

**Ministry of the
Attorney General**

Legal Services Branch

Ministry of Community Safety and
Correctional Services

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January 9, 2009

By Regular Mail & Electronic Mail

Gary McHale



Dear Mr. McHale:

Re: Confidential Documents

I am counsel with the Legal Services Branch, Ministry of Community Safety and Correctional Services. In that capacity, I act on behalf of the Ontario Provincial Police (the "**OPP**").

It has come to the attention of the OPP that you recently came into possession of a number of internal OPP documents. Those documents are the property of the OPP. In addition, those documents contain personal information of private individuals. You have no right at law to possess them, copy them, distribute them or publish them. The original documents should be returned forthwith along with any electronic copies or photo reproductions you have made or arranged to be made of those documents. If you have already published any of this material or provided it to other sources, you should take all reasonable steps to remove it from your website(s) or recover it from anyone to whom it has been disclosed.

We look forward to your anticipated cooperation. If you have any questions or wish to discuss this matter, please do not hesitate to contact me.

Yours truly,

Christopher Diana
Counsel

Canadian Advocates for Charter Equality



When Freedom demands action

www.CANACE.ca

Gary McHale
President & Executive Director
Canadian Advocates for Charter Equality

Date: Jan 7, 2009

Attn: Christopher Diana, Counsel
Legal Services Branch
Ministry of Community Safety and Correctional Services

RE: Confidential Documents

Dear Mr. Diana:

As per your letter dated Jan. 9, 2009 but received via email on Jan. 6, 2009, I have considered your request to return documents that you have acknowledge as valid documents which you alleged are owned by the OPP. You further allege that I have 'no right at law to possess them, copy them, distribute them or publish them'.

It is on this point I wish to address. The Right to possess them, copy them, distribute them or to publish them is a question of law which I believe has been directly answered by the court in the case of **O'Neill v. Canada (Attorney General), 2006 CanLII 35004 (ON S.C.)**.

In this case the RCMP used two searches and seizures at a journalist's home and newspaper's office in the course of its investigation of alleged criminal offences under section 4 of the *Security of Information Act*, [R.S.C. 1985, c. O-5](#), as *am* (the "SOIA") regarding unauthorized "leaks" of "secret official" government information.

The RCMP conducted these searches on the bases that unauthorized 'leaked secret official' government information was illegal to be in the possession of the media. Sections 4(1)(a), 4(3) and 4(4)(b) of the SOIA made it illegal to possess such documents. The RCMP did recover these documents during its search but never laid criminal charges against the reporter.

The reporter, however, challenged the actions of the RCMP and whether the quoted sections of the SOIA were in violation of the Charter of Rights and Freedoms under Section 2(b) which is Freedom of Expression and Freedom of the Press.

This case concluded two main points. First the sections of the *SOIA* were ruled to be in violation of the Charter. Second, that the search warrant itself was quashed and 'the things seized are ordered returned' based on a violation of Section 7 of the Charter.

In *Canadian Broadcasting Corp. v. Lessard*, [1991 CanLII 49 \(S.C.C.\)](#), [1991] 3 S.C.R. 421 at paras. 2 and 3, La Forest J. spoke of the importance of protecting a reporter's sources as part of the constitutionally protected freedom of the press:

[T]he 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.

I have little doubt, too, that the gathering of information could in many circumstances be seriously inhibited if government had too ready access to information in the hands of the media. That someone might be deterred from providing information to a journalist because his or her identity could be revealed seems to me to be self-evident.

At para. 7, La Forest J. commented on the *Pacific Press* case (*Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C.S.C.), where reporters' handwritten notes and a reporter's "contact book" had also been seized in the search, and commented:

The press should not be turned into an investigative arm of the police. The fear that the police can easily gain access to a reporter's notes could well hamper the ability of the press to gather information. I would think that, barring exigent circumstances, the seizure of items of this nature should only be permitted when it is clear that all reasonable alternative sources have been exhausted.

In the concurrent case of *Canadian Broadcasting Corp. v. New Brunswick (A.G.)*, [1991 CanLII 50 \(S.C.C.\)](#), [1991] 3 S.C.R. 459 at para. 44, Cory J. summarized the factors to be considered by a justice of the peace on an application for a search warrant for media premises. He stated, in part:

(2) Once the statutory conditions [under section [486\(1\)\(b\)](#) of the *Criminal Code*] have been met, the justice of the peace should consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant.

(3) 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 gathering and news dissemination. It must be borne in mind that the media play a vital role in the functioning of a democratic society.

Generally speaking, the news media will not be implicated in the crime under investigation. They are truly an innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant. [...]

Furthermore, other case law makes it quite clear that Section 2(b) of the Charter makes it the Right of citizens to distribute information in order to hold governments accountable.

Finally, it should be noted that in Canada the media has no special rights over that of individual citizens as demonstrated in the following paragraph found on the Canadian Charter of Rights Decisions Digest section of CanLII under the heading for section 2(b) of the Charter:

Canadian courts have stated emphatically that the press enjoys no privilege of free speech greater than enjoyed by a private individual and that the liberty of the press is no greater than the liberty of every subject...

Journalists have no more right to information, or to disclosure or even to access to information than the ordinary citizen. Freedom of the press as a concept does not confer any special status on media people. Should a journalist in quest of news put himself in a dangerous situation, he has no greater right to protection than his neighbour. If a journalist, in the centre of an armed confrontation feels it his professional duty to remain there, he cannot impose on any person an obligation to do all that would be necessary to keep him there. If, as stated in *Branzburg v. Hayes*, (1972) 408 U.S. 665, a journalist has no constitutional right of access to scenes of crime or disaster when the general public is excluded, he cannot gain constitutional protection when he voluntarily remains in a compound under siege: *MacLeod v. de Chastelain*, [reflex](#), [1991] 1 F.C. 114 (F.C.T.D.)...

The section has to do with intellectual freedom and freedom to communicate with others. The suggestion, moreover, that this section guarantees privileges to “the press and other media of communication” which are not available to other members of the public, has no obvious support in its wording. The section treats freedom of the media in what seems to be a very deliberate way, as an integral part of the freedoms of the intellect and communication guaranteed to “everyone”. The suggestion is contrary to the common law concept of “freedom of the press”, which accords to newspaper and other publishers and broadcasters only the right to publish to the world that which every private citizen is entitled to say or write, free from administrative or judicial restraint or interference.

At the heart of this issue is our right to hold the Government accountable based on any and all information we receive. That right is protected by the Charter of Rights and Freedoms. Although I may be personally willing to cooperate with the OPP's request to have the documents returned, I cannot comply without a court order.

These documents are of great public interest and we must ensure that our sources remain private and that material handed to us remains available for both public review and legal proceedings. The OPP has other means available to it to investigate any leaks within its ranks without any help from us.

Any further actions on the part of the OPP to get a court order to retrieve the documents will be met with a Charter Challenge and we will seek legal cost in this matter.

Yours Truly;



Gary McHale
President & Executive Director
Canadian Advocates for Charter Equality
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