v. Robinson***, [1984] B.C.W.L.D. 266, 1983 CarswellBC (S.C.).

[40] The secondary submission of the Canwest defendants is that if the information sought is relevant at all, the relevance is marginal at best. Therefore, it is argued the Court should decline to order production, either on the basis of the discretion set out in the ***Rules***, or on a finding of qualified privilege on the application of the ***Wigmore*** tests recognized by the Supreme Court of Canada in ***McClure*** and applied recently by the Ontario Court of Appeal in ***R. v. National Post***, 2008 ONCA 139.

[41] In ***National Post***, the Court accepted that the ***Wigmore*** criteria may be modified to fit a particular case, and the Court held that the criteria should be infused with the values underlying s. 2(b) of the ***Charter*** (freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication). In that case the contest was between the law enforcement interests of the state, and the privacy interests of the press in refusing to disclose a confidential source and refusing to produce a document and envelope for forensic tests. The police had obtained a search warrant and assistance order requiring the newspaper to produce a document and the envelope in which it was sent. It had been alleged that the document was a forgery and the police wanted to investigate that potential crime. The Ontario Court of Appeal considered the ***Wigmore*** criteria and held that the fourth ***Wigmore*** criterion was not met. Leave has been granted by the Supreme Court of Canada and the matter is tentatively set for hearing May 22, 2009.

ANALYSIS

Issue No. 1 – Relevance

[42] With the claim against Mr. Gill having been settled, the remaining allegations set out in the pleadings focus exclusively on the contents of the March 15 and April 5 newspaper articles. There is no plea against any party for having prepared or signed the Petition. Specifically, there is no plea that a defendant or even an unknown third party made the newspaper aware of the Petition and provided a copy of the Petition to the newspaper.

[43] It is clear on the evidence before me that the informant simply made the reporter aware of the Petition, and then, on condition of confidentiality, provided a copy of the Petition to the reporter. The informant's identity is not germane to the allegations in the pleadings. Even if the Petition had been provided to the reporter anonymously, I doubt that either article would have been significantly different than they were.

[44] There is no indication in either article or in the evidence before me that the reporter was relying upon any information that may have come from the informant.

[45] On these facts it would not matter whether the informant believed the accusations in the Petition. The reliability or basis of knowledge of the informant makes no difference. The evidence of Ms. Larsen was that after receiving the Petition, she took independent steps to confirm that it was authentic. She confirmed that the Petition had indeed been delivered to the Mayor and Council.

[46] With specific reference to the arguments for relevance made by the plaintiff, and as set out above in para. 32, I do not see any of those questions as being relevant to the case against the remaining defendants as pleaded. The issue of relevance is to be determined by reference to the pleadings as they appear at the time of the application – therefore, the informant's status as a potential defendant is not relevant, as there is no pleading as such: see ***Belzberg*** at para. 11.

[47] I do not see questions relating to the informant as relevant to the defence plea of "responsible journalism" qualified privilege. Given that the informant simply made Ms. Larsen aware of the Petition, the informant's knowledge of the facts or the perspective of the informant is immaterial.

[48] I therefore conclude that the identity of the informant and other questions relating to the informant, and documents identifying the informant or relating to the informant, are not relevant. I do not therefore need to exercise the discretion given to the court by the law of privilege or the ***Rules***.

Issue No. 2 – Discretion to Decline the Order for Production

[49] In case I am wrong on the issue of relevance, I will go on to consider the secondary submissions of the Canwest defendants.

[50] The authorities are clear that there is no blanket or "class" privilege that allows journalists to refuse to divulge their sources where they are relevant to the case.

[51] However, privilege may be established, on a case by case basis, through the application of the four ***Wigmore*** criteria: ***McClure*** at para.29.

[52] I will therefore examine the ***Wigmore*** criteria in turn.

(1) The communications must originate in a confidence that they will not be disclosed.

[53] The reporter, Ms. Larsen, deposed that the informant offered to provide a copy of the Petition on the condition that she not reveal the identity of the informant to anyone outside the Burnaby Now's senior editorial staff, and Ms. Larsen agreed to that condition.

[54] While the informant obviously wanted the allegations in the Petition to be publicized, on the limited evidence available on this interlocutory application, I accept that the informant stipulated for confidentiality and would not otherwise have provided the Petition to the reporter, and that the reporter agreed to the condition of confidentiality. I conclude that this criterion is met.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

[55] The Court in ***National Post*** analysed this element both broadly in the context of the relationship between journalists and their sources and narrowly in the context of the particular case: see ***National***

Post paras. 87-88.

