Flip Flop to the Top: The Battle of Privacy vs Fair Trials at the Supreme Court of Canada

With the growing trend of "fake news" that has risen with the birth of the Internet and online platforms, it is imperative for journalists to have reliable sources to support research- and evidence-based news. Without these confidential sources, journalists would lack credibility and authority, but more importantly, journalists would not be able to create awareness of the changing times in modern society. From the #MeToo movement, to the corruption of government officials, journalists and their confidential sources play an integral role in rallying support and shaping democratic society as we see it. However, when does journalism go too far? Can the confidential sources of journalists damage fair trial rights? This was the main issue addressed in the recent Supreme Court case *Denis v Côté* this past September.

The Case

Marc-Yvan Côté was a former Quebec politician, who, in 2016, was arrested and charged with numerous offences related to possible political corruption from 2000 to 2012, including fraud, breach of trust, and bribery of officers. Côté sought to suspend the charges based on the belief that there was an abuse of process. He believed there had been conduct that risked undermining the integrity of the justice system and that government officials were leaking confidential information to prejudice him. Côté served a subpoena on the journalist who had published information from the leaks, Marie-Maude Denis, of Radio-Canada. He hoped by finding out Denis's sources, he could find out who was responsible for the leaks and prove the government was trying to hurt his case. However, Denis contested her subpoena and the two parties thus started their 'flip flop to the top'. Their first battle was at the Court of Quebec, which quashed the subpoena based on the results of the new balancing exercise set out in s. 39.1 of the *Canada Evidence Act* (CEA). Their second battle was on appeal at the Superior Court, which applied s. 39.1 again and found that the subpoena was in fact valid. Their third battle was on appeal again, where the Quebec Court of Appeal decided they did not have jurisdiction to rule on the appeal. This took Denis and Côté to the top – the Supreme Court of Canada, to find out if privacy or fair trials prevailed.

The Importance of Privacy

As I alluded to before, journalism and the media play an integral role in Canada. The always questioning, often criticizing information they publish add to and sustain the very definition of democracy. For example, journalists played a large part in helping advance the #MeToo movement by investigating reports and publicizing the concerns of society. In many of these cases, the confidentiality of their sources was imperative for telling their story. If the privacy of these sources was to be put into jeopardy, it would surely change their willingness to come forward. Without these whistleblowers and confidential sources, journalists would simply not be able to do their job. Moreover, journalists, in principle, should have confidence to produce and publish news without fear of obstacles to their activities as set out in s. 2(b) of the *Canadian Charter of Rights and Freedoms,* based on their freedom of expression and freedom of the press. Therefore, the privacy of confidential sources should be of utmost importance and only disclosed

when extreme circumstances deem it truly necessary and, in those cases, the disclosure should be limited.

The New Test

Previously, if a journalist objected to disclosing information, including identifying a source, they were required to show that the four criteria of the Wigmore test were met. The criteria were that 1) the communication originated in confidence that the identity of the informant would not be disclosed, 2) the confidence was essential to the relationship for the communication to arise, 3) the relationship was deliberately fostered for public good and 4) if the first three criteria were met, that the court must consider whether in the case, if the public interest served by protecting the informant's identify outweighs the public interest in getting at the truth.

The new balancing exercise required by the new federal statutory scheme for the protection of journalistic sources set out in s. 39.1 of the CEA shifts the burden of proof from the journalist to the party seeking to obtain the information. The only burden of proof on the journalist is to prove that they are a "journalist" and that their confidential source is a "journalistic source". While the definitions of "journalist" and "journalistic source" in the CEA are still troublesome because they limit the range of people who can claim the privilege against disclosure, it is nonetheless a step in the right direction for the protection of privacy. The party seeking to obtain the information must do the heavy lifting and establish that the information cannot be found in any other way. After that, the court proceeds with the balancing exercise to decide whether public interest of the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source.

The Solution, or Lack Thereof

The new scheme as outlined above affords enhanced protection of the anonymity of journalistic sources as compared to the Wigmore test -- a huge win for privacy. In future criminal cases, or rare interlocutory appeals in criminal law trials like *Denis v Côté*, it will be less likely that confidential sources will need to reveal their identity. This new sense of privacy will likely have two ripple effects. First, more whistleblowers will come forward with information, and second, as they often find themselves with targets painted on their backs, whistleblowers will have a greater sense of safety and hopefully fewer future cases of violence against them. Thus, we see out of a somewhat small shift of burden in criminal proceedings, there is a large impact on the success of future journalism, the safety of their members, and the voice of democracy.

Despite this large impact for society, the change in process was of little significance to the case in question. In *Denis v Côté,* the SCC concluded that the case be remanded back to the Court of Quebec for reconsideration once new evidence from the investigation is available. It was stated in the factum filed that an investigation started in October 2018 was still under way and the results would be directly relevant and shed light on other means to produce the information in evidence. This would render Denis's information irrelevant and frankly speaking, the entire 'flip flop to the top', a waste of time, money, and resources.

Sources

Denis v Côté

https://www.scc-csc.ca/case-dossier/info/sum-som-eng.aspx?cas=38114

https://www.scc-csc.ca/case-dossier/cb/2019/38114-eng.aspx

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