

**Globe and Mail v Canada - More Case-by-Case Privilege
for Journalists and Confidential Sources**

October 29, 2010 by Bob Tarantino

The Supreme Court of Canada's October 22, 2010 decision in *Globe and Mail v. Canada (Attorney General)* (2010 SCC 4) prompted a flurry of responses (Omar Ha-Redeye's post at slaw (Wigmore Criteria Upheld for Journalistic Sources) is one of the best sources for a concise summation of the decision). Available online are the factums of both the Globe and the Attorney-General of Canada.

The decision is perhaps best seen as a companion decision to the *R. v. National Post* (2010 SCC 16) decision released earlier this year (earlier Signal coverage of the *R v National Post* decision can be found here). The Court described the relationship between the two cases in the *Globe and Mail* decision:

[25] While this appeal raises issues similar to those addressed in *National Post*, the context is nevertheless different. This case involves civil litigation, not the criminal investigative process. It involves testimonial compulsion, and not the production of documents or other physical evidence. The parties' dispute is subject to the laws of Quebec and the *Quebec Charter*. These factors must be considered in determining how, and to what extent, the majority reasons in *National Post* are equally applicable to the issues raised by this appeal.

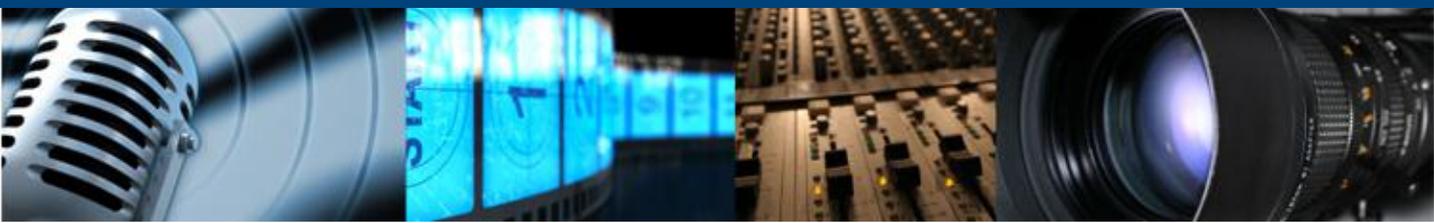
The Court concluded that, while the contexts might be different, the applicable law was nevertheless the same: Canadian law does not recognize a class-based journalist-source privilege, nor does the Charter guarantee of press freedom entail such a privilege; that being said, there is a common law (and, in Quebec, civil law) basis for recognizing a case-by-case privilege - a privilege which is available in both civil litigation matters and criminal prosecutions, in both Canadian common law and civil law jurisdictions.

The criteria to be met in order to shelter under the protection of the privilege are the following, derived from the academic writings of John Henry Wigmore (see paras. 22 and 53 of the *Globe and Mail* decision):

1. the relationship must originate in a confidence that the source's identity will not be disclosed
2. anonymity must be essential to the relationship in which the communication arises
3. the relationship must be one that should be sedulously fostered in the public interest
4. the public interest served by protecting the identity of the informant must outweigh the public interest in getting at the truth

In effect, then, *Globe and Mail* confirms and extends *R v National Post* - and,

as I noted about the earlier decision



, perhaps the most significant element of the two decisions is that they confirm that the concept of "journalist" is now so amorphous and so incapable of being restrictively defined that the courts are adopting a case-by-case approach to assessing whether privilege will be accorded in a particular instance.

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