

**University of Ottawa**  
**PROFESSIONAL DEVELOPMENT INSTITUTE**

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PDI NATIONAL SECURITY PROGRAM

# JOURNALISTIC SOURCES

**BRIEFING NOTE**



uOttawa

Institut de développement professionnel  
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# JOURNALISTIC SOURCES

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## ISSUE

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In recent months the Canadian media has reported on classified CSIS information alleged leaked by a “whistleblower” to a Canadian newspaper regarding “Foreign Interference.” This controversy has raised the issue of the limits of the media in protecting the identity of a “journalistic source.” The notion of a journalist being protected from compelled disclosures of secret sources has long been based on the common law in western liberal democracies. The privilege was never viewed as absolute but rather considered on a case-by-case balance between whether the public interest in the continued protection of the source’s identity outweighed other public interest, including the investigation of a crime. In 2017, Canada enacted the “Journalistic Sources Protection Act” to create an explicit, charter compliant law on the protection of a “journalistic source” identity.

While a “journalistic source” could be relevant to any information domain, the uOttawa PDI National Security program has a particular interest in how it relates to “leaks” of classified national security information. Although motivation isn’t relevant as evidence to the technical breach of a law, it is relevant to the NS program as we explore the “cause and effect” of national security issues. This briefing note provides some relevant history for the context around how complicated these cases involving national security can be and how expert legal analysis on Canadian law pertains to “journalistic sources.”

## BACKGROUND

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Some historical examples of “journalistic sources” may be of interest, note these examples are not presented as case law nor jurisprudence for any current situation:

In 1971 a former American military analyst named Daniel Ellsberg passed to The New York Times unredacted copies of a Top-Secret document, he had worked on entitled “The Pentagon Papers.” The NYT published extracts of those papers in a series of articles alleging that the American people had been misled by President Johnson about US involvement in the Vietnam War. Ellsberg had approached some US Senators asking to release the papers via the Senate where he would be immune from prosecution but was rebuffed. Ellsberg was protected by the NYT as an anonymous journalistic source. The Nixon administration ordered the NYT to halt publication of these classified extracts, but it refused. Ellsberg was eventually charged with espionage but was acquitted based on a flawed investigation. Ellsberg’s motivation for leaking The Pentagon Papers was excluded as evidence in his defense by the presiding judge.

“The Pentagon Papers” has since been viewed as a turning point in government “whistleblowers” who reveal secrets via the media and there have been many such events since “The Pentagon Papers.”

In 1994 an alleged whistleblower revealed the name of CSIS human source, the identity of which, at that time, was protected as are all human sources under Section 18 of the CSIS Act, and alleged that CSIS was secretly supporting a neo-Nazi movement in what became known as the Heritage Front affair. The alleged whistleblower's allegations were investigated and refuted by the Security Intelligence Review Committee and later also refuted by media investigations. Although, the CSIS source's name had been revealed via the media, SIRC did not refer to the source's name in its report as it felt that it remained bound by Section 18 of the CSIS Act. The alleged "whistleblower" was never criminally charged but later publicly admitted his actions.

More recently, there was the case of Vice Admiral Mark Norman of the Royal Canadian Navy who was accused of leaking classified cabinet information to the CBC regarding the possible cancellation of a shipbuilding program for the RCN. Admiral Norman was charged in a breach-of-trust case, but the charges were eventually dropped by Crown Prosecutors and in an unprecedented turn of events the House of Commons unanimously passed an all-party apology to Admiral Norman for what he had endured.

The legal analysis for this note is provided by Gerry Normand L.LL, former General Counsel with the federal Department of Justice who has decades of experience and leadership in national security law including the drafting of related legislation. Gerry Normand teaches a course on national security at the uOttawa Faculty of Civil Law and is an instructor in the uOttawa PDI National Security program. This note is for educational purposes only.

## ANALYSIS OF CANADIAN LAW

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In October 2017, the Journalistic Sources Protection Act (JSPA) came into force. This Act amended the Canada Evidence Act to add section 39.1 and the Criminal Code to insert subsections 488.01 and 488.02 with respect to, inter alia, production orders against journalists.

