(UN)PROTECTED SOURCES, (UN)PROTECTED DEMOCRACY: A CRITICAL ANALYSIS OF JOURNALISTIC SOURCE PROTECTION LAW

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I INTRODUCTION

Twenty-one years before the United Kingdom voted to leave the European Union, Quebec voted on whether to proclaim sovereignty and initiate secession from Canada. By a margin of 50.58 per cent to 49.42 per cent, Quebecers voted to remain.[1] The narrow victory spurred the federal government into action. To increase the visibility of their contributions to Quebec and to counteract the sovereignty movement, the federal government created a promotional program in 1996. It saw the federal government spending more than $40 million every year in sponsorship and advertising at community, cultural, and sporting events in Quebec.[2] Much of this money was spent on contracts with private advertising firms.[3]

In the early 2000s, a confidential source[4] who came to be known as "Ma Chouette" ("My Sweetie") contacted *Globe and Mail* reporter Daniel Leblanc. Relying on Ma Chouette, Leblanc wrote a series of articles on the sponsorship program alleging an appalling misuse of public funds.[5] For example, in March 2002, he reported that the federal government paid $550,000 to a Quebec company for a report "that no one could find."[6] The effects of Leblanc's articles reverberated across Canada. Significant public and political interest in what had become known as the "Sponsorship Scandal" led to a scathing report from Canada's Auditor General which showed that the government had paid more than $100 million in contracts for little or no work.[7] A Royal Commission was created, and the resulting Gomery Report exposed the worst political scandal in recent Canadian history. It led to the retirement of Prime Minister Jean Chrétien and eventual defeat of the Liberal government.

A properly functioning democracy requires an informed public. Journalism, which exposes matters of public importance, is therefore essential for a vibrant liberal democracy.[8] In an age where public relations officers and press secretaries are paid to obfuscate, journalists must cultivate relationships with other sources. Sources often speak to journalists only if they are assured anonymity, because speaking truth out of turn can lead to discipline and detestation.[9] Like many important stories, the Sponsorship Scandal would not have come to light had Leblanc been unable to assure Ma Chouette their anonymity.

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1. Gerald L Gall, "Québec Referendum (1995)" (21 August 2013), online: *The Canadian Encyclopedia* <thecanadianencyclopedia.ca/en/article/quebec-referendum-1995>.

2. Stephen Azzi, "Commission of Inquiry into the Sponsorship Program and Advertising Activities" (21 September 2006), online: *The Canadian Encyclopedia* <thecanadianencyclopedia.ca/en/article/sponsorship-program-and-advertising-activities-gomery-inquiry-commission-of-inquiry-into>.

3. *Ibid*.

4. This article uses the term "confidential source" to describe a source whose identity is known by the journalist, but who only provides information on the condition that their identity will not be revealed in the reporting of the information they have provided. This differs from an "anonymous source" whose identity is not known by the journalist.

5. *Globe & Mail c Canada (Procureur général),* 2010 SCC 41 at para 4, [2010] 2 SCR 592 [*Globe & Mail*].

6. Azzi, *supra* note 2.

7. *Ibid*.

8. *Denis v Côté*, 2019 SCC 44 at para 45, 437 DLR (4th) 191 [*Denis*]; *R v National Post*, 2010 SCC 16 at para 31 45, [2010] 1 SCR 477 [*National Post*]; Janice Brabyn, "Protection against Judicially Compelled Disclosure of the Identity of News Gatherers' Confidential Sources in Common Law Jurisdictions" (2006) 69:6 Mod L Rev 895 at 921–928.

9. Brabyn, *supra* note 8; *Denis, supra* note 8 at para 35.

In this way, a vibrant liberal democracy depends on a journalist's ability to protect the confidentiality of their sources. In the words of the Supreme Court of Canada (SCC) in the seminal media rights decision *R v National Post*, the public has a profound interest in "being informed about matters of importance that may only see the light of day through the cooperation of sources who will not speak except on condition of confidentiality."[10]

The public, however, also has an interest in capable law enforcement and an effective judicial system. These interests require that courts and police have sufficient access to relevant information. This has resulted in the general rule that "the public has the right to every person's evidence," to use the SCC's phrase from *National Post*.[11] Search warrants can be executed, subpoenas can be issued, and disclosure can be ordered against parties who would rather not participate in judicial processes. When these mechanisms are used to force journalists to reveal the identity of their confidential sources, distinct public interests come into conflict. This article discusses the manner in which Canadian law mediates this conflict through the law of "protection of sources."

Part I of this article outlines the many Canadian legal powers that can be used to reveal the identity of journalists' confidential sources. These either compel journalists to reveal the identity of their sources or authorize investigations that could reveal such information. Part II provides an overview of the Canadian common law of protection of sources, outlining journalists' ability to protect source identity by resisting the powers outlined in Part I. It discusses the legal tests for obtaining a search warrant for journalists' premises and for establishing journalist–source privilege, and the way these tests relate to protections afforded by the *Canadian Charter of Rights and Freedoms*.[12] Part III assesses the extent to which the common law allows journalists to protect their sources, arguing that it provides grossly insufficient protection. Part IV describes the federal government's recent legislative response to a perceived inadequacy of protection, the *Journalistic Sources Protection Act* (JSPA).[13] Finally, Part V critically analyzes the JSPA.

This article ultimately suggests the JSPA improves the legal protection available to journalists but has three potential shortcomings: (1) It does not apply to most civil actions, (2) it contains an exception that may be abused, and (3) its focus on balancing may lead to an uncertainty chill. The effects of these shortcomings, and of the JSPA more generally, remain to be seen. They may be inconsequential, or they may undermine the important purpose of the JSPA—addressing the troubling defects in the common law of protection of sources. Journalists have reason to be optimistic, but also reason to be vigilant.

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10. *National Post*, *supra* note 8 at para 28. The case focused on under what conditions the police, when investigating a crime, can obtain a warrant for the production of a document that may reveal the identity of a journalist's confidential source. A confidential source provided the *National Post* a bank document that, on its face, implicated Jean Chrétien in a serious conflict of interest. It later came to light that the document was most likely forged. The alleged forgery prompted a police investigation, and the police sought a search warrant and assistance order in relation to the *National Post* offices and staff. The *National Post* resisted the warrant's issuance on the ground that it might reveal the identity of confidential sources.

