BRIEF SUBMITTED BY THE BARREAU DU QUÉBEC

Bill S-231, *An Act to amend the Canada Evidence Act and the Criminal Code (protection of journalistic sources)*

February 28, 2017

Barreau du Québec

Mission of the Barreau du Québec

To ensure the protection of the public, the Barreau du Québec oversees professional legal practice, promotes the rule of law, enhances the image of the profession and supports members in their practice.

Overview of the position of the Barreau du Québec

- ✓ **The Barreau du Québec supports the objective of the bill, which is to provide better protection for the confidentiality of journalistic sources**

  It is essential to promote the free circulation of information while at the same time preserving the right to a fair trial. The bill is an effort to strike a proper balance between these two sometimes contradictory facets of the public interest, and this is a crucial issue.

  It is also crucial that journalists be free to gather all relevant information so they are able to better inform the public. From that perspective, journalistic sources sometimes have to speak confidentially with journalists without being afraid their identity will be revealed.

- ✓ **The Barreau du Québec considers the definition of "journalist" proposed by the bill to be too broad, however**

  The proposed definition covers many participants involved in the journalism and media world, including people who are involved only occasionally. The protections offered by the bill will extend to people who have contributed on only a few occasions to the collection, writing or production of information. Anyone who assists such persons will also be protected. That definition is broad and could be used to prevent individuals from testifying who would otherwise be compellable.

- ✓ **The Barreau du Québec has questions about interlocutory appeals in criminal cases**

  In criminal cases, interlocutory appeals are practically nonexistent. This means that a decision on the merits of the case is generally required in the appeal, to avoid fragmenting a trial and spreading it out over a long period of time. These considerations have been exacerbated since the recent Supreme Court of Canada decision in *R.* v. *Jordan*. We therefore support a procedure for appealing an interlocutory decision only where it does not have the effect of unduly prolonging trials.

- ✓ **The Barreau du Québec has questions about judges' ability to issue search warrants that relate to journalists**

  The bill provides that search warrants relating to a journalist may be issued only by a judge of the Superior Court or of the Court of Québec. This means that presiding justices of the peace may not issue search warrants and authorizations. Presiding justices of the peace already apply important legal tests in issuing search warrants and it is hard for us to see why the bill limits the issuing of warrants relating to journalists to judges of the Superior Court of the Court of Québec alone.

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INTRODUCTION

The Barreau du Québec has read Bill S-231, *An Act to amend the Canada Evidence Act and the Criminal Code (protection of journalistic sources)* (hereinafter "the bill") with interest, and submits its comments herewith.

By amending the *Canada Evidence Act*,[1] Bill S-231 establishes the principle that journalists cannot be compelled to disclose information or documents from which a journalistic source could be identified, unless such information or documents cannot be obtained by any other reasonable means and the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the source.

It also provides that a judge may issue a warrant, an authorization or an order relating to a journalist or a document or data relating to or in the possession of a journalist only if he or she is satisfied that there is no other reasonable way to obtain them and the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information.

1. THE BARREAU DU QUÉBEC SUPPORTS THE OBJECTIVE OF THE BILL, WHICH IS TO PROVIDE BETTER PROTECTION FOR THE CONFIDENTIALITY OF JOURNALISTIC SOURCES

It is essential to promote the free circulation of information while at the same time preserving the right to a fair trial. The bill is an effort to strike the right balance between these two sometimes contradictory facets of the public interest, and this is crucial.

It is also crucial that journalists be free to gather all relevant information so they are able to better inform the public. From that perspective, journalistic sources sometimes have to speak confidentially with journalists without fear that their identity will be revealed.

