THE *JOURNALISTIC SOURCES PROTECTION ACT* AND THE CSIS FOREIGN INTERFERENCE WHISTLEBLOWERS

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This article assesses the effectiveness of Canada's new Journalistic Sources Protection Act *(*JSPA*) that aims to protect confidential news sources. The authors argue the reforms implemented under the* JSPA *as interpreted by the Supreme Court of Canada, while an improvement over the common law, do not go far enough. They argue that an interpretation of the* JSPA *should create a rebuttable presumption of non-disclosure, and that greater deference should be afforded to journalists who adhere to standard journalistic practices. The article finishes with a look at the case of the CSIS foreign electoral interference whistleblowers and how a reinvigorated interpretation of the* JSPA *as applied to that case would better advance the remedial purpose of the legislation.*

TABLE OF CONTENTS

I. INTRODUCTION 634
II. WHY PROTECT JOURNALISTIC SOURCES? 635
III. COMMON LAW PROTECTIONS FOR CONFIDENTIAL SOURCES 638
  A. *NATIONAL POST* 638
  B. *GLOBE AND MAIL* 640
  C. *1654776 ONTARIO LIMITED V. STEWART* 641
IV. *JOURNALIST SOURCES PROTECTION ACT* 642
V. PRESCRIPTIVE INTERPRETIVE GUIDANCE 645
  A. REVERSE ONUS 646
  B. THE IMPORTANCE OF THE INFORMATION TO A CENTRAL ISSUE IN THE PROCEEDING 650
  C. FREEDOM OF THE PRESS 651
VI. THE CASE OF THE CSIS WHISTLEBLOWERS 654
  A. IMPORTANCE OF THE INFORMATION TO A CENTRAL ISSUE 656
  B. FREEDOM OF THE PRESS/IMPACT ON JOURNALIST AND JOURNALISTIC SOURCE 657
  C. POSSIBLE RESOLUTION 659
VII. CONCLUSION 660

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I. INTRODUCTION

Since late 2022, deep concerns of foreign interference in our political system have dominated Canadian politics.[1] The main allegation is that the People's Republic of China attempted to influence the outcome of various party nominations and electoral races. Even more concerning is the suggestion that certain Canadian politicians had connections to the Chinese government. In one particularly explosive allegation, a Liberal caucus member is said to have encouraged Chinese consular officials *not* to release Michael Spavor and Michael Kovrig, both of whom were arbitrarily detained in that country.[2]

Like many scandals, these allegations originated from confidential news sources. The sources are unidentified Canadian Security Intelligence Service (CSIS) employees who, frustrated by government inaction, leaked this information to media outlets likely in violation of the *Security of Information Act*.[3] These facts expose the tension that inheres in the public interest balancing exercise courts undertake when deciding whether to release identifying information about a confidential news source. On the one hand, protecting anonymity encourages whistleblowers to come forward with high value public interest information while, on the other, fidelity to the administration of justice (including the prosecution of potential crimes possibly committed by leaking such information) is facilitated by the disclosure of evidence that might identify the source. This common law public interest balancing exercise, as applied by Canadian courts, tends to favour the disclosure of identifying information about journalistic sources.

The federal enactment of the *Journalistic Sources Protection Act* in 2017 represents a milestone for press freedoms in Canada.[4] It is the first piece of legislation in Canada — at any level of government — that aims to protect individuals who disclose information to journalists on a confidential basis.[5] The legislation is an acknowledgement by Parliament — long echoed in the rhetoric of the common law — of the indispensable role that confidential news sources play in exposing matters in the public interest. The aim of the legislation is to bolster the relatively weak protection offered under the common law with respect to information that identifies or is likely to identify a journalistic source. Unfortunately, it is likely that the terms of the *JSPA* fall short of this laudable goal.

Under the common law, confidential news sources are protected if the party seeking privilege satisfies a court that public interest balancing favours maintaining confidentiality.

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1 More recently, these concerns have prompted the federal government to establish the Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions and as a result, pass *An Act Respecting Countering Foreign Interference*, SC 2024, c 16, which introduces several changes to Canada's ability to combat and detect foreign interference.

2 Sam Cooper, "Liberal MP Han Dong Secretly Advised Chinese Diplomat in 2021 to Delay Freeing Two Michaels: Sources," *Global News* (22 March 2023), online: [perma.cc/58VV-2LLK] [Cooper, "Secret Advice"].

3 RSC 1985, c O-5 [*Security of Information Act*].

4 SC 2017, c 22 [*JSPA*].

5 The scope of analysis in this article is limited to *JSPA* amendments made to section 39.1 of the *Canada Evidence Act*, RSC 1985, c C-5 [*CEA*]. When we refer to the *JSPA* in this article, we mean section 39.1 of the *CEA*. These amendments apply to administrative, civil, and criminal proceedings under federal jurisdiction. Outside our scope, the *JSPA* also amends the *Criminal Code*, RSC 1985, c C-46 with respect to search warrants and productions orders sought by police during a criminal investigation under sections 488.01 and 488.02. Applications for warrants and search orders have always placed the onus on the police to satisfy public interest balancing.