11. *Ibid*, at para 1.

12. *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

13. *Journalistic Sources Protection Act,* SC 2017, c 22 [JSPA].

II PROCUREMENT OF EVIDENCE

The public's interest in capable law enforcement and an effective judicial system means everyone has the right to every person's evidence.[14] This means, that as a general rule, all evidence is producible, all witnesses are compellable, and all compelled witnesses must truthfully answer every question put to them.[15] This "fundamental first principle," as the SCC described it, operates unless some countervailing social value is deemed to take priority over the finding of truth.[16] This general rule manifests in a variety of legal powers that can be used to compel resistant witnesses and obtain sheltered evidence. The rules of civil and criminal procedure, which are outlined below, allow for the procurement of such evidence both before and during trial.

A. Civil Procedure

The rules of civil procedure derive largely from each province's Rules of Court (the Rules). Depending on the province, the Rules are made either by the lieutenant governor in council[17] or judges themselves[18] through authority delegated by provincial legislation. Working in tandem with the common law rules of evidence and applicable evidence acts,[19] the Rules establish the procedures for compelling evidence. Before trial, a party to a civil action is entitled to obtain as much information relevant to the opposing party's case as possible. This entitlement is affected by several rules that mandate the disclosure of documents and oral examination of parties.

Though the Rules are created by each province, they are largely similar. The province of Saskatchewan's Rules, which are largely equivalent to that of other provinces,[20] will therefore be used to illustrate Canadian civil procedure more generally. Saskatchewan's Rules require that every party to a civil action provide the opposing party a list of every relevant document in their possession.[21] Upon receiving the list, one may request a copy of every document mentioned.[22] If the request is resisted, the aggrieved party may apply for the court to order the document be produced.[23] A court may also order production of any document possessed by a non-party, as long as there is reason to believe that the document is relevant.[24] Every party also has to make itself available to be questioned under oath before trial about any relevant topic.[25]

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14. *National Post*, *supra* note 8 at 26.

15. *R v S (RJ)*, [1995] 1 SCR 451.

16. *R v Gruenke*, [1991] 3 SCR 263 at para 43.

17. For example, see *Judicature Act*, RSA 2000, c J-2, s 28.1(1)(a)(i) (Alberta); *Court Rules Act*, RSBC 1996, c 80, s 1 (British Columbia).

18. For example, see *Queen's Bench Act, 1998*, SS 1998, c Q-1.01, s 28(1) (Saskatchewan).

19. For a discussion on the applicability of various evidence acts, see Part V(A) of this article.

20. See generally *Alberta Rules of Court*, Alta Reg 124/2010, R 1.1; *British Columbia Supreme Court Civil Rules*, BC Reg 168/2009, R 1-2(2); *Manitoba Court of Queen's Bench Rules*, Man Reg 553/88; and *Saskatchewan 2013 Queen's Bench Rules* [*Saskatchewan Rules*].

21. *Saskatchewan Rules*, *ibid* at 5-5.

22. *Ibid* at 5-11.

23. *Ibid* at 5-12.

24. *Ibid*.

25. *Ibid,* at 5-13.

At trial, a party to a civil action is generally entitled to adduce the best evidence possible. Parties therefore may issue subpoenas to either compel a witness to testify during trial or to produce any document in their possession at trial.[26] If a witness fails to comply with a subpoena, the court may order the person to do so. It can even direct the police to apprehend the person to ensure compliance.[27] Also, if a witness refuses to be sworn in or to answer questions, the court may order the witness to do so.[28] These orders are all enforceable through contempt proceedings.

B. Criminal Procedure

The rules of criminal procedure also provide for broad rights to collect evidence, both before and during trial.

The rules of criminal procedure are mostly codified in the *Criminal Code*.[29] It allows law enforcement, during an investigation and prior to trial, to apply to a judge or justice of the peace for authorization to obtain evidence in a variety of ways. For example, law enforcement may apply for authorization to surreptitiously intercept private communications.[30] They also may apply for a warrant to track the locations of vehicles or transactions, such as credit card payments.[31] Warrants can also be issued authorizing surveillance or to search any building, receptacle, or place.[32] During an investigation, law enforcement is also permitted to apply for an order that an individual produce any "document that is in their possession or control when they receive the order."[33] These warrants and orders are granted only if law enforcement convinces the presiding judge or justice of the peace that doing so would not infringe the subject's section 8 Charter right "to be secure against unreasonable search and seizure."[34]

Accused persons also have tools available to them to compel the production of evidence prior to trial. The *O'Connor* regime, developed in the SCC case *R v O'Connor*, allows an accused to obtain any private record held by a third party, which could include a record held by a journalist that contains information about the identity of a confidential source.[35] Production is only ordered if a two-part test is satisfied. First, the record has to be likely relevant to the proceeding against the accused. Second, the deleterious effects of production must not outweigh the salutary effects of production to the extent that non-production would unreasonably interfere with the accused's right to a fair trial.[36]

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26. *Ibid* at 9-8.

27. *Ibid* at 9-11.

28. *Ibid* at 6-30.

29. *Criminal Code*, RSC 1985, c C-46. It is important to note that there are other acts, both federal and provincial, that authorize search powers [*Criminal Code*].

30. *Ibid*, ss 184–188.

31. *Ibid*, s 492.1.

32. *Ibid*, ss 487–487.1.

33. *Ibid*, s 487.014 (1).

34. Charter, *supra* note 12 at s 8. Section 8 compliance is determined by reference to the tests outlined in both the specific warrant-granting provisions of the *Criminal Code* and the common law interpreting these tests in light of the s 8 guarantee.

35. *R v O'Connor* [1995] 4 SCR 411.

36. *Ibid* at paras 138–164.

