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## ARTICLE

# Significant New Statutory Protections for Journalistic Sources Affirmed by the Supreme Court of Canada

The Supreme Court of Canada (SCC) has given effect to important new protections for journalistic source information in *Denis v. Côté*, 2019 SCC 44, its first case interpreting the *Journalistic Sources Protection Act* (JSPA). Enacted in 2017, the JSPA amended the *Criminal Code* and the *Canada Evidence Act* (CEA) to augment the journalist-source privilege recognized at common law with new statutory protections for journalists and their confidential sources. The SCC's decision confirms that the new statutory scheme altered the journalist-source privilege available at common law by creating a new presumption against disclosure and reallocating the burden of establishing that disclosure of journalistic source information is in the public interest to the party seeking disclosure.

## Background

The appeal originated from a motion to stay a prosecution brought by Marc-Yvan Côté, a former Québec politician charged with offences including bribery, fraud, and breach of trust. Mr. Côté sought a stay on the grounds that the Unité permanente anticorruption (UPAC), a Québec government organization responsible for investigating public corruption, had leaked information gathered as part of the investigation for improper tactical purposes, that the leaks originated from high-ranking officials in UPAC, and were intended to deprive him of the right to a fair trial. The Crown disputed that any leaks were from employees of a sufficiently high rank to be acting on the government's behalf. Mr. Côté sought to supplement circumstantial evidence said to show that the leakers were acting on the government's behalf by seeking direct evidence of the identity of the leakers, and served subpoenas on journalists who had published information from the leaks. The appellant, journalist Marie-Maude Denis, had objected to the subpoena. This triggered the first application of JSPA amendments to the CEA by a Canadian court. Initially, the Court of Québec refused to authorize disclosure but an appeal to the Superior Court resulted in an order that journalistic source information be disclosed. After the Québec Court of Appeal found that it lacked jurisdiction to hear a further appeal, Ms. Denis obtained leave to appeal this interlocutory decision to the Supreme Court of Canada.

The appeal called upon the SCC to apply for the first time section 39.1 of the CEA, the statutory scheme enacted by the JSPA.

## A "paradigm shift" in the law of journalist-source privilege

In an 8-1 decision the Supreme Court of Canada granted the appeal.

The majority reasons authored by Chief Justice Wagner recognized that the JSPA had introduced a "paradigm shift" in the law of journalist-source privilege when compared to protections available at common law. Observing that at common law the journalist-source privilege is "exceptional" and requires a case-by-case basis showing by the journalist that it should apply, the majority concluded that what had previously been the exception had "now become the rule". The JSPA altered the status quo by (i) introducing a presumption of non-disclosure when statutory thresholds are met, (ii) reallocating the burden of proof onto the party seeking disclosure, and (iii) requiring that statutory presumption of non-disclosure be rebutted on a case-by-case basis.

## A framework for applying s. 39.1 of the CEA

The Court also provided a two-step framework for applying s. 39.1 of the CEA intended to guide the determination of future applications for disclosure under the statutory scheme.

### Step 1: Threshold Showings

At the first step, the person objecting to disclosure and the party seeking it must each make a threshold showing. The person objecting to disclosure must first establish that he or she is a "journalist" and that the source is a "journalistic source" within the meaning of the statute.

Once this is shown, the person seeking disclosure must then establish that disclosure of the journalistic source information is "reasonably necessary" — meaning that the information cannot be obtained by other reasonable means. If the reasonable necessity showing is not made, the application for disclosure does not proceed any further.

### Step 2: Balancing the public interest

The second step is engaged after a showing that disclosure of journalistic source information from a journalist is reasonably necessary. The party seeking disclosure must next persuade the court that the "public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source". This analysis involves a balancing exercise described as being at "the heart of the new statutory scheme". The balancing exercise weighs three statutorily-prescribed criteria: (i) "the importance of the information . . . to a central issue in the proceeding", (ii) "freedom of the press", and (iii) "the impact of disclosure on the journalistic source and the journalist".

#### a. The importance of the information to a central issue in the proceeding

Under the first criterion, a court must evaluate whether the issue for which disclosure is sought is central to the proceeding, and then the importance of the information to that issue. It will be easier to justify disclosure of information that is "crucial" to determining a "central issue" in the proceeding. Where the issue is "peripheral" or the information is "irrelevant", disclosure will be disfavoured.

## b. Freedom of the press

Regarding the second criterion — freedom of the press — after reviewing the values underlying freedom of the press recognized in the jurisprudence and observing that in light of these "it is easy to understand why mobilizing a journalist against his or her source is incompatible with freedom of the press", the majority stated that it was clear "that the freedom of the press criterion will quite often weigh against disclosure". It added that "this criterion" can "help . . . identify news reports that relate fundamentally to the public's right to be informed", and that in cases where the journalistic source may have been motivated by considerations "contrary to the public interest", a court may "pay[] closer attention" to the freedom of the press factor in conducting the balancing exercise.

## c. The impact on the journalist and the journalistic source

On the third criterion, the majority observed that "[a]ssessing the impact of disclosure on the journalistic source and on the journalist will be particularly challenging", but noted that Parliament had imposed a burden on the party seeking disclosure to "prov[e] that the impact of disclosure will be minimal or insignificant". This choice "reflects the fact that disclosing information . . . that identifies or is likely to identify a journalistic source will generally have an adverse impact on the source as well as on the journalist."

## d. Possible additional criteria

The majority noted that the criteria relevant to the balancing exercise are not closed, and that a court determining whether to order disclosure in a particular case could take into account other considerations, including those recognized in the pre-JSPA case law (though without "eclipsing the ones explicitly retained by Parliament").

It added that ordering disclosure will be appropriate "only where the advantages of doing so outweigh the disadvantages", and that if a court "decides to favour disclosure, it should, so far as possible, keep the disadvantages of its decision to a strict minimum by accompanying the authorized disclosure with any conditions that are appropriate in the circumstances ... in particular by limiting the scope of the disclosure."

## Conclusion

As a result of further investigation into the source of the leaks while the appeal was pending, the Crown had abandoned its original position on Mr. Côté's motion for a stay of proceedings and no longer relied upon the factual matrix presented in the courts below. Accordingly, the SCC concluded that the appropriate disposition of the appeal would be to set aside the order authorizing disclosure, restore the parties to their original position, and remand the case to the application judge for reconsideration once new evidence resulting from the investigation has been provided.

Abella J., dissenting, would have set aside the disclosure order against Ms. Denis and quashed the subpoena.

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