



**SUPREME COURT OF CANADA**

**CITATION:** Denis v. Côté, 2019 SCC 44

**APPEAL HEARD:** May 16, 2019

**JUDGMENT RENDERED:** September 27, 2019

**DOCKET:** 38114

**BETWEEN:**

**Marie-Maude Denis**  
Appellant

and

**Marc-Yvan Côté**  
Respondent

- and -

**Her Majesty The Queen, Attorney General of Quebec, Fédération  
professionnelle des journalistes du Québec, Canadian Association of Journalists,  
Canadian Journalists for Freedom of Expression, Reporters Without Borders,  
La Presse (2018) Inc., Canadian Civil Liberties Association, AD  
IDEM/Canadian Media Lawyers Association, CTV, a Division of Bell Media  
Inc., Global News, a division of Corus Television Limited Partnership,  
The Globe and Mail Inc., Postmedia Network Inc. and Vice Studio Canada Inc.**  
Intervenors

**OFFICIAL ENGLISH TRANSLATION:** Reasons of Wagner C.J.

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,  
Rowe and Martin JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 65)

Wagner C.J. (Moldaver, Karakatsanis, Gascon, Côté,  
Brown, Rowe and Martin JJ. concurring)

**DISSENTING REASONS:**  
(paras. 66 to 73)

Abella J.

**NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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DENIS v. CÔTÉ

**Marie-Maude Denis**

*Appellant*

v.

**Marc-Yvan Côté**

*Respondent*

and

**Her Majesty The Queen,  
Attorney General of Quebec,  
Fédération professionnelle des journalistes du Québec,  
Canadian Association of Journalists,  
Canadian Journalists for Freedom of Expression,  
Reporters Without Borders, La Presse (2018) Inc.,  
Canadian Civil Liberties Association,  
AD IDEM/Canadian Media Lawyers Association,  
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**Indexed as: Denis v. Côté**

**2019 SCC 44**

File No.: 38114.

2019: May 16; 2019: September 27.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

*Criminal law — Evidence — Journalists — Disclosure of information that identifies or is likely to identify journalistic source — Accused charged with fraud, breach of trust and bribery of officers — Reports by journalist presenting information about investigation into accused that had been obtained from confidential sources — Subpoena served on journalist for purpose of obtaining evidence in support of motion by accused for stay of proceedings — New federal statutory scheme for protection of journalistic sources — Canada Evidence Act, R.S.C. 1985, c. C-5, s. 39.1.*

*Courts — Jurisdiction — Subpoena served on journalist — Court of Québec quashing subpoena pursuant to new federal statutory scheme for protection of journalistic sources — Superior Court confirming on appeal that subpoena valid — Whether Court of Appeal has jurisdiction to rule on merits of appeal from Superior Court's decision — Canada Evidence Act, R.S.C. 1985, c. C-5, s. 39.1.*

C was arrested and charged with numerous offences, including fraud, breach of trust and bribery of officers. C sought to have the proceedings stayed on the ground that they were abusive in that there had been state conduct that risked undermining the integrity of the justice system. C submitted that high-ranking

government representatives had provided journalists with a significant quantity of confidential information for the purpose of prejudicing him. C therefore served a subpoena on D, a journalist who had published information from the leaks. He hoped that the disclosure of the sources would make it possible to identify those who were responsible for the leaks. D contested her subpoena. The Court of Québec proceeded to the balancing exercise required by the new federal statutory scheme for the protection of journalistic sources set out in s. 39.1 of the *Canada Evidence Act* (“CEA”) — a new provision that had been enacted by the *Journalistic Sources Protection Act*, S.C. 2017, c. 22 — and quashed the subpoena. The Superior Court, hearing an appeal, applied s. 39.1 CEA anew and confirmed that the subpoena was valid. That decision was appealed to the Quebec Court of Appeal, which held that it did not have jurisdiction to rule on the appeal.

*Held* (Abella J. dissenting): The appeal against the Superior Court’s decision should be allowed in part, the order authorizing disclosure should be set aside, and the case should be remanded to the court of original jurisdiction for reconsideration. The appeal against the Court of Appeal’s decision should be dismissed.

*Per Wagner C.J. and Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.:* Section 39.1 CEA concerns subpoenas to give testimony or orders to produce documents that are issued to journalists and are likely to reveal the identities of confidential sources. In carrying out its plan to modernize the law by

including s. 39.1 in the CEA, Parliament drew upon the various decisions of the Court, but modified the structure of the test and the weights of the identified criteria. It thus 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.

A threshold requirement for the application of the new scheme is that the person objecting to the disclosure of information or a document that identifies or is likely to identify a journalistic source must show that he or she is a "journalist", and his or her source a "journalistic source", as defined in the CEA. Next, if the person succeeds in doing so, it is the party who seeks to know the source's identity who must then prove that the conditions for judicial authorization of the disclosure are met. If a journalist objects to the disclosure of information on the ground that it is likely to identify a confidential source, non-disclosure should be the starting point for the analysis. It is then up to the party seeking to obtain the information to rebut this presumption. This shifting of the burden of proof is the most important difference between the former common law scheme and the new federal statutory scheme. Whereas the applicability of the journalist-source privilege was the exception in the former scheme, it has now become the rule. The court may not authorize the disclosure of information unless the party seeking its disclosure shows that the condition based on reasonable necessity is met and that the balancing exercise under the CEA weighs in favour of disclosure.

The party seeking the disclosure of information or a document that identifies or is likely to identify a journalistic source must show that the disclosure is reasonably necessary, that is, that the information being sought cannot be produced in evidence by any other reasonable means. If this is not shown, the case is closed, and the application for disclosure will be dismissed. If the party seeking the disclosure of information meets this requirement, he or she must then convince the court that the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source. This balancing exercise requires considering, on the one hand, the importance of the document or information being sought to a central issue in the proceeding and, on the other hand, the impact on freedom of the press and on the journalist and the source. To be successful, a party must convince the court that the document or information at issue is so important that this balancing exercise weighs in favour of disclosure. The court must bear in mind that disclosing information that identifies or is likely to identify a source is an appropriate remedy only where the advantages of doing so outweigh the disadvantages. It is only as a last resort that a court should require a journalist to breach a confidentiality undertaking with a source.

In the Court, the Crown abandoned its original position with respect to C's motion for a stay of proceedings, and it now maintains that the disclosure of new information alters the factual matrix. The Crown's change of position is serious enough to justify an intervention by the Court, but it precludes appellate review of the Superior Court's decision on the merits. This change of position instead justifies

remanding the case to the court of original jurisdiction in order to have that court conduct anew, once the new evidence has been adduced by the Crown, the analysis required by s. 39.1 CEA.