The main reform of the *JSPA* is that it reverses the onus onto the party seeking the identity of a confidential news source to satisfy this public interest balancing. However, courts typically ignore the role of onus in the public balancing exercise, a trend that continues even after the adoption of the *JSPA*. We argue that this reverse onus may not be a workable standard for courts to apply given that the evidence considered in assessing the public interest is often speculative. A better standard is to view the reverse onus as creating a presumption of non-disclosure of confidential sources unless there are exceptional circumstances.

Public interest balancing under the *JSPA* identifies three factors for courts to consider that, for the most part, echo that the main considerations under the common law: (1) the importance of the information to a central issue in the proceeding; (2) freedom of the press; and (3) the impact of disclosure on the journalistic source and the journalist. From a remedial perspective, the Supreme Court of Canada's interpretation of these factors has so far been tepid at best. We argue that these factors should be infused with meaning that aligns with the statute's remedial purpose of providing strong protection for confidential news sources. Most notably, we argue that "freedom of the press" should mean that courts afford deference to journalists and news organizations that follow rigorous journalistic practices before promising confidentiality to sources.

The structure of this article is as follows. Part II explains the importance of journalistic sources to the public interest. Part III describes the common law rules related to journalistic source public interest balancing in both civil and criminal law. Part IV provides an overview of the *JSPA* and its interpretation in the Supreme Court case of *Denis v. Côté*.[6] Part V offers prescriptive interpretive guidance for courts to better assess the public interest balancing test in accordance with the *JSPA*'s remedial purpose. Part VI considers the public interest balancing test under the *JSPA* as it might apply to the CSIS journalistic sources in accordance with the interpretive guidance we propose. For this purpose, a useful comparison is made with the United States case of *Grand Jury (Miller)*,[7] which also involved an intelligence leak.

II. WHY PROTECT JOURNALISTIC SOURCES?

Journalistic sources play a critical role in exposing news items in the public interest. On many issues of concern to the public, self-interested organizations and individuals resort to public relations communiqués, spin, silence, or outright lies to conceal malfeasance. If wrongdoing is exposed, chances are good that the source of damning information is a whistleblower who speaks up in the public interest at the risk of personal and professional harm. The whistleblower may reveal their information as a confidential source to a journalist to insulate themselves from negative professional or personal consequences.

Senator Claude Carignan, sponsor of the bill that led to the enactment of the *JSPA*, eloquently situated the critical role of confidential news sources:

> In a healthy democracy, the role of the media is to keep those in power in check. Inadequate protection for sources could compromise that ability to counterbalance judicial, political or police powers, an ability that

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[6] *Denis v Côté*, 2019 SCC 44 [*Denis*].

[7] *In re Grand Jury Subpoena (Miller)*, 397 F (3d) 964 (DC Cir 2005) [*Grand Jury (Miller)*].

> relies in part on information provided by men and women who are not prepared to reveal anything if doing so could pose a significant risk to their physical, financial or material safety.
>
> They will do it only on condition that their anonymity is guaranteed.
>
> Basically, journalists are the active agents of freedom of the press, which is recognized as a fundamental right in our society. However, in order for journalists to be able to act as the effective force behind freedom of the press, they must be allowed to enter into confidentiality agreements with the sources who guide them in their research, inform them of dubious schemes and provide them with crucial information in their search for the truth.
>
> Without these sources, the sometimes scandalous stories that undermine the integrity of our democratic institutions or that violate the most basic rules of probity and good governance may never come to light. The blight affecting public administrations could therefore spread even further until it finally reaches the very core of our institutions.[8]

Journalistic sources tell us about possible illegal and unethical dealings of those who hold the strings of political or economic power. They are critical, in other words, to serving the goals of accountability and transparency that lie at the foundation of a functioning democracy.

In bringing their stories to light, journalists typically rely on sources for behind-the-scenes tips and information for their stories.[9] The kind of information shared by sources may range from simple background and context, to sharing documents or acting as a first-hand informant.[10] Sources, however, may insist on confidentiality since they may fear retaliation if they become identified as the source of the information. As David Walmsley, editor-in-chief of the Globe and Mail and witness at the Senate hearings on the *JSPA*, stated:

> I have examples where I have sources on stories who have raised [the promise of confidentiality] issue. They haven't walked away from us, but they are aware of it. Again, the sources are often on a case-by-case basis, but what they have in common is the desire to stay secret often because of personal risk. On the odd occasion, we can get sources to sign affidavits that say if it gets to the final point, they will go public, but those are rare, and I think there is a broader chill and certainly an awareness. When we say, "We will provide

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8 "Bill S-231, An Act to amend the Canada Evidence Act and the Criminal Code," 2nd reading, *Debates of the Senate*, 42-1, No 82 (5 December 2016) at 1949 (Hon Claude Carignan), online: [perma.cc/R88N-GE59] [Bill S-231, 2nd reading].

