BRIEF BY

THE CANADIAN MEDIA COALITION

La Presse, ltée

Postmedia Network Inc.

Torstar Newspapers Ltd.

Bell Media Inc.

Corus Entertainment Inc.

CBC/Radio-Canada

Submitted in the course of the

SPECIAL CONSULTATIONS AND PUBLIC HEARINGS ON BILL S-231,

AN ACT TO AMEND THE CANADA EVIDENCE ACT AND

THE CRIMINAL CODE (PROTECTION OF JOURNALISTIC SOURCES)

Presented on February 15, 2017

to

The Standing Senate Committee on
Legal and Constitutional Affairs

The Canadian Media Coalition (the "Coalition") wishes to voice its support for Bill S-231. Amendments to the applicable criteria and processes in order to force a journalist to reveal information that could identify a confidential source are urgently required. In this brief, the Coalition will describe the background of its representations and will then go on to suggest a few improvements to the draft bill.

Meanwhile, the *Commission d'enquête sur la protection de la confidentialité des sources journalistiques* created by the Government of Québec has a mandate, inter alia, to cast light on the conduct of the police toward journalists. Certain members of the Coalition intend to make their representations to the said Commission and the Coalition will therefore restrict its comments strictly to Bill S-231.

I. BACKGROUND OF THE REPRESENTATIONS BY THE COALITION

In October 2016, La Presse learned that one of its journalists, Patrick Lagacé, had been the subject of a series of judicial orders at the request of an internal affairs officer of the Montreal police force, the *Service de police de la Ville de Montréal* ("SPVM"). In all, 24 judicial authorizations were obtained for the avowed purpose of identifying the journalist's confidential sources inside the SPVM. The authorizations which were obtained allowed the SPVM to compile a complete record of:

- all the phone numbers having contacted Patrick Lagacé's cell phone from May 1, 2015 to July 12, 2016 — both through phone calls and text messages;
- the identity of all the account holders connected to those numbers along with their contact information and the other confidential services of those subscribers;
- the location of Patrick Lagacé based on the identification of the cell phone towers used during such communications; and
- the precise location of Patrick Lagacé at all times by way of a GPS localization warrant.

Nowhere in the documents which the investigator submitted to the justices of the peace is there any indication of concern about compliance with the criteria laid out by the Supreme Court of Canada for the execution of search warrants against journalists[1] or for attempts to discover the identity of a journalist's confidential source[2]. Moreover, the criminal investigation was directed at a police officer who was suspected of giving information to a journalist. However, according to the

[1] *CBC* v. *Lessard*, [1991] 3 S.C.R. 421
[2] *R.* v. *National Post*, [2010] 1 S.C.R. 477

Coalition's research, no breach of trust charges have ever been laid in Canada against a police officer or public servant for having given information to a journalist.

Following these revelations, the public learned that investigators had gained access to the phone records of journalists in other cases, again for the purpose of identifying confidential sources.

Thus, in the following days, the provincial police, the Sûreté du Québec, admitted that a year earlier it had asked and obtained the orders allowing it to access the phone records of six journalists: Alain Gravel, Marie-Maude Denis and Isabelle Richer of Radio-Canada, André Cédilot and Denis Lessard of *La Presse*, and Éric Thibault of the *Journal de Montréal*. According to the available information, the Sûreté du Québec had apparently obtained the records of all the calls received and made by these journalists over a period varying from a few months to five years. As regards the Radio-Canada journalists, their records were obtained for the longest period, namely from November 2008 to October 2013.

Finally, in 2014, the same SPVM internal affairs investigator who was responsible for the 2016 investigation, had also obtained Patrick Lagacé's phone records. He sought to identify a source in connection with a journalistic investigation into a traffic ticket issued to Denis Coderre before he became Montreal's current mayor, while he was a Member of Parliament.

These three cases illustrate the inadequacy of the current framework when it comes to protecting journalists' confidential sources, especially when disclosure orders are obtained and executed without the knowledge of the journalists in question. This method of operation *de facto* allows police officers to bypass the rules laid out by the Supreme Court in the *Lessard* and *National Post* decisions.

