CITATION: 1654776 Ontario v. Stewart and The Globe and Mail, 2012 ONSC 1991
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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1654776 Ontario Limited, Plaintiff / Applicant

AND:

Sinclair Stewart and The Globe and Mail, Defendants / Respondents

BEFORE: Justice E. P. Belobaba

COUNSEL: Paul Bates, Doug Worndl, Dimitri Lascaris and Robert Gain for Applicant

Peter Jacobsen, Paul LeVay, Tae Mee Park and Justin Safayeni for Respondents

HEARD: March 21, 22 and 23, 2012

ENDORSEMENT

[1] This application for a Norwich Order[1] turns on the following question: should a newspaper be required to disclose the identity of confidential sources because their published statements about a high-profile corporate transaction were *possibly* in breach of provincial securities law?

[2] The applicant says that the sources' statements definitely breached securities law, undermined the integrity of the capital markets and caused significant trading losses. The applicant intends to commence a class action and wants the sources identified so they can be added as named defendants.

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[1] An equitable and extraordinary remedy for pre-action discovery used to obtain information essential for a lawsuit, such as the identity of an alleged wrongdoer, from a non-party. See *Norwich Pharmacal Co. v. Commissioners of Customs and Excise,* [1974] A.C. 133 (H.L.) For an up-to-date discussion of this important and evolving discretionary remedy see *GEA Group AG v. Flex-N-Gate Corp*., 2009 ONCA 619 (C.A.).

[3] The respondents deny any breaches of securities law and, in any event, point to two recent decisions of the Supreme Court of Canada that have recognized "the special position of the media" and the importance of protecting secret sources.[2]

[4] Both sides agree that the confidentiality of journalistic sources is not guaranteed under Canadian law. Journalist-source privilege is not a class privilege. Whether or not a newspaper or other media will be required to disclose the identity of its confidential source must be determined on a case by case basis.[3]

[5] The question as framed - should a newspaper be required to disclose the identity of confidential sources because their published statements were *possibly* in breach of provincial securities law - suggests the answer.

[6] For the reasons that follow, I have concluded that the requirements for a Norwich Order have not been satisfied. The confidentiality of the newspaper's sources should be preserved. The application is dismissed with costs.

Background

(1) The leveraged buy-out of BCE

[7] The context of this application is the attempted leveraged buy-out of BCE in 2008 by a private equity consortium led by the Ontario Teachers' Pension Plan. Had the deal closed, it would have been the largest corporate takeover transaction in Canadian history and probably the largest leveraged buy-out in world history. As it turned out, the transaction was terminated in December, 2008.

[8] This application, however, relates to what happened in and around June 30, 2008. The global credit crisis was in full force. There was world-wide financial turbulence. The completion of the BCE 'going private' transaction had become a huge business story that was generating hundreds of news articles.

[9] On June 20, 2008 just ten days before the June 30 closing date, the Supreme Court of Canada provided the required legal approval. BCE was of course delighted with the

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[2] *R v. National Post,* 2010 SCC 16, [2010] 1 S.C.R. 477; *Globe and Mail v. Canada (Attorney General)* ["*Groupe Polygone*"], 2010 SCC 41, [2010] 2 S.C.R. 592.

[3] The Supreme Court's decisions in *National Post* and *Groupe Polygone*, *supra*, note 2, are determinative to the analysis herein and will be discussed in detail below.

decision and announced the same day that it now expected to close the transaction in the third quarter of 2008. The lenders in turn announced that they remained committed to the transaction and would continue to negotiate the financing documents in good faith. All that remained was the finalization of the financing arrangements.

[10] It became apparent, however, in the days following the Supreme Court decision that the negotiations between the buyers' consortium and the lenders were not going well. Various newspapers, citing confidential sources "close to the transaction", reported that the deal was in difficulty, could "go off the rails" and that it would probably not close in the third quarter as BCE had stated. Indeed, one source said it would be a "miracle" if it closed by Christmas. These articles appeared between June 20 and June 30, 2008.

[11] Sinclair Stewart, then a financial reporter with the Globe and Mail (and now its national editor), was deeply immersed in the story and had already written dozens of articles describing the deal's progress. Many of the articles relied on information provided by confidential sources that were said to be close to the transaction.

(2) The news article

[12] The article in question herein was published on June 30, 2008 ("the Article") and appeared on the front page of the Globe and Mail's business section. It was titled:

> Haggling may stall BCE deal till year-end; Lenders are balking at the purchase price as buyers dig in; "They're at $42.75, and damn the torpedoes".

[13] In the lead paragraph, Stewart wrote that the "problem-plagued $35 billion takeover of BCE Inc. will likely be delayed until the end of the year owing to the increasingly fractious negotiations between the company's private equity buyers and a syndicate of lenders who are pushing to lower the value of the buyout, according to people involved in the negotiations."

