Court File No. 38114

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

MARIE-MAUDE DENIS

Appellant
(Appellant)

– and –

MARC-YVAN COTÉ

Respondent
(Respondent)

– and –

HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF QUÉBEC, FEDERATION PROFESSIONNELLE DES JOURNALISTES DU QUEBEC, CANADIAN ASSOCIATION OF JOURNALISTS FOR FREEDOM OF EXPRESSION, REPORTERS WITHOUT BORDERS, LA PRESSE (2018) INC., CANADIAN CIVIL LIBERTIES ASSOCIATION, AND AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, CTV, A DIVISION OF BELL MEDIA INC., GLOBAL NEWS, A DIVISION OF CORUS TELEVISION LIMITED PARTNERSHIP, GLOBE AND MAIL INC., POSTMEDIA NETWORK INC., VICE STUDIO CANADA INC.

Interveners
(Interveners)

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TABLE OF CONTENTS

Page

PART I - OVERVIEW

1. In 2017, Parliament enacted the *Journalistic Sources Protection Act*[1] (the "*JSPA*") to augment existing protections against compelled disclosure of journalistic sources recognized in this Court's foundational decisions in *R v. National Post*[2] and *Globe and Mail v. Canada*.[3]

2. Mindful that "the protection of anonymity of sources" is "a pillar of our democracy"[4] — without which "scandalous stories that undermine the integrity of our democratic institutions… and good governance may never come to light"[5] — Parliament added robust new safeguards for journalists and their confidential sources to the *Criminal Code*[6] and the *Canada Evidence Act*[7] (the "*CEA*"), to ensure that "inadequate protection for sources"[8] would not impede the flow of information from confidential sources to journalists, and to the public.[9]

3. In this appeal, this Court will determine for the first time an application for disclosure of information falling within the protection of the *JSPA*'s amendments to the *CEA* — an exercise that involves not only the adjudication of new statutory rights, but also engages rights protected by the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[10]

4. The *JSPA* represents a fundamental shift in the legal status of confidential journalistic source information. Specifically, the *JSPA* creates a statutory framework that (1) creates a presumption of protection, or non-disclosure, of confidential information; and (2) imposes a burden upon any party seeking disclosure to satisfy the conditions set out in s. 39.1(7) of the *CEA*. This appeal presents an early opportunity for this Court to address this fundamental shift. The CCLA has intervened in this appeal to highlight the interpretative factors that courts should take

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[1] S.C. 2017, c. 22.
[2] *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477 [*National Post*].
[3] *Globe and Mail v. Canada (A.G.)*, 2010 SCC 41, [2010] 2 S.C.R. 592 [*Globe and Mail*].
[4] *Debates of the Senate*, 42nd Parl., 1st Sess., No. 82 (5 December 2016) at 1948 (Hon. Claude Carignan).
[5] *Ibid* at 1949 (Hon. Claude Carignan).
[6] See, R.S.C., 1985, c. C-46 at s. 488.01 – 488.02.
[7] See, R.S.C., 1985, c. C-5 at s. 39.1 ["*CEA*"].
[8] *Supra* note 4 at 1949 (Hon. Claude Carignan).
[9] *Ibid* (Hon. Claude Carignan).
[10] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11; see also, *Globe and Mail*, *supra* note 3 at para. 48.

into account when applying s. 39.1 of the *CEA*, and takes no position on the facts or the outcome of this appeal.

PART II - QUESTIONS AT ISSUE

5. The CCLA's submissions bear upon the following issues raised in this appeal, as framed by the appellant:[11]

(a) What was Parliament's legislative intent with regard to s. 39.1 of the *CEA* introduced by the *JSPA*?

(b) What is the scope of the reversal of the burden of proof contemplated by s. 39.1(9) of the *CEA*, and the implications thereof?

(c) What factors should be taken into account in conducting the balancing process contemplated by s. 39.1(7)(b) of the *CEA*?