However, it is important to point out that protection of the confidentiality of journalistic sources is not a fundamental right protected by the Canadian constitution. As the Supreme Court noted in *R.* v. *National Post*:[2]

> ... the protection attaching to freedom of expression is not limited to the "traditional media", but is enjoyed by "everyone" (in the words of s. 2(*b*) of the *Charter*) who chooses to exercise his or her freedom of expression on matters of public interest whether by blogging, tweeting, standing on a street corner and shouting the "news" at passing pedestrians or publishing in a national newspaper. To throw a constitutional immunity around the interactions of such a heterogeneous and ill-defined group of writers and speakers and whichever "sources" they deem worthy of a promise of confidentiality and on whatever terms they may choose to offer it (or, as

[1] R.S.C. 1985, c. C-5.
[2] [2010] 1 S.C.R. 477.

> here, choose to amend it with the benefit of hindsight) would blow a giant hole in law enforcement and other constitutionally recognized values such as privacy.
>
> The law needs to provide solid protection against the compelled disclosure of secret source identities in appropriate situations but the history of journalism in this country shows that the purpose of s. 2(*b*) can be fulfilled without the necessity of implying a constitutional immunity.[3] (Emphasis added)

Accordingly, while it is crucial to protect the exchange of information between journalists and their sources, certain exceptions must be put in place to promote the public interest in the administration of justice and the search for the truth.

> The public interest in freedom of expression is of immense importance but it is not absolute and in circumstances such as the present it must be balanced against other important public interests, including the investigation and suppression of crime. The courts understand the need in appropriate circumstances to protect from disclosure the identity of secret sources who provide the media, on condition of confidentiality, with information of public interest....[4] (Emphasis added)

For this reason, the Supreme Court laid down a test in *R.* v. *National Post* for determining what communications will enjoy protection from disclosure. A promise of confidentiality given by a journalist will be honoured if the communication was made privately with the assurance that the informant's identity would not be disclosed; confidentiality is essential to the relationship in which the communication arises; that relationship must be one that should be sedulously fostered in the public good; and the public interest in protecting the informant's identity from disclosure outweighs the public interest in getting at the truth.

Although the conclusions in that decision are based on the common law, the Supreme Court held in *Globe and Mail* v. *Canada (Attorney General)*[5] that similar principles apply in Quebec civil law:

> There is therefore a basis in the laws of Quebec for a journalist-source privilege or an exemption from the general obligation to give evidence in civil cases. Despite its common law origins, the use of a Wigmore-like framework to recognize the existence of the privilege in the criminal law context, as established in *National Post*, is equally relevant for litigation subject to the laws of Quebec.[6] (Emphasis added)

The applicable test in Quebec civil law was then summarized by Justice Lebel in that decision as follows:

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[3] *R.* v. *National Post*, *supra*, paras. 40 and 41.
[4] *Id.*, para. 5.
[5] *Globe and Mail* v. *Canada (Attorney General)*, [2010] 2 S.C.R. 592.
[6] *Globe and Mail v. Canada (Attorney General)*, *supra*, para. 53.

In summary, to require a journalist to answer questions in a judicial proceeding that may disclose the identity of a confidential source, the requesting party must demonstrate that the questions are relevant. If the questions are irrelevant, that will end the inquiry and there will be no need to consider the issue of journalist-source privilege. However, if the questions are relevant, then the court must go on to consider the four Wigmore factors and determine whether the journalist-source privilege should be recognized in the particular case. At the crucial fourth factor, the court must balance (1) the importance of disclosure to the administration of justice against (2) the public interest in maintaining journalist-source confidentiality. This balancing must be conducted in a context-specific manner, having regard to the particular demand for disclosure at issue. It is for the party seeking to establish the privilege to demonstrate that the interest in maintaining journalist-source confidentiality outweighs the public interest in the disclosure that the law would normally require.

The relevant considerations at this stage of the analysis, when a claim to privilege is made in the context of civil proceedings, include: how central the issue is to the dispute; the stage of the proceedings; whether the journalist is a party to the proceedings; and, perhaps most importantly, whether the information is available through any other means. ...[7]
(Emphasis added)

[7] *Id.*, para. 65.