The Court of Appeal was right to find that it did not have jurisdiction to hear the appeal from the Superior Court's decision confirming that the subpoena was valid. First, the right of appeal is a statutory right. It is an exceptional right that cannot exist if no legislation provides for it. Second, where there are two levels of appeal, they are provided for in legislation, which is not the case here with the CEA. The existence of a single level of appeal is, moreover, consistent with the purpose of efficiency and expeditiousness being pursued in s. 39.1 CEA.

*Per Abella J. (dissenting):* The *Journalistic Sources Protection Act* is legislation of historic weight. The new scheme anticipates that absent exceptional circumstances, a presumption of protection for journalistic sources will prevail. The burden is on the party seeking disclosure to demonstrate both that there is no other reasonable means of getting the information and that the public interest in preserving the confidentiality of journalistic sources is outweighed by the public interest in the administration of justice. Through the *Act*, Parliament clearly asserted its intention to provide journalists with more robust statutory protections than existed under the common law.

While the factual terrain in this appeal may have shifted, the legal foundation for the Superior Court of Quebec's conclusion that a disclosure



authorization was appropriate is unsustainable in light of the language and purposes of the *Act*. The Superior Court effectively placed a burden on the journalist to demonstrate why she should not be forced to reveal her sources, rather than requiring the party seeking disclosure to prove why those sources should be revealed. Moreover, the Superior Court applied the new legislation in a way that mirrored, rather than departed from, the former common law regime, and failed to recognize the paramount objective of protecting journalistic sources. Given these fundamental legal errors in the interpretation and application of the legislation, the disclosure authorization issued against the journalist should be set aside and the subpoena quashed.

### **Cases Cited**

By Wagner C.J.

**Referred to:** *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Vice Media Canada Inc.*, 2018 SCC 53; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592; *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631.

By Abella J. (dissenting)

*R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477.

**Statutes and Regulations Cited**

*Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 39.1.

*Canadian Charter of Rights and Freedoms*, s. 2(b).

*Criminal Code*, R.S.C. 1985, c. C-46, s. 488.01.

*Journalistic Sources Protection Act*, S.C. 2017, c. 22, ss. 2, 3.

*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40.

**Authors Cited**

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Oliphant, Benjamin. “Freedom of the Press as a Discrete Constitutional Guarantee” (2013), 59 *McGill L.J.* 283.

Québec. *Commission d’enquête sur la protection de la confidentialité des sources journalistiques — Rapport*. Québec: Publications du Québec, 2017.

APPEAL from a judgment of the Quebec Court of Appeal (Dutil, Bich and Ruel JJ.A.), 2018 QCCA 611, AZ-51484765, [2018] J.Q. no 3149 (QL), 2018

CarswellQue2585 (WL Can.), affirming a decision of Émond J., 2018 QCCS 1138, AZ-51479332, [2018] J.Q. no 2236 (QL), 2018 CarswellQue 2254 (WL Can.), setting aside a decision of Perreault J.C.Q., 2018 QCCQ 547, AZ-51467457, [2018] Q.J. No. 809 (QL), 2018 CarswellQue 3098 (WL Can.).  
Appeal dismissed.

APPEAL from a judgment of the Superior Court of Quebec (Émond J.), 2018 QCCS 1138, AZ-51479332, [2018] J.Q. n° 2236 (QL), 2018 CarswellQue 2254 (WL Can.), setting aside a decision of Perreault J.C.Q., 2018 QCCQ 547, AZ-51467457, [2018] Q.J. No. 809 (QL), 2018 CarswellQue 3098 (WL Can.).  
Appeal allowed in part, Abella J. dissenting.

*Christian Leblanc, Patricia Hénault and Geneviève McSween*, for the appellant.

*Jacques Larochelle and Olivier Desjardins*, for the respondent.

*Robert Rouleau, Julie Desbiens and Richard Rougeau*, for the intervener  
Her Majesty The Queen.

*Michel Déom and Vincent Riendeau*, for the intervener the Attorney  
General of Quebec.

*Mark Bantey* and *Sandra Lando*, for the interveners Fédération professionnelle des journalistes du Québec, the Canadian Association of Journalists, Canadian Journalists for Freedom of Expression and Reporters Without Borders.

*Sébastien Pierre-Roy*, for the intervener La Presse (2018) Inc.

*Jamie Cameron*, *Christopher D. Bredt* and *Pierre N. Gemson*, for the intervener the Canadian Civil Liberties Association.

*David A. Crerar* and *Iain A. C. MacKinnon*, for the interveners the AD IDEM/Canadian Media Lawyers Association, CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Postmedia Network Inc. and Vice Studio Canada Inc.

English version of the judgment of Wagner C.J. and Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ. delivered by

THE CHIEF JUSTICE —

[1] In this case, the Court is considering rare interlocutory appeals in the criminal law context. The main appeal concerns the validity of a subpoena served on a journalist, namely the appellant, Marie-Maude Denis, for the purpose of obtaining evidence in support of a motion for a stay of proceedings falling into the “residual” category described in *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 31,

citing *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 73. Ms. Denis's testimony was likely to reveal the identities of certain of her confidential journalistic sources.

[2] This appeal on the merits of the case, which concerns freedom of the press and the limits of that freedom, is an opportunity for the Court to consider, for the first time, the new statutory scheme for the protection of journalistic sources set out in s. 39.1 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 ("CEA"). This new federal scheme comprises both existing common law rules and new features.

[3] The Court of Québec quashed the subpoena against Ms. Denis, concluding in particular that she did not know the identities of the sources in question. The Superior Court, hearing an appeal from the Court of Québec's decision, held that this conclusion was an error that was not only palpable — a point on which the parties agreed — but also overriding, and it then applied s. 39.1 CEA anew, which led it to confirm that the subpoena issued to Ms. Denis was valid.

[4] That decision was appealed to the Quebec Court of Appeal, which held, relying on the words of the relevant provision as well as on the provision's purpose of efficiency and expeditiousness, that it did not have jurisdiction to rule on the merits of the appeal. It accordingly granted the motion brought by the respondent, Marc-Yvan Côté, to dismiss the appeal.

[5] Ms. Denis was granted leave to appeal to this Court from both those decisions, that of the Court of Appeal with respect to jurisdiction and that of the

Superior Court on the merits. These are thus two separate, but related, appeals. For the reasons that follow, I would dismiss the appeal with respect to jurisdiction, but would allow in part the appeal on the merits and remand the case to the court of original jurisdiction for reconsideration. In my opinion, the remanding of the case means that the parties must be restored to the positions they were in before the decisions of the courts below.

I. Facts

[6] Mr. Côté was a member of the Quebec National Assembly who was responsible for various ministerial portfolios in Liberal Party governments until 1994. After that, he was vice-president of Roche Ltd., Consulting Group, a consulting engineering company, from 1994 to 2005. In 2016, Mr. Côté was arrested and charged, together with a number of co-accused, with numerous offences, including fraud, breach of trust and bribery of officers, in relation to events that had taken place between 2000 and 2012. They were alleged to have set up an elaborate system of secret political financing in Quebec in which consulting engineering and construction companies had made unlawful political contributions for the purpose of gaining undue advantages in public calls for tenders and applications for subsidies.