During trial, a variety of steps are also available to both the Crown and the accused to compel the appearance of a witness. For example, anyone who is "likely to give material evidence" can be subpoenaed to testify.[37] Judges may also order that a witness in custody testify[38] or that a witness testify by video or audio link.[39] As is the case with civil proceedings, these orders are all enforceable through contempt proceedings.[40]

III COMMON LAW PROTECTIONS FOR JOURNALISTIC SOURCES

Each power mentioned in Part I of this article can be used to determine the identity of a journalist's confidential source, either by compelling a journalist to testify on the matter or by permitting searches and surveillance likely to reveal the identity of a source. There are, however, two doctrines of Canadian common law that shield journalists from the exercise of such powers: The *Lessard* framework and the *Wigmore* test. Any discussion of the two doctrines that help journalists protect the identity of their sources would be incomplete without noting the conspicuous absence of a third form of protection: constitutional protection. This part of the article therefore discusses the *Lessard* framework, the *Wigmore* test, and the lack of constitutional protection at common law.

A. The *Lessard* Framework

Courts have developed a framework that governs all applications by law enforcement for search warrants, wiretaps, and production orders relating to the media (the *Lessard* framework).[41] The *Lessard* framework is different, and purportedly stricter, than the framework that governs the same applications relating to non-media subjects. It is intended to recognize "that the media plays a special role in a free and democratic society."[42] The *Lessard* framework therefore seeks to balance "the state's interest in the investigation and prosecution of crime" and the media's "right to be free from unreasonable search or seizure . . . *and* the guarantee of freedom of expression."[43] This contrasts with the usual framework, which aims to balance only the state's interest in prosecuting crime and the subject's right to be free from "unreasonable search and seizure."[44]

The *Lessard* framework was developed by the SCC in the 1991 decision *Société Radio-Canada c Lessard*.[45] It has been repeatedly affirmed,[46] most recently by the SCC in *R v Vice*

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37. *Criminal Code*, *supra* note 29 at s 698.
38. *Ibid*, s 527.
39. *Ibid*, ss 714–714.8.
40. *Ibid*, s 708.
41. See *Société Radio-Canada c Lessard*, [1991] 3 SCR 421, 130 NR 321 [*Lessard*]; *National Post*, *supra* note 8; and *R v Vice Media Canada Inc,* 2018 SCC 53 [*Vice*].
42. *Vice*, *ibid* at para 13.
43. *Ibid* at paras 1, 13 [emphasis added].
44. *Ibid* at para 13.
45. *Lessard*, *supra* note 41.
46. For example, see *National Post*, *supra* note 8.

Media Canada Inc.[47] Accordingly, the SCC in *Vice*, affirming the *Lessard* framework, found that the presiding judge or justice of the peace is to apply the framework in four distinct steps.

First, the presiding judge[48] considers whether to exercise their discretion to require notice of the application be given to the media. The status quo is that the application be heard on an *ex parte* basis. This means the media receives no notice and is not given an opportunity to appear and argue against the application.[49] Second, whether notice is given or not, the presiding judge next determines whether the order or warrant should be authorized. To give authorization, the judge first must be satisfied that the specific test for approving warrants and production orders outlined in the *Criminal Code* has been met.[50] Third, in order to give authorization, the judge must be satisfied that "the state's interest in the investigation and prosecution of crimes" is not outweighed by "the media's right to privacy in gathering and disseminating the news."[51] The judge considers all of the circumstances, including the following:

a. the likelihood and extent of any potential chilling effects;

b. the scope of the materials sought and whether the order sought is narrowly tailored;

c. the likely probative value of the materials;

d. whether there are alternative sources from which the information may reasonably be obtained and, if so, whether the police have made all reasonable efforts to obtain the information from those sources;

e. the effect of prior partial publication, now assessed on a case-by-case basis; and

f. more broadly, the vital role that the media plays in the functioning of a democratic society and the fact that the media will generally be an innocent third party.[52]

Fourth, if the judge grants authorization because they are satisfied that all statutory conditions have been met and that the balancing exercise favours authorization, they finally consider whether to impose conditions on the order to ensure that the media "will not be unduly impeded."[53]

B. The *Wigmore* Test

Courts have also developed a framework known as the *Wigmore* test for establishing legal privilege on a "case-by-case" basis where no established "class privilege" applies. The framework is often applied when journalists seek to establish privilege with respect to their communications with sources. If established, journalist–source privilege shields the journalist from all court processes that could be used to compel information and evidence relating to their relationship with the source. Established privilege does more than allow a journalist not

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47. *Vice*, *supra* note 41.

48. For the sake of simplicity, I use the word "judge" here to denote both judges and justices of the peace.

49. *Vice*, *supra* note 41 at para 65.

50. *Ibid*.

51. *Ibid* at para 82.

52. *Ibid*.

53. *Ibid*.

to have to answer questions in court; it can be used to defend against the execution of warrants and similar orders. Privilege can be asserted against the issuance of a search warrant[54] or in support of an application to have an already-issued search warrant set aside.[55] Furthermore, judges and justices of the peace tasked with approving search warrants or surveillance orders must consider privilege when deciding whether to grant them. Law enforcement is also obliged to take great care in executing a search warrant in any place privileged documents are expected to be located.[56]

In *National Post*, the SCC established the parameters of source–journalist privilege in Canada. It is not a "class privilege" that creates a *prima facie* presumption of protection, but a "case-by-case" privilege that only protects information if the specific situation satisfies the *Wigmore* test.[57] The test requires the journalist to prove each of the following four criteria on a balance of probabilities.[58] First, the communication must originate in confidence that it will not be disclosed. Second, the confidence must be "essential" to the relationship in which the communication arises. In the journalist–source context, the first two criteria mean the communication must be "made *explicitly* in exchange for a promise of confidentiality."[59] Communication with non-confidential sources therefore receives no protection. Third, the relationship must be one that should be "sedulously fostered in the public good."[60] According to the SCC, the more formal and professional the journalist, the more likely their source is to receive protection: "The relationship between the source and a blogger might be weighed differently than [a journalist] who is subject to much greater institutional accountability within his or her own news organization."[61]

Fourth and finally, it must be shown that the "public interest served by protecting the identity of the informant from disclosure [outweighs] the public interest in getting at the truth."[62] According to the SCC, this fourth criterion "does most of the work."[63] Among other considerations, the weighing considers the nature and seriousness of the offence under investigation and the expected probative value of the evidence sought. For example, the mere identity of a source is likely to have little probative value.[64] However, a bloody knife passed to a journalist from a confidential source will have great probative value and will therefore be weighted differently. The weighing will also consider "the underlying purpose of the investigation, as inferred from the objective circumstances."[65] The more it seems the criminal investigation is aimed at silencing or punishing a source, the more likely privilege is to be