9 There is no empirical work about this in Canada. However, in two separate studies (1971 and 1985) in the US, it was found that confidential sources were used in approximately one-quarter of news stories. Another US study shows that 80 percent of news magazine stories and two-thirds of Pulitzer Prize awards relied on confidential sources: Jason M Shepard, *Privileging the Press: Confidential Sources, Journalism Ethics and the First Amendment* (El Paso: LFB Scholarly, 2011) at 4. In another US study of former federal policymakers, 42 percent admitted to leaking information to the press while in office. Of those, 80 percent did so "to counter false or misleading information" while 75 percent sought to direct public attention to a policy issue: *ibid* at 6.

10 *Ibid* at 4: "Sometimes, a promise of confidentiality is the price journalists are willing to pay for access to information they otherwise could not obtain. Some promises of confidentiality result in explosive scoops, but more often they allow sources to talk frankly so journalists can better understand issues and context."

> or afford confidentiality to you," the challenge they offer to us is, "How can you guarantee that?" And, of course, we can't.[11]

These are the kinds of sources the *JSPA* seeks to protect.

The list of major controversies brought to light by confidential sources in Canada are numerous.[12] Two cases discussed in this article dealt with efforts by journalists to protect confidential sources relied upon to expose the so-called "Sponsorship" and "Shawinigate" scandals. Most recently, anonymous CSIS personnel were responsible for bringing the issue of Chinese interference in the Canadian political system to light. We revisit this controversy at the end of the article after presenting our argument for how the *JSPA* should be interpreted.

Of course, not all confidential sources are reliable.[13] Most menacingly, some anonymous leaks are knowingly false or misleading and targeted to unfairly harm an individual or organization. The inaccurate press coverage of Maher Arar by some media outlets, based on false information from unidentified government sources, is a cautionary tale of the dangers of anonymity.[14] Thus, while there is enormous social value gained by protecting journalistic sources, safeguards are necessary to ensure that the anonymity it affords does not itself hide malfeasance.

The rhetoric, if not the reality, of common law jurisprudence affirms the critical role of journalistic sources to the public interest. As Justice Binnie in *National Post* recognized,

> It is in the context of the *public* right to knowledge about matters of public interest that the legal position of the confidential source or whistleblower must be located.… The public also has an 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.[15]

Moreover, the common law recognizes the "chilling effect" of court orders that require a journalist to produce information that may include identifying their source, being that: (1) sources will "dry up" for fear of being revealed; (2) journalists will avoid note-taking or otherwise self-censor to avoid documenting any information that may help identify the source (thus impacting on the accuracy of the news); and (3) public perceptions of journalists as an arm of the state.[16] As we will see next, the public interest to avoid chilling effects that

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11 Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, 42-1, No 22 (15 February 2017) (David Walmsley), online: [perma.cc/GTL8-LL48].

12 For a list of seven major controversies, see e.g. *R v National Post*, 2010 SCC 16 at para 28 [*National Post*].

13 Shepard, *supra* note 9 at 6: identifies seven types of leaker motives:

> The "ego leak" is done to increase the self-importance of the leaker. A "goodwill leaker" is done to build rapport or earn good will with the reporter. A "policy leak" aims to get more attention to particular proposals. An "animus leak" is done to criticize or attack an opponent. A "trial balloon leak" floats a particular idea or strategy to test its favorability. A "whistle-blower leak" is attempting to fix what the leaker perceives as a wrong.

14 See e.g. *O'Neill v Canada (Attorney General)*, 2006 CanLII 35004 (ONSC) (concerning the inaccurate press coverage of Maher Arar, based in large part on confidential government sources). See also Andrew Mitrovica, "Hear No Evil, See No Lies," *The Walrus* (12 December 2006), online: [perma.cc/C744-QFTP].

15 *National Post*, *supra* note 12 at para 28 [emphasis in original].

16 *R v Vice Media Canada Inc*, 2018 SCC 53 at para 26 [*Vice Media*].

discourage sources from coming forward is weighed against a competing public interest broadly known as the administration of justice.

III. COMMON LAW PROTECTIONS FOR CONFIDENTIAL SOURCES

The general rule in court proceedings is that each party is entitled to access evidence relevant and material to the issues at trial, including that which is in the possession of the opposing side. Privileged information is an exception. The common law protects confidential journalist sources through a residual, case-by-case privilege. The party seeking to uphold the privilege bears the onus of satisfying a four-part test:

1) the communications originate in a confidence that they will not be disclosed;

2) this element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties;

3) the relation is one which in the opinion of the community ought to be sedulously fostered; and

4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.[17]

Sources who insist on confidentiality prior to providing information concerning a matter in the public interest to a journalist typically satisfy the first three requirements. As Justice Lebel noted in *Globe and Mail*, "most of the grunt work" in confidential news source cases occurs under the fourth criterion.[18] This final step balances the public interest in disclosure of all relevant information to a criminal investigation or civil proceeding against the public interest in protecting the confidential source.[19] To illustrate the common law framework, which retains some application under the *JSPA*, we consider three leading cases from the Supreme Court and the Ontario Court of Appeal.