[14] Stewart then went on to provide a more detailed discussion that included references to various sources. The confidential sources at issue herein were quoted as follows:

- "Several sources described the tenor of the discussions as grinding and suggested that the parties remained far apart on a number of key issues."

- " 'Everyone has underestimated when this deal gets done,' said one executive at the bargaining table. 'It's Christmas' ... The source added he did not think the buyers and the banks would reach an agreement over the financing terms this summer, if at all."

- "Two high-level sources, one at BCE and another that is participating in negotiations, insisted that the company's embattled board had little appetite for lowering the price of the offer."

- " 'They're at $42.75 and damn the torpedoes,' said one of the sources."[4]

[15] Just four days later, on July 4, 2008 BCE announced via press release that a final agreement had been achieved and definitive financing was in place. BCE had succeeded in retaining its $42.75 share price. Closing was set for December 11, 2008. (As things turned out, however, the transaction never closed. The deal was terminated on December 11, 2008 because the required solvency certificate could not be obtained.)

(3) The applicant complains to the Ontario Securities Commission

[16] The applicant is a numbered company used for trading purposes by its owner, Jeffrey MacIntosh, a law professor at the University of Toronto. MacIntosh is an expert in corporate and securities law. On June 18, 2008 he caused the applicant company to purchase 35,000 BCE call options with a July 18 expiry date, for about $38,290. The initial closing date for the BCE transaction was June 30 (it was changed on June 20 to sometime in the third quarter). Professor MacIntosh knew that the Supreme Court had expedited its hearing and he expected a decision in a matter of days, before the June 30 closing date. MacIntosh was betting that BCE would win in the Supreme Court, the resulting increase in share prices would exceed the strike price of his call options and he, in turn, could "make a lot of money" perhaps as much as "half a million dollars."

[17] The bet proved right, at least in part. The Court approved the deal on June 20. BCE celebrated the decision with a press release advising that financial negotiations were progressing and the transaction would close in the third quarter. Unfortunately, the ensuing news reports were negative, many saying that the deal was in difficulty and may not close. The share price, needless to say, did not go up.

[18] On July 2, two days after the Article was published, MacIntosh decided to sell his package of call options, sustaining a loss of almost $36,000. He blamed this loss on the Article and the statements of the confidential sources that the BCE transaction might not close. Four days later, on July 4, BCE announced that a final agreement had been reached

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[4] Stewart explained on cross-examination that he used three confidential sources for this article: the first source was the "executive at the bargaining table"; the second source was "at BCE" and was "one of [the] two high-level sources"; and the third source was the other "high-level source" who was "participating in the negotiations." He had used these sources at various times in other articles. He trusted them and had promised them confidentiality.

and closing was scheduled for December 11, 2008. MacIntosh concluded that what was said by Stewart's confidential sources must not have been true. As he would later state in his letter to the OSC:

> The inaccuracy of the [June 30] story seems plain on its face. If it was doubtful on Monday [June 30] that the buyers and the banks would reach an agreement over financing terms during the summer "if at all", how is it that a deal was concluded on Thursday a mere 3 days later, and closed [sic] on Friday morning [July 4]? ... It seems highly doubtful that some miraculous epiphany resulted in a sudden, unexpected deal.

[19] Convinced that the confidential sources in the June 30 article must have misrepresented the true state of affairs, Professor MacIntosh wrote a 27-page letter to the OSC on September 17 setting out in detail why, in his view, the anonymous statements of these high-placed sources were misrepresentations and in breach of the Ontario *Securities Act.*[5] He urged the OSC to commence a formal investigation.

(4) The OSC declines to investigate

[20] The OSC enforcement staff reviewed the letter, discussed the matter via a conference call with Professor MacIntosh and his counsel on November 21, 2008 and declined to investigate.

[21] Counsel for both sides referred at length to the reasons offered on cross-examination by the Deputy-Director of Enforcement for not pursuing an investigation - that it was not a clear case; the difficulty of challenging journalist-source privilege; the lack of resources; and the insufficiency of the evidence. No one has suggested that the decision not to commence an investigation was made in bad faith or for some reason other than the public interest.

(5) The two op-ed pieces

[22] Professor MacIntosh continued in his effort to draw attention to the breaches of securities law contained in the June 30 news article and persuade the OSC to investigate. He wrote two op-ed pieces that were published in the National Post in 2010.

[23] In the first opinion piece dated August 4, 2010 and titled "Option to ignore; The OSC should investigate possible manipulation of the options markets during the failed BCE bid," MacIntosh made the following statements:

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[5] R.S.O. 1990, c. S.5.

- *I want to make it clear at the outset that the following events may be completely on the up-and-up and betray no illegality or attempt to mislead.* However, in my view, there is a reasonable basis to conduct an investigation.