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54. *National Post, supra* note 8 at para 52.
55. *Ibid* at para 52.
56. *Lavallee, Rackel & Heintz v Canada (Attorney General)*, 2002 SCC 61, [2002] 3 SCR 209; *Descôteaux v Mierzwinski*, [1982] 1 SCR 860.
57. *National Post*, *supra* note 8 at para 53.
58. *Ibid* at para 60.
59. *Ibid* at para 56.
60. *Ibid* at para 57.
61. *Ibid*.
62. *Ibid* at para 53.
63. *Ibid* at para 58.
64. *Ibid* at paras 61, 65.
65. *Ibid* at para 62.

found. The weighing also considers "the stage of the proceedings." For example, the fact that proceedings might be at an early stage, such as at an examination for discovery, may militate in favour of recognizing privilege.[66] Finally, "The public interest in free expression [which manifests in protection of news gathering methods] will *always* weigh heavily in the balance."[67]

C. The Lack of Constitutional Protections

Although Canadian journalists can protect their sources' identities to some extent through the above-mentioned common law doctrines, the conspicuous absence of a third form of protection must be discussed. The SCC has repeatedly refused to give journalists a *constitutional* right to protect the identity of their sources.

Constitutional protection for news gathering could derive from the Charter. Determining whether state action is unconstitutional because it violates the Charter is a two-step process.[68] First, the party challenging the act attempts to establish that it limits a right explicitly guaranteed by the Charter. This involves interpreting Charter provisions or applying tests specific to particular Charter rights already developed at common law. If a limit is found, a violation is presumed unless the state can prove the infringement "can be demonstrably justified in a free and democratic society."[69] This is determined by applying the *Oakes* test,[70] which concludes that rights-limiting actions are justifiable only if they are prescribed by law, aimed at achieving a "pressing and substantial objective," and are proportionate in their pursuit of that objective.[71]

Section 2(b) of the Charter states "Everyone has the following fundamental freedoms . . . (b) freedom of thought, belief, opinion and expression, including *freedom of the press and other media of communication*."[72] Journalists have sought constitutional protection for news gathering activities, arguing search warrants conducted against journalists and orders that compel journalists to disclose the identity of their confidential sources limit their section 2(b) rights. Because the warrants and orders limit a Charter right, the argument continues, they are unconstitutional unless the state proves they are justifiable on the basis of the strict *Oakes* test.

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66. *Globe & Mail, supra* note 5 at para 58. This is a variation of the UK "newspaper rule," which allows journalists to protect their sources during the discovery stage of proceedings even where they may be required to disclose their sources at trial. See also *Canwest Publishing Inc v Wilson*, 2012 BCCA 181 at para 62, 349 DLR (4th) 739; *Wasylyshen v Canadian Broadcasting Corp*, 2005 ABQB 902 at paras 15–22 & 39–41, 63 Alta LR (4th) 238. Although the SCC noted that privilege is likely to be recognized at earlier stages of proceedings because at that "point the procedural equities do not outweigh the freedom of the press," it also stated that the early stages of proceedings might also militate in favour of *not* recognizing privilege if the information sought has "the potential to resolve certain issues prior to going to trial" (*Globe & Mail* at para 58).

67. *National Post, supra* note 8 at para 64.

68. See generally Peter W Hogg, *Constitutional Law of Canada: 2015 Student Edition* (Toronto: Carswell, loose-leaf updated 2015).

69. Charter, *supra* note 12 at s 1.

70. Developed in *R v Oakes*, [1986] 1 SCR 103. The Oakes test provides a mechanism for balancing charter rights with the imposition of reasonable limits on those rights.

71. *Ibid* at 72–75.

72. Charter, *supra* note 12 at s 2(b) [emphasis added].

For example, in both *Lessard* and *National Post*, parties claimed the execution of search warrants on journalistic premises limited their section 2(b) rights. The majority of justices in both cases proclaimed support for a free press and spoke vaguely of a connection between Charter values and news gathering activities.[73] However, they ultimately refused to find a limit of section 2(b). There was therefore no need to apply the *Oakes* test to determine whether the warrants were nonetheless constitutional. The SCC instead developed common law doctrines—the previously mentioned *Lessard* framework and *Wigmore* test—to purportedly balance competing interests and in some instances grant journalists powers to resist source disclosure. The SCC ambiguously stated that section 2(b) should be "balanced" when applying the *Lessard* framework and *Wigmore* test,[74] but did not explicitly incorporate constitutional standards into these doctrines, which demand less strict justification for infringing source confidentiality than the *Oakes* test would.

In the words of Justice Abella dissenting in *Vice*, the court has for twenty-five years avoided giving any "distinct constitutional content to the words 'freedom of the press' in s.2(b)."[75] To the chagrin of other dissenting SCC judges[76] and many academic commentators,[77] Canadian journalists therefore do not have a constitutional right to protect the identity of their sources. News gathering activities likewise receive no distinct constitutional protection. In the words of Benjamin Oliphant, "Canadian courts have tended to treat [the "freedom of press" guarantee in] s.2(b) as one of the Charter's few superfluities."[78]

This approach starkly contrasts with that of the European Court of Human Rights [ECtHR]. In the 1996 decision *Goodwin v United Kingdom*,[79] the ECtHR explicitly held that the right to free expression created by article 10(1) of the *European Convention on Human Rights*[80] protects the ability of journalists to shield the identity of their confidential sources. Because protection of sources has been assigned rights status, any limit must pass the ECtHR's proportionality test to be lawful. The proportionality test resembles the *Oakes* test. It requires all legal powers to identify sources be prescribed by law, pursue a legitimate aim, and be a means of pursuing that legitimate aim that is "necessary in a democratic society."[81]

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73. Jamie Cameron, "Does Section 2(b) Really Make a Difference? Part 1: Freedom of Expression, Defamation Law, and the Journalist-Source Privilege" (2010) 6:6 CLPE Research Paper 28/2010 at 136; *Lessard*, *supra* note 41 at 429; *National Post*, supra note 8 at para 41.