[7] Mr. Côté sought to have the proceedings stayed on the ground that they were abusive, and his co-accused supported his motion orally at the initial hearing. According to *Babos*, there are two types of abuse of process that can justify a stay of proceedings: state conduct that compromises the fairness of the trial of the accused

(the “main” category); and state conduct that does not compromise trial fairness but risks undermining the integrity of the justice system (the “residual” category). Mr. Côté, who hardly mentioned the first of these categories, argued primarily that the instant case concerns abuse of the second type, and thus stressed the impact on the integrity of the justice system as a whole. He acknowledged that, as far as the burden of proof is concerned, the threshold in such a case is a high one. He had to show state conduct that was “so troublesome that having a trial — even a fair one — will leave the impression that the justice system condones conduct that offends society’s sense of fair play and decency”: *Babos*, at para. 35.

[8] In support of his motion for a stay of proceedings, Mr. Côté submitted that high-ranking government representatives had, between 2012 and 2017, provided journalists with a significant quantity of confidential information (hereinafter the “leaks”) for the purpose of prejudicing his co-accused and himself. This information came in large part from active investigation files of the Unité permanente anticorruption (“UPAC”), a Quebec government organization whose mandate is to coordinate actions to prevent and fight corruption in the public sector. Mr. Côté maintained that the information had been leaked for improper tactical purposes. In his opinion, these leaks were intended to, among other things, deny him the right to a fair trial by judge and jury, as potential jurors had been [TRANSLATION] “contaminated by the numerous leaks of evidence”, and deprive him of the presumption of innocence, “as the government has used the media to ensure his *de facto* conviction”: motion for a stay of proceedings, A.R., vol. II, at pp. 26-27.

[9] Mr. Côté asserted, citing various pieces of circumstantial evidence, that the leakers were acting on the government's behalf. In his opinion, the coincidental timing of the leaks and certain specific events, the highly sensitive nature of the disclosed information, the failure of all the government's investigations to determine who was responsible, and the failure to seek injunctions and publication bans were all factors that suggested that the leaks represented a concerted action by high-ranking individuals.

[10] In her initial response to Mr. Côté's motion for a stay of proceedings, the intervener Her Majesty the Queen — that is to say, Quebec's Director of Criminal and Penal Prosecutions (hereinafter "Crown") — conceded that the leaks seemed to come from one or more government employees, but rejected the argument that those employees were of sufficiently high rank to be acting on the government's behalf. More specifically, the Crown agreed that, [TRANSLATION] "on a balance of probabilities", at least one government employee had been involved in leaking secret information: A.R., vol. II, at p. 66. But the Crown maintained that this "undesirable leak of confidential information" was the work of a "rogue official" in UPAC or a "group of individuals" (summary statement, A.R., vol. II, at p. 94) whose personal goals were incompatible with those of the government and whose acts could not be imputed to it.

[11] Aware of his onerous burden of proof, Mr. Côté wished to adduce, in addition to his circumstantial evidence, direct evidence of the identities of the leakers.



After filing his motion for a stay of proceedings, he therefore served subpoenas on two journalists who had published information from the leaks: Louis Lacroix (*L'Actualité*) and Ms. Denis (*Canadian Broadcasting Corporation*). He hoped that the disclosure of their sources would make it possible to identify those who were responsible for the leaks and thereby to establish the great extent of the government's involvement, which was essential to the success of his *Babos* motion. The subpoena issued to Mr. Lacroix was quashed after he had declared in an affidavit that he did not know the identity of his source. The case involving Mr. Lacroix is now closed.

[12] As for Ms. Denis, between 2012 and 2016, she presented four reports on the *Enquête* public affairs program about a possible system of corruption. Sensitive information obtained from confidential journalistic sources was disclosed in those reports. Because, as she declared in an affidavit, Ms. Denis does not know the identities of the sources for the reports broadcast in 2014 and 2016, only the ones from 2012 and 2015 are at issue here.

[13] The first of these reports, entitled *Anguille sous Roche* (2012), presented some of the evidence against eight persons who had been arrested by UPAC in February 2011, which included a letter addressed to Mr. Côté and a video clip of the questioning of one of his co-accused. The second report, entitled *Ratures et ruptures* (2015), related the content of emails exchanged between the commissioners of the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry, and of an annotated draft of the Commission's report.

[14] In response to the subpoena issued to Ms. Denis, the Crown originally argued in the courts below that Ms. Denis's testimony would be unnecessary. In its view, the leaks came from people at low levels of the hierarchy whose acts could not be attributed to the government. Mr. Côté's *Babos* motion for a stay of proceedings was therefore certain to fail regardless of Ms. Denis's testimony.

## II. Statutory Provisions

[15] Section 39.1 CEA is reproduced in its entirety in the Appendix. The two key parts of s. 39.1 are subss. (2) and (7). Under s. 39.1(2), a journalist is entitled to contest a subpoena to give testimony or an order to produce a document in evidence on the basis that the subpoena or order "identifies or is likely to identify a journalistic source". It should be mentioned in this regard that s. 39.1(4) CEA provides that a court considering the disclosure of information that identifies or is likely to identify a journalistic source may raise the application of s. 39.1(2) CEA on its own initiative.

[16] As for s. 39.1(7), it establishes the test the court must apply to determine whether to authorize the disclosure of information or a document that identifies or is likely to identify a journalistic source. This test requires the court to determine, first, whether there is no other reasonable means by which to obtain the information being sought, and then, if this first condition is met, whether the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source:

(7) The court . . . may authorize the disclosure of information or a document only if [it] consider[s] that

(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.

### III. Procedural History

#### A. *Court of Québec — 2018 QCCQ 547*

[17] Ms. Denis and Mr. Lacroix contested their subpoenas in the Court of Québec. Judge Perreault, who signed the court’s decision, found that Ms. Denis and Mr. Lacroix were both “journalists” as that term is defined in s. 39.1(1) CEA and that the information in question came from “journalistic sources” as defined in that same provision: paras. 206-7. He concluded that disclosure of the identities of the journalistic sources was the only reasonable means to obtain the information in question (para. 204) and that the “proceeding” (referred to in s. 39.1(7)(b)(i)) at issue in this case was Mr. Côté’s motion for a stay of proceedings: para. 212. The importance of the information being sought (the identities of the journalistic sources)

was thus to be assessed in light of the central issues raised in that motion rather than in terms of those of Mr. Côté's criminal trial.