- Now call me a cynic, but there's something fishy about a report stating that it was doubtful that "the buyers and the banks would reach an agreement over the financing terms this summer, if at all," juxtaposed against a concluded agreement four days later. *Sure, surprising and unexpected breakthroughs in negotiations sometimes happen. But let's face it – other interpretations are possible.* A person who deliberately planted a false story, for example, might have exploited that falsehood to make a small fortune in the options market. A huge amount of money was at stake. In these circumstances, is it too much to ask the OSC to undertake an investigation? [Emphasis added.]

[24] In his second opinion piece dated August 5, 2010 and titled "Media Chill: In the BCE case, the OSC has the power to compel journalists to reveal sources", MacIntosh again outlined his arguments as to why the OSC should have investigated his complaint and again acknowledged that there may have been no wrong-doing at all:

> *This chain of events may be perfectly innocent. Unexpected breakthroughs in negotiations clearly can happen.* But the sequence of events is also capable of bearing other, more sinister interpretations such as the deliberate manipulation of BCE's share price in order to make a killing. [Emphasis added.]

(6) The losses sustained

[25] Both sides spent some time in both written and oral submissions debating the drop in share prices that may have been caused by the June 30 article. The applicant says that after the Article was published, the price of BCE shares and call options fell significantly – the shares by 4.2% and the call options by between 43 to 60%. After the July 4 press release from BCE announcing that a "final agreement" had been achieved, the shares jumped from $35.15 to $39.50, about 13%; and the call options from 17 cents the day before to $1.90, an increase of over 1000%.

[26] The respondents point to the volatility of the BCE share prices over the entire period, from June 20 to July 4 and argue that BCE share prices fluctuated on a daily basis in the range of several percentage points, either up or down; and that even though the share price did drop by a relatively unremarkable $1.21 on June 30 there is no evidence that this drop was caused by the Article.

[27] In my view, there is little to be gained in parsing the share price data or engaging in any further causation analysis, at least at this stage of the proceedings. Suffice it to say that the share price fluctuated up and down during the entire ten day period from the

Supreme Court's decision to the Article's publication and did so again after the Article was published.[6] The amount of losses sustained and their causation are matters that are best left for trial. For my purposes here, I am content to assume without deciding that the applicant sustained losses that may well have been caused by the Article.

(7) The applicant files a proposed class action

[28] The applicant numbered company has filed a proposed class action under the private remedy provisions in Part XXIII.1 of the *Securities Act.*[7] The applicant seeks to be the class representative for itself and others who lost money on the sale of BCE common shares or call options during the four-day window between June 30 (the date of the Article) and July 4 (the date that BCE announced that the transaction would proceed). The proposed class action seeks $30 million in damages for both losses sustained and gains foregone.[8]

[29] The applicant alleges that the "misinformation" provided to Stewart by the confidential sources was material information about the BCE transaction that was disclosed to Stewart in breach of the *Securities Act* and other common law and statutory duties owed by the sources and their employers to the holders of BCE securities. Alternatively, if the information provided by the sources was not misleading but true, then the sources again were in breach of securities law by making unlawful selective disclosure, and BCE for its part had a positive duty to immediately disclose the material change that the transaction was not going to proceed.

[30] The proposed class action defendants are the confidential sources, BCE and 6796508 Canada Inc., the corporate vehicle that was used by the buyer's consortium. The

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[6] The respondents' position is that on the day the Article was published, the stock price dipped approximately 3%. This occurred against the backdrop of over a week of price movement following the Supreme Court's decision, and in the context of speculation over the very matters covered in the Article (which had been contained in earlier media reports) as well as other news such as the status of the BCE's quarterly dividend payment. BCE announced its decision to withhold its second-quarter dividend in the amount of $294 million at the close of business on June 30 and before the applicant sold its call options.

[7] Part XXIII.1: "Civil Liability for Secondary Market Disclosure."

[8] BCE's press release of July 4 caused share and call option prices to go up – hence the additional damages claim for the gains that were foregone. Professor MacIntosh has also filed a $3.5 million action against Dundee Securities and his former investment advisors for the trading losses that he allegedly sustained over several years because of negligently provided financial advice. MacIntosh had invested more than $1.7 million in his trading account. By the summer of 2010 the amount had dwindled to $98,000.

applicant says it's entitled to the names of the confidential sources who are currently described in the style of cause as simply "John or Jane Doe."[9]

The applicable law

[31] Because this application seeks the disclosure of confidential newspaper sources, two lines of analysis necessarily intersect. The first requires a consideration of the Norwich criteria. The second, the application of the Wigmore test.