74. See *National Post*, *supra* note 8 at paras 5, 26, 64; *Lessard*, *supra* note 41 at para 24.

75. *Vice*, *supra* note 41 at paras 109–171 (dissent by Abella J, with Wagner CJ, Karakatsanis J, and Martin J concurring).

76. See e.g. *Lessard*, *supra* note 41 at paras 56–85 (dissent by McLachlin J).

77. See Benjamin Oliphant, "Freedom of the Press as a Discrete Constitutional Guarantee" (2013) 59:2 McGill LJ 283; *Cameron*, *supra* note 73; Simon Kupi, "Charter-ing a Course: National Post, Journalist-Source Privilege and the Future of Canada's Charter 'Press Clause'" (2011) 69:2 UT Fac L Rev 78; and Gerald Chan, "Transparency Confined to the Courthouse: A Critical Analysis of Criminal Lawyer's Assn., C.B.C. and National Post" (2011) 54:7 SCLR 169.

78. Oliphant, *ibid* at 285.

79. *Goodwin v United Kingdom,* [1996] 22 EHRR 123, 1 BHRC 81, 22 EHRR 123, [1996] ECHR 16 [*Goodwin*].

80. General Assembly of the United Nations, *Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS No 5, 213 UNTS 222 (1950) at 230.

81. *Goodwin*, *supra* note 79.

IV. SUFFICIENCY OF AVAILABLE PROTECTIONS FOR JOURNALISTS

Part I of this article outlined a wide variety of legal powers that can be used to compel resistant witnesses and obtain otherwise sheltered evidence in Canada. All of these powers can, and often are, used to determine the identity of a journalist's confidential source. There are only two doctrines at common law that shield journalists from the exercise of these powers, both of which were outlined in Part II. The *Lessard* framework governs applications by the police for search warrants and production orders relating to the media, and the *Wigmore* test allows journalists to establish privilege with respect to their communications with sources. Part III of this article discussed whether these doctrines sufficiently protect journalists' interests in maintaining their sources' confidentiality in light of the fact that a vibrant liberal democracy depends on a journalist's ability to protect such confidentiality.

In 2006, Janice Brabyn observed that doctrines like the *Wigmore* test and *Lessard* framework rarely provide sufficient protection. Unless doctrines that protect source identity on the basis of a balancing test include a "constitutional imperative or strong presumption in favour of news gatherer/confidential source protection," judges across common law jurisdictions "have proved to be unreliable protectors of news gatherers' sources."[82] Although judges applying doctrines such as these are supposed to be evenly balancing interests, they tend to treat freedom of the press as a mere exception or qualification to other more established interests and procedures. In the words of Brabyn, judges see other interests "with greater favour than they do the confidentiality needs of news gatherers."[83]

Although Brabyn's observations predated *National Post* and were not focused exclusively on Canada, they now seem prophetic. Simon Kupi has more recently described Canada's common law protections as "essentially skeletal"[84] and stated the *Wigmore* test is "an approach . . . ill-suited to journalist-source privilege, past its prime as a feasible test and entirely uncertain in its balancing-oriented application."[85] These remarks are echoed by Jamie Cameron, who said the *Wigmore* test and *Lessard* framework mean "expressive freedom remains at risk."[86] Quite simply, these academics say the tests are insufficient.

The cases applying the *Lessard* framework and *Wigmore* test, which are rarely decided in favour of the journalist, demonstrate the accuracy of Kupi's and Cameron's observations. For example, in the city of Montreal, an estimated 98 per cent of all applications for a warrant to investigate a journalist submitted by the police to a justice of the peace are granted.[87] Also, according to David Paciocco (now a justice) and Lee Stuesser, the *Wigmore* test is stringent and journalist–source privilege is only found "in rare cases."[88]

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82. Brabyn, *supra* note 8 at 929.

83. *Ibid*.

84. Kupi, *supra* note 77 at 90.

85. *Ibid* at 96.

86. Cameron, *supra* note 73 at 156.

87. Canada, Parliament, *House of Commons Debates*, 42-1, No 148 (11 May 2017) at 1715 (Deputy Speaker; Canada, Parliament, *House of Commons Debates*, 42-1, No 148 (9 June 2017) at 1320 (Brigitte Sansoucy) [collectively, Parliamentary Debates].

88. David M Paciocco & Lee Stuesser, *The Law of Evidence*, 6th ed (Toronto: Irwin Law, 2011) at 256.

Given how apparently easy it is to obtain search warrants and how difficult it is to establish journalist–source privilege, it is not surprising that there have been high-profile abuses of police powers against journalists.

In 2010, police in the province of Quebec initiated a corruption investigation into the management of public construction contracts. As the investigation continued, several journalists published stories on the investigation. It became clear that someone within the police service was leaking information to journalists.[89] In response, in September 2013, the Sûreté du Québec (Quebec's provincial police force) launched a criminal investigation into an alleged "disclosure of the existence and content of communications intercepted by wiretapping."[90] The police logged the incoming and outgoing call data of six journalists, allowing them to see who the journalists were calling, when they were calling, and from where they were calling.[91] Over the next three years, twenty-four surveillance warrants were issued and executed against journalists. None of the journalists were alleged to have committed crimes; the warrants were aimed only at identifying confidential sources.

As the surveillance came to light in 2016, public and political uproar followed.[92] Canada's rating in Reporters Without Borders' World Press Freedom Index dropped out of the top twenty for the first time.[93] The province of Quebec established a commission of inquiry—the Chamberland Commission—to look into the matter.[94] The commission concluded that the surveillance was not an isolated incident.[95] Like Kupi and Cameron, it also determined that Canadian common law provides insufficient protection to journalists preserving their sources' confidentiality and recommended that Canadian legislators act quickly to remedy the situation.[96] It is clear that the common law inadequately protects journalists' ability to maintain their sources' confidentiality.