A. *NATIONAL POST*

The case concerned the so-called "Shawinigate Scandal."[20] Andrew McIntosh, then a journalist with the National Post, was investigating Prime Minister Jean Chrétien's involvement in procuring a loan from the Business Development Bank of Canada (BDBC) for the Auberge Grand-Mère, a hotel in Chrétien's riding.[21] McIntosh's investigation led him to suspect that Chrétien was somehow involved with BDBC loans to the hotel. On prior

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[17] *National Post*, *supra* note 12 at para 53, citing John Henry Wigmore, *Evidence in Trials at Common Law*, vol 8, revised ed by John T McNaughton (Boston: Little, Brown & Co, 1961), § 2285. This test is sometimes referred to as the "Wigmore test."

[18] *Globe and Mail v Canada (AG)*, 2010 SCC 41 at para 57 [*Globe and Mail*].

[19] *National Post*, *supra* note 12 at para 60.

[20] While the information at issue in the *National Post*, *ibid* case was false (that is, the loan document was a forgery), serious conflict of interest allegations were levelled at the Prime Minister for meeting with the President of the BDBC to help secure the loan from the Auberge Grand-Mere, in which he still maintained holdings (see generally Wikipedia, "Shawinigate," online: [perma.cc/UZT3-VNWF]).

[21] *National Post*, *ibid* at para 8.

occasions, an informant X had provided accurate and reliable information and documents in connection with the Shawinigate controversy.[22] The informant X eventually requested confidentiality, which was granted to him by McIntosh in consultation with his editor.[23]

Thereafter, McIntosh received a sealed brown envelope, sent to him by X. The envelope contained what appeared to be a copy of a 1997 BDBC internal loan authorization for a CDN$615,000 mortgage to the Auberge Grand-Mère. The document showed that the Auberge Grand-Mère had an outstanding debt of approximately CDN$23,000 to "JAC Consultants," a holding company owned and operated by the Chrétien family.[24] To verify the authenticity of the document, McIntosh sent copies to the BDBC, Chrétien's office, and Chrétien's lawyer.[25] The BDBC replied, stating that it had no record of a debt to "JAC Consultants," and that the loan document was a forgery.[26]

Thereafter, the police requested access to the forged loan document and envelope that were in McIntosh's possession. They believed the originals contained fingerprint or DNA evidence that could identify those responsible for the forged document.[27] However, X claimed to have received the document anonymously in the mail, discarded the original envelope, and forwarded the document in a new envelope to McIntosh.[28] X claimed not to know the document might be a forgery when they sent it to McIntosh.[29] McIntosh had relied on X before (who had previously provided accurate documentation in the Shawinigate affair) and believed that X had no knowledge of the forgery. McIntosh refused to hand over the loan document and envelope to police, fearing it might reveal the identity of X, forcing the RCMP to seek a production order.

This main issue at the Supreme Court was whether McIntosh had to provide the loan document and envelope to the RCMP, which could in turn reveal the identity of his confidential source. Writing for a seven-Justice majority, Justice Binnie applied the Wigmore test and held that McIntosh had not established privilege over the document and envelope.[30] The first three branches of the Wigmore test were easily met: (1) the communication involved an explicit promise of confidentiality; (2) the confidentiality was essential to the relationship; and (3) the relationship between professional journalists and their confidential sources ought to be protected.[31]

Under the fourth criterion, the majority held that the probative value of the evidence and the nature and seriousness of the offence outweighed the public interest in respecting the confidentiality of the journalist's source.[32] While X maintained that they were not the author of the forgery, received the document anonymously, and had disposed of the original envelope, the Supreme Court characterized these as "anonymous, uncorroborated and self-

22 *Ibid* at paras 125–26, Abella J, dissenting.
23 *Ibid*.
24 *Ibid* at para 13.
25 *Ibid*.
26 *Ibid*.
27 *Ibid* at para 14.
28 *Ibid* at para 135, Abella J, dissenting.
29 *Ibid*.
30 *Ibid* at para 91.
31 *Ibid* at paras 56–57, 70.
32 *Ibid* at para 61.

exculpatory statements."[33] Nor did the Supreme Court seem at all concerned that several individuals (including National Post editors) handled the loan document, thus making forensic identification through fingerprinting or DNA unlikely. Justice Binnie paid only rhetorical homage to the public interest in protecting journalistic sources. He gave no weight to the apparent reliability of the source on a prior occasion, the stellar reputation of the journalist involved, or the standards and procedures followed before offering a promise of confidentiality. Nor was Justice Binnie swayed by the chilling effect that ordering production would have on potential journalistic sources in the future.[34]

Justice Abella, in her dissent, found "a fatal disconnect between the envelope, the documents, the identity of X and the alleged forgery."[35] Moreover, "[t]he only possible evidence the envelope could yield, and that only remotely, is the identity of X, not of the alleged forger."[36] In her view, the harm caused by possible disclosure of the identity of X is "far weightier than any benefit to the investigation of the crime."[37]

B. *GLOBE AND MAIL*

Released the same year as *National Post*, the Supreme Court in *Globe and Mail* elaborated upon the public interest balancing exercise in the context of civil litigation. The facts of the case, while not generally important for our purposes, concerned the identity of the confidential source responsible for bringing to light the Sponsorship scandal.[38] While the merits of the case were remitted back to trial, the Supreme Court offered the following guidance relevant to the fourth criterion (the public interest balancing exercise) in the context of civil litigation.