[32] In order to satisfy the five-part Norwich test, the applicant must show that:

(i) it has a valid, *bona fide*, or reasonable claim; in cases such as this where freedom of expression interests are involved, the first-level hurdle has been raised and the applicant must show a *prima facie* case;[10]

(ii) the respondents are somehow involved in the acts complained of;

(iii) the respondents are the only practicable source of the information;

(iv) the respondents can be indemnified for any costs of the disclosure; and,

(v) the interests of justice favour the obtaining of the disclosure.[11]

[33] The Supreme Court concluded in *National Post* and *Groupe Polygone* that claims of journalist-source privilege should be resolved on a case by case basis by applying the Wigmore criteria.[12] The onus is on the respondents, who are seeking to preserve source-confidentiality and establish journalist-source privilege, to satisfy the four-part Wigmore test. The respondents must show that:

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[9] The respondents say that the class action was "an afterthought" following Professor MacIntosh's "unsuccessful crusade" to attract the interest of the OSC; that absolutely no steps were taken to investigate the sources' identity until December 15, 2010 – almost two and a half years after the Article was published. The respondents submit that such a lengthy and unexplained delay betrays a lack of interest in pursuing a civil cause of action.

[10] *Morris v. Johnson*, 2011 ONSC 3996 (S.C.J.) at para. 22; *Warman v. Fournier*, 2010 ONSC 2126 (Div. Ct.) at para. 42.

[11] *Norwich Pharmacal*, *supra,* note 1 at 175; *GEA Group, supra*, note 1, at para. 53 to 55.

[12] *Supra*, note 2.

(i) the relationship originated in a confidence that the source's identity will not be disclosed;

(ii) anonymity is essential to the relationship in which the communication arises;

(iii) the relationship is one which should be sedulously[13] fostered in the public interest; and

(iv) the public interest served by protecting the identity of the informant outweighs the public interest in getting at the truth.

[34] The Supreme Court has acknowledged the "special position of the media" and the importance of protecting confidential sources. As Justice Binnie noted in *National Post,* "[U]nless the media can offer anonymity in situations where sources would otherwise dry-up, freedom of expression in debate on matters of public interest would be badly compromised. Important stories will be left untold."[14] The courts should therefore strive to protect the media's secret sources where such protection is in the public interest.[15] But the journalist's promise of confidentiality is not absolute and sometimes, depending on the competing public interests, and only as a last resort, confidential sources will have to be disclosed.[16]

[35] The analytical template for this case-by-case assessment of journalist-source privilege is the four-part Wigmore test. In most cases, the first two steps – the existence and importance of a promise of confidentiality - will easily be satisfied. The focus will generally be on steps three and four.

[36] Step three requires the court to examine "the relationship" and determine if it is the kind of relationship that should be "sedulously" (i.e. deliberately and consciously) fostered and protected in the public interest. The concern here is the legitimacy and status of the journalist: is he or she an accredited professional or a less than credible, one-off blogger? The concern here is not about the content of the impugned communication (I will return to this point below) but the relationship itself. Assuming the journalist can

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[13] See *National Post, supra,* note 2, at para. 53: "Sedulously" is defined in the *New Shorter Oxford English Dictionary on Historical Principles* (6th ed. 2007), vol. 2, at p. 2755, as "diligently . . . deliberately and consciously".

[14] *National Post, supra*, note 2, at para. 33.

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

[16] *Groupe Polygone*, *supra,* note 2, at para. 63.

show professional standing with a legitimate news organization, the third step is readily satisfied. As Justice Binnie concluded in *National Post*, "[I]n general, the relationship between professional journalists and their secret sources is a relationship that ought to be sedulously fostered."[17]

[37] The real work is done at the fourth step of the Wigmore test – this is where the "weighing up" is done.[18] Having established the value to the public of the relationship in question, the court must weigh against its protection any countervailing public interest such as the investigation of a particular crime (or national security or public safety or some other public good).[19] The "weighing up" will include the nature and seriousness of the alleged wrong-doing and the probative value of the evidence sought to be obtained, measured against the public interest in respecting the journalist's promise of confidentiality.[20] Or putting it somewhat differently, whether the public interest in protecting the identity of the informant outweighs the public interest in getting at the truth. In the end, the balancing exercise is essentially "one of common sense and good judgment."[21]

[38] It is important to remember that in most cases the confidential source will be breaking a law or some other legal obligation by disclosing the information to the journalist. However, as the Supreme Court made clear in both *National Post* and *Groupe Polygone*, crime alone will not automatically vitiate the journalist-source privilege.[22] The law accepts that "in some situations the public interest in protecting the secret source from disclosure outweighs other competing public interests - including criminal investigations."[23]

[39] In sum, whether or not the disclosure of confidential journalistic sources will be court-ordered depends on the outcome of the fourth step of the Wigmore test. It comes down to striking the right balance on the particular facts of the particular case.

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[17] *National Post, supra,* note 2, at para. 57.

[18] *Ibid.,* at paras. 58 and 61.

[19] *Ibid.,* at para.58.

[20] *Ibid.,* at para. 61.

[21] *Ibid*., at para. 60.