[18] Judge Perreault then proceeded to the balancing exercise required by s. 39.1(7)(b) CEA, concluding that in this case the public interest in preserving the confidentiality of the journalistic sources outweighed the public interest in the administration of justice, because the information being sought could not be said to be important to a central issue in the motion (s. 39.1(7)(b)(i) CEA) insofar as the two journalists did not know the identities of their sources: paras. 215-16. He added that even if those sources could be identified, it was not certain that this would make it possible to trace the people who were originally responsible for the leaks: para. 219. Finally, he stressed that there were other arguments Mr. Côté could make or other evidence he could adduce in support of his *Babos* motion: para. 224. Judge Perreault accordingly declined to authorize the disclosure of the identities of the journalistic sources and quashed the subpoenas issued to the journalists.

B. *Superior Court — 2018 QCCS 1138*

[19] Mr. Côté appealed to the Superior Court, as is provided for in s. 39.1(10)(d) CEA. All the parties agreed that the application judge had made a palpable error of fact in stating that the journalists did not know the identities of their sources, because Ms. Denis was in fact aware of the identities of her sources for two of her four reports: paras. 98-99. Émond J., who heard the appeal, concluded that this was also an overriding error in that it was central to the application judge's reasons on

the key question of the importance of the information being sought to a central issue in the proceeding: para. 137.

[20] Émond J. first agreed that Ms. Denis and Mr. Lacroix were “journalists”, and their sources “journalistic sources”, within the meaning of s. 39.1(1) CEA. He then proceeded to repeat the analysis required by s. 39.1(7). Pointing out that the leaks, about which the authorities were unable to do anything, had taken place over a long period and that this represented a real risk for the integrity of the judicial process and for the justice system (para. 178), and finding on this basis that the information being sought could not be obtained by any other reasonable means, Émond J. held that the criteria for disclosure of the sources’ identities were met in the cases of Ms. Denis’s two reports. In his view, the application judge had erred in concluding that the information being sought was not important to a central issue in the proceeding and that its absence did not justify a stay of proceedings. He found, rather, that the information in question was important, [TRANSLATION] “if not crucial”: para. 137. Émond J. accordingly reformulated the disposition of the application judge’s judgment and authorized the disclosure by Ms. Denis of information with respect to the content of the two reports for which she knew the identities of the sources.

*C. Quebec Court of Appeal — 2018 QCCA 611*

[21] Ms. Denis appealed Émond J.’s decision to the Quebec Court of Appeal. Mr. Côté then filed a motion to dismiss Ms. Denis’s appeal on the ground that,

according to his own interpretation of the words of s. 39.1(10) CEA, she had no right of appeal to the Court of Appeal.

[22] The Court of Appeal allowed Mr. Côté’s motion to dismiss the appeal. Noting that there is [TRANSLATION] “no appeal without a provision” (para. 9), it stated that s. 39.1(10) CEA indicates in what circumstances an appeal is possible and in what court the appeal must be brought. In the Court of Appeal’s view, the effect of s. 39.1(10) is that the only decision that can be appealed is that of the court that first ruled on the original application for disclosure, because the “court, person or body” referred to in s. 39.1(7) CEA is the decision-maker — the Court of Québec here — before whom the journalist originally objected to the disclosure. In this case, therefore, the appeal to the Superior Court was the only recourse provided for in and permitted by s. 39.1(10) CEA. In the end, the Court of Appeal stated that it “lack[ed] jurisdiction” to rule on Ms. Denis’s appeal (para. 32), but mentioned that she could nonetheless apply for leave to appeal to this Court under s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 (para. 31).

#### IV. Analysis

[23] The factual matrix has changed since the decisions of the courts below. In the fall of 2018, at a time when the hearing in this Court was scheduled for that December, the Crown cited new evidence that had recently been brought to its attention and indicated that it could no longer in this Court support the factual framework originally advanced in the Court of Québec and the Superior Court. It

obtained an adjournment on that basis. It then sent the Court sealed information that it considered to be protected by the ongoing investigation privilege in order to explain this change in position to the Court. In March 2019, the Crown filed a second motion to adjourn, which was dismissed.

[24] This change of position by the Crown has serious consequences. Its effect is to deprive the Court of a basis in fact that is sufficient for it to adequately assess the Superior Court's decision on the merits, in particular because the Crown is now casting doubt on the fact, assumed to be true until this point, that Ms. Denis's testimony on the identities of her journalistic sources is needed in order to rule on Mr. Côté's motion for a stay of proceedings. This change justifies remanding the case to the court of original jurisdiction in order to have that court conduct anew, once the new evidence has been adduced by the Crown, the analysis required by s. 39.1 CEA. This is an exceptional remedy that is being granted in equally exceptional circumstances. I will not, therefore, proceed to review the merits of the Superior Court's decision. Nevertheless, I feel that it would be appropriate to define the scope of the new s. 39.1 CEA in order to provide decision-makers with guidance on the nature of the new federal scheme and on how it is to be applied.

A. *Appeal Regarding the Jurisdiction of the Court of Appeal*

[25] I would stress from the outset that the Court of Appeal was right to find that, in light of both the provisions and the purposes in question in this case, it did not have jurisdiction to rule on the merits of Ms. Denis's appeal. First, as the Court of

Appeal pointed out, the right of appeal is a statutory right. It is an exceptional right that cannot exist if no legislation provides for it: C.A., at para. 9. Second, as the Court of Appeal observed, where there are two levels of appeal, as in the case of summary conviction offences, they are provided for in legislation: C.A., at paras. 11-12.

[26] Finally, I agree with the Court of Appeal that the existence of a single level of appeal is, moreover, consistent with the concern to ensure efficient and expeditious judicial proceedings. This purpose can be seen not only in s. 39.1 CEA, which fixes a short time limit for an appeal and requires that it be heard in a summary way (s. 39.1(11) and (12)), but also in the sections of the CEA on related matters (e.g. objections to the disclosure of confidential information on grounds of a specified public interest, of information relating to international relations, national defence or national security, or of Cabinet confidences), which either make no provision for a right of appeal or reserve the initial decision to the Federal Court or a provincial superior court, thereby specifically excluding the possibility of two levels of review: C.A., at paras. 23-24. The appeal from the Court of Appeal's decision that it lacks jurisdiction must therefore be dismissed.

*B. Appeal Regarding Disclosure of the Sources' Identities*

[27] Section 39.1 CEA, the statutory provision at the heart of this case, was enacted by the *Journalistic Sources Protection Act*, S.C. 2017, c. 22 ("JSPA"). Sections 2 and 3 of the JSPA simultaneously amended the *Criminal Code*, R.S.C. 1985, c. C-46, and the CEA with respect to two distinct fact scenarios that were until



then governed by common law principles. One amendment, the addition of s. 488.01 Cr. C., applied to warrants issued with respect to a journalist's communications or to objects, documents or data relating to or in the possession of a journalist. The other amendment, the addition of s. 39.1 CEA, concerned subpoenas to give testimony or orders to produce documents that are issued to journalists and are likely to reveal the identities of confidential sources. As the majority of this Court indicated in the recent case of *R. v. Vice Media Canada Inc.*, 2018 SCC 53, the purpose of these two amendments was to enhance the protection afforded to the confidentiality of journalistic sources: para. 6.