PART III - ARGUMENT

A. The *JSPA* creates a presumption that protects the non-disclosure of confidential journalistic source information

6. The *JSPA* replaces and extends the protections available at common law for confidential journalistic source information. Both at common law, and under the *JSPA*, this protection is linked to s. 2(b) of the *Charter* and its guarantee of freedom of expression and of the media. As this Court has stated, "freedom of the press and other media is vital to a free society".[12] Section 2(b)'s guarantee "comprises the right to disseminate news, information and beliefs", and "would be of little value if the freedom . . . did not also encompass the right to gather news and other information without undue governmental interference."[13] In *National Post*, this Court took the "further step" of recognizing that newsgathering includes the "ability of the media to make use of confidential sources",[14] acknowledging that:

> unless 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

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[11] See, Appellant's Factum at para. 28.
[12] *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 421 at 429 [*Lessard*].
[13] *Ibid* at 429-30 (*per* La Forest J.); *Canadian Broadcasting Corporation v. New Brunswick (A.G.)*, [1996] 3 S.C.R. 480 at 497.
[14] *National Post*, *supra* note 2 at para. 33.

> badly compromised. Important stories will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment.[15]

Because freedom of expression and the media "protects readers and listeners as well as writers and speakers", this Court situated "the legal position of the confidential source or whistleblower" within "the *public* right to knowledge about matters of public interest".[16] After acknowledging the public's interest in important information that may be conditional on a promise of confidentiality, Binnie J. stated that "democratic institutions and social justice" will suffer without a free flow of accurate and pertinent information.[17]

7. *National Post* applied the Wigmore criteria for a case-by-case privilege at common law to confidential journalistic sources.[18] Under Wigmore, confidential source information is shielded from disclosure only if the journalist establishes all four of its criteria. Significantly, this includes a showing that "the public interest served by protecting the identity of the informant [outweighs] the public interest in getting at the truth".[19] *National Post* applied Wigmore's presumption of disclosure to the question of confidential source information and placed "the risk of non-persuasion" at all four steps on the journalist seeking recognition of a privilege.[20]

8. The *JSPA* displaces the Wigmore test, reversing the common law presumption of disclosure and its burden of proof requiring a journalist to establish that confidential source information should be protected.

9. The *JSPA*'s framework has three key elements:[21] First, the statute's protection is triggered by a journalist's objection to the disclosure of information that identifies or is likely to identify a confidential source (*CEA* ss. 39.1(2) & (5)). Second, s. 39.1(9) of the *CEA* places the burden on the party seeking disclosure to establish that the statutory conditions for authorizing disclosure in

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[15] *Ibid*.
[16] *National Post*, *supra* note 2 at para. 28, emphasis in original.
[17] *Ibid*.
[18] *National Post*, *supra* note 2 at para. 55.
[19] *Globe and Mail*, *supra* note 3 at para. 22, citing *National Post*, *supra* note 2 at para. 53.
[20] *National Post*, *supra* note 2 at para. 64.
[21] See generally, *Debates of the Senate*, 42nd Parl., 1st Sess., No. 86 (12 December 2016).

s. 39.1(7) have been met. Third, where disclosure is authorized, conditions to protect the identity of the source may be attached to any order (*CEA* s. 39.1(8)).

10. Section 39.1(1) of the *CEA* defines the terms "journalist" and "journalistic source". In so doing, Parliament has identified a class, consisting of professional journalists, who can invoke the statute's protection for confidential journalistic information. Once a journalist objects to the disclosure of a "journalistic source" the information is protected,[22] unless and until disclosure is ordered by a court.[23] In this way, the *JSPA* fundamentally departs from Wigmore by replacing its presumption in favour of disclosure[24] with a statutory presumption of non-disclosure.[25]

B. Section 39.1(7) of the *CEA* should be interpreted to maximize the *JSPA*'s protections and to ensure that any departures from those protections are minimally impairing of the interests recognized and entrenched by the *JSPA*

11. A shift in the burden of proof marks the *JSPA*'s second major departure from the common law Wigmore standard.

12. Section 39.1(7) of the *CEA* sets out the steps that must be followed in determining whether a court should order disclosure in any case. The requirements of s. 39.1(7) are cumulative, and on each branch the party seeking disclosure bears the burden of proof.

13. First, s. 39.1(7)(a) requires the party seeking disclosure to demonstrate that the information sought is not available "by any other reasonable means". Second, s. 39.1(7)(b) reverses the common law approach and requires the party seeking disclosure to establish that the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of

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[22] *CEA*, *supra* note 7 at ss. 39.1(2), (5).

[23] *CEA*, *supra* note 7 at s. 39.1(2). The *CEA* refers to a "court, person or body" having the authority to compel disclosure. For ease of reference, these are referred to as a "court" throughout this factum.