[22] *National Post, supra,* note 2, at para. 61; *Groupe Polygone, supra,* note 2, at para. 84.

[23] *National Post, supra,* note 2, at para. 34.

[40] When the Norwich and Wigmore tests intersect, such as here, the Wigmore test becomes almost the entire "interests of justice" analysis that is conducted in the fifth step of the Norwich test.[24] In other words, if the four-part Wigmore test is satisfied by the media respondents, it probably will not be in the interests of justice to order disclosure. If the Wigmore test is not satisfied at any of the four steps, it probably will be in the interests of justice to order disclosure.

[41] In balancing the competing interests, the seriousness of the alleged criminal or wrongful conduct will figure prominently in the analysis. It may be useful, therefore, before turning to the Norwich-Wigmore tests as they apply herein, that I set out my findings about the impugned statements that were made by the confidential sources.

Key finding – no breaches of securities law

[42] In my view, none of what was said by the confidential sources was clearly or even likely in breach of provincial securities law. I find that the most that can be said about the sources' statements as published in the Article is that they were *possibly* in breach of the *Securities Act.* In other words, the level of criminality or quasi-criminality at its very highest is very low - at most, there was *possible* wrong-doing.

[43] The applicant disagrees. In its submission, there were clear breaches of securities law whether the statements were untrue or true. I will consider each of these submissions in turn.

[44] *First, that the sources' statements were not true.* Section 126.2 of the *Securities Act* provides as follows:

> Misleading or untrue statements
>
> 126.2(1) A person or company shall not make a statement that the person or company knows or reasonably ought to know,
>
> (a) in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue … and
>
> (b) would reasonably be expected to have a significant effect on the market price or value of a security …

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[24] *York University v. Bell Canada Enterprises* (2009), 99 O.R. (3d) 695 (S.C.J.), at para. 30.

[45] Professor MacIntosh argues in his affidavit that the statements about the state of the transaction "were highly unlikely to have been materially accurate." In his view, the sources could not have been telling the truth about the status of the negotiations. As far as I can discern from the material before me, MacIntosh relies on two points to support this submission. One, the unlikelihood that negotiations that were almost collapsing on Monday, June 30 could be turned around and would result in an agreement on Friday July 4, just four days later. And two, the fact that share prices dropped after the Article was published.

[46] With respect, neither point is particularly compelling. The first point is contrary to common sense and common knowledge. Negotiations that are on the verge of collapsing on day one can and do result in an agreement on day four. Neither corporate nor labour negotiations are a straight-line process. If necessary, I am comfortable taking judicial notice of this. The second point – the drop in share prices – is also not particularly compelling given the ongoing price volatility even days before the Article, the unremarkable magnitude of the actual price drop and the difficulty of attributing the price drop to the publication of the Article.[25]

[47] The respondents say there is no credible evidence that the sources' statements as published in the Article were misleading or untrue. I tend to agree. I note that Professor MacIntosh himself acknowledged in his two op-ed pieces that his concerns may be groundless: "the chain of events may be perfectly innocent … [they] may be completely on the up-and-up and betray no illegality or attempt to mislead … Unexpected breakthroughs in negotiations clearly can happen." The respondents' submission that MacIntosh is simply speculating seems to be supported by MacIntosh himself.

[48] More importantly, what the sources told Stewart as quoted in the Article is what other papers had been reporting for at least ten days. Stories in the National Post, the Toronto Star and the Montreal Gazette (as well as other stories in the Globe and Mail) were quoting "sources close to the deal" as saying, in essence, that the banks had considered walking away from the deal, the deal could derail, and it would be "a miracle" if the transaction closed by Christmas.[26] If the statements made in the Article were

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[25] *Supra*, paras. 25 – 26.

[26] During the ten days before the Article was published, other newspapers, quoting sources "close to the transaction" or "sources close to the deal" painted a decidedly negative picture of the negotiations. In essence, the news reports were saying that the banks could walk away the deal and the transaction might never get done: "Realistically, I would be happy if we got it done by Christmas" (*National Post,* June 20); "If those talks go **off the rails**, the deal faces another potential court battle…" (*Globe and Mail,* June 21); "You're talking about some of the toughest players in finance, on both sides, going head to head over terms." (*The Globe and Mail,* June 21); "If that process [financing negotiations] ends favourably for BCE's would-be buyers **by Christmas**, it will be as much of **a miracle** as the original Christmas" (*The Toronto Star,* June 21, 2008); "The banks also have actively

materially misleading, then the statements made in these other news articles over the preceding ten days that were virtually similar would have to be equally untrue. I agree with the respondents that the notion of such a widespread conspiracy strains credulity.

[49] A final point. Even if what was quoted in the Article was untrue, it would be difficult if not impossible on these facts to satisfy the second part of the test set out in s. 126.2 – namely, that the source's statement "would reasonably be expected to have a significant effect on the market price or value of a security …." If the same information has already been published and absorbed by the marketplace, the statements in the Article could not reasonably be expected to have a significant effect on BCE share prices.