[28] Only s. 39.1 CEA is at issue in the instant case. It is important to stress that in carrying out its plan to modernize the law by including s. 39.1 in the CEA, 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. Thus, some criteria that were but considerations are now essential conditions, while others have become less important. By this meticulous reorganization, Parliament has 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. Although the clearest illustration of this intention lies in the shifting of the burden of proof provided for in s. 39.1(9) CEA, there are, as I will explain below, a number of other modifications that also attest to it. A brief overview of the two schemes — the old and the new — is needed in order to fully explain the scope of the change.

(1) Former Common Law Scheme

[29] In the scheme developed in *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, and *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592, the burden of proof was on a journalist who objected to the disclosure of information that might identify a source. The journalist was required to show that the four criteria of the Wigmore test were met: *National Post*, at paras. 50 et seq.

[30] The four Wigmore criteria were described as follows in *National Post*:

First, the communication must originate in a confidence that the identity of the informant will not be disclosed. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be “sedulously fostered” in the public good (“Sedulous[ly]” being defined . . . as “diligent[ly] . . . deliberately and consciously”). Finally, if all of these requirements are met, the court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth. [para. 53]

The first three criteria were essential. If any one of them was not met, the journalist’s objection was certain to fail. But if the first three criteria were all met, the court proceeded to the balancing exercise required by the fourth.

[31] The balancing exercise required by the final criterion was based on a non-exhaustive list of factors, including the nature and the seriousness of the offence under investigation, the importance of the issue to the proceeding, the status of the journalist in the proceeding (third party or party), the probative value of the evidence

being sought, the importance of the journalist's report for the public, and freedom of the press: *National Post*, at paras. 61 et seq.; *Globe and Mail*, at paras. 57 et seq.

(2) New Federal Statutory Scheme

[32] Although the new statutory scheme under s. 39.1 CEA is based on the former common law scheme, it differs from that scheme in significant ways, including a shifting of the burden of proof (s. 39.1(9)), and the adoption of new threshold requirements (the statutory definitions of “journalist” and “journalistic source” (s. 39.1(1)) and the criterion of reasonable necessity (s. 39.1(7)(a)). A few words are also in order on the new balancing exercise provided for in s. 39.1(7)(b) CEA, which is different from the one that was required before the enactment of the new legislation. I will begin by reviewing the new statutory scheme and its various components, after which I will conclude by summarizing the procedure to follow in applying s. 39.1 CEA.

*(a) Burden of Proof*

[33] The common law scheme included an exceptional privilege against disclosure. Journalists claiming this privilege had to show that it applied on a case-by-case basis. There was thus a presumption in favour of disclosing the identity of a source that applied unless the journalist met the four criteria of the Wigmore test. Where the test under s. 39.1 CEA is concerned, on the other hand, the journalist's only burden is to prove that he or she is a “journalist”, and his or her confidential

source a “journalistic source”, as defined in s. 39.1(1), and if the journalist discharges that burden, it is the other party — the one who seeks the disclosure of information or a document that identifies or is likely to identify a journalistic source — who must then prove that the conditions for judicial authorization of the disclosure are met.

[34] This shifting of the burden of proof is unquestionably the most important difference between the two schemes. If a journalist objects to the disclosure of information on the ground that it is likely to identify a confidential source, non-disclosure should be the starting point for the analysis. It is then up to the party seeking to obtain the information to rebut this presumption. Whereas the applicability of the journalist-source privilege was the exception in the former scheme, it has now become the rule. I note that this allocation of the burden of proof had already been considered in relation to the fourth criterion of the Wigmore test before ultimately being rejected by this Court: see *Globe and Mail*, at para. 24. I also note that the court now has the power to raise on its own initiative the issue of the disclosure, or non-disclosure, of information that is likely to identify a source: s. 39.1(4) CEA. These are two significant differences that illustrate the paradigm shift that has resulted from the enactment of s. 39.1 CEA.

[35] It is not unreasonable to consider that an inadequate protection of sources could contribute to their drying up. Their confidentiality must be protected in order to encourage their contributions and thereby favour the existence of strong and effective investigative journalism.

(b) *Threshold Requirements: Statutory Definitions and Reasonable Necessity*

(i) Statutory Definitions

[36] Parliament took a step that the Court had not taken in its decisions (*National Post*, at paras. 42 et seq.) in choosing to formally define the concepts of “journalist” and “journalistic source”:

**39.1 (1)** The following definitions apply in this section.

...

***journalist*** means a person whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person.

***journalistic source*** means a source that confidentially transmits information to a journalist on the journalist’s undertaking not to divulge the identity of the source, whose anonymity is essential to the relationship between the journalist and the source.

Having the status of a “journalist” and a “journalistic source” within the meaning of the CEA is a threshold requirement for the application of the new scheme. Section 39.1(3) specifies that the word “journalist” includes “an individual who was a journalist when information that identifies or is likely to identify the journalistic source was transmitted to that individual”.

[37] These definitions overlap the first three criteria of the Wigmore test, whose role was essentially to determine whether the relationship at issue could

correctly be characterized as being “journalistic”. The third criterion, that of the existence of a relationship that was “sedulously fostered”, was based on the premise that the maintenance of constant relationships between “journalists” and “journalistic sources” is generally in the public interest. That being said, as we will see below, this premise does not bar a court, in the course of the balancing exercise, from assessing the importance of this relationship in the context of the actual facts of a specific case, especially where a clear attempt has been made to divert journalism from its legitimate purposes.

[38] At first blush, the definitions of “journalist” and “journalistic source” in the CEA limit the spectrum of persons who can claim the privilege against disclosure. I would stress that nothing in these reasons should be regarded as deciding the question — which, moreover, is not before the Court — whether participants in a public debate who do not fall within the scope of these definitions can nonetheless invoke the common law scheme on this point on a residual basis. This question is beyond the scope of this appeal, and I will therefore not answer it.

(ii) Reasonable Necessity

[39] Once it has been shown that the journalist and his or her journalistic source fall within the statutory definitions of those terms set out in s. 39.1(1) and (3) CEA, another threshold requirement for the court’s balancing exercise must be met: that of reasonable necessity (s. 39.1(7)(a) CEA). An applicant who wishes to obtain

the disclosure of information or of a document must establish that the information or document “cannot be produced in evidence by any other reasonable means”.

