***Case Title: Denis v. Côté***

**Case Analysis**

Meta-Data:

− Case Number: File No.: 38114

− Date of decision: September 27, 2019

− Featured case: N/A

− Region: North America

− Country: Canada

− Type of expression: Press / Newspapers

− Judicial Body: Supreme Court of Canada

− Type of law: Civil

− Main Themes: Press Freedom/Privacy, Data Protection and Retention

− Outcome: Mix outcome

− Status: Closed

− Tags: Right to Privacy, Media/Press, Freedom of press, Investigation, Confidentiality

On September 27, 2019, the Supreme Court of Canada (SCC) ruled on the dispute between Marie-Maude Denis, a journalist in Quebec, and Marc-Yvan Coté, a former Quebec cabinet minister who faced criminal charges. Court did not rule on the merits of the case and ultimately sent it back to the Court of original jurisdiction due to new evidence coming to light. However for the first time provided guidance on the 2017 amendment to the Canada Evidence Act (CEA).

Through this ruling, the SCC delivered its interpretation of section 39.1 CEA concerning a subpoena to give testimony or orders to produce documents issued to journalists and are likely to reveal the identities of confidential sources. The SCC determined that individuals who don't want to reveal a source had to show they are "journalists" and their source is a "journalistic source" under the CEA. Whereas the individual who wants the information to be disclosed must show, they can't get it any other way and demonstrate that the public has a greater interest in making sure the crime is prosecuted than it does in protecting the confidential source.

**Facts:**

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.

From 2012 to 2016, journalist Marie-Maude Denis presented four reports on her Radio-Canada program *Enquête,* detailing the involvement involving the former Quebec Liberal minister. In one of Ms. Denis's reports, she revealed a series of emails "exchanged between the commissioners of the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry and an annotated draft of the Commission's report" [para.13].

In 2016, Mr. Côté was arrested and charged, together with seven co-accused, with numerous offenses, including fraud, breach of trust, and bribery of officers, concerning events that had taken place between 2000 and 2012. It was alleged that the accused had set up an elaborate scheme to solicit political contributions from engineering firms in exchange for government contracts.

Mr. Côté filed a motion for a stay of proceedings on the ground that they were abusive. Mr. Côté claimed that the information disclosed had been deliberately leaked by high-ranking government officials and that the leaks were an abuse of process that would compromise the fairness of his trial. He argued that this was done tactically on behalf of the government to use “the media to ensure his de facto conviction”[para. 8].

In its initial response, Quebec's Director of Criminal and Penal Prosecutions (the Crown) admitted that the leaks appeared 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. However, it denied any conspiracy afoot to damage Côté in the public eye.

Mr. Côté then served subpoenas on Louis Lacroix of the news outlet *L'Actualité* and Ms. Denis. Both journalists had disseminated the information about his alleged role in a dirty financing scheme. Through the subpoenas, Mr. Côté sought to disclose the identity of those responsible for the leaks and thereby established the extent of the government's involvement, which was essential to the success of his Babos motion. Nonetheless, 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.

 As for Ms. Denis, she declared in an affidavit that she did not know the sources' identities for the reports broadcast in 2014 and 2016, only from 2012 and 2015.

In response to the subpoena issued to Ms. Denis, the Crown contended that her testimony was unnecessary since the leaked information came from people at low levels of government; therefore, their acts could not be attributed to the government.

Mr. Côté appealed the Crown's decision to the Quebec Court of Appeal. In his appeal, he argued that the Crown did not have jurisdiction to rule on the merits of the appeal. Quebec Court of Appeal granted the request.

Ms. Denis and Mr. Lacroix contested their subpoenas in the Court of Québec. At the Court of Quebec, Judge Perreault concluded in light of Section 39.1(1) of the CEA that both plaintiffs were "journalists" and that the information in question came from "journalistic sources". Judge Perreault held that disclosing the identity of the journalistic sources was the only reasonable means to obtain the information in question, therefore determining that Ms. Denis did not have to reveal her sources because she did not know them. Mr. Côté then appealed to the Superior Court.

The Superior Court agreed that the parties' claim that the application judge made an error of fact because Ms. Denis did know the identities of some of the sources. Justice Émond J. then proceeded to repeat the application of the test under Section 39.1(7). By reexamining the claim, he found that the information was clearly crucial for the central issue of the proceeding and thus authorized the disclosure by Ms. Denis of information concerning the content of the two reports for which she knew the sources' identities.

Consequently, Ms. Denis appealed the decision to the Quebec Court of Appeal. Mr. Côté then filed a motion to dismiss Ms. Denis's appeal. M. Côté argued that, in his view, Ms. Denis had no right to appeal under Section 39.1(10) of the CEA.