[50] The applicant says the sources quoted in the Article were different. Unlike the sources relied on in the previous articles that were generally described as "sources close to the deal", the sources referred to in the Article were more specific and more important. For example, the Article quoted a high-level source from BCE, the very target of the leveraged buy-out. I do not agree with this submission. First, there is nothing in the Article that would compel the reasonable reader to make much of the BCE-source reference. Note that the headline writer made no mention of this nuance and was content to attach the following title to the Article:

> Haggling may stall BCE deal till year-end; Lenders are balking at the purchase price as buyers dig in; "They're at $42.75, and damn the torpedoes."

There is nothing about a high-level source at BCE saying anything particularly unique or important.

[51] Secondly, it is not correct to say that the news reports in the days before the Article were limited to "sources close to the deal" and did not mention BCE or any other party. An article dated June 21 quoted "one source close to Teachers" and, as counsel for the respondents reminded the court, unlike BCE, Teachers, being the lead buyer, was actually at the negotiating table with the lenders.

[52] In sum, there is little, if any, basis for the allegation that the statements quoted in the Article were untrue or misleading or materially different from what had already been

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considered **walking away from the deal**, the sources said." (*The Toronto Star*, June 24); "BCE Inc.'s buyers and their banks are fighting over financing for the $52-billion takeover, **threatening to derail** the biggest leveraged buyout after it was kept alive last week by Canada's top court. … (*Montreal Gazette,* June 25 with files from *Bloomberg News* and *The Financial Post*). [Emphasis added.]

published. The most that can be said on this branch of the argument is that it is possible that the statements made in the Article were untrue and in violation of s. 126.2. Not likely, far from probable, but certainly possible.

[53] *The applicant's alternative submission is that the statements were true* – that one of the sources was describing the state of the negotiations accurately when he or she said that the transaction would not close during the summer "if at all." The applicant submits that if the statements were true, then they were in breach of s. 76(2) of the *Securities Act*:

> Tipping
>
> 76(2) No reporting issuer and no person or company in a special relationship with a reporting issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed.

[54] The respondents are adamant about the inapplicability of the "anti-tipping" provisions on the facts herein. In their submission, if the sources were 'tipping', then they were effectively tipping the entire public at large, or at least all readers of the Report on Business section of the Globe & Mail, and not just a privileged subset of individuals. As such, there is no nexus between the alleged conduct of the sources and the mischief that the tipping provision is meant to address.

[55] There is merit in the respondents' submission. I can, however, decide the point more directly by another route. Consider the most damaging of the sources' statements, as seen by the applicant - that the deal would not close during the summer "if at all." If s. 76(2) applies, then the issue is whether this statement was a "material fact" or "material change".[27] Counsel sparred over the fact/opinion distinction and the correct interpretation of the Supreme Court's decision in *Kerr v. Danier Leather* and its analysis of forward-looking statements.[28] For my part, I am content to focus on materiality rather than factuality. "Material fact" and "material change" are defined in s. 1(1) of the *Securities Act*, as meaning (for our purposes herein) a fact or change "that would reasonably be

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[27] Both sides agree that the "special relationship" hurdle is probably cleared given the descriptions of the sources' high-level status and that the "general disclosure" cannot be accomplished by virtue of other newspaper accounts. General disclosure is a technical term that is described in NI 51-102 and NP 51-201.

[28] [2007] 3 S.C.R. 331.

expected to have a significant effect on the market price or value of any of the securities of the issuer."

[56] In my view, what the sources said in the June 30 Article - including the statement that the deal would not close in the summer "if at all" - was neither new nor different from what had already been published over the previous ten days and thus "would not reasonably be expected to have a significant effect" on the market price or value of BCE securities. As already noted, the share price of BCE fluctuated between June 20th and July 4th but remained well below the deal price of $42.75 because of the general uncertainty about whether the deal would close. There is really no evidence, other than Professor MacIntosh's own speculation, that the relatively unremarkable $1.21 decrease in price on June 30th was caused by the Article.

[57] I therefore conclude that the statements that appeared in the Article were probably not in breach of the *Securities Act.* Were they possibly in breach of either ss. 126.2 or 76(2) of the Act? Yes, possibly. But that's the most that can be said.

[58] I can now turn to the Norwich and Wigmore analysis.

Analysis

[59] I will begin with the Norwich criteria. They were set out above in paragraph 32. I am inclined to find that the first four steps are easily satisfied on the evidence before me. The applicant has established a *prima facie* case; the respondent journalist and newspaper are definitely involved in the acts complained of; they are the only practical sources of the information that is needed; and there is no suggestion that indemnification of costs incurred will be a problem.