[40] This criterion based on reasonable necessity existed in the former common law scheme in the context both of search warrants targeting the media (*Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421, at pp. 431-32; *Vice Media*, at para. 16) and of the Wigmore test, of which it was one of the relevant factors (*National Post*, at paras. 66-67). Moreover, the idea that particular importance should be attached to this criterion, indeed that it should be an essential condition for the disclosure of confidential information, was expressed in two dissents: *Lessard*, at p. 455, per McLachlin J. (as she then was); see also *National Post*, at paras. 147-49, per Abella J. These dissenting reasons seem to have been a source of inspiration for the reasons in *Globe and Mail*, in which the Court held that, although reasonable necessity was not explicitly found to be determinative, a court must determine whether the information is available by any other means. It is thus only as a last resort that a court should “[r]equir[e] a journalist to breach a confidentiality undertaking with a source”: *Globe and Mail*, at paras. 62-63. The fact that the reasonable necessity criterion is provided for in s. 39.1(7)(a) CEA means that it is now a threshold requirement. If the applicant meets this requirement, the court will turn to the core of the analysis required by the new statutory scheme: the balancing exercise under s. 39.1(7)(b) CEA.

(c) *Balancing Exercise*

[41] The court proceeds to this balancing exercise only after the conditions with respect to the statutory definitions and to the need for the journalist's participation in order for the information to be obtained are met. Section 39.1(7)(b) CEA, 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. 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". In the balancing exercise, the disclosure must be considered in light of the actual circumstances, taking into account, among other things, the conditions that might accompany it: s. 39.1(8) CEA. I will now consider the meaning of these various criteria.

(i) Importance of the Information to a Central Issue in the Proceeding

[42] In the courts below, the parties presented arguments on the meaning to be given to the word "proceeding" in s. 39.1(7)(b)(i) CEA. Ms. Denis proposed a broad definition to the effect that the word "proceeding" means the whole of the criminal trial of Mr. Côté and his co-accused, while Mr. Côté replied that this word should instead be interpreted narrowly and that, in this case, the "proceeding" is solely his motion for a stay of proceedings. The Court of Québec and Superior Court judges



both agreed with Mr. Côté on this point, and in my opinion, that is the right conclusion.

[43] First of all, I note that it was in the context of his motion for a stay of proceedings that Mr. Côté subpoenaed Ms. Denis. Mr. Côté's motion is a proceeding that could put an end to the prosecution and prevent a trial from going forward. Furthermore, that motion is based on the "residual" category described in *Babos*, a category that requires evidence of state conduct that risks undermining the integrity of the justice system (a criterion that corresponds to the "public interest in the administration of justice" aspect of the balancing exercise under s. 39.1(7)(b) CEA). These factors suggest that the "proceeding" (s. 39.1(7)(b)(i) CEA) at issue in this case is Mr. Côté's motion for a stay of proceedings. The importance of the information being sought must therefore be assessed in light of the central issues raised in that motion rather than in terms of those of Mr. Côté's criminal trial as a whole.

[44] Section 39.1(7)(b)(i) CEA introduces two elements: "the importance of the information or document" being sought and "a central issue in the proceeding". I find that it will be helpful to consider these two elements and their interplay. Where a court must apply this provision, I would suggest that it proceed in stages. It must first be determined whether the issue for which a party seeks to obtain privileged journalistic information is a central issue. The requirement is not that it be "the" central issue in the proceeding, but merely that it be "a" central issue as indicated in the French version of s. 39.1(7)(b)(i) CEA: "[u]ne question essentielle dans le cadre

*de l'instance*". Thus, a peripheral issue or one whose consequences for the proceeding are limited would not favour disclosure. Once it has been determined that the issue is central to the proceeding, the importance of the information to that issue must then be considered. The more crucial the information being sought is to the resolution of a "central issue" in the proceeding, the more it can be characterized as important and the more the disclosure will be justified. By contrast, information that is quite simply not relevant cannot be characterized as important.

(ii) Freedom of the Press

[45] There is no doubt that the role of the media in our country is unique. By investigating, questioning, criticizing and publishing important information, the media contribute to the existence and maintenance of a free and democratic society. The work of journalists requires accountability for decisions and activities not only from public institutions such as courts (see *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326) and governments (see *Globe and Mail*) — thus helping to "fill what has been described as a democratic deficit in the transparency and accountability" of such institutions (*National Post*, at para. 55) — but also from private sector entities (see *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640). By contributing to the free flow of information, journalists also help to ensure "productive debate" on questions of public interest: *Grant*, at para. 52.

[46] Freedom of the press encompasses the ability of the media to gather information, maintain confidential relationships with journalistic sources and produce

and publish news without fear of obstacles to their activities. This Court's decisions with respect to s. 2(b) of the *Canadian Charter of Rights and Freedoms* also confirm the principle that freedom of expression, which includes freedom of the press, protects both those who express ideas and opinions and those who read or hear them: *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 767; *Edmonton Journal*, at p. 1339; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 1006, per McIntyre J., dissenting, but not on this point; *National Post*, at para. 28.

[47] In light of these founding values, it is easy to understand why mobilizing a journalist against his or her source is incompatible with freedom of the press. Without whistleblowers and other anonymous sources, it would be very difficult for journalists to perform their important mission. As this Court has rightly pointed out, many important controversies have been unearthed only with the help of sources who would not agree to speak other than on condition of confidentiality: *National Post*, at para. 28. This is why Parliament, fully aware of the possible consequences of disclosure orders both at the individual and the collective levels, clearly recognized by enacting the JSPA, and in particular by adding s. 39.1 to the CEA, that it was in the public interest to provide robust statutory protection to such confidential sources of information. It can in fact be said that without such protection, the public's very right to information would be jeopardized.

[48] It is thus clear that the freedom of the press criterion will quite often weigh against disclosure of the journalistic source's identity. This does not mean,

however, that it is entirely inflexible and therefore of little assistance. In fact, given that s. 39.1 CEA is likely to apply in many different circumstances, this criterion will help the court identify news reports that relate fundamentally to the public's right to be informed because, for instance, they are central to the democratic experience of a free society.

[49] For example, it could happen that what motivated the journalistic source to disclose the information seems contrary to the public interest, in which case the court would be justified in paying closer attention to this factor in the balancing exercise under s. 39.1(7)(b) CEA. Great caution must of course always be exercised in such a case, given that the court asked to rule on such a question does not have the whole picture. That being said, it is possible that an applicant who seeks the disclosure of a journalistic source's identity will submit evidence capable of convincing the court that the source's purpose is contrary to the public interest. One such situation might involve the communication of information the source knows to be deliberately false for the purpose of hindering the orderly progress of public business. In such a case, freedom of the press would in the end not have the same weight in the balancing exercise, because upholding that freedom would then be incompatible with the very interests it is intended to protect.

(iii) Impact of Disclosure on the Journalistic Source and on the Journalist

[50] Assessing the impact of disclosure on the journalistic source and on the journalist will be particularly challenging. Parliament made a conscious choice to

impose on the applicant (i.e. the person who wishes to obtain the source's identity) the burden of proving that the impact of disclosure will be minimal or insignificant. This choice clearly reflects the fact that disclosing information or a document 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. The risk of such an impact is the very reason for the anonymity of journalistic sources, and the purpose of protecting their confidentiality is to ensure that the fear of legal or social sanctions will not deter them from making situations known where such knowledge would be in the public interest.