The Quebec Court of Appeal agreed with Mr. Côté and held that Ms. Denis had no right of appeal beyond the first ruling on the original application since she had already exercised it at the Superior Court. Therefore, it concluded that even though it lacked jurisdiction to rule on Ms. Denis's appeal, she could nonetheless apply for leave to appeal to the Supreme Court of Canada (SCC).

* **Decision Overview**:

 Chief Justice Richard Wagner delivered the majority's opinion. The Supreme Court's main issue to analyze was whether the Court of Appeal had the power to rule on Ms. Deni's appeal and determine the criteria that must guide Courts when examining section 39 of the CEA.

The mayority began the examination of the appeal by stating that Section 39.1(2) of CEA entitles journalists 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". The Court also remarked that Section 39.1(4) of CEA provides that considering the disclosure of information that identifies or is likely to identify a journalistic source may raise the application of Section 39.1(2) CEA on its own initiative.

The Court recalled that in 2017, the Canadian government passed the *Journalistic Sources Protection Act* (JSPA) that amended the CEA to include Section 39.1 as an additional protective provision concerning orders issued to journalists that would have them reveal the identities of confidential sources.

According to the SCC, the main modifications to the CEA were: i). The introduction of a presumption of non-disclosure when statutory thresholds are met; ii).the relocation of the burden of proof onto the party seeking disclosure, and iii). the rebuttal of the requirement that statutory presumption of non-disclosure on a case-by-case basis.

The SCC explained that under the new provision, the burden of proof requested journalists to prove that they are a "journalist", and their confidential source is a "journalistic source", in light of Section 39.1(1).

Under the new provision, the burden of proof transformed from a presumption of disclosure into a presumption of non-disclosure.

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

*First step: Threshold Showings*

The Court held that the person objecting to disclosure must establish that they are a "journalist" and that the source is a "journalistic source" within the statute's meaning. Whereas the party seeking to disclose information or a document that identifies or is likely to identify a journalistic source must demonstrate that the disclosure is reasonably necessary. In the Court's words, "reasonably necessary" meant that "the information being sought (i.e., the source's identity) "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" [para. 56].

The mayority referred to its decision in the case of *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592 to highlight that although reasonable necessity is not explicitly determinative, Courts must determine whether the information is available by any other means. Thus, the SCC noted that Courts should consider requesting a journalist to breach confidentiality only as a last resource.

*Second step: Balancing the public interest*

The Court noted that the heart of the new statutory scheme was Section 39.1(7)(b) CEA, which "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" [para.41].

The SCC pinpointed that if the party seeking the disclosure of information meets the reasonable necessity requirement set out in Section 39.1(7)(a) CEA, they then must convince the Court, following Section 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" [para.57]. More, the mayority stated that 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 as per Section 39.1(8) CEA.

*i). Importance of the Information to a Central Issue in the proceeding*

The SCC recalled that the previous instances had agreed with Mr. Côté's interpretation of the word "proceeding" that this word should instead be understood narrowly, hence applicable solely for his motion for a stay of proceedings. According to the SCC, this was the proper conclusion since Mr. Côté's motion could end the prosecution and prevent a trial from going forward.

Also, the mayority considered that motion was 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)" [para.43]. According to the Court, the importance of the information had to be evaluated in light of the central issues raised in the motion rather than in Mr. Côté's criminal trial.

The SCC highlighted that when a court applies Section 39.1(7)(b)(i), it must determine whether the issue for which a party seeks to obtain privileged journalistic information is a central issue. The SCC then clarified that "the requirement is not that it be "the" central issue in the proceeding, but merely that it be "a" central issue" [para.44]. Hence, the SCC determined that a peripheral issue or one whose consequences for the proceeding are limited would not favor disclosure. Once the central to the proceeding has been determined, the importance of the information to that issue must then be evaluated. The mayority noted "that 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" [para.44].

*ii). Freedom of the Press*

The Court proceeded to underscore the role media plays in maintaining a free and democratic society. By referencing its cases of *Edmonton Journal v. Alberta (Attorney General), [1989] 2 SCR 1326* , *Globe and Mail*, *R. v. National Post, 2010 SCC 16, [2010] 1 S.C.R. 477*, and *Grant v. Torstar Corp., 2009 SCC 61, [2009] 3 SCR 640,* the Court stressed that the work of journalists requires accountability for decisions and activities not only from public institutions such as courts and governments but also from private sector entities.

Likewise, the mayority referred to its case of G*rant v. Torstar Corp* to highlight that journalists also help ensure a productive debate on questions of public interest.