V. THE *JOURNALISTIC SOURCES PROTECTION ACT*

Federal legislators responded to the Chamberland Commission's call. On November 22, 2016, federal opposition senator Claude Carignan introduced the bill that would become the *Journalistic Sources Protection Act*.[97] It quickly passed through both houses of Parliament with bipartisan support and received royal assent on October 18, 2017. This part of the article

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89. See *Côté c R*, 2018 QCCQ 547 at paras 4–176 [*Côté*].

90. In contravention of the *Criminal Code*, *supra* note 29, s 193(1).

91. Quebec, "Commission d'enquête sur la protection de la confidentialité des sources journalistiques: Report Overview" (2017) at 10, online (pdf): *Gouvernement de Québec* <www.cepcsj.gouv.qc.ca/fileadmin/documents_client/documents/CEPCSJ_Rapport_Accessible.pdf> [Quebec Commission].

92. For example, see Parliamentary Debates, *supra* note 87; Kamila Hinkson, "La Presse Columnist Says He Was Put under Police Surveillance as Part of 'Attempt to Intimidate'" (31 October 2016), online: *CBC News* <www.cbc.ca/news/canada/montreal/journalist-patrick-lagace-police-surveillance-spying-1.3828832>.

93. Reporters Without Borders, "Top Marks for Press Freedom Leadership Abroad but Room for Improvement at Home" (2017), online: <https://rsf.org/en/canada>.

94. Quebec Commission, *supra* note 91.

95. *Ibid*, 10–11.

96. *Ibid,* 4.

97. JSPA, *supra* note 13.

describes the JSPA, which has two parts: one that displaces the *Wigmore* test and one that alters the *Lessard* framework.

A. Section 39.1 Objections: The New *Wigmore* Test

Section 2 of the JSPA displaces the *Wigmore* test by inserting section 39.1 into the *Canada Evidence Act* (CEA).[98] Section 39.1 creates a procedure whereby journalists can resist "the disclosure of information or document before a court, person or body with the authority to compel" such disclosure.[99] Journalists therefore no longer have to rely on the *Wigmore* test to establish privilege; they can instead file a "section 39.1 objection" if the requested "information or document identifies or is likely to identify a journalistic source."[100]

The section 39.1 objection test is essentially a modified *Wigmore* test. The first two *Wigmore* factors ensure that only communications between a journalist and a *confidential* source can be privileged.[101] The third *Wigmore* factor establishes that communication between a source and journalist is more likely to be privileged the more *professional* the journalist is.[102] This is mirrored in the section 39.1 objection test, which applies only to communications between "journalists" and "journalistic sources," both of which are narrowly defined. "Journalist" is defined as "A person whose main occupation is to contribute . . . to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person."[103] It excludes hobbyist bloggers but includes many, like freelancers, who work outside traditional media organizations. "Journalistic source" is also narrowly defined, applying only to sources that "confidentially transmit information to a journalist on the journalist's undertaking not to divulge" their identity.[104] The fourth *Wigmore* factor sees the court weighing the public interest served by protecting the source's confidentiality with the public interest served in "getting at the truth."[105] This component of the test is also paralleled in the section 39.1 objection test, which asks whether "the public interest in the administration of justice [which is equated with "getting at the truth"] outweighs the public interest in preserving the confidentiality of the journalistic source."[106]

Although the section 39.1 objection test and *Wigmore* test are similar, the section 39.1 objection test is more journalist-friendly in two important ways. First, the burden of proof lies on the journalist asserting privilege in the *Wigmore* test,[107] but it lies with the party requesting disclosure in the section 39.1 objection test.[108] If a journalist files an objection, there is a presumption in favour of confidential source protection. Such a presumption is a feature

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98. *Canada Evidence Act*, RSC 1985, c C-5 [CEA].

99. *Ibid*, s 39.1(2).

100. *Ibid*.

101. *National Post*, *supra* note 8 at para 56.60.

102. *Ibid* at para 57.

103. CEA, *supra* note 98, s 39.1(1).

104. *Ibid*.

105. *National Post, supra* note 8 at para 53.

106. CEA, *supra* note 98, s 39.1(7)(b).

107. *National Post, supra* note 9 at 60.

108. CEA, *supra* note 98, s 39.1.

Brabyn opined is necessary to properly protect source identity in the absence of constitutional protection.[109] Second, the party seeking disclosure must prove that "the information or document cannot be produced in evidence by any other reasonable means" in addition to having to prove that "the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source."[110] Requiring the party seeking disclosure to prove both criteria prior to obtaining a disclosure order greatly increases source identity protection.

B. Section 3 of the JSPA: The New *Lessard* Framework

As was discussed in Part I(B) of this article, warrant-granting powers are mostly outlined in the *Criminal Code*.[111] To obtain a warrant, wiretap, or production order (collectively, "warrants"),[112] law enforcement must satisfy a judge or justice of the peace that all statutory preconditions outlined in the warrant-granting provisions in the *Criminal Code* have been met. This is all that is typically required. The *Lessard* framework governs applications for all warrants relating to the media and imposes additional hurdles on the applicant party. It requires applicants to satisfy judges or justices of the peace that all statutory preconditions have been met *and* that "the media's right to privacy in gathering and disseminating the news" does not outweigh "the state's interest in the investigation and prosecution of crimes."[113] It also encourages judges or justices of the peace to "exercise discretion" in deciding whether to give the media notice of the application and whether to impose conditions on the execution of the warrant.[114] Although the *Lessard* framework expands protection for journalists, it allows warrants against journalists to be presumptively issued on an *ex parte* basis. This means it is likely that journalists will have their phones wiretapped and the identity of their sources revealed without their knowledge and without an opportunity to argue against the warrant's issuance.

Section 3 of the JSPA alters the *Lessard* framework by amending the *Criminal Code*. The new section 488.01-2 framework is more journalist-friendly in two important ways. First, it creates a stricter test for issuance of all warrants under the *Criminal Code* against journalists. Any warrant "relating to a journalist's communications or an object, document or data relating to or in the possession of a journalist" may now only be issued if (1) "there is no other way by which the information can reasonably be obtained" and (2) "the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information."[115] Importantly, warrant applications now must go before a judge. Warrants against journalists may be issued only by judges; justices of the peace are no longer able to issue them.[116]

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109. Brabyn, *supra* note 8 at 929.