Previously, various decisions from the Supreme Court of Canada, especially *Canadian Broadcasting Corp. v. Lessard*,<sup>1</sup> 1991 3 S.C.R. 421, *R. v. National Post*, 2010 SCC 16, and more recently in *R. v. Vice Media Canada Inc.*, 2018 SCC 53, had helped shape and refine the legal parameters around journalistic sources.<sup>2</sup> After the JSPA became law, the Supreme Court of Canada rendered a decision on September 29, 2019 in the matter of *Denis v. Côté*, 2019 SCC 44 where it summarily discusses the new section 39.1 provision of the Canada Evidence Act.

# ANALYSIS

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## National Post

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In 2010, the Supreme Court of Canada issued a decision in the case involving the National Post, one of its journalists and a secret source. The journalist was investigating whether Jean Chrétien, then Prime Minister of Canada, was improperly involved with a loan from a federally funded bank. A secret source provided the journalist with apparently relevant information in exchange for a blanket, unconditional promise of confidentiality.

The Court stated under normal circumstances, a promise of confidentiality given to a secret source by a journalist will be respected. However, it also added that the public's interest in being informed about matters revealed by confidential sources is not absolute. This interest must be balanced against other important public interests, including the investigation of crime. In some cases, a promise of confidentiality will not justify the suppression of evidence in the context of criminal investigation.

The Court expressed the view that where the source is involved in criminal activity, the claim for protection might not be sustainable:

... "the document and the envelope are not merely pieces of evidence tending to show that a crime has been committed. They are the very *actus reus* [or *corpus delicti*] of the alleged crime" (para. 115). In such circumstances the identity of the individual who shipped Mr. McIntosh the forged document has no continuing claim to the protection of the law.

## Vice Media

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In the Vice Media decision, three news stories were published in 2014 based on exchanges between a journalist and a source, a Canadian man suspected of having joined a terrorist organization in Syria.

The articles contained statements by the source that, if true, could provide strong evidence implicating him in multiple terrorism offences.

The RCMP successfully applied for a production order under s.487.014 of the Criminal Code directing Vice Media to produce the screen captures of the messages exchanged with the source.

Vice Media brought an application in the Superior Court to quash the order. The matter was appealed up to the Supreme Court of Canada. The Supreme Court ultimately held that the production order was properly issued and should be upheld. It concluded that the state's interest in the investigation and prosecution of crime outweighed the media's right to privacy in gathering and disseminating the news.

In particular, the Court expressed the view that state's interest in investigating and prosecuting allegations of serious terrorism offences weighs heavily in the balance. It accepted, based on a principle from the Lessard decision that when a crime has been committed and evidence of that crime has been published, society has every right to expect that it will be investigated and, if appropriate, prosecuted. It held the view that "the publication of materials that raise serious and credible concerns over potential criminality, particularly where there is an ongoing or imminent threat to safety and security, cannot be ignored in weighing the state and the media's respective interests. Neither the police nor Canadian society should turn a blind eye to such materials. Nor should the courts."

The appellants had argued that in assessing the state's interests, the judge that issued the production order should have considered (1) the prospect of a trial actually taking place; and (2) the probative value of the evidence sought.

The Court was of the view that searches performed at this stage are solely aimed at investigating and gathering evidence of potential criminality. It added that the public interest requires prompt and thorough investigation of potential offences. Finally, the Court said that even where it would appear uncertain, or even unlikely, that a trial would actually take place, society still had an interest in seeing a crime investigated.

Finally, it is important to note that the production order was not seeking the actual text released by the media, but the screen captures of the messages exchanged with the source. For investigatory purposes, this information was the one deemed important to identify and possibly charge the source.

## Denis v Côté

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In this matter, the Supreme Court of Canada welcomed the opportunity to discuss the new statutory scheme appearing at section 39.1 of the Canada Evidence Act. The Court did not provide any views on the amendments to the Criminal Code at sections 488.01 and 488.02 as only section 39.1 was at issue.