[24] See *National Post*, *supra* note 2 at para. 60; *Globe and Mail*, *supra* note 3 at para. 24.

[25] Apart from the *JSPA*, the common law Wigmore standard governs the availability of a journalist source privilege on a case-to-case basis. It will be open to this Court, when and if appropriate, to consider whether and how the common law and statutory approaches to the protection of confidential journalistic information can be harmonized.

the journalistic source. The statute sets out three enumerated but non-exhaustive criteria for determining the public interest (*CEA* ss. 39.1(7)(b)(i)–(iii)).

14. Each factor enumerated in s. 39.1(7) must be applied rigorously. The *JSPA* imposes a burden of proof[26] — not of merely persuasion — on anyone who seeks access to a confidential journalistic source. The statute's presumption of non-disclosure can only be displaced by cogent evidence, at every stage of the analysis, from the party seeking disclosure of a confidential journalistic source.

15. At the threshold, before embarking upon the s. 39.1(7) analysis, the applicant must demonstrate that the information in question is *relevant*. As this Court stated in *Globe and Mail*, whether information is relevant in the proceedings is an antecedent question of evidence law.[27] There, Justice LeBel cautioned, specifically in the context of access to confidential information, that relevance "play[s] . . . an important gatekeeping role in the prevention of fishing expeditions", observing, that "it constitutes an added buffer against any unnecessary intrusion into aspects of the s. 2(b) newsgathering rights of the press."[28]

16. Once relevance has been shown, the requirements of ss. 39.1(7)(a) and (b) must be met.

a. Journalistic source information cannot be compelled unless the evidence is not otherwise available

17. Section 39.1(7)(a) requires the person seeking disclosure to establish that the information sought "cannot be produced in evidence by any other reasonable means". By requiring a showing that compelled disclosure *from a journalist* is *necessary* to obtain the information sought, Parliament has codified the "alternative sources principle"; according to *Globe & Mail*, "those avenues ought to be exhausted," and the breach of a confidential undertaking should only be ordered "as a last resort."[29] Moreover, the "mere administrative inconvenience" associated with obtaining the information from another source will not suffice.[30]

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[26] *CEA*, *supra* note 7 at s. 39.1(9).
[27] *Globe and Mail*, *supra* note 3 at para. 56.
[28] *Ibid*.
[29] *Ibid* at paras. 62-63.
[30] *Globe and Mail*, *supra* note 3 at para. 62.

18. It follows that a failure to establish that the information is unavailable by any other reasonable means ends the inquiry. Under the *JSPA* framework, each condition prescribed by ss. 39.1(7)(a) and (b) must be met before disclosure can be ordered.

b. The party seeking disclosure must establish that the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source

19. A public interest analysis is only required where the applicant has established that the information is relevant and its disclosure from a journalist is necessary. Only then should a court consider whether the public interest favours disclosure or non-disclosure.[31]

20. Section 39.1(7)(b) of the *CEA* modifies the common law by placing the burden on the applicant to satisfy the public interest in ordering disclosure. Specifically, this sub-section requires the statute's presumption of non-disclosure to be affirmatively displaced. In other words, the party seeking access to a journalistic source must articulate and establish *how* the public interest in the administration of justice will be advanced by granting disclosure in a given case.

21. The first factor in the public interest analysis is "the importance of the information or document to a central issue in the proceeding" (*CEA* s. 39.1(7)(b)(i)). The *JSPA* sets a high bar in specifying the "importance" of the information or document and its relationship to a "central issue" in the proceeding. For that reason, this factor requires a persuasive showing that the information sought will be directly probative. Considerations applicable to this factor that weigh against disclosure are recognized in this Court's jurisprudence. For example, where information is sought at an early stage of the proceeding — such as discovery — the "procedural equities" should not "outweigh the freedom of the press", as recognized by well-established English common law "newspaper rule" which allows journalists to protect their sources at the discovery stage.[32] Similarly, relevance alone — even to a central question in the proceeding — is not determinative: disclosure should not be ordered where a fact is relevant but "peripheral to the actual legal and factual dispute between the parties".[33] Under s. 39.1(7)(a), courts should require the party seeking disclosure to establish — as closely and directly as possible — the relationship between the

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[31] *CEA*, *supra* note 7 at s. 39.7(b).
[32] *Globe and Mail*, *supra* note 3 at para. 58.
[33] *Globe and Mail*, *supra* note 3 at para. 60.

information sought, its bearing upon an issue in the proceeding, and the importance and centrality of that issue to the overall proceeding.