The factors considered under public interest balancing were somewhat different than *National Post*. One consideration is the *stage of the proceeding*. Seeking evidence at an early, pretrial stage may militate either in favour of, or against, recognizing privilege. At early stages, the parties' liabilities have not yet been established, and thus disclosing the identity of a source may be unnecessary.[39] At the same time, it is possible that identification of a confidential source may resolve certain issues before trial, militating against recognizing the privilege.[40] A second consideration is the *centrality of the question to the dispute*. While relevancy is normally broadly determined in civil matters, a factual or legal issue may be so peripheral to the dispute as to not justify disclosure of identity of the source.[41] A third

[33] *Ibid* at para 75.

[34] By breaching that confidentiality in this case, Justice Binnie jeopardized McIntosh's and other journalists' ability to rely on journalistic sources in the future: Jamie Cameron, "Of Scandals, Sources and Secrets: Investigative Reporting, National Post and Globe and Mail" (2011) 54:1 SCLR (2d) 233 at 260.

[35] *National Post*, *supra* note 12 at para 134, Abella J, dissenting.

[36] *Ibid* at para 140, Abella J, dissenting.

[37] *Ibid* at para 106, Abella J, dissenting.

[38] This scandal involved the illegal transfer of public funds to government supporters, and is widely viewed as substantially contributing to the downfall of Paul Martin's Liberal government in 2006: Wikipedia, "Sponsorship scandal," online: [perma.cc/N3HD-WGEX].

[39] *Globe and Mail*, *supra* note 18 at para 58.

[40] *Ibid*.

[41] *Ibid* at para 60.

consideration is *whether the journalist is a party to the litigation*, or merely a third party witness. In the latter case, identifying the source is less likely to be central to the dispute.[42]

A fourth consideration is whether there is *no available alternative means to acquire the information*.[43] If there are other means of acquiring the information, those avenues should be explored before forcing the journalist to breach confidentiality. Breaking the promise of confidentiality "should be done only as a last resort."[44] The Supreme Court added that there may be other relevant considerations in the context of a particular case including "the degree of public importance of the journalist's story, and whether the story has been published and is therefore already in the public domain."[45]

C. *1654776 ONTARIO LIMITED V. STEWART*

In *1654776 Ontario Limited v. Stewart*,[46] the appellants sought the identity of journalistic sources they claim violated securities law, causing them financial damage. The Court of Appeal for Ontario emphasized the importance of onus in terms of satisfying the fourth Wigmore criterion.[47] The Court identified the following *main* public interest considerations: (1) the public interest in the media's use of confidential sources; and (2) the public interest in compliance with the securities law, which is served by the appellant's private cause of action.

The Court of Appeal for Ontario then elaborated upon specific factors relevant to public interest balancing.[48] The Court considered the *harm that would flow from upholding the claim of privilege*. Here, the Court focused on whether the appellants would be denied a remedy and whether privilege would, by sheltering the identity of the sources, encourage future wrongdoing. On both fronts, the Court concluded that little to no harm would result from upholding the privilege. If the sources were within the impugned company as alleged by the appellants, they could simply sue the company. Similarly, exposure to liability would incentivize companies to ensure their directors, officers, and employees do not violate securities law.[49]

The Court also considered *the public interest in knowing the status of the transaction*, which favoured upholding the privilege. On the other hand, the *harm that would flow if the claim of privilege rejected* did not carry much weight since the Court was not convinced the source here was a whistleblower who would not have otherwise disclosed this information.[50]

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42 *Ibid* at para 61.
43 *Ibid* at para 62.
44 *Ibid* at para 63.
45 *Ibid* at para 64.
46 2013 ONCA 184 [*Stewart*].
47 *Ibid* at para 81. See also *ibid* at paras 79–80.
48 The Court gave *no weight* to (1) the Securities Commission's decision not to investigate the alleged wrongdoing; and (2) the fact that the journalist's story won an award (*ibid* at para 123). The Court also found that the journalist's *promise of absolute confidentiality* was cavalier in this case and, therefore, was not a relevant factor. Specifically, in giving an absolute promise of confidentiality, the journalist did not turn his mind to the requirements of the *Securities Act* (RSO 1990, c S5), the possible motivations of the sources in disclosing information to him, or why they consented to some identifying information being included in the story (*Stewart*, *supra* note 46 at para 128).
49 *Stewart*, *ibid* at paras 142–43.
50 *Ibid* at para 139.