The Court stressed that Parliament drew upon the various decisions rendered by the Court on this subject over the years. However, it modified the structure of the test and the weights of the identified criteria. By this, Parliament created a scheme of new law from which a clear intention emerges: to afford enhanced protection to the confidentiality of journalistic sources in the context of journalists' relations with those sources. The Court explained that the changes are mainly reflected in the shifting of the burden of proof from the journalists wanting to protect the identity of his/her source to those seeking the information that identifies or is likely to identify a journalistic source, and in the modification of the balancing exercise (subsection 39.1(7)).

The Court held that an applicant who wishes to obtain the disclosure of information that identifies or is likely to identify the journalistic source, or of a document, must establish that it "cannot be produced in evidence by any other reasonable means." If this is met, then paragraph 39.1(7)(b), "which is in fact the heart of the new statutory scheme," requires that the court decide whether the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source in question. Doing so, the court must take account of the following criteria, among others: (i) the importance of the information . . . to a central issue in the proceeding before it; (ii) freedom of the press; and (iii) the impact of disclosure on the journalistic source and the journalist.

The Court stated its view that the freedom of the press criterion will quite often weigh against disclosure of the journalistic source's identity. However, it added that the motivation of a journalistic source to disclose information could, at times, be seen as contrary to the public interest, in which case the court would be justified to consider it in the balancing exercise. For example, where the source knows the communicated information to be deliberately false, the freedom of the press criteria would not have the same weight in the balancing exercise. Upholding the freedom of the press would be incompatible with the very interests it is intended to protect.

## Canada Evidence Act

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Section 39.1 was added to the Canada Evidence Act. It created and defined the term "journalistic source" as where a source confidentially transmits information to a journalist on the journalist's undertaking not to divulge the identity of the source. The section 39.1 regimes provides that a journalist may object to the disclosure of information before a court, a person or a body (hereinafter referred to as the court) with the authority to compel the disclosure of information on the grounds that the information or document identifies or is likely to identify a journalistic source. If this objection is raised, there is a statutory prohibition to disclose the information unless the court orders otherwise. This will essentially apply where a journalist will have received a subpoena in the course of any type of proceedings.

A person who requests the disclosure has the burden of proving that the conditions set out in subsection 39.1(7) are fulfilled.

The court may ultimately authorize the disclosure of the information but only if it considers that:

- (a) the information cannot be produced in evidence by any other reasonable means; and
- (b) the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source, having regard to, among other things,
  - (i) the importance of the information or document 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.

## Criminal Code

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Subsection 488.01 refers to the definition of journalistic source as it appears in the Canada Evidence Act. The process provided for at subsections 488.01 and 488.02 is a two-step one.

First, pursuant to paragraph 488.01(2), an application aimed at obtaining a search warrant, a wiretap authorization, or a production order (hereinafter referred to as a warrant) in relation to a journalist's communications or an object, document or data relating to or in the possession of a journalist, may be made to a judge.<sup>3</sup>

This process being *ex parte*, the judge may request that a special advocate present observations in the interests of freedom of the press. First, the judge may issue the warrant if satisfied that (1) there is no other way by which the information can reasonably be obtained, and (2) the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information. There is no direct reference to the journalistic source in the test, at least at this stage.

In issuing the warrant, the judge may, pursuant to subsection 488.01(6), add any conditions considered appropriate to protect the confidentiality of journalistic sources and to limit the disruption of journalistic activities.

Any document obtained pursuant to a warrant is to be placed in a packet and sealed by the court that issued the warrant and is to be kept in the custody of the court.

Second, pursuant to paragraph 488.02(2), the journalist and relevant media outlet must be given notice by the applicant officer of the decision of the judge and must, pursuant to paragraph 488.02(3), within 10 days of receiving this notice, apply to a judge of the same court that issued the warrant. The application is aimed at obtaining an order that the document is not to be disclosed to an officer on the grounds that the document identifies or is likely to identify a journalistic source. Therefore, at this second stage, the issue is all about the journalistic source and not about the journalist's right to privacy in gathering the information.