22. The next factors a court must consider, under ss. 39.1(7)(b)(ii) and (iii), are freedom of the press and the impact of disclosure on journalistic source and the journalist.[34] The common law Wigmore test treated these issues as background considerations that could inform the public interest, but not mandatory parts of the analysis. Under the *JSPA*, Parliament has directed courts to explicitly consider the constitutional principles and values underpinning freedom of the media and freedom of expression, and to give them weight when considering whether the public interest favours disclosure. In doing so, the "courts should strive to uphold the special position of the media".[35]

23. It should be emphasized that neither the objecting journalist nor any interested party carries any onus under ss. 39.1(7)(b)(ii) or (iii). While the applicant must show that the public interest favours disclosure, the journalist and interested parties are entitled to participate in the hearing, lead evidence, and make submissions on this issue.[36]

24. In determining what the public interest requires, ss. 39.1(7)(b)(ii) and (iii) focus attention on the potential chilling effects of ordering disclosure of a journalistic source. The legislative history demonstrates that alleviating these effects was a significant pre-occupation of parliamentarians and motivated broad, all-party support for the bill.[37] As this Court recently recognized, the term "chilling effects" captures a broad set of concerns related to the "stifling or discouragement of the media's legitimate activities in gathering and disseminating the news *for*

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[34] *CEA*, *supra* note 7 at s. 39.1(7)(b)(ii).
[35] *National Post*, *supra* note 2 at para. 3.
[36] *CEA*, supra note 7 at ss. 39.1(6) & (9).
[37] See, for example, Standing Committee on Public Safety and National Security, 42nd Parl., 1st Sess., No. 71 (19 June 2017) at 8, 11 & 15; and The Standing Senate Committee on Legal and Constitutional Affairs, 42nd Parl., 1st Sess. (15 February 2017) at 22:29, 22:51, 22:52, 22:55 & 22:61.

fear of legal repercussions such as compelled disclosure."[38] Manifestations of such effects include:

(a) confidential sources "drying up", resulting in "los[t] opportunities to receive and disseminate important information to the public";

(b) journalists avoiding keeping written records to prevent such records falling into third-party hands;

(c) "self-censor[ship]" by journalists by avoiding the disclosure of the existence of certain information; and

(d) public loss of faith in journalists, to the extent that compelled disclosure may cause the public to view the media as serving as an arm of the state.[39]

25. The *JSPA* addresses these concerns, in part, by defining and limiting the scope of protection for confidential sources. A "journalistic source" is only protected when information is confidentially disclosed to a journalist, on the journalist's undertaking not to divulge the identity of the source, and when "anonymity is essential to the relationship between the journalist and the source".[40] The *JSPA*'s definitions recognize that chilling effects are a risk whenever confidential source information is disclosed. That is why s. 39.1(9) requires the applicant to demonstrate that the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the source. It is important to emphasize, as noted above, that without being required to do so, any journalist or interested party may lead evidence or make submissions on freedom of the press (*CEA* s. 39.1(7)(b)(ii)) or the impact disclosure may have on the journalist and journalistic source (*CEA* s. 39.1(7)(b)(iii)). In the absence of cogent evidence displacing it, an unrebutted presumption of chill militates against disclosure.

26. In conclusion, the *JSPA*'s requirement that the public interest in disclosure must be proven is intended to, and will, protect journalists and their journalistic sources from compelled disclosure of confidential information. In some instances, information that is relevant and even important may not be compellable because the party seeking disclosure cannot meet its burden under the *JSPA*. That was Parliament's purpose and intent in conferring statutory protection on journalistic

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[38] *R. v. Vice Media Canada Inc.*, 2018 SCC 53 at para. 26 ["*Vice Media*"], emphasis added.
[39] *Ibid*.
[40] *CEA*, *supra* note 7 at s. 39.1(1).

source information and establishing a rigorous process to determine when disclosure serves the public interest.

c. Where disclosure is warranted, conditions should be imposed to protect the identity of a journalistic source

27. Where the public interest tips in favour of disclosure, a court should consider whether conditions should be attached under s. 39.1(8) to protect the identity of a source. This is a statutory reflection of the minimal impairment principle,[41] and in this context takes the form of conditions ensuring that any disclosure impair "the public interest in preserving the confidentiality of the journalistic source" as little as possible.[42] Where the applicant has met the requirements of s. 39.1(7), the court should apply s. 39.1(8) to ensure that the disclosure authorized goes only so far as is necessary to satisfy the public interest justification for compelling disclosure.