The *strength of the appellant's proposed action* played a significant, if not determinative, role in this case. Citing a lack of evidence that the statements made were false, the Court found that the appellant's claims that the sources had ulterior motives to be "speculative."[51] As such, the action "had little merit and would likely fail."[52] In upholding the privilege, the Court remarked: "The balance may well have shifted, had the apparent strength of the appellant's case been compelling; however, the appellant has not put forward such a case."[53]

In sum, the fourth criterion of Wigmore requires courts to balance the disclosure of evidence for the proper administration of justice against the harm that disclosure would cause to journalists and their sources. *National Post*, *Globe and Mail*, and *Stewart* elaborate a non-exhaustive list of factors for courts to consider under public interest balancing, including:

1) the nature and the seriousness of the offence under investigation;
2) promoting compliance with the law;
3) the importance and centrality of the information to the proceeding;
4) the stage of the proceeding;
5) the availability of other means to acquire the information;
6) the status of the journalist in the proceeding (third party or party);
7) the probative value of the evidence being sought;
8) the importance of the journalist's report for the public;
9) the strength of the plaintiff's action;
10) the harm flowing from upholding the privilege; and
11) the harm flowing from denying the privilege.

With these factors, the common law has developed some guidance for courts to conduct public interest balancing.

IV. *JOURNALIST SOURCES PROTECTION ACT*

The *JSPA* came into force on 18 October 2017, and provides a legislative pathway for recognizing confidential source privilege. While the transition from the common law to legislation introduces some welcome benefits, it retains the same public interest balancing

[51] *Ibid* at para 137.
[52] *Ibid* at para 130.
[53] *Ibid* at para 145.

exercise.[54] In this section, we probe the background of the legislation and summarize the *JSPA* amendments to the *Canada Evidence Act*. Then, we include the Supreme Court's interpretation of these amendments as elaborated in *Denis*.

The *JSPA* was first introduced in 2016 as a Senate Private Members' Bill S-231.[55] Senator Carignan sponsored Bill S-231 in response to "disturbing revelations" that numerous journalists were illegally placed under surveillance by the Quebec provincial police force.[56] Addressing concerns from journalists that their sources no longer felt safe to co-operate, Senator Carignan explained that "it has become extremely important that we provide a framework for the protection of sources or whistle-blowers through formal legislation. That is the purpose of Bill S-231."[57] The *JSPA* makes amendments to two acts: the *CEA*[58] and the *Criminal Code*.[59] Under the *CEA*, a journalist called upon to testify in a criminal, civil, or administrative proceeding, may refuse to disclose information if it identifies, or is likely to identify, a journalistic source.[60]

The new scheme for protection under the *JSPA* operates in two main stages. At the threshold stage, the party seeking to recognize the privilege (typically the journalist) must first show that they are "journalist" protecting a "journalistic source" as those terms are defined.[61] Section 39.1(1) defines "journalist" as anyone "whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person."[62]

The term "journalistic source" is defined as "a source that confidentially transmits information to a journalist on the journalist's undertaking not to divulge the identity of the source, whose anonymity is essential to the relationship between the journalist and the source."[63]

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[54] Noah S Wernikowski, "(Un)Protected Sources, (Un)Protected Democracy: A Critical Analysis of Journalistic Source Protection Law" (2022) 5:1 Lakehead LJ 22 at 39 (the retention of public balancing, even in a more favourable form, still creates "uncertainty chill" that may deter journalistic sources from sharing information with journalists).

[55] "Bill S-231, An Act to amend the Canada Evidence Act and the Criminal Code," 1st reading, *Debates of the Senate*, 42-1, No 74 (22 November 2016) at 1763 (Hon Claude Carignan), online: [perma.cc/7XHW-XFAV].

[56] "Bill S-231, An Act to amend the Canada Evidence Act and the Criminal Code," 3rd reading, *Debates of the Senate*, 42-1, No 110 (6 April 2017) at 2738 (Hon Claude Carignan), online: [perma.cc/6UYD-KKH9] [Bill S-231, 3rd reading].

[57] Bill S-231, 2nd reading, *supra* note 8 at 1950 (Hon Claude Carignan).

[58] *CEA*, *supra* note 5.

[59] *Criminal Code*, *supra* note 5. As discussed at *supra* note 5, these amendments will not be discussed.

[60] *CEA*, *supra* note 5, s 39.1(2). Notably, a "court, person or body" may also raise this objection under section 39.1(4).

[61] These definitions "overlap" with the requirements posed by the first three criteria of the Wigmore test: *Denis*, *supra* note 6 at para 37.

[62] *CEA*, *supra* note 5; Amar Khoday, "Safeguarding Confidential News Sources? Assessing the Protections in the Federal *Journalistic Sources Protection Act*" in Christopher DL Hunt, ed, *Perspectives on Evidentiary Privileges* (Toronto: Thomson Reuters, 2019) 115 (the words "for consideration" and "main occupation" indicate an intention to limit protections to those who confide to journalists "employed and salaried for media outlets that disseminate information as their primary métier," at 127; this definition seems to exclude bloggers, citizen journalists, and student journalists, at 128).

[63] *CEA*, *supra* note 5, s 39.1(1).