Further, the SCC cited its decisions of *Ford v. Quebec (Attorney General), [1988] 2 SCR 712, Edmonton Journal, Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 SCR 927,* to accentuate that Section 2(b) of the Canadian Charter of Rights and Freedoms "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" [para. 45].

 The Court noted that "without whistleblowers and other anonymous sources, it would be challenging for journalists to perform their important mission" [para. 47]. In addition, the SCC recognized that many important controversies had been unearthed only with the help of sources who would not agree to speak other than on the condition of confidentiality. In the Court's view, without such protection, the public's right to information would be jeopardized. The mayority found it clear that the freedom of the press criterion "will quite often weigh against disclosure of the journalistic source's identity" [para. 48]. Nonetheless, it warned that it was not entirely inflexible. The SCC noted that given that s. 39.1 CEA was likely to apply in diverse circumstances, such criterion would allow tribunals to identify news reports that relate fundamentally to the public's right to be informed.

The Court recognized that future cases might present situations where applicants could seek the disclosure of a journalistic source's identity and submit evidence capable of convincing the Court that the source's purpose is contrary to the public interest. In such cases, it held that "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" [para. 49]. Thus the Court remarked that in such cases, tribunals must examine the circumstances of the issue with great caution.

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

The Court held that the Parliament had made "a conscious choice to impose on the applicant the burden of proving that the impact of disclosure will be minimal or insignificant" [para.50]. Therefore, the SCC determined that Courts must be considered the impact on the possible adverse impact that disclosing information could have on the source and on the journalist in light of the context of the case.

*(iv) Possible Additional Criteria*

Given that the list of criteria relevant to the balancing exercise under Section 39.1(7)(b) of the CEA was not exhaustive, the Court held it allowed it to consider other factors. The Court deemed that the case law from before the enactment of Section. 39.1 of CEA remained relevant, yet it specified that the application of the additional considerations must not have the effect of outweighing the ones established by the Parliament. Moreover, the SCC clarified that the required balancing exercise must not rely on a straightforward mathematical operation but demands an appraisal based on a continuum of varying situations.

Finally, the SCC emphasized that disclosing information that could identify a source would only be considered if the advantages outweigh the disadvantages. In the Court's words, "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" [para. 53].

The Court resolved in Mr. Côté's favor and dismissed Ms. Denis's appeal against the Court of Appeal's decision. The Crown had initially claimed that the leaks had come from people at low levels of the government hierarchy; therefore, the information being sought "by having Ms. Denis testify was of no consequence given that the motion was (...) certain to fail" [para. 60]. However, the Court clarified that the Crown "now maintains that the disclosure of new information alters the factual matrix as presented in the courts below" [para.60].

The SCC expressed that in a factum filed to the Court, the Crown informed that the investigation started by the *Ministère de la Sécurité* *Publique* in October 2018 was still underway and that that inquiry was yielding results that were directly relevant to the Babos motion brought by the Mr. Côté. In the factum, the Crown added that the results were likely to shed relevant light on "the availability of other reasonable means to produce the information in evidence" [para. 60].

The Court determined that such a change of position by the Crown precluded appellate review of the Superior Court's decision on the merits; thus held that to safeguard the parties' rights, the case had to be reexamined by the Court of original jurisdiction pending completion of the investigation into the media leaks.

In conclusion, the mayority deemed the Crown's change of position as "serious enough to justify an intervention by this Court" [para. 64] and ordered the remand. It likewise set aside a disclosure order issued by the Superior Court of Quebec that requested Ms. Denis to her to give up her source, however refused to rule on the merits of that order.

Finally, the SCC ordered the parties to bear their own costs in the immediate proceedings and those of the courts below.

***Dissenting Opinion of Justice Per Abella J.:***

Justice Per Abella J. held that the JSPA was legislation of historical weight. Likewise, she noted that far from requiring an even balancing of interests, the new scheme under the 2017 amendment "anticipates that absent exceptional circumstances, a presumption of protection for journalistic sources will prevail" [para.72].

Even though she accepted 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" [para. 72]. In her opinion, the Superior Court had effectively set a burden on Ms. Denis to show why she should not be coerced to reveal her sources rather than requiring Mr. Côté to prove why the sources should be divulged.

In addition, in Justice Per Abella J.'s view, the SCC had 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. In light of such fundamental legal errors in the interpretation and application of the legislation, she considered that the disclosure authorization issued against Ms. Denis should have been set aside and quash the subpoena ought to be quashed.

***Direction:***

* **Outcome**: Mix outcome.

The SCC’s interpretation of the new CEA provisions confirm broader, more robust protections for journalistic sources. Likewise, the Court acknowledged that “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” [para. 35]. More, the Court recognized that only as a last resort should confidential journalist sources ought to be revealed.