[60] The respondents submit that a *prima facie* case (as required in step one) has not been established because none of the impugned statements are in any way actionable, and the statutory-based and common law claims of misrepresentation are time-barred by the three-year and two-year limitation periods set out in s. 138.14 of the *Securities Act* [29] and s. 4 of the *Limitations Act.*[30] The applicant disagrees. I would prefer to leave these kinds of arguments to the trial of the action. I adopt Morden J.A.'s approach in *Straka v Humber River Regional Hospital*,[31] which was also an application for a Norwich Order, replacing the words "*bona fide*" with "*prima facie*":

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[29] *Supra,* note 5.

[30] S.O. 2002, c. 24, Sch. B.

[31] [2000] O.J. No. 4212 (C.A.) at para. 53.

> On these facts, I do not think that the appellant should be "non-suited" because his claim is not a *bona fide* one, i.e. that his claim should fail because the threshold requirement of a *bona fide* claim has not been shown. As I have said, we are concerned with an equitable remedy the granting of which involves the exercise of a discretion. The general object is to do justice. Accordingly, I do not think that a rigid view should be taken of the elements of the claim. With this approach in mind, I think that it is reasonable to accept that sufficient *bona fides* has been shown to justify consideration of the case as a whole. The nature and apparent strength of the appellant's case is a factor to be weighed together with the other relevant factors in arriving at the final determination of the claim.

[61] In other words, I will assume, without deciding, that a *prima facie* claim has been established but I will assess the apparent strength of the applicant's case when I am balancing the interests in the final step of the Norwich analysis.

[62] Because the final step of the Norwich test requires the court to engage in the Wigmore analysis, I now turn to this analysis. The four-part Wigmore test is set out above in paragraph 33.

[63] On the evidence before me, I find that the first three steps of the Wigmore test have been satisfied by the respondents. The relationship between Mr. Stewart and his sources clearly originated in a confidence that the sources' identity would not be disclosed; anonymity was essential to this relationship; and the relationship between Stewart, an award-winning journalist with a nationally-recognized newspaper, and his high-level financial sources is one that should be sedulously fostered in the public interest.

[64] The applicant takes issue with steps one and three. The applicant says step one was not satisfied because Stewart failed to ask the sources why they were willing to disclose this information and whether they were aware that these disclosures might be in breach of provincial securities law. In *Groupe Polygone,* however, the Supreme Court made clear that journalists are not obliged to ask these questions. They are not required to act as legal advisors:

> [T]here are sound policy reasons for not automatically subjecting journalists to the legal constraints and obligations imposed on their sources. The fact of the matter is that, in order to bring to light stories of broader public importance, sources willing to act as whistleblowers and bring these stories forward may often be required to breach legal obligations in the process. History is riddled with examples. In my view, it would also be a dramatic interference with the work and operations of the news media to require a journalist, at the risk of having a publication ban imposed, to ensure that the source is not providing the information in

> breach of any legal obligations. A journalist is under no obligation to act as legal adviser to his or her sources of information.[32]

[65] The applicant also takes issue with step three. The applicant says that, here, confidential information was being provided by deal-insiders in violation of securities law. This kind of secret and selective disclosure by deal insiders, argues the applicant, undermines the regulatory scheme of the *Securities Act* and does great harm to the integrity of the capital markets. This is not the kind of relationship that is in the public interest. It is not the kind of relationship that should be sedulously fostered.

[66] There are two responses to this submission. One, as I have already found, the information provided by the sources was not in breach of provincial securities law. Two, and more importantly, any evaluation of the specific *content* of the impugned communication between source and journalist is not part of the step three "relationship" analysis. The extent to which the impugned communication triggers allegations of criminality or other wrong-doing, or indeed criminal investigations, is a matter for step four of the Wigmore test, where such factors are taken into consideration as part of the required balancing exercise. If the content of the impugned communication and evidence of criminality or other wrong-doing was made part of the step three "relationship" analysis, then any evidence of any crime would automatically vitiate the journalist-source privilege even before you got to step four because these would not be relationships that should be sedulously fostered in the public interest. This is contrary to what was said in both *National Post* and *Groupe Polygone* where the Supreme Court made clear that in some cases the public interest in protecting the confidentiality of journalistic sources will outweigh the need to prosecute criminal wrong-doers.[33]

[67] I agree with the respondents' submission that by deconstructing the relationship at the third step and adding a merit-based analysis of the content of the impugned communication, this court would essentially be engaging in an analysis of the competing interests, which is the balancing exercise that is clearly reserved for the fourth step of Wigmore. This is not what *National Post* or *Groupe Polygone* prescribed.

[68] Finally, I note that in analogous cases involving confidential communications, for example, in a college tenure[34] or hospital hiring[35] setting, courts have applied the

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[32] *Groupe Polygone, supra,* note 2, at para. 84.