Although there seems to be a disconnect between the two stages, we must remember that if the journalist chooses not to make an application within 10 days of receiving the notice, the information will be released publicly. One could argue that the scheme is therefore essentially aimed at protecting the journalistic sources but only if the journalist seeks such an order. However, as a pre-emptive measure in case such an application is made, a judge can issue, as we have seen above, conditions to protect the source's identity pursuant to subsection 488.01(6).

That being said, let's now look at the test to be applied if there is an application. The judge may order the disclosure of a document only if satisfied that (a) there is no other way by which the information can reasonably be obtained; and (b) the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information. Even though the application under subsection 488.02(3) is for an order not to disclose information identifying or likely to identify a journalistic source, there is no reference in the test appearing in subsection 488.02(5) to such a notion, i.e., to the notion of "the public interest in preserving the confidentiality of the journalistic source", as it appears under the Canada Evidence Act test. The judge may, if considered necessary, examine the document to determine whether it should be disclosed. At this stage, although the test is the same as the one to obtain the warrant at the first step, the judge will have had the benefit of hearing the journalist.

## COMMENT

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As we have just seen, the respective tests appearing in the provisions of the Criminal Code discussed above and the ones in the Canada Evidence Act differ.

Under the Canada Evidence Act, it is about:

- (a) the information or document cannot be produced in evidence by any other reasonable means; and
- (b) the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source, having regard to, among other things,
  - (i) the importance of the information or document 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.

Under the Criminal Code, the decision at the first step is based on:

(3) A judge may issue a warrant, authorization, or order under subsection (2) only if, in addition to the conditions required for the issue of the warrant, authorization or order, he or she is satisfied that

- (a) there is no other way by which the information can reasonably be obtained; and
- (b) the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information.

The decision at the second step is based on the same:

- (5) The judge may order the disclosure of a document only if he or she is satisfied that
- (a) there is no other way by which the information can reasonably be obtained; and
  - (b) the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information.

Under the Criminal Code, the notions of "public interest in the investigation and prosecution of a criminal offence" on the one hand, and the "journalist's right to privacy" (note the absence of the words public interest) on the other hand are at play.

Under the Canada Evidence Act, any situation where a court, body, or a person with jurisdiction to compel could require a journalist to disclose a source (or information that may identify a source) are covered, including serving a subpoena to a journalist at a criminal trial. Under this Act, the notions of "public interest in the administration of justice" on the one hand, and "the public interest in preserving the confidentiality of the journalistic source" on the other hand are at play.



It would appear that Parliament has chosen to deal with the issue of journalistic sources differently in the context of a criminal investigation and prosecution, as opposed to any other scenario falling under the notion of administration of justice. It has deliberately decided not to make the notion of “public interest in preserving the confidentiality of the journalistic source” part of the test under the Criminal Code, replacing it instead with the notion of “journalist’s right to privacy”.

Arguably, Parliament may have chosen to apply some of the principles appearing in the Supreme Court of Canada’s decisions in *National Post* and *Vice Media*. In the latter case specifically, the Court said that “the publication of materials that raise serious and credible concerns over potential criminality, particularly where there is an ongoing or imminent threat to safety and security, cannot be ignored in weighing the state and the media’s respective interests. Neither the police nor Canadian society should turn a blind eye to such materials. Nor should the courts.” One could say that Parliament determined that in cases involving secret sources where criminal investigations are at play, the balancing test should be against the lower threshold of a journalist’s right to privacy rather than against the public interest in preserving the confidentiality of the journalistic sources. It will be interesting to follow future court decisions in this area of the law.

<sup>1</sup>The decision in *Lessard* provided nine factors, or criteria, to be considered by a judge issuing an order, such as a production order. This decision will not be discussed in this document.

<sup>2</sup>In this case, the Court explained that its decision applied the law to the facts that took place before the JSPA.

<sup>3</sup>A judge of a superior court of criminal jurisdiction or to a judge as defined in section 552.