CSN Confédération des syndicats nationaux

fnc. Fédération nationale des communications

Brief submitted by the Confédération des syndicats nationaux and the Fédération nationale des communications-CSN

To the Standing Senate Committee on
Legal and Constitutional Affairs

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

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Confédération des syndicats nationaux
1601 De Lorimier Avenue
Montreal, Quebec
H2K 4M5
Tel.: 514-598-2271
Fax: 514-598-2052
www.csn.qc.ca

Foreword

The Confédération des syndicats nationaux (CSN) is a trade union organization with nearly 2,000 member unions, who together represent over 325,000 working women and men, primarily within Quebec, who are organized on a sectoral or occupational basis into eight federations and on a regional basis into 13 central councils.

For years now, the CSN has been concerned about issues relating to the public's right to be informed. For example, in 2011 the CSN took part in the consultations held by the Quebec Department of Culture, Communications and the Status of Women regarding news in the public interest. In addition, many of our members from the Fédération nationale des communications (FNC-CSN) work in the media and the cultural industries.

The FNC-CSN consists of 88 unions with some 6,000 members from the communications and cultural industries, including most of the unionized journalists in the major print and electronic media, mainly in Quebec, but also in Ontario and New Brunswick. Over the years, the FNC-CSN has developed strong expertise in the issues surrounding the quality of news and the future of the media. For example, in April 2016 the FNC-CSN submitted a brief on the future of regional news to the Standing Committee on Canadian Heritage. It also submitted two briefs in November 2016 for the consultations on Canadian content in a digital world. In May 2016, the FNC-CSN submitted a brief to the office for the renewal of the Quebec government's cultural policy for the Quebec Department of Culture and Communications consultations on the problems facing the news media and potential solutions. Finally, the FNC-CSN was just recognized as an intervener by the Quebec commission of inquiry on the protection of confidential media sources, recently established by the Government of Quebec.

Introduction

The media are a unique industry. They play a vital role in building and maintaining democracy. They contribute to transparency in government and public administration. The media are not without their faults, but they are critical to the formation and expression of public opinion, and social engagement. The freedom, quality and diversity of the press still need to be preserved.

We were therefore deeply shocked by the revelations of police surveillance of numerous journalists in Quebec who were legitimately doing their jobs. These events raise serious concerns about the public's right to be informed.

The protection of journalistic sources

Protecting journalistic sources is vital to freedom of the press. Yet the *Canadian Charter of Rights and Freedoms* offers little protection in this regard. According to the Supreme Court, "There is no basis for recognizing a class-based constitutional or quasi-constitutional journalist-source privilege under … the Canadian Charter."[1] However, the Court recognized a "case-by-case" privilege based on the Wigmore test, a general, four-step test that applies to evidence. The test is therefore not specifically designed to protect journalistic sources. Moreover, the burden of proof lies with the party that invokes the confidentiality privilege.

Given the above, we can conclude that confidential sources are not completely protected. Indeed, these criteria clearly did not prevent law enforcement from spying on a number of Quebec journalists.

Accordingly, we enthusiastically welcome Bill S-231, An Act to amend the Canada Evidence Act and the Criminal Code (protection of journalistic sources). This legislation is a step in the right direction. Nevertheless, this brief suggests several improvements.

Definition of a journalist

The bill defines a "journalist" as "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." This definition does not require that a journalist be paid, a choice we applaud. We also approve of the fact that the protection extends to occasional contributors and those who assist journalists. However, the use of the term "directly" seems superfluous to us and could provoke needless debate (s. 39.1(1)). In addition, we believe the use of such a term does not account for the profound changes affecting the journalism profession.

Definitions of a document and data

The bill defines a "document" and "data" with references to section 487.011 of the *Criminal Code*.[2]

We believe it is inappropriate to use the definitions of "document" and "data" set out in section 487.011 of the *Criminal Code*. The bill should protect all forms of data, whether they are location, transmission or computer data.

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[1] Globe and Mail *v. Canada (Attorney General)*, [2010] 2 SCR 592.

[2] Document: A medium on which data is registered or marked.
Data: Representations, including signs, signals or symbols, that are capable of being understood by an individual or processed by a computer system or other device.

Canada Evidence Act

Objection to disclosure

Under the bill, a journalist may object to the disclosure of information or a document before a court (broadly defined) on the grounds that it identifies or is likely to identify a journalistic source.[3] When an objection is raised, the disclosure can be made only if the information or document cannot be produced in evidence 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.

The criteria for authorizing disclosure are not strict enough. The criterion requiring that the information or document cannot be produced in evidence "by any other reasonable means" seems to us inadequate (s. 39.1(7)(a)). The criterion should instead be that *no* other reasonable means is available to produce in evidence information that identifies a source.

The second criterion asks the court to determine whether the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source (s. 39.1(7)(b)). In weighing these interests, the court considers whether or not the role of the information or document is essential, freedom of the press and the impact of disclosure on the source and the journalist. Granted, the burden of proof lies with the person who requests the disclosure (s. 39.1(8)). We believe this reverse onus—relative to the current system—is vital. However, as the bill essentially applies to criminal matters, we fear that the weighing test will unduly favour the administration of justice over the confidentiality of sources.