Once the journalist has shown that they and their source fall within the above definitions, the onus switches onto the party seeking disclosure of the information to show that the information being sought "cannot be produced in evidence by any other reasonable means."[64]

If this threshold stage is satisfied, the second stage of analysis under the *JSPA* is, like the fourth Wigmore criterion, a public interest balancing exercise. This stage requires the court to order disclosure of the revealing information only if:

> [T]he public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source, having regard to, among other things,
>
> (i) the importance of the information or document to a central issue in the proceeding,
>
> (ii) freedom of the press, and
>
> (iii) impact of disclosure on the journalistic source and the journalist.[65]

According to the Supreme Court in *Denis*,[66] factor (i) requires a reviewing judge to determine whether the document relates to a central issue in the proceeding. The more central the issue is to the proceeding, the more likely disclosure will be justified.[67] Factor (ii), "freedom of the press," will nearly always weigh in favour of protecting the confidentiality of the source[68] since the press contribute to the "existence and maintenance of a free and democratic society"[69] and "productive debate."[70] Without the information made available by journalists and their confidential sources, "the public's very right to information is jeopardized."[71] However, if the journalistic source is motivated for reasons contrary to the public interest, then this mitigates in favour of disclosure.[72]

Factor (iii), "the impact of disclosure on the journalistic source and the journalist,"[73] assesses the harms likely suffered by both the journalist and the journalistic source if the information is released. Weighing these factors will be "particularly challenging" because of the lack of information before the court.[74] There will nearly always be some harm to sources. However, the degree of that harm will vary along a spectrum. In more minor cases, this could include unwanted publicity or less serious workplace reprisals.[75] In more extreme cases, it

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64 *Ibid*, s 39.1(7)(a). Again, this requirement mirrors the Wigmore test (see discussion in Part III).

65 *Ibid*, s 39.1(7)(b).

66 *Denis*, *supra* note 6.

67 *Ibid* at paras 42–44 (the court should consider only the proceeding relating to the disclosure, not the entirety of the surrounding litigation. This is important because the document may be central to a preliminary matter or sub-proceeding at trial without being central to the primary proceeding as a whole. For instance, if a document is sought as part of a stay application, the court should only consider that stay application in assessing the document's importance, not the entirety of the broader litigation. Furthermore, the issue at hand need not only be *a* — and not necessarily *the* — central issue in the proceeding).

68 *Ibid* at para 48.

69 *Ibid* at para 45.

70 *Ibid*.

71 *Ibid* at para 47.

72 *Ibid* at para 49. For example, a source that provided a journalist with information they know to be false just for the purpose of "hindering orderly business" would be less deserving of protection. "Great caution" must be exercised in inferring this kind of ulterior motive, since the court will be operating on extremely limited information in making this determination (*ibid* at para 49).

73 *Ibid* at para 50.

74 *Ibid*.

75 *Ibid* at para 51.

could include serious professional and financial consequences, "judicial proceedings, and even violent reprisals."[76]

In addition to these three factors, pre-*JSPA* case law remains relevant though non-enumerated considerations must not eclipse the three factors expressly provided by Parliament.[77] Lastly, when a court orders disclosure, it is important that it does so minimally — it should seek to minimize the harm done to the journalist and their source.[78] The court can do this by augmenting the order with conditions appropriate to the circumstance and by limiting the scope of the disclosure.[79]

Critically, the *JSPA* reverses the evidentiary burden for public interest balancing on to the party seeking to disclose the journalistic source.[80] Chief Justice Wagner called this "unquestionably the most important difference" between the common law and the *JSPA*.[81] Justice Abella in dissent, went further. She noted the expressed intent of the sponsor for Bill S-231 was to maintain confidentiality unless there were "exceptional, grave and serious situations where the public interest will dictate that the protection must be lifted and the source's identity disclosed. In other cases, the public interest will dictate that anonymity must be maintained."[82]

In her view, therefore, the *JSPA* "anticipates that absent exceptional circumstances, a presumption of protection for journalistic sources will prevail."[83]

V. PRESCRIPTIVE INTERPRETIVE GUIDANCE

By enacting the *JSPA*, Parliament intended to afford journalistic sources stronger protection than offered in the common law. In this section, we posit further interpretive guidance to aid courts in conducting the public interest balancing exercise. As Chief Justice Wagner correctly identifies, the main mechanism to improve journalistic source protection is the reverse onus. However, given the nature of the evidence in journalistic source cases, we find the notion of onus difficult to conceptualize. We argue instead that a presumption in favour of non-disclosure save "exceptional circumstances,"[84] as advanced in dissent by Justice Abella in *Denis*, to be a more workable standard for triers of fact.

In addition, while the public interest balancing analysis offered by the majority in *Denis* is a good beginning, further elaboration is needed. As implied by the reverse onus, we argue that the party seeking disclosure must offer thorough evidence to satisfy the court on a balance of probabilities that the information sought is likely to be important to (and probative of) a central issue in the proceeding. Equally important, freedom of the press should require courts to give greater deference in cases where the journalist is reputable, their sources are reliable,

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[76] *Ibid*.
[77] *Ibid* at paras 52–53.
[78] *Ibid*.
[79] *Ibid* at para 52.
[80] *Ibid* at paras 32–33.
[81] *Ibid* at para 34.
[82] *Ibid* at para 70; Bill S-231, 3rd reading, *supra* note 56 at 2738 (Hon Claude Carignan).
[83] *Denis*, *ibid* at para 71.
[84] *Ibid*.

and when rigorous journalistic standards are followed before offering a promise of confidentiality to sources.