This situation is serious and urgent: it is universally recognized that non-transparent and unrestricted access by the police to the information, recordings and data gathered by journalists can severely limit their ability to report on important matters of public interest. Such reporting is vital in a democracy where the media acts as a vital check and balance on government, and as a watchful eye on what is supposed to be an open court system of justice. Journalists who are perceived to be cooperating or acting as agents of the police will see their sources dry up over fears of being identified and/or prosecuted based on information they provide. Information that is vital to a healthy public debate may never be revealed if sources come to know that the authorities can easily learn their identity. Whistleblowers will be discouraged from reporting the egregious and negligent acts or criminal wrongdoing they witnessed because of the fear of reprisal.

II. THE IMPORTANCE OF PROTECTING CONFIDENTIAL SOURCES

In 2010, the Supreme Court of Canada acknowledged the importance of journalists' confidential sources[3]:

> [3] The courts should strive to uphold the special position of the media and protect the media's secret sources where such protection is in the public interest, (…)
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> [33] (…) We should likewise recognize in this case the further step that an important element in the news gathering function (especially in the area of investigative journalism) is the ability of the media to make use of confidential sources. The appellants and their expert witnesses make a convincing case that unless the media can offer anonymity in situations where sources would otherwise dry-up, freedom of expression in debate on matters of public interest would be badly compromised. Important stories will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment.

It had been demonstrated to the Court that, without confidential sources, a number of events that were undeniably of public interest would never have been disclosed to the public. The Court referred in particular to the tainted tuna scandal, the secret commissions paid by Airbus Industrie, the investigation into an RCMP employee suspected of being a KGB mole, the health inspection system for restaurants in the City of Toronto, the activities of an illegal slaughterhouse which presented a major health hazard, information about the fall of Nortel Networks, and the wrongdoings of the RCMP in 1977. South of the border, the Watergate affair and the Pentagon Papers made their mark on American culture, as did the revelations concerning the abuses at the Abu Ghraib prison. Closer to home, one might also think of the sponsorship scandal, which would not have come to light without the contribution of confidential sources.

More recently, one could add to this list the revelation of the systemic corruption in Québec's construction industry, which eventually led to major investigations and the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry. These inquiries, arising from the work of journalists, led to the filing of charges and the conviction of some of those involved. Important legislative and regulatory changes were also enacted by the Québec National Assembly as a result of these revelations.

The Court of Appeal of Québec, in a decision penned by Justice Dalphond, well describes the contribution which confidential sources make to the public's right to information:

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[3] *Ibid*

> [TRANSLATION] To deny journalists the right to use confidential information would seriously limit, if not annihilate, their ability to investigate and gather information. Moreover, this kind of reasoning would have prevented some major journalistic investigations, such as the one that led to the revelation of the dubious management of the sponsorship program.[4]

However, Canada is behind the rest of the western world in terms of the protection of sources. Numerous democracies and international organizations have recognized the importance of protecting journalists' confidential sources by enacting specific legislation. According to a study published in 2007[5], some one hundred countries have enacted protection for the confidentiality of journalists' sources by either passing a law or enshrining it in the country's constitution. Several other countries have recognized this principle under their common law or as an essential adjunct to the right to freedom of speech. Alarmingly, the author ranked Canada as one of the laggards:

> The US, Canada, and Ireland stand out as the few established democratic countries that do not automatically respect the right of protection of sources.

Nonetheless, in the United States, even though there is no federal legislation on this matter, the vast majority of states recognize that journalistic sources are privileged, with more than 30 states enacting specific legislation. This privilege is also explicitly recognized by specific laws in Australia, Argentina, Germany, Belgium, El Salvador, France, Great Britain, Mexico, Norway, New Zealand, Sweden, and Switzerland, to name but a few. Privilege even exists in the legislation of countries known to have a more tense relationship with the media, such as Russia.

Declarations of principle by the Council of Europe[6] and the Human Rights Commission of the Organization of American States[7] are in the same vein.

Since the *Goodwind*[8] affair, the European Court of Human Rights has recognized and applied the principle of the protection of journalistic sources. The Court has

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[4] *Gesca limitée* c. *Le groupe Polygone éditeurs inc.*, 2009 QCCA 1534

[5] BANISAR, David, *Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources*.

[6] *Recommendation of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information,* R (2000) 7, March 8, 2000.

[7] *Inter-American Declaration of Principles on Freedom of Expression*, Inter-American Commission on Human Rights.

[8] *Goodwind* v. *United Kingdom*, 22 Eur. H. R. Rep 123: "Without such protection, sources may be deterred from assisting the press in informing the public in matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected".

reiterated on several occasions[9] that searches and seizures executed against journalists to discover the identity of a source represented a violation of the European Convention on Human Rights. The same protection has been recognized for war correspondents by the appeals division of the International Tribunal for the former Yugoslavia[10].