2. THE BARREAU DU QUÉBEC CONSIDERS THE DEFINITION OF "JOURNALIST" PROPOSED BY THE BILL TO BE TOO BROAD, HOWEVER

Clause 2 of the bill adding section 39.1(1) to the *Canada Evidence Act*

39.1(1) ***journalist*** means a person who contributes directly, either regularly or occasionally, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person.

The Barreau du Québec welcomes the introduction of a definition of the expression "journalist" in the bill. A definition of the concept of journalist is essential in order to properly delineate the field to which the bill applies. However, we have questions about the meaning of the definition as it is worded.

The proposed definition actually covers many participants involved in the journalism and media world, including people who are involved only occasionally. The protections offered by the bill will extend to people who have contributed on only a few occasions to the collection, writing or production of information. Anyone who assists such persons will also be protected. That definition is broad and could be used to prevent individuals from testifying who would otherwise be compellable.

It is important to note that the compellability of witnesses is a principle that is essential to the proper functioning of the administration of justice. For that reason, exceptions to this principle are rare. The *Code of Civil Procedure*[8] of Quebec provides only three:

- ✓ communications made to a spouse during community of life;[9]
- ✓ information obtained in the exercise of a public servant's functions;[10]
- ✓ professional secrecy.[11]

The *Canada Evidence Act* provides for spousal privilege in respect of communications made during the marriage[12] and the *Canadian Charter of Rights and Freedoms* protects individuals against self-incrimination.[13] Disclosure of information protected by solicitor-

[8] CQLR, c. C-25.01.
[9] *Id.*, art. 282.
[10] *Id.*, art. 283.
[11] *Id.*, art. 284.
[12] *Canada Evidence Act*, *s. 4(3)*.
[13] Part I of the *Constitution Act, 1982* [Schedule B to the *Canada Act 1982* (UK), 1982, c. 11], s. 11 (Hereinafter "Canadian Charter").

client privilege, which is recognized as a principle of fundamental justice within the meaning of section 7 of the Canadian Charter,[14] is also protected.

The Barreau du Québec therefore urges caution in creating an exception to the principle of the compellability of witnesses before the courts or to the privileges they are allowed. It is important that Parliament weigh these competing interests in order to establish a definition of "journalist" that is not too broad, but that effectively protects journalists and the confidentiality of sources.

This is a particularly notable problem because of the fact that the bill does not include any definition of the concept of "media". In addition, the protection proposed extends to "anyone who assists" journalists, a concept that is also difficult to define. As the Court said in *R.* v. *National Post*:

> Journalistic-confidential source privilege has not previously been recognized as a class privilege by our Court (*Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572), and has been rejected by courts in other common law jurisdictions with whom we have strong affinities. The reasons are easily stated. First is the immense variety and degrees of professionalism (or the lack of it) of persons who now "gather" and "publish" news said to be based on secret sources. In contrast to the legal profession there is no formal accreditation process to "licence" the practice of journalism, and no professional organization (such as a law society) to regulate its members and attempt to maintain professional standards. Nor, given the scope of activity contemplated as journalism in *Grant v. Torstar*, could such an organization be readily envisaged.[15] (Emphasis added)

In fact, it may be difficult for the various actors involved, including the police, criminal and penal prosecutors and judges, to determine whether a particular person referred to in a warrant is in fact a journalist or a person working for a media outlet who assists a journalist.

[14] See, for example, the recent decision in *Canada (Attorney General)* v. *Chambre des notaires du Québec*, [2016] 1 S.C.R. 336.
[15] *R.* v. *National Post, supra*, para. 43.

3. THE BARREAU DU QUÉBEC HAS QUESTIONS ABOUT INTERLOCUTORY APPEALS IN CRIMINAL CASES

Clause 2 of the bill adding subsections (9) to (11) to section 39.1 of the *Canada Evidence Act*

39.1(9) 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.

(10) An appeal under subsection (9) 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.

(11) An appeal under subsection (9) shall be heard and determined without delay and in a summary way.