A. REVERSE ONUS

As every lawyer knows, the burden of proof placed on a party in civil cases is discharged on a balance of probabilities, namely, "the trier of fact must find that the existence of the contested fact is more probable than its non-existence."[85] Such findings, of course, are normally based on the admissible evidence tendered in a proceeding. Evidence may be direct, for example, an eyewitness account or document asserting a particular fact, or circumstantial, namely, inferences of fact may be drawn from other facts that are sufficiently proved.[86] Exceptionally, courts may take judicial notice of certain facts as true without the requirement of proof.[87] The kinds of facts under this category are varied but courts have taken judicial notice of human needs and behaviours[88] or social facts.[89]

The leading case on the civil burden of proof, *FH v McDougall*, attempts to offer further guidance:

> [E]vidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency.… Some alleged events may be highly improbable. Others less so. There can be no rule as to when and to what extent inherent improbability must be taken into account by a trial judge. As Lord Hoffmann observed at para. 15 of *In re B*:
>
>> Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.
>
> It will be for the trial judge to decide to what extent, if any, the circumstances suggest that an allegation is inherently improbable and where appropriate, that may be taken into account in the assessment of whether the evidence establishes that it is more likely than not that the event occurred. However, there can be no rule of law imposing such a formula.[90]

This sets the evidentiary standard for discharging a balance of probabilities at "sufficiently clear, convincing and cogent."[91] At the same time, the court acknowledges there is no objective standard or rule to measure when the burden has been discharged. Moreover,

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[85] John Sopinka, Sidney N Lederman & Alan W Bryant, *The Law of Evidence in Canada*, 4th ed (Markham, ON: LexisNexis, 2014) at 210; Linda R Rothstein, Robert A Centra & Eric Adams, "Balancing Probabilities: The Overlooked Complexity of the Civil Standard of Proof" in *Law Society of Upper Canada Special Lectures 2003* (Toronto: Irwin Law, 2004) ("according to the classic texts, the proponents must establish that the 'existence of the contested fact is more probable than its non-existence', or has 'more than 50 percent chance of being true'," *ibid* at 455).

[86] Sopinka, Lederman & Bryant, *ibid* at 69–70.

[87] *Ibid* at 1318.

[88] *Ibid* at 1321.

[89] *Ibid* at 1332 (debate remains about whether judicially noted facts "forecloses any evidence on the point," at 1333).

[90] 2008 SCC 53 at paras 46–48 [*McDougall*].

[91] *Ibid* at para 46.

the Supreme Court cites, with approval *dicta* suggesting common sense should guide judges at least with respect to "inherent probabilities."[92]

The task of assessing when a burden of proof is discharged by "sufficiently clear, convincing and cogent" evidence is difficult enough in relatively straightforward cases where there is some direct evidence of witnesses or documents to central issues in dispute. In journalistic source cases, there is usually only speculative inferences that can be made about the critical factors considered in the public interest balancing assessment.

The first enumerated factor under the *JSPA* — the importance of the information or document to a central issue in the proceeding — is assessed behind a curtain of ignorance about what the evidence will reveal or whether it will be of assistance to an investigation or indeed even relevant. It was unlikely that the forged document or the envelope it was contained in could reveal the identity of the forger in *National Post* (if anything, they were more likely to reveal the identity of the journalistic source). Yet the Supreme Court nonetheless speculated that it might and therefore ordered disclosure of the document. This was not "sufficiently clear, convincing and cogent evidence" but rather a speculative, and therefore, weak inference made from necessarily limited known facts.

The second factor — freedom of the press — values the role of journalistic sources as purveyors of information for journalists to disseminate in the public interest. As such, courts consistently emphasize that legal rules should not create an undue chill on journalistic sources coming forward.[93] The impact of specific journalistic protection regimes on would-be journalistic sources is an empirical question that has never been tested. Therefore, the "evidence" on this point is of the "common sense" based on "inherent probabilities" kind, as stated in *McDougall*.

As such, Chief Justice Wagner in *Denis* seems to presume that disclosure will almost always result in some negative impact on freedom of the press. After lauding the importance of journalistic sources to the public's right to know, Chief Justice Wagner recognizes that "the freedom of the press criterion will quite often weigh against disclosure of the journalistic source's identity."[94] This seems to create a baseline presumption that disclosure creates some chilling effect on journalistic sources.[95]

Under this factor, Chief Justice Wagner also raises the relevance of motivation of the journalistic source, offering the example of the source who deliberately provides false information to a journalist.[96] More than that, however, we again encounter the evidentiary shortcomings of, at best, weak inferences drawn from a limited factual basis. Chief Justice Wagner acknowledges the evidentiary limitations of necessarily not having the "whole picture" to gauge the motivations of a journalistic source,[97] yet nevertheless persists on this point.

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[92] *Ibid* at para 48.

[93] *Vice Media*, *supra* note 16 and accompanying text.

[94] *Denis*, *supra* note 6 at para 48.

[95] Furthermore, evidence of chilling effect is almost impossible to produce: Eric M Freedman, "Reconstructing Journalists' Privilege" (