28. The scope of any such conditions will vary on a case-by-case basis, requiring adjustment in proceedings as the nature of information becomes known and the appropriate use(s) of that information can be articulated. For example, a court might order disclosure only for *in camera* review to determine the utility of the information to the purpose for which it is sought. Section 39.1(8) is also broad enough to ground further conditions, such as orders imposing limits on the dissemination of the information or sealing orders preventing the protected information from entering the public record.

29. Whenever disclosure is authorized under the *CEA*, a court will be trenching upon a relationship of confidence which Parliament has chosen to cloak with robust new protections. This Court should endorse the use of s. 39.1(8) in all such cases to minimize the deleterious impact of disclosure and to ensure that the public interest in preserving the confidentiality of the journalistic source yields only so far as is necessary to advance the public interest in the administration of justice.

C. Conclusion

30. In this appeal, disclosure cannot be ordered unless the respondent (applicant) initially shows the relevance of the information sought; in addition, the respondent must demonstrate its

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[41] *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136-137.
[42] *CEA*, *supra* note 7 at s. 39.1(7)(b).

importance to a central issue on the stay of proceedings application and to state conduct that undermines the integrity of the judicial process.[43] Ordering disclosure, for purposes of a stay of proceedings, also requires a showing that the public interest in disclosure outweighs the public interest in protecting a confidential journalistic source.[44] Finally, if these burdens are discharged, a court should apply conditions necessary to ensure that the public interest in preserving the confidentiality of a journalistic source is impaired as little as possible by an authorization of disclosure.

31. In *National Post*, after noting developments in other countries, the Court observed that legislative proposals to protect journalistic sources had been introduced, federally and provincially, but not enacted. The *JSPA* has responded with legislation that mandates protection for sources, according to the statute's cornerstone provisions, which define journalists and journalistic sources; create a presumption of non-disclosure; impose the burden of proof on disclosure; and authorize conditions to minimize the interference with confidential sources. In doing so, Parliament's signal could hardly be clearer of its intention to transform the law in this area.

PART IV - SUBMISSIONS ON COSTS

32. The CCLA seeks no costs and asks that no costs be awarded against it.

PART V - REQUEST TO PRESENT ORAL ARGUMENT

33. By order dated February 18, 2019, the Court granted the CCLA permission to present oral argument not exceeding five minutes at the hearing of the appeal.

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[43] *R. v. Babos*, [2014] 1 S.C.R. 309 at paras. 31-32.
[44] *CEA*, *supra* note 7 at s. 39.7(b).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th of March 2019

FOR

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PART VI - TABLE OF AUTHORITIES

AUTHORITY	CITED AT PARAGRAPH(S)
CASELAW	
Canadian Broadcasting Corporation v. Lessard, [1991] 3 S.C.R. 421	6
Canadian Broadcasting Corporation v. New Brunswick, [1996] 3 S.C.R. 480	6
Globe and Mail v. Canada, 2010 SCC 41, [2010] 2 S.C.R. 592	1, 7, 10, 15, 17, 21
R. v. Babos, [2014] 1 SCR 309	30
R. v. National Post, 2010 SCC 16, [2010] 1 S.C.R. 477	1, 6, 7, 10, 22
R. v. Oakes, [1986] 1 S.C.R. 103	27
R. v. Vice Media Canada Inc., 2018 SCC 53	24
SECONDARY SOURCES	
Debates of the Senate, 42nd Parl, 1st Sess, No 82 (5 December 2016)	2
Debates of the Senate, 42nd Parl, 1st Sess, No 86 (12 December 2016)	9
The Standing Senate Committee on Legal and Constitutional Affairs, 42nd Parl, 1st Sess (15 February 2017)	24
The Standing Committee on Public Safety and National Security, 42nd Parl, 1st Sess, No 71 (19 June 2017)	24

LEGISLATION	CITED AT PARAGRAPH(S)
Canada Evidence Act, R.S.C., 1985, c. C-5, s. 39.1 *Loi sur la preuve au Canada*, R.S.C., 1985, c. C-5, s. 39.1	2, 10, 14, 19, 22, 23, 25, 27, 30
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