110. CEA, *supra* note 99, s 39.1(7).

111. *Criminal Code*, *supra* note 29.

112. For the sake of simplicity, I use the term "warrants" to describe all warrants, wiretaps, and production orders that can be issued under the *Criminal Code*.

113. *Vice*, *supra* note 41 at para 82.

114. *Ibid*.

115. *Criminal Code*, *supra* note 29, ss 488.01(3), 488.02(5).

116. *Ibid*, s 488.01(2).

Second, the section 488.01-2 framework creates a procedure that gives journalists an opportunity to effectively challenge warrants *before* any information that could reveal the identities of sources is accessed by law enforcement. Although warrant applications are still presumptively made on an *ex parte* basis,[117] judges may request that a special advocate attend the application to "present observations in the interests of freedom of the press."[118] More importantly, if a warrant has been issued and executed, all documents obtained are to be immediately sealed.[119] Law enforcement cannot examine or reproduce these documents without further authorization.[120] The journalist is then able to apply to have the documents permanently sealed if disclosure "is likely to identify a journalistic source."[121] The judge then hears the matter and decides, only after hearing from the affected journalist, whether the document should be disclosed.[122] Disclosure requires that the judge be satisfied "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."[123]

VI. SHORTCOMINGS OF THE *JOURNALISTIC SOURCES PROTECTION ACT*

The JSPA was overwhelmingly praised in the weeks following its enactment.[124] The measures it introduced clearly improve the legal protection available to journalists shielding the identity of their confidential sources. Although the JSPA gives journalists cause for optimism, it has three potential shortcomings that will be discussed in this part of the article.

A. An Applicability Gap

The JSPA amends the CEA and the *Criminal Code*. Its reach is therefore limited to proceedings to which the CEA and *Criminal Code* apply. This leaves an applicability gap wherein the maladroit common law frameworks continue to be the only protection available to journalists.

As was discussed in Part I of this article, legal authority to compel journalists to reveal the identity of their sources derives from the rules of civil and criminal procedure. Canadian

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117. *R v Canadian Broadcasting Corporation*, 2018 ONSC 5856, 150 WCB (2d) 418 [*CBC*].

118. *Criminal Code*, *supra* note 29, s 488.01(4).

119. *Ibid*, s 488.02(1).

120. *Ibid*, s 488.02(2).

121. *Ibid*, s 488.02(3).

122. *CBC*, *supra* note 117 at paras 6 & 20.

123. *Ibid*, s 488.02(4)–(7).

124. See National Union of Journalists, "Canada Strengthens the Protection of Journalists' Sources" (26 October 2017), online: <www.nuj.org.uk/news/canada-strengthens-the-protection-of-journalists-sources>; Justin Safayeni, "The Journalistic Sources Protection Act: A Primer" (26 October 2017), online: *Ryerson University Centre for Free Expression Blog* <www.cfe.ryerson.ca/blog/2017/10/journalistic-sources-protection-act- primer>; Lisa Taylor et al, "Here's What You Need to Know about Canada's New Shield Law for Confidential Sources" (23 October 2017), online: *J Source Blog* <http://j-source.ca/article/understanding-canadas- new-shield-law-confidential-sources/>.

criminal procedure is largely codified in the *Criminal Code* and is therefore totally within the purview of the JSPA. Civil procedure, however, derives from each respective province's Rules of Court. These Rules work in tandem with the common law rules of evidence and *applicable* evidence acts to establish the procedure for compelling evidence.

Either the federal CEA or a provincial evidence act (each province has its own evidence act[125]) will apply to any given civil action. The federal CEA applies to "all civil proceedings and other matters whatever respecting which Parliament has jurisdiction."[126] It therefore applies to all actions before courts created by federal statute, all actions before other courts determining matters under federal laws, and some actions before other courts that focus on a subject matter obviously within the constitutional competence of the federal government.[127] Each respective province's evidence act applies to every other action, which includes most civil actions before provincial courts.

The section 39.1 objection test, which is codified in the CEA, therefore does not apply to most civil actions because they focus on matters neither under federal law nor within the constitutional competence of the federal government. Where the section 39.1 objection test does not apply, journalists only have one doctrine to resist being compelled to disclose the identity of their confidential sources: the *Wigmore* test. It is not difficult to conceive of hypothetical situations where this issue would arise. Imagine a situation where a journalist living in Saskatchewan relied on a confidential source to publish an article about a local politician. During the interview, the journalist recorded the source's name and contact information into a notebook. After publication, the politician took offence and initiated a defamation action against the journalist. In accordance with Saskatchewan's Rules of Court, the journalist was forced to provide the politician with a list of every document in their possession "that may be relevant to a material issue."[128] After receiving the list, which necessarily includes the notebook, the politician demanded a copy of the notebook's contents.[129] The journalist could not resist the request by recourse to the CEA, which would have no bearing on the defamation action; the only option would be to try to establish privilege on the basis of the *Wigmore* test.[130]

Considering the problems with the *Wigmore* test outlined in Part III, this is particularly troubling. Furthermore, if the journalist were unable to establish privilege on the basis of *Wigmore* yet continued to resist production of the notebook, they may eventually be found in contempt of court.[131]

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125. See *The Evidence Act*, SS 2006, c E-11.2 of the province of Saskatchewan.

126. CEA, *supra* note 98, s 2.

127. Canadian federalism is characterized by a "division of powers" that assigns legislative powers and responsibilities between the federal and provincial governments. Generally speaking, provincial governments are constitutionally prohibited from legislating in an area of federal competence, like criminal law. The federal government is constitutionally prohibited from legislating in an area of provincial competence, like health care (See generally Hogg, *supra* note 68).

128. *Saskatchewan Rules*, *supra* note 20 at 5-5.

129. *Ibid* at 5-11.

130. The journalist, however, is more likely to be able to establish privilege based on the *Wigmore* test because the hypothetical proceedings are still at the discovery phase. See *Globe & Mail, supra* note 5 at para 58.

131. For a discussion of how issues of contempt are to be adjudicated in situations such as these, see *St Elizabeth Home Society v Hamilton (City)*, 2008 ONCA 182, 291 DLR (4th) 338.