[33] See above paras. 35 to 38.

[34] *Slavutych v. Baker,* [1976] 1 S.C.R. 254.

[35] *Straka v. Humber River Regional Hospital,* [1999] O.J. No. 4362 (S.C.J.), aff'd [2000] O.J. No. 4212 (C.A.).

Wigmore test exactly as set out in *National Post* and *Groupe Polygone.* The value or importance of the confidential relationship *per se* was examined under step three and the defamatory content or other damaging aspects of the impugned communication was left to the balancing exercise in step four.[36]

[69] I now turn to step four of the Wigmore test. The court must weigh up the evidence on both sides, supplemented by judicial notice, common sense, good judgment and an appropriate regard for the "special position of the media."[37] As already noted, the "weighing up" should include the nature and seriousness of the alleged wrong-doing and the probative value of the evidence sought to be obtained, measured against the public interest in respecting the journalist's promise of confidentiality. Or putting it somewhat differently, whether the public interest in protecting the identity of the informant outweighs the public interest in getting at the truth.[38]

[70] The public interest evidence favouring the protection of the respondents' confidential sources is strong and compelling for the following reasons:

- The "special position of the media" and the Supreme Court's admonition that "the public interest in free expression will *always* weigh heavily in the balance;"[39]

- The level of alleged wrong-doing is very low; the most that can be said is the sources' statements *possibly* breached securities law;

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[36] The applicant referred to a 2008 decision of the Federal Court (Trial Division) in *Re Charkaoui,* 2008 FC 61. In applying the third step of Wigmore, the motions judge appeared to consider the content of the impugned communication, not just the relationship. The judge noted it was a "secret document" that was in issue and that "social values do not go so far as to endorse the leak of a secret document by a source to a reporter or its confirmation in violation of the law" (at para. 106.) With respect, social values in some cases will support the leak of a secret document if there is a greater and over-riding public interest – recall the Pentagon Papers example cited by Binnie J in *National Post*, supra, note 2, at para. 61: "The Pentagon Papers case originated in circumstances amounting to an offence, yet few would now argue that the publication of the true facts in that situation was not in the greater public interest." I agree with the respondents that if *Re Charkaoui* stands for the proposition that the content of the impugned communication can and should be addressed at step three of the Wigmore test, then it is wrongly decided. In any event, it is important to remember that *Re Charkaoui* was decided two years before the Supreme Court's decisions in *National Post* and *Groupe Polygone*.

[37] *National Post, supra,* note 2, at para. 64.

[38] As outlined, *supra,* para. 37.

[39] *National Post, supra,* note 2, at para. 64. [Emphasis in original.]

- The OSC enforcement staff reviewed the allegations and declined, in the public interest, to investigate;

- Professor MacIntosh himself acknowledged in his two op-ed pieces that his allegations may be baseless; that maybe there was no wrong-doing at all; and that "the chain of events may be perfectly innocent;"

- The BCE leveraged buy-out was a matter of national, even international, interest and importance. News reports about when or whether the transaction would close were clearly in the public interest. It is relevant to note the respondents' coverage of the BCE deal was nominated for a National Newspaper Award, an award that recognizes excellence in journalism on topics in the public interest.

[71] The public interest favouring disclosure is minimal:

- There is, at most, a possibility that the sources breached securities law;

- The applicant intends to commence a class action and needs the sources' names to add them as defendants.

[72] The "weighing up" or balancing of the interests under the fourth step of the Wigmore test results in a self-evident outcome. The public interest in protecting the journalist-source privilege far outweighs the public interest in ordering disclosure. The OSC's decision not to investigate was a public interest decision. Any further public interest in "getting at the truth" is minimal to non-existent. The respondents have satisfied each of the Wigmore criteria. On the facts of this case, they have established journalist-source privilege.

[73] Returning then to the fifth step in the Norwich test, the applicant has failed to show that it is in the interests of justice to compel disclosure.

A final comment

[74] No one denies that great damage can be done to the integrity of capital markets and to shareholders and investors by secret and selective disclosure of confidential corporate information by deal-insiders in violation of provincial securities law. There may well be cases where the information provided by the confidential financial sources is in contravention of securities law and a claimed journalist-source privilege will be trumped by a greater public interest in the criminal investigation and prosecution of wrong-doers. This is not that case.

[75] Here, the "sources close to the transaction" under a promise of confidentiality, conveyed information that was already in the public domain and no longer new or

material. The level of wrong-doing was minimal to non-existent. The OSC enforcement staff declined to investigate. There is little to no public interest in compelling disclosure.

Disposition

[76] The application for a Norwich order is dismissed with costs.

[77] I will be pleased to receive a brief costs submission from the respondents within 14 days and from the applicant within 10 days thereafter.

[78] I am grateful to counsel for their co-operation and assistance.

Belobaba J.

Date: April 20, 2012