JULY 13, 2021

The *Journalistic Sources Protection Act:* How Does the Scheme of New Law Influence Search Warrant Authorization?

Authors: Léon H. Moubayed, Chantelle Cseh and Amélie Lehouillier

In the recent decision in *R v Laffont*,[1] the Court of Québec (CQ) quashed a number of search warrants on the basis that they had been improperly authorized under the general *Criminal Code*[2] regime instead of under the specific regime introduced by the *Journalistic Sources Protection Act*[3] (JSPA). The warrants were authorized under the *Criminal Code* notwithstanding that:

i. the suspect was a journalist;

ii. the material to be seized was partially used for professional journalistic purposes; and

iii. the locations to be searched included the place of business of a media organization operating a website dedicated exclusively to military news.

The JSPA

The JSPA was enacted in 2017 and served to amend the *Canada Evidence Act* (CEA) to protect the confidentiality of journalistic sources, and to provide a measure of protection to the right of journalists to privacy in their gathering or dissemination of information.

The JSPA also amended the *Criminal Code* such that only a judge of a superior court of criminal jurisdiction or a judge within the meaning of section 552 of the *Criminal Code* may issue a search warrant relating to a journalist. The JSPA requires, as a condition precedent to the issuance of a search warrant relating to a journalist, that the judge be satisfied that:

i. There is no other way by which the desired information can reasonably be obtained;

ii. The public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in the collection and dissemination of information.

In addition, the JSPA provides that the judge hearing an application for a search warrant against a journalist must be convinced that the foregoing conditions remain satisfied before an officer can examine information obtained under a search warrant regarding communications, objects, documents or data relating to or in the possession of a journalist.

Finally, the JSPA grants the judge hearing an application for a search warrant against a journalist the discretion to impose any condition considered appropriate to protect the confidentiality of journalistic sources and to limit the disruption of journalistic activities.

The Decision of the SCC in *Denis v Côté*

In *Denis v Côté*,[4] the Supreme Court of Canada (SCC) provided its interpretation of section 39.1 CEA concerning a subpoena to give testimony or orders to produce documents that are issued to journalists and are likely to reveal the identities of confidential sources. The majority held that with the changes to the law introduced by the JSPA, "Parliament has created a scheme of new law from which a clear intention emerges: to afford enhanced protection to the confidentiality of journalistic sources in the context of journalists' relations with those sources."[5]

The Decision of the CQ in *R v Laffont*

Context and Facts

A search warrant was obtained against the applicant under section 487 of the *Criminal Code*. While the police officer who sought the warrant knew that the applicant was a journalist, he was not aware of the JSPA and its impact on the process for obtaining search warrants against journalists. As a result, the judge who authorized the search warrant was not made aware of the JSPA or the fact that the applicant was a journalist.

The search warrant was granted and later executed. Following the seizure of the applicant's computer, two additional search warrants relating to the applicant were sought and obtained, one targeting his locker and the other, his luggage. Once again, the police officer who sought the search warrant did so under section 487 of the *Criminal Code*, without ever disclosing to the issuing judge that the applicant was a journalist.

At his trial, the applicant brought a motion requesting that the court quash all of the search warrants obtained and executed against him.

Analysis

The CQ, referring to *Denis*, reiterated the new federal statutory scheme for the protection of journalistic sources set out in section 39.1 CEA, which was enacted by the JSPA.

The CQ concluded that the search warrants should have been authorized under section 488.01 of the *Criminal Code* and, therefore, authorized by a judge with proper jurisdiction under the terms of this provision. As a result, the CQ found that the search warrants were invalid and, consequently, led to an illegal and abusive search and seizure. The CQ ultimately ordered that the evidence obtained under the warrant be excluded, holding essentially, after balancing all competing interests, that it had to dissociate itself from the conduct of the police in this specific case.

This recent decision, along with *R v Canadian Broadcasting Corporation*,[6] is one of the first decisions dealing with the JSPA's amendments to the *Criminal Code*. It is in line with the SCC's jurisprudence, including its interpretation of the new scheme of law that introduced specific and imperative rules applicable to searches and seizures relating to journalists and their sources.

[1] *R v Laffont* 2021 QCCQ 4433.
[2] RSC, 1985, c C-46.
[3] SC 2017, c 22.
[4] 2019 CSC 44 [*Denis*].
[5] *Ibid*, para 28.
[6] 2018 ONSC 5856.

Key Contacts: Léon H. Moubayed, Guy Du Pont, Ad.E., John Bodrug, Sandra A. Forbes and Chantelle Cseh