Experience has shown that the current system in Canada does not adequately protect confidential sources in the context of police investigations. If, as in the above cases, an investigation into a non-existent crime is sufficient to compile a complete record of all of a journalist's confidential sources, the vast majority of whom are completely extraneous to the investigation, it can only be concluded that the current legal framework is insufficient.

III. THE GUARANTEES CONTAINED IN BILL S-231

Bill S-231 contains two sets of legislative amendments necessary for the protection of journalistic sources.

The purpose of the amendments to the *Canada Evidence Act* is to allow a journalist to object to disclosing information on the ground that it could identify a journalistic source.

The purpose of the amendments to the *Criminal Code* is to tighten up the conditions for obtaining a court order for search and seizure or for disclosure when the ultimate target is a journalist or journalistic information.

(a) Amendments to the *Canada Evidence Act*

The Coalition considers that, with some adjustments, the proposed amendments will provide adequate protection for confidential sources, while not otherwise being excessive in their scope.

(i) Definition of journalist

The definition of "journalist" covers the majority of persons acting as journalists in Canada. However, the proposed definition excludes editorial writers and columnists. This situation is problematic because editorial writers and columnists, being so visible to the public, tend to receive many tips or confidential information. Moreover, it is necessary to stipulate that persons who were acting as journalists when they received information will also be protected. Therefore the Coalition suggests revising the definition to include these two categories of individuals:

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[9] *Roemen and Schmit* v. *Luxembourg*, 51772/99 [2003] ECHR 102 (February 25, 2003); *Ernst and Others* v. *Belgium*, 33400/96 [2003] ECHR 359 (July 15, 2003).
[10] *Prosecutor* v. *Brdjanin and Talic,* IT-99-36-AR73.9.

> ***journalist*** means a person who contributes or contributed at the relevant time directly, either regularly or occasionally, to the collection, writing or production of information, editorials or columns for dissemination by the media, or anyone who assists such a person.

During earlier work, some people had raised concerns about the fact that the definition of journalist was too broad and, accordingly, susceptible of applying to a large number of people who were clearly not journalists. The current proposal could be amended to specify that only career journalists are covered:

> ***journalist*** means a person who, in connection with his or her primary paid occupation, contributes or contributed directly and regularly or occasionally, to the collection, writing or production of information, editorials or columns for dissemination to the public by the media, or anyone who assists such a person.

In the past, some prosecution and police force representatives have claimed, erroneously, that a broad definition of journalist would shelter many criminals from prosecution, inasmuch as they occasionally publish a few texts on social media or maintain a website. The Coalition is of the view that the proposed definition limits its application to individuals who are unquestionably career journalists. Moreover, it must be borne in mind that a judge could always refuse to apply the definition in borderline situations or clear cases of abuse.

The Coalition also underlines the fact that in general the police have no problem identifying who is a journalist. Their investigations are often instigated by newspaper articles or news reports prepared by the person who will become their target. It would be regrettable to refuse to protect journalists and their sources out of a hypothetical fear that such protection might someday, perhaps, be wrongfully invoked by organized criminals.

Meanwhile, since it is difficult to accurately foresee all scenarios, the Coalition recommends the adoption of a clause that would give a judge discretion to recognize that a person was acting as a journalist in a specific instance, notwithstanding that the person in question may not qualify under the general definition:

> If a person does not qualify as a journalist under the foregoing definition, that person may nevertheless be recognized as being a journalist within the meaning of the Act if it is demonstrated that the person has the usual characteristics of a journalist;

(ii) Privilege

Bill S-231 provides for a generic privilege to protect a journalist's confidential sources. It is not an absolute privilege. The deciding authority before whom the privilege is invoked must find the balance between the importance of protecting

confidential sources and reasonable limits on the authority of government and police to investigate and prosecute citizens in accordance with Canadian laws.

The Coalition is in favour of such a balance, but it submits that additional guidelines must be established. The test developed by the Supreme Court of Canada in *Lessard* can be perfectly adapted to this type of situation. Subsection 39.1 (7) (a) could be amended as follows:

> **39.1 (7) (a)** the information, recording or document cannot be produced in evidence by any other reasonable means, having regard to:
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> (i) as a last resort in the absence of other sources of information, or
> (ii) if other sources, including non-journalistic ones, do exist, they have been consulted and all reasonable efforts to obtain the information have been exhausted;

Experience has shown that the journalist's intervention, where possible, is always of a nature to fully enlighten the deciding authority. It would therefore be desirable to provide that if the deciding authority raises the existence of privilege on their own initiative the journalist will be heard:

> **39.1 (4)** The court, person or body may raise the application of subsection (3) on their own initiative. The journalist in question must then have an opportunity to be heard, as well as the media for which he operates.