[51] Where a journalist objects to the disclosure of information that identifies or is likely to identify a journalistic source, the court will take into account the impact of the disclosure on the source and on the journalist in light of, among other things, the parties' submissions on the context of the case and the nature of the information being sought. Although, as I mentioned in the preceding paragraph, the burden of proof is on the party seeking to obtain the information in question, it goes without saying that the journalist can substantiate his or her objection to the extent that it is possible to do so without thereby compromising the source's anonymity that the objection is in fact intended to protect. It is possible to imagine various scenarios on a graduated scale of degrees of impact on the journalistic source. The impact could take the form of relatively minor personal or professional inconveniences (unwanted publicity, being sidelined at work), of more serious professional and therefore

financial consequences (dismissal), of judicial proceedings, and even of violent reprisals.

(iv) Possible Additional Criteria

[52] It should be noted that the list of criteria that are relevant to the balancing exercise under s. 39.1(7)(b) CEA is not exhaustive, as is expressly indicated by the words “among other things” that are used in that provision. The court is therefore not barred from taking other factors into account, such as certain of the considerations that were formerly applied in relation to the fourth criterion of the Wigmore test. The case law from before the enactment of s. 39.1 CEA remains relevant, although the application of such additional considerations must not have the effect of eclipsing the ones explicitly retained by Parliament. Moreover, it is clear that the required balancing exercise is not a purely mathematical operation and that the weights of the statutory criteria — importance of the information being sought to a central issue in the proceeding, freedom of the press and impact of disclosure on the journalistic source and the journalist — will be assessed on a continuum of varying situations.

[53] Finally, when the court weighs the public interest in the administration of justice against the public interest in preserving the confidentiality of a journalistic source, it must bear in mind that disclosing information that identifies or is likely to identify such a source is an appropriate remedy only where the advantages of doing so outweigh the disadvantages. If the court decides in favour of 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 (s. 39.1(8) CEA), and in particular by limiting the scope of the disclosure.

*(d) Summary of the Steps to Take in Applying Section 39.1 CEA*

[54] As I mentioned above, although s. 39.1 CEA is based on several elements of the former common law scheme, the scheme it establishes is new law. Under the new scheme, enhanced protection is afforded to the anonymity of journalistic sources, and the party seeking the disclosure of information that identifies or is likely to identify such a source bears the burden of proof in this regard. If it has been shown that the case concerns a “journalist” and a “journalistic source” as defined in s. 39.1(1) and (3) CEA, the court may not authorize the disclosure of such information unless the party seeking its disclosure shows that the condition based on reasonable necessity (s. 39.1(7)(a) CEA) is met and that the balancing exercise under s. 39.1(7)(b) CEA weighs in favour of disclosure. I will now summarize the steps to take in applying these provisions.

(i) Threshold Requirements

1. *Application of the Definitions of “Journalist” and “Journalistic Source”*

[55] The person objecting to the disclosure must show that he or she is a “journalist” as defined in s. 39.1(1) CEA (or a former journalist to whom s. 39.1(3)

CEA applies) and that the source is a “journalistic source” as defined in s. 39.1(1) CEA.

*2. Reasonable Necessity*

[56] The party seeking the disclosure of information or a document that identifies or is likely to identify a journalistic source must show that the disclosure is reasonably necessary, that is, that the information being sought (i.e. the source’s identity) “cannot be produced in evidence by any other reasonable means”: s. 39.1(7)(a) CEA. If this is not shown, the case is closed, and the application for disclosure will be dismissed.

(ii) Balancing Exercise

[57] If the party seeking the disclosure of information meets the requirement of reasonable necessity set out in s. 39.1(7)(a) CEA, he or she must then convince the court, in accordance with s. 39.1(7)(b), that “the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source”. This balancing exercise requires considering, on the one hand, the importance of the document or information being sought to a central issue in the proceeding and, on the other hand, the impact on freedom of the press and on the journalist and the source. To be successful, a party must convince the court that the document or information at issue is so important that this balancing exercise weighs in favour of disclosure.



V. Appropriate Order in This Case

[58] The Crown's change of position has no impact where the Court of Appeal's decision on the jurisdiction issue is concerned. This issue is resolved in Mr. Côté's favour, and Ms. Denis's appeal against the Court of Appeal's decision is dismissed.

[59] As for the Superior Court's decision on the merits, this Court notes the Crown's abandonment of its original position with respect to Mr. Côté's motion for a stay of proceedings and, by extension, of its position with respect to the application of s. 39.1 CEA: see affidavit in support of the Crown's first motion to adjourn, at para. 22.

[60] In the courts below, the Crown claimed that the leaks had come from people at low levels of the government hierarchy who wanted to cause harm to the government and that, as a result, the information being sought by having Ms. Denis testify was of no consequence given that the motion was therefore certain to fail. It now maintains that the disclosure of new information alters the factual matrix as presented in the courts below. It stated in the factum it filed in this Court that the investigation begun by the Ministère de la Sécurité publique in October 2018 [TRANSLATION] "is still under way [and that that investigation] is producing results that are directly relevant to the *Babos* motion brought by the respondent": Crown's factum ("CF"), at para. 16. The Crown added that these results "are liable to shed relevant light on . . . the availability of other reasonable means to produce the

information in evidence”: CF, at para. 17; see also para. 20. This change of position by the Crown thus precludes appellate review of the Superior Court’s decision on the merits.

[61] The case must be remanded to the application judge pending completion of the investigation into the media leaks in order to safeguard the parties’ rights. It is possible, as the Crown suggests, that after the case is remanded to the court of original jurisdiction, Mr. Côté will be in a position to examine new witnesses (other than Ms. Denis) and add evidence in support of his *Babos* motion. His application to examine Ms. Denis would thus become [TRANSLATION] “moot” (CF, at para. 22), as it would not meet the necessity criterion under s. 39.1(7)(a), and the rights of all the parties would then be safeguarded. As LeBel J. noted in *Globe and Mail*, “[r]equiring a journalist to breach a confidentiality undertaking with a source should be done only as a last resort”: para. 63.

[62] The Crown has undertaken to communicate to the parties, [TRANSLATION] “as soon as possible”, a “substantial portion of the results of the investigation” into the media leaks: CF, at para. 22. It goes without saying that the existence of other procedures — such as an eventual application for disclosure of this evidence — and the Crown’s obligation to justify delays in excess of the ceiling established in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, are serious inducements to communicate those results as soon as possible.

[63] Remanding the case to the application judge means that the parties must be restored to the positions they were in before the decisions of the courts below. The Superior Court's order authorizing the disclosure of information must therefore be set aside. The application judge must review the entire case, including the Crown's new evidence, assessing it in light of the principles established by this Court on the scope and application of s. 39.1 CEA before ruling on the legality of the subpoena served on Ms. Denis.