B. The Section 488.01(5) Exception

The JSPA alters the *Lessard* framework by amending the *Criminal Code*, creating a new framework that governs all applications for warrants, wiretaps, or production orders relating to the media. Although it is clearly more journalist-friendly than the previous *Lessard* framework, the section 488.01-2 framework contains an exception that may be exploited as a loophole. Subsection 488.01(5) the *Criminal Code* states:

> (5) Subsections (3) and (4) do not apply in respect of an application for a warrant, authorization or order that is made in relation to the commission of an offence by a journalist.

The section 488.01-2 framework does not apply if the warrant concerns alleged wrongdoing on the part of the targeted journalist. While section 488.01(6) grants judges discretion to protect journalistic sources in such instances, it is clear that the improved protections afforded by the section 488.01-2 framework become irrelevant.

Although journalists should not benefit from increased procedural protections when they are accused of criminal wrongdoing in their private lives, the broad wording of section 488.01(5) leaves open a loophole that could be exploited by some law enforcement officers wanting to uncover the identity of a confidential source. Imagine a situation where a confidential source gives a journalist confidential documents from Immigration, Refugees and Citizenship Canada that prove two immigrants were wrongfully deported. The journalist publishes a story, and law enforcement becomes eager to determine the identity of the source. Such hypothetical officers could bypass the section 488.01-2 framework protections by premising their warrant application on a questionable charge against the journalist.

Canada's *Security of Information Act*[132] criminalizes the act of intentionally "receiving any secret official code word, password, sketch, plan, model, article, note, document or information, knowing, or having reasonable ground to believe, at the time he receives it, that [it] is communicated to him in" an illegal manner, such as by way of an unauthorized leak of confidential information.[133] If law enforcement were to premise the warrant application on the source's alleged illegal activities—the disclosure of the "secret" documents to the journalist[134]—the section 488.01-2 framework would apply. But if law enforcement were to premise the warrant application on an alleged contravention of the *Security of Information Act* on the part of the journalist—the receiving of "secret" documents[135]—the section 488.01-2 framework apparently does not apply. The journalist would be left with only the insufficient protections available at common law.

The broad wording of the section 488.01(5) exception, combined with the existence of broadly worded offences that could be used to criminalize news gathering behaviour, means there is potential for abuse.

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132. *Security of Information Act,* RSC 1985, c 0-5 [SIA].

133. *Ibid*, s 4(3).

134. In contravention of SIA, *supra* note 132, s 4(1).

135. In contravention of SIA, *supra* note 132, s 4(3).

C. The Hazards of Balancing

Like the *Lessard* framework and *Wigmore* test before them, the new protections created by the JSPA rely on a balancing test. Disclosure of a confidential source's identity ultimately hinges on a judge's determination of whether the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source.

Judges[136] and academics[137] have noted that balancing tests lead to uncertainty, which discourages sources from speaking to journalists. The law of protection of sources is premised on the notion that sources are disinclined to speak to journalists who cannot guarantee their anonymity. This premise assumes sources consider the state of the law—and whether court processes could be used to reveal their identity—before deciding to offer information to a journalist. If protection is contingent and uncertain—if no one knows whether a court would eventually compel disclosure—sources will rarely speak to journalists. In this way, a law that gives uncertain protection may be no better than a law that gives no protection.

As Kupi notes, a "test that provides some level of *certainty* for sources" is required to mitigate this chilling effect on sources.[138] Balancing tests are case and fact specific. Their results are difficult to predict, which leaves both journalists and sources unsure of whether confidentiality will be maintained. Although the shifted burden of proof helps ease uncertainty, the persisting focus on balancing means the risk of an uncertainty chill remains.

D. The Path Forward

The JSPA is a relatively new piece of legislation and its impact largely remains to be seen. It did not appear in a single published decision until October 2018[139] and has only been considered by the SCC once.[140]

The scarce case law means the effects of these potential shortcomings, and the JSPA more generally, remain to be seen. The applicability gap may plague journalists, or supplemental provincial legislation may be enacted to round out source protection. The section 488.01(5) exception may be egregiously exploited, or the provision may be interpreted in a manner that prevents such abuse. The balancing test may leave sources reluctant to speak to journalists, or the shifted burden of proof may leave them encouraged. Although there are some areas of concern and it is not yet clear whether the JSPA will in itself sufficiently address the troubling deficits in the protection available at common law,[141] there is still reason for journalists to be optimistic.

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136. *Bransburg v Hayes*, 408 US 665 (1972) at para 702: "If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem . . . For them, it would appear that only an absolute privilege would suffice."

137. See Kupi, *supra* note 77.

138. *Ibid* at 109.

139. See *CBC*, *supra* note 117 at para 7.

140. The JSPA has only appeared in four written decisions: *CBC*, *supra* note 117; Côté, *supra* note 89, *Côté c R*, 2018 QCCS 1138; and *Denis c Côté*, 2018 QCCA 611; see also *Denis*, *supra* note 8.

141. Which was discussed in Part III of this article.

VII CONCLUSION

A healthy democracy requires an informed public. An informed public depends, at least partially, on journalists' ability to protect their sources' confidentiality. Without assurances of confidentiality, many important stories like the Sponsorship Scandal would never have come to light.

In Canada, the rules of criminal and civil procedure create many powers that can be used to reveal confidential sources' identities. Journalists and sources have little power to resist these powers at common law. As was demonstrated by the events that led to the creation of the Chamberland Commission, the two common doctrines of source protection—the *Lessard* framework and the *Wigmore* test—are unacceptably deficient.

In October 2017, federal legislators responded to this deficit and enacted the JSPA. It was widely praised and clearly increases the legal protection available to journalists. It, however, has three potential shortcomings: (1) It does not apply to most civil actions, (2) it contains an exception that may be abused, and (3) its focus on balancing may lead to an uncertainty chill. It is not yet clear how problematic these issues will be because the JSPA has not yet received much judicial attention.

Canadian legislators, academics, and freedom-of-expression advocates must carefully follow JSPA jurisprudence and advocate for legislative change if the cases begin to go awry. The JSPA is a clear improvement and gives journalists cause for optimism, but it also gives cause for vigilance. A healthy Canadian democracy depends on it.