[56] In relation to the broader relationship of journalists and informants, Ms. Larsen has deposed as follows:

> I also believe that if a journalist is compelled to reveal his or her confidential source of information or documentation that is clearly of public interest, then individuals who believe in good faith that they are in possession of such information, will be reluctant to convey it to the media if they fear repercussions of any kind. The public could then lose a valuable resource for obtaining information that governments or public or organizational bodies might otherwise have suppressed.

[57] This argument was accepted by Court in ***National Post***. The Court explained:

> 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.

[58] The broader context applies in this case in my view.

[59] In the specific context of this case I accept that Ms. Larsen and the newspaper would be significantly hampered in their ability to report on matters of interest to the public if confidentiality cannot be maintained. I therefore find that this criterion is established.

> **(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.**

[60] The plaintiff conceded that this criterion is met.

[61] It is clear on the cases that the relation between informants and journalists is one which in the opinion of the community ought to be sedulously fostered.

[62] In ***National Post*** at para. 97, the court quoted the following comments from the decision under appeal in that case:

> 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.

[63] The fundamental importance of freedom of the press and other media of communication to our society is reflected in s. 2(b) of the ***Charter of Rights and Freedoms***.

[64] In ***Cusson***, R.J. Sharpe J.A., with whom the other members of the Court agreed, stated at paras. 125 and 126:

> It is hardly necessary to repeat here the importance of the rights protected by s. 2(b) of the *Charter*, namely "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". These rights are an inherent aspect of our system of government and have been generously interpreted by the courts. Democracy depends upon the free and open debate of public issues and the freedom to criticize the rich, the powerful and those, such as police officers, who exercise power and authority in our society. Freedom of expression extends beyond political debate to embrace the "core values" of "self-fulfilment", "the communal exchange of ideas", "human

> dignity and the right to think and reflect freely on one's circumstances and condition": *R.W.D.S.U. v. Pepsi-Cola*, [2002] 1 S.C.R. 156 at para. 32. Debate on matters of public interest will often be heated and criticism will often carry a sting and yet open discussion is the lifeblood of our democracy. This court recognized in *R. v. Kopyto* (1987), 62 O.R. (2d) 449 at 462 that "[i]f these exchanges are stifled, democratic government itself is threatened."
>
> On the other side of the scales, the Supreme Court of Canada has recognized and reaffirmed that the protection of reputation is also an important *Charter*-protected Canadian value: *Hill v. Scientology* at para. 120.
>
> **(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 disposition of litigation.**

[65] The Plaintiff submitted that this criterion was not met.

[66] As I interpret the application of this criterion, I must weigh the benefit to be gained by disclosure for the correct disposition of litigation, as against the interests of society in journalists having full access to information: see ***Belzberg v. British Columbia Television Broadcasting System Ltd.***, [1981] 3 W.W.R. 85 (B.C.S.C.) at paras. 11, 12, overturned on different grounds (1981), 31 B.C.L.R. 140, [1981] 6 W.W.R. 273 (B.C.C.A.).

[67] In ***National Post*** the Court decided that the benefit of disclosure prevailed. The police were investigating the alleged forgery of the very document provided to the journalist. The document itself formed the *actus reus* of the offence and was therefore critical to the case. The information sought was not obtainable from any other source. The Court was of the view that the allegations were of "an especially grave and heinous crime" involving an intention to create controversy and undermine a sitting Prime Minister of Canada.

[68] Where, as here, the facts to be disclosed are marginally relevant, at best, then the benefit to be gained by their disclosure is also marginal. I therefore have no difficulty in concluding that in this case the benefit to be gained for the correct disposition of the litigation does not outweigh the injury that would inure to the relation by the disclosure of the communications.

[69] On the basis of the foregoing analysis of the ***Wigmore*** criteria, I conclude that on the facts of this case I have a discretion to decline to order disclosure. For the reasons stated, I do so. I would exercise my discretion under the ***Rules*** in the same way and for the same reasons.

CONCLUSION

[70] I have decided that Ms. Larsen is not required to answer questions concerning the identity of her informant nor questions relating to the informant, and is not obliged to produce documents in relation thereto. I have assumed that this conclusion will deal with all of the outstanding requests for information on the examination for discovery of Ms. Larsen as set out in Schedule "A" to the notice of motion. If the parties require further directions with respect to specifics, I will deal with them and arrangements may be made through the Registry for that purpose. Any remaining questions may be dealt with by written or oral submissions, as the parties may wish.

"The Honourable Mr. Justice Verhoeven"