[64] In conclusion, the Crown's change of position is serious enough to justify an intervention by this Court. As a result, Ms. Denis's appeal against the Superior Court's decision on the merits is allowed in part, the order authorizing disclosure is set aside, and the case is remanded to the court of original jurisdiction for reconsideration once the new evidence resulting from the investigation has been communicated.

[65] Given the qualified success of the parties, and in light of the unusual circumstances of these two appeals that I have described above, I would order that the parties bear their own costs in this Court and in the courts below.

The following are the reasons delivered by

ABELLA J. —

[66] The *Journalistic Sources Protection Act*, S.C. 2017, c. 22, is legislation of “historic weight” (*Debates of the Senate*, vol. 150, No. 110, 1st Sess., 42nd Parl., April 6, 2017, at p. 2740 (Hon. Claude Carignan)). Through the *Act*, Parliament clearly asserted its intention to provide journalists with more robust statutory protections than existed under the common law.

[67] The legislation was a response to revelations in the fall of 2016 that police in Quebec had for years been surveilling journalists (*Debates of the Senate*, vol. 150, No. 86, 1st Sess., 42nd Parl., December 12, 2016, at pp. 2056-59 (Hon. André Pratte); vol. 150, No. 110, 1st Sess., 42nd Parl., April 6, 2017, at pp. 2738-39 (Hon. Claude Carignan); *Debates of the House of Commons*, vol. 148, No. 191, 1st Sess., 42nd Parl., June 9, 2017, at pp. 12447-48 (Marco Mendicino); Quebec, *Commission d’enquête sur la protection de la confidentialité des sources journalistiques (Chamberland Report, 2017)*). The scandal galvanized multi-party support for the protection of journalistic sources that would extend well beyond the existing common law regime. The *Act* was adopted unanimously by the House of Commons on October 4, 2017, and received Royal Assent on October 18.

[68] The Senate debates over the legislation left little doubt about its purpose:

Journalists and their sources benefitted somewhat from the ruling in the *Globe and Mail* case. Today, with Bill S-231, their rights will be strengthened by legislation. (*Debates of the Senate*, vol. 150, No. 110, 1st Sess., 42nd Parl., April 6, 2017, at p. 2739 (Hon. Claude Carignan))

[69] Even a cursory review of the new legislation confirms that its pre-eminent purpose was to enhance protection for journalistic sources. The legislation, among other things, amended the *Canada Evidence Act*, R.S.C. 1985, c. C-5, by adding s. 39.1. Most notably, s. 39.1(9) of the *CEA* specifies that authorization is available *only* if the party requesting the disclosure has proven the conditions set out in s. 39.1(7)(a) and (b). Those conditions are:

- There is no other reasonable means of getting the information;

*and*

- The public interest in preserving the confidentiality of journalistic sources is outweighed by the public interest in the administration of justice.

The burden is on the party seeking disclosure to demonstrate that *both* branches of this test are met before disclosure can be authorized.

[70] The dual burden on the party seeking disclosure under s. 39.1(7) is a marked departure from the former common law regime, which had placed the onus on the journalist to satisfy the court that the identity of the source should not be revealed (*R. v. National Post*, [2010] 1 S.C.R. 477, at para. 60). This created an onerous hurdle for journalists (Benjamin Oliphant, “Freedom of the Press as a Discrete Constitutional Guarantee” (2013), 59 *McGill L.J.* 283, at pp. 325-26). Concerned that Canada was “lagging behind [other countries] when it [came] to protecting sources”, those promoting the legislation sought to remove this burden and limit the disclosure of confidential sources to

*exceptional, grave and serious situations* where the public interest will dictate that the protection must be lifted and the source's identity disclosed. In other cases, the public interest will dictate that anonymity must be maintained. (*Debates of the Senate*, vol. 150, No. 110, 1st Sess., 42nd Parl., April 6, 2017, at pp. 2737-38 (Hon. Claude Carignan) (emphasis added))

[71] Far from requiring an even balancing of interests, therefore, the new scheme anticipates that absent exceptional circumstances, a presumption of protection for journalistic sources will prevail.

[72] While I accept that the factual terrain in this appeal may have shifted, the legal foundation for the Superior Court of Quebec's conclusion that authorization was appropriate, is unsustainable in light of the language and purposes of the *Act*. The Superior Court effectively placed a burden on the journalist to demonstrate why she should not be forced to reveal her sources, rather than requiring the party seeking disclosure to prove why those sources should be revealed (2018 QCCS 1138, at paras. 113-14 and 160-62). Moreover, the Superior Court applied the new legislation in a way that mirrored, rather than departed from, the old common law and failed to recognize the paramount objective of protecting journalistic sources (paras. 74-77 and 81).

[73] Given these fundamental legal errors in the interpretation and application of the legislation, I would set aside the disclosure authorization issued against the journalist, Marie-Maude Denis, and quash the subpoena.

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APPENDIX

*Canada Evidence Act*, R.S.C. 1985, c. C-5

**39.1 (1)** The following definitions apply in this section.

*document* has the same meaning as in section 487.011 of the *Criminal Code*.

*journalist* means a person whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person.

*journalistic source* means a source that confidentially transmits information to a journalist on the journalist's undertaking not to divulge the identity of the source, whose anonymity is essential to the relationship between the journalist and the source.

(2) Subject to subsection (7), a journalist may object to the disclosure of information or a document before a court, person or body 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.

(3) For the purposes of subsections (2) and (7), *journalist* includes an individual who was a journalist when information that identifies or is likely to identify the journalistic source was transmitted to that individual.

(4) The court, person or body may raise the application of subsection (2) on their own initiative.

(5) When an objection or the application of subsection (2) is raised, the court, person or body shall ensure that the information or document is not disclosed other than in accordance with this section.

(6) Before determining the question, the court, person or body must give the parties and interested persons a reasonable opportunity to present observations.

(7) The court, person or body may authorize the disclosure of information or a document only if they consider that

(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.
- (8) An authorization under subsection (7) may contain any conditions that the court, person or body considers appropriate to protect the identity of the journalistic source.
- (9) A person who requests the disclosure has the burden of proving that the conditions set out in subsection (7) are fulfilled.
- (10) An appeal lies from a determination under subsection (7)
- (a) to the Federal Court of Appeal from a determination of the Federal Court;
  - (b) to the court of appeal of a province from a determination of a superior court of the province;
  - (c) to the Federal Court from a determination of a court, person or body vested with power to compel production by or under an Act of Parliament if the court, person or body is not established under a law of a province; or
  - (d) to the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.
- (11) An appeal under subsection (10) shall be brought within 10 days after the date of the determination appealed from or within any further time that the court having jurisdiction to hear the appeal considers appropriate in the circumstances.
- (12) An appeal under subsection (10) shall be heard and determined without delay and in a summary way.

*Appeal from the decision of the Quebec Court of Appeal dismissed.*

*Appeal from the decision of the Superior Court of Quebec allowed in part, ABELLA J. dissenting.*

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