Finally, the Bill seems to leave no leeway for the deciding authority in the decision that must be rendered. Either the information is disclosed, or it is not. It would be desirable to state explicitly that the deciding authority may render a decision tailored to the situation, while preserving the confidentiality of the source's identity:

> **39.1** (7.1) Before the court, person or body authorizes the disclosure of information or a document, it must consider all the alternatives and the methods of communication which will allow the disclosure to still preserve the identity of the journalistic source.

(b) Amendments to the *Criminal Code*

Amendments to the *Criminal Code* are urgently required. At this stage, there are almost no safeguards to prevent an investigator from obtaining, upon request, a complete record of the identity of a journalist's sources. Experience shows that this possibility exists notwithstanding the absence of a criminal act or an emergency, even when other more efficient investigative techniques are available.

Disclosure orders, sought and executed without journalists' knowledge, circumvent the guarantees considered by the Supreme Court in the *National Post* decision. More specifically, the Wigmore test described by the Court cannot be applied in

such instances, since the journalist is completely unaware of the data-gathering the investigator wishes to conduct.

*(i) Exclusive jurisdiction conferred on judges (**488.01 (2)**)*

The impacts of search warrants issued in relation to the media or journalists are significant. The requirement to observe stricter rules before obtaining a search warrant or a disclosure order will not impede serious police investigations, while it will prevent the existing tools from being used for other than their original purpose.

The obtaining of warrants relating to journalists should be exceptional. There should be nothing routine or typical in police obtaining warrants and court orders to expose a journalist's confidential sources. Therefore, it is necessary to entrust such exceptional acts to judges rather than justices of the peace as provided in Bill S-231 (section **488.01 (2)**) to ensure that special attention is given to such applications.

The Coalition will leave it to others to reflect on the justice of the peace institution, but it cannot remain silent about certain disturbing facts. According to the Commitee on the Remuneration of Judges*,* the vast majority of the justices of the peace appointed by the government come from the public service, including from the Director of Criminal and Penal Prosecutions, which raises the issue of the appearance of institutional partiality[11]. The appearance of conflict of interest and bias can weaken public confidence in the justice system. This perception is reinforced when one considers that since 2013, the justices of the peace sitting in Montreal have approved between 98.3% and 99.2% of the applications presented by the SPVM[12]. Based on these recent statistics, the public might conclude that justices of the peace are not fulfilling their intended role as guardians of the public's charter rights, and are unable to meet their responsibilities to check government and police powers in cases of abuse or misrepresentation. It is likely that the lack of specialized training for justices of the peace in this regard may play a role.

(ii) Protection measures

Subsection **488.01 (3)** of the proposed Bill adds two conditions for the issuance of a warrant: a demonstration that there is no other source of information and a test balancing the public interest against the journalist's right to confidentiality. The balancing test reformulates the test that should be applied currently, but is not.

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[11] *Report of the Committee on the Remuneration of Judges 2016-2019*, p. 119. In the last nine years, only one justice of the peace has come from the private sector.

[12] *Les procédures et les critères suivis par le SPVM pour l'obtention de mandats judiciaires visant des journalistes dans le cours d'enquêtes*, report of the Commission de la sécurité publique submitted to the Municipal Council of Montréal on December 19, 2016.

The Coalition acknowledges that once information has been published in full, the privilege covering journalistic material with respect to this published version no longer applies. This exception could be stated.

The obtaining of a warrant relating to journalists must be exceptional, a tool of last resort when all other investigative avenues and techniques have been exhausted. This will discourage the abuse of such warrants and court orders, preventing them from being used for anything other than their intended purpose. The burden of proof that confidential sources should be publicly exposed should sit squarely with government and the authorities. It should not be for journalists to defend this privilege, rather it is for government and police to convince the Court that privilege should be suspended in the rarest of circumstances in the interest of justice and in service of the public interest.