The bill provides a procedure for an interlocutory appeal from a determination by a court or body concerning the disclosure of information or documents that could identify a journalistic source. The Barreau du Québec supports that measure, but has questions about the field it covers in criminal cases. The *Canada Evidence Act* applies to all trials governed by a federal statute, including criminal procedure.

In criminal cases, interlocutory appeals are practically nonexistent.[16] Section 37.1 of the *Canada Evidence Act* provides for an interlocutory appeal only from a determination in criminal law. That section provides for an appeal from a determination concerning an objection to the disclosure of information to a court, a body or a person vested with power to compel the production of information for specified public interest reasons. However, it appears from *R.* v. *Minisini*[17] that appellate courts prefer, where possible, to defer this type of appeal to the panel that will hear the appeal concerning guilt. This means that a decision on the merits of the case is generally required when an appeal is taken, to avoid fragmenting a trial and spreading it out over a long period of time.[18] These considerations have been exacerbated since the recent Supreme Court of Canada decision in *R.* v. *Jordan*.[19] We therefore support a procedure for appealing an interlocutory decision only where it does not have the effect of unduly prolonging trials.

[16] Tristan DESJARDINS, *L'appel en droit criminel et pénal*, 2nd ed., Montreal, LexisNexis, 2012, p. 6.
[17] 2008 QCCA 264.
[18] *R.* v. *La Chapelle*, 1988 ABCA 263.
[19] [2016] 1 S.C.R. 631.

4. THE BARREAU DU QUÉBEC HAS QUESTIONS ABOUT JUDGES' ABILITY TO ISSUE SEARCH WARRANTS THAT RELATE TO JOURNALISTS

Clause 3 of the bill adding section 488.01 to the *Criminal Code*

488.01 (2) Despite any other provision of this Act or any other Act of Parliament, a search warrant under this Act, notably under section 487, 487.1, 492.1 or 492.2, or any other Act of Parliament, an authorization under section 184.2, 184.3, 186 or 188, or an order under any of sections 487.014 to 487.017 relating to a journalist or an object, document or data relating to or in the possession of a journalist may be issued only by a judge of a superior court of criminal jurisdiction or by a judge within the meaning of section 552.

The bill requires that search warrants relating to a journalist or an object, document or data relating to or in the possession of a journalist may be issued only by a judge of a superior court of criminal jurisdiction[20] or a judge within the meaning of section 552 of the *Criminal Code*.[21] This means that in Quebec, presiding justices of the peace may not issue the warrants and authorizations provided in section 488.01 as proposed by the bill.

This specific provision seems to us to be unusual, since a large majority of the search warrants and authorizations provided for in the *Criminal Code* are issued by presiding justices of the peace.[22] One of the few authorizations that may not be issued by presiding justices of the peace is an authorization to intercept private communications.[23]

For this reason, the Barreau du Québec has questions about the objective of and need for this measure. Presiding justices of the peace already apply important legal tests in issuing search warrants and it is hard for us to see why the bill limits the issuing of warrants relating to journalists to judges of the Superior Court of the Court of Québec alone.

[20] In Quebec, a judge of the Superior Court.
[21] R.S.C. 1985, c. C-46. In Quebec, a judge of the Court of Québec.
[22] S. 487.1 Cr. Code.
[23] S. 185 Cr. Code.

CONCLUSION

The Barreau du Québec reiterates its support for the objective of the bill, which is to provide better protection for the confidentiality of journalistic sources. It is essential to promote the free circulation of information while at the same time preserving the right to a fair trial.

The comments and recommendations made by the Barreau du Québec in this brief are intended to improve the bill so that it can fully achieve its objective.

Based on the various decisions of the Supreme Court of Canada, the public interest in respecting the confidentiality of journalistic sources and freedom of expression is crucial, but it must also be weighed against other interests that are also important, such as the conduct of criminal investigations, punishing crimes, and the public interest in the administration of justice.