Finally, we must reiterate that all types of data should be protected, not just "documents" and "data" within the meaning of section 487.011 of the *Criminal Code*.

Criminal Code amendments

The bill sets out a specific *Criminal Code* procedure for searches or other surveillance activities relating to a journalist (s. 488.01 to s. 488.03).

Judges

The bill provides that only a judge of a superior court or a judge of the Court of Quebec (in Quebec) may authorize such search warrants or similar orders (s. 488.01(2)), thus stripping administrative justices of the peace of their jurisdiction in such cases. We agree

[3] The court may even object on its own initiative.

with this approach, especially since a recent study showed that search warrants sought by the Montreal police force (SPVM) from justices of the peace were nearly always granted.[4]

Search for and disclosure of documents

The process for issuing a warrant, authorization or order has two stages. First, a judge must authorize the search, seizure, surveillance, electronic eavesdropping, etc. The documents seized are subsequently sealed and kept in the custody of the court. Second, a judge must authorize the disclosure of the information or documents seized.

First and foremost, we want to underscore the ambiguity of the procedures covered by the process. Section 488.01(2) covers all search warrants issued under all federal laws, but applies only to those authorizations and orders issued pursuant to the *Criminal Code*. This means that authorizations and orders made under other federal laws would not be covered. This appears to be a flaw in the legislation.

Moreover, the judge may issue the warrant, authorization or order only if he or she is satisfied that there is no other way by which the information can reasonably be obtained 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. We must reiterate the danger of a criterion that, in criminal matters, could unduly favour the administration of justice at the expense of the protection of sources. The risk is even greater at the stage of issuing a search warrant, authorization or order since the journalist or media outlet will not be summoned to the hearing. As a result, at this stage the court will hear only the perspective of the police officers. This flaw should be corrected.

We believe that, except in case of emergency or where the materials are at risk of destruction, the media outlet or journalist subject to the search order should be informed that a warrant is about to be issued. Indeed, this is the procedure recommended by Judges LeBel and Abella (dissenting) in the National Post decision.[5] If this option is not adopted, then at the very least it would be appropriate to allow a lawyer with expertise in freedom of the press to be present (as a friend of the court) when the warrant is issued. This lawyer could help the court balance the interests involved.

In addition, the bill provides that the judge "may" set conditions to protect the confidentiality of journalistic sources and to limit the disruption of journalistic activities (s. 488.01(4)). We believe that the judge *should* in all cases impose strict conditions on the execution of the warrant, authorization or order. To that end, and given that neither the journalist nor the media outlet is invited to the authorization hearing, the conditions

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[4] "SPVM: 98.6% des mandats demandés aux juges de paix sont autorisés," *La Presse*, December 16, 2016, http://www.lapresse.ca/actualites/justice-et-affaires-criminelles/actualites-judiciaires/201612/15/01-5051946-spvm-986-des-mandats-demandes-aux-juges-de-paix-sont-autorises.php [in French only].

[5] *R. v.* National Post, [2010] 1 SCR 477, 2010 SCC 16. Judge LeBel notes in paragraph 144 of the decision: "A search warrant of media premises is a particularly serious intrusion, and a decision should not be made about its propriety without submissions from the party most affected."

imposed should provide for strict oversight of the seizure or any order relating to a journalist or media outlet.

Once the warrant, authorization or order is issued, the information must be sealed by the court (s. 488.02(1)). It is at that point that the journalist and media outlet are notified (s. 488.02(2)) and may object to the disclosure of the information within 10 days of receiving the notice (s. 488.02(3)). The criteria for objecting to the disclosure are the same as those for obtaining the warrant, authorization or order. That is to say that, at the very least, the journalist or media outlet can make their arguments at that point. However, it would be quite shocking if disclosure were refused when the same criteria apply. Therefore, it seems all the more necessary to take the steps needed to ensure the interests of the journalist and the source are defended at the stage where the search is authorized, either by allowing them to make representations or by allowing a lawyer with the relevant expertise to act as a friend of the court.

Conclusion

In 1996, in *Goodwin v. United Kingdom* (March 27, 1996), the European Court of Human Rights wrote as follows: “Protection of journalistic sources is one of the basic conditions for press freedom …. Without such protection, sources may be deterred from assisting the press in informing the public on 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.”

Journalists must be able to do their work without fearing that they will later be used by the police. The protection of their sources is necessary for democracy. It is equally vital to freedom of expression, which includes “a right to receive as well as broadcast expression” (*Baier v. Alberta*, 2007 SCC 31).

In recent years, journalists have uncovered numerous frauds and schemes, including in the areas of government contracting and political fundraising. Society as a whole benefitted from the information gathered and disseminated. In many cases, the journalistic sources behind these revelations put their jobs or their safety in jeopardy to make this information public. The identity of such sources should be better protected. Passing Bill S-231 would be an important step in this direction.