

## Whatever Happened to ... Confidential Sources at the National Post

September 3, 2015,(2015-09-03T13:46:59+00:00) By Peter Bowal(Posts by Peter Bowal) and Allison Seto(Posts by Allison Seto)



"[N]o journalist can give a secret source an absolute assurance of confidentiality."

– Supreme Court of Canada, per Binnie J.

### Introduction

People who speak to and inform Canadian journalists often ask to be protected by confidentiality. Journalists depend on these tips and will promise not to disclose their sources to police, courts or other legal authorities. The *National Post* case answered how journalists can guarantee the confidentiality of their sources [*R. v. National Post*, [2010] 1 SCR 477, 2010 SCC 16 (CanLII) <http://canlii.ca/t/29177>].

### Facts

In 1999, Andrew McIntosh, a reporter for the *National Post*, began investigating what was known as the "Shawinigate" scandal and would over the next decade become the focus of that story. The newspaper wanted to determine Prime Minister Jean Chretien's ownership interest in the Grand-Mère Auberge and Golf Club, and any role he played in that business's acquisition of a federal Business Development Bank of Canada (BDC) loan that was originally declined.

McIntosh first published pieces on the transaction in the *National Post* on January 23, 1999, and January 25, 1999. In the fall of 2001, a confidential source "Y" contacted McIntosh. Y claimed to speak on behalf of another confidential source, "X". Both of these sources would only provide information if they could be promised confidentiality. McIntosh gave them blanket, unconditional assurances of confidentiality.

On April 5, 2001, McIntosh received a sealed, plain brown envelope with no return address. It contained a copy of a document that appeared to be a bank loan authorization which related to the \$615,000 mortgage loan granted to the Grand-Mère Auberge (Inn) by the BDC in 1997. The footnotes showed the Inn owed a debt of \$23,040 to "J & AC Consultants". This was a Chretien family holding company.

**On July 4, 2002, the Ontario Superior Court of Justice issued a general warrant and assistance order. The *National Post* was to make the document available to the RCMP.**

McIntosh thought if the document was genuine, it could have consequences for the political career of the Prime Minister. So he forwarded copies of the document to the Bank, the Prime Minister's Office, and the Prime Minister's lawyer, requesting their comments on the contents.

The Bank said the document appeared to be a copy of a document from the Bank's record, but it was a forgery. The Prime Minister's lawyer agreed that the document was forged and said the Prime Minister had no debt with the Inn. On April 7, 2001, the Bank asked the RCMP to investigate the document.

A week after receiving the brown envelope, McIntosh was contacted by X, requesting a meeting. X revealed he or she sent McIntosh the document after receiving it in the mail from an anonymous source. X asked for an undertaking of confidentiality and

asked McIntosh to destroy the document so fingerprints or DNA would not disclose the identity of X. McIntosh instead stored the document in a secure location. He believed X to be a reliable source and the loan authorization to be genuine. As long as he believed he was not being misled, McIntosh told X, he would ensure confidentiality.

## The Matter Goes to Court

On July 4, 2002, the Ontario Superior Court of Justice issued a general warrant and assistance order. The *National Post* was to make the document available to the RCMP. The newspaper applied to quash this order on July 29, 2002.

Almost a year and a half later, on January 21, 2004, the Ontario Superior Court Justice quashed the warrant and order on the basis of the *Charter's* protection of freedom of expression. This ruling was overturned by a unanimous three-judge Ontario Court of Appeal on Leap Day four years later. The Supreme Court of Canada agreed to hear the appeal and rendered a final decision some nine years after McIntosh received the first confidential contact.

## Supreme Court of Canada Decision

Section 2(b) of the *Charter of Rights* protects the freedom of expression, including freedom of the press. News gathering is an inherent part of news publishing. However, today anyone can be a journalist and publisher. There are many news-gathering techniques and it is unreasonable that every technique be protected in the *Constitution*. Accordingly, confidentiality of sources is not automatically protected. Yet, the law must provide immunity from compelled disclosure of secret source identities in some situations.

A case-by-case analysis must be followed. The four elements required to establish privilege for a journalist and confidential source are:

1. the communication must originate in a confidence that the identity of the informant will not be disclosed;
2. the confidence must be essential to the relationship in which the communication arises;
3. the relationship must be "sedulously fostered" in the public interest; and
4. in the case at hand the public interest served by protecting the public identity of the informant from disclosure outweighs the public interest in identifying the informant.

The Supreme Court of Canada was satisfied the *National Post* had met the first three criteria, but not the fourth. The document and envelope were not mere pieces of evidence but the very essence (*actus reus*) of the alleged crime. The Court dismissed the appeal and ruled (8-1) the warrant and assistance order were properly issued. The *National Post* had to deliver the document and envelope to the RCMP, even if this might reveal the identities of X and Y.

Today, journalists cannot guarantee anonymity for their sources because the courts will make the final call by applying this criteria.

## Where Are They Now?

Chretien has long retired from politics. Andrew McIntosh left the *National Post* during this litigation that had put his career on hold in Canada. He moved to Sacramento, California in 2005 to work for the *Sacramento Bee* newspaper. He now is an investigative editor in Montreal for QMI News Agency with whom he won a journalistic award in 2012.

In the end, we believe the Supreme Court of Canada made the wrong call. The high cost and effort of nine years of procedural wrangling was the main practical legacy of this case. The matter died. X's identity was never disclosed to the public. No crime of forgery was ultimately charged. Freedom of the press lost ground and journalism in Canada became slightly more tentative.

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Filed Under: Famous Cases

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