However, the decision shifts away from the *JSPA*’s objective of enhancing protections for journalist sources by granting Courts the power to raise the issue of the disclosure of information that is likely to identify a source. Such discretion could ultimately cause a chilling effect, given that the media strongly relies on Courts to protect them when they report on complex and controversial stories.

***Perspective***:

* **Related International and/or regional laws**:
* N/A
* **National law or jurisprudence**:
	+ [Can.,Canada Evidence Act, R.S.C. 1985, c. C-5, s. 39.1.](https://laws-lois.justice.gc.ca/eng/acts/c-5/)
	+ [Can.,Canadian Charter of Rights and Freedoms, s. 2(b).](https://laws-lois.justice.gc.ca/eng/const/page-12.html#:~:text=1%20The%20Canadian%20Charter%20of,a%20free%20and%20democratic%20society.)
	+ [Can.,Criminal Code, R.S.C. 1985, c. C-46, s. 488.01.](https://laws-lois.justice.gc.ca/eng/acts/c-46/)
	+ [Can., Journalistic Sources Protection Act, S.C. 2017, c. 22, ss. 2, 3.](https://laws-lois.justice.gc.ca/eng/annualstatutes/2017_22/FullText.html#:~:text=It%20allows%20journalists%20to%20not,public%20interest%20in%20preserving%20the)
	+ [Can.,Supreme Court Act, R.S.C. 1985, c. S-26, s. 40](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-s-26/latest/rsc-1985-c-s-26.html)
	+ [Can.,R. v. Babos, 2014 SCC 16, [2014] 1 S.C.R. 309](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13487/index.do)
	+ [Can., R. v. O’Connor, [1995] 4 S.C.R. 411](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1323/index.do)
	+ [Can., R. v. Vice Media Canada Inc., 2018 SCC 53, [2018] 3 S.C.R. 374](https://globalfreedomofexpression.columbia.edu/cases/r-v-vice-media-canada-inc/)
	+ [Can.,R. v. National Post, 2010 SCC 16, [2010] 1 S.C.R. 477](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7856/index.do)
	+ [Can.,Globe and Mail v. Canada (Attorney General), 2010 SCC 41, [2010] 2 S.C.R. 592;](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7883/index.do)
	+ [Can.,Canadian Broadcasting Corp. v. Lessard, [1991] 3 S.C.R. 421](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/813/index.do)
	+ [Can.,Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326](https://globalfreedomofexpression.columbia.edu/cases/edmonton-journal-v-alberta/)
	+ [Can., Grant v. Torstar Corp., 2009 SCC 61, [2009] 3 S.C.R. 640](https://globalfreedomofexpression.columbia.edu/cases/grant-v-torstar/)
	+ [Can., Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712](https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/384/index.do)
	+ [Can. Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927](https://globalfreedomofexpression.columbia.edu/cases/irwin-toy-ltd-v-quebec/)
	+ [Can., R. v. Jordan, 2016 SCC 27, [2016] 1 S.C.R. 631](https://www.canlii.org/en/ca/scc/doc/2016/2016scc27/2016scc27.html)

**Other national law or jurisprudence**:

* **N/A**

***Significance***:

* The decision establishes a binding or persuasive precedent within its jurisdiction.
* **Related Cases**: Self-generated
* **Date updated**: N/A

***Docs***:

* **Official Case Documents**:

**Examples:**

Judgment (in English):<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17946/index.do>

* **Reports, Analysis, and News Articles**:
	+ Ramna Saferr (2019), Denis v Côté : Dancing at the Margins of Independent Rights for Journalists, TheCourt.CA
		- <http://www.thecourt.ca/denis-v-cote-dancing-at-the-margins-of-independent-rights-for-journalists/>
	+ Ruty Korotaev, The journalistic sources protection act gets its first test in Denis case, J-Source.
		- <https://j-source.ca/the-journalistic-sources-protection-act-stands-its-first-test-in-denis-case/>
	+ P Gutowski (2019) , Denis v Côté: Balancing Journalism and Justice , Robson Crim
		- <https://canliiconnects.org/en/summaries/67962>
	+ Anonymous (2019), Protection of journalistic sources, SCC decision in Denis v. Côté , Acumen Law Corporation
		- <https://vancouvercriminallaw.com/protection-of-journalistic-sources-scc-decision-in-denis-v-cote/>
	+ Dan Coles & Hot Topics (2019), Journalist Source Protection, BarTalk
		- <https://www.cbabc.org/BarTalk/Articles/2019/December/Features/Journalist-Source-Protection>