Before approving such a warrant, the judge should be convinced that there is no other alternative and that the crime committed is serious enough to justify infringing on the freedom of the press. Subsection **488.01 (3)** should be reformulated:

> (3) A judge may issue a warrant, authorization or order under subsection (2) only if, in addition to the conditions required for the issue of the warrant, authorization or order, he or she is satisfied that <u>either the information, recording or document in question has already been published in full in the same form as the one sought, or that</u>
>
> a) there is no other way, including non-journalistic sources, by which the information can reasonably be obtained;
> b) <u>the information sought is of overriding importance to establish proof of the commission of a crime punishable by at least ten years of imprisonment[13], or to prevent an imminent violent act or a grave and imminent risk to public security;</u> and
> c) the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information;

[13] For example :

- 63 : Wearing of mask during a riot or an unlawful assembly;
- 88 : Possession of weapon for dangerous purpose;
- 139 : Obstructing justice;
- 163.1 : Possession of child pornography;
- 221 : Causing bodily harm by criminal negligence;
- 249 : Dangerous operation causing bodily harm;
- 271 : Sexual assault;
- 342 : Theft, forgery, etc., of credit card;
- 348 : Breaking and entering with intent, committing offence or breaking out in relation to a place other than a dwelling-house.

The identical test reiterated in subsection **488.02 (5)** should also be reformulated in accordance with the foregoing.

In the course of earlier debates, some have claimed that tightening up the rules would hinder investigations involving public security. That is not the case. The test as reformulated specifically stipulates that urgent and important investigations involving serious crime, violence or risk to public security will be exceptions to the privilege, so long as the other two criteria of subsection **488.01 (3)** are satisfied.

In Canada as well as in other parts of the world, there seem to be no examples of cases where a journalist's invocation of privilege has jeopardized or compromised an investigation involving national security. In the same vein, none of the countries with similar legislation have reported any such issues.

Furthermore, in cases where prior notification will not substantially hinder an investigation, notice should be given to the journalist before a warrant is obtained:

> Before a warrant, authorization or order is granted in accordance with subsection (3), the judge should hear representations from the journalist who is involved unless the judge is convinced, by clear and convincing proof, that giving the journalist prior notice would entail a substantial risk to the integrity of a criminal investigation or that a state of emergency exists.

If such a notice cannot be given for the aforesaid reasons, the Coalition suggests calling on the services of a special advocate, a type of *amicus curiae*, who could, after reviewing the disclosure, make the necessary representations to the judge. This exercise would allow the judge to get a fuller picture of the situation and to benefit from the special enlightenment provided by a lawyer who is experienced in this particular field of the law:

> If the judge determines that prior notice cannot be given, he or she may only grant a warrant, authorization or order in accordance with subsection (3) after having heard the representations of a special advocate, in accordance with the procedure described in sections 85 to 85.5 of the *Immigration and Refugee Protection Act*, with the necessary adaptations.

The automatic placement under seal described in subsection **488.02 (1)** is an essential measure, which was described with approval by the Supreme Court in *National Post*. Otherwise, as soon as the information is seized or communicated to the investigator, the identity of the confidential sources will have been revealed. Intervention by the journalist at this stage could permit the identity of the source to be protected, while leaving it to a judge to determine what can be communicated to the investigator to advance the investigation, as the case may be.

However, in *National Post*, the Court endorsed a process by which the seal was put in place as soon as the seizure was executed, rather than when the documents were submitted to the Court. The Coalition is of the opinion that this situation is better suited to protect the confidentiality of sources:

> **488.02 (1)** Any document obtained pursuant to a warrant, authorization or order issued under subsection 488.01 (3) is to be immediately placed in a packet and sealed by the officer who obtains the document without being examined, reproduced or copied; the packet is to be kept in the custody of the court that issued the warrant, authorization or order in a place to which the public has no access or in such other place that the judge may authorize and is not to be dealt with except in accordance with this section.

The Coalition notes that, unlike the amendments to the *Evidence Act*, the Bill provides in subsection **488.02 7 (b)** that the judge can exercise his or her discretion about the conditions of disclosure, which is desirable. The Coalition suggests harmonizing these sections.

By way of conclusion, the Coalition wishes to reiterate its primary concern: the existing legislative system is no longer suited to the investigative techniques used by the police to identify journalists' sources, whether by obtaining phone records, tailing by activation of a phone's GPS or by the use of real-time number-recording devices. These investigative techniques circumvent the measures which the Supreme Court found necessary to the preservation of a free press. It is urgent that Parliament correct this situation by adopting measures that will restore a fair balance between the repression of crime and the public's unfettered right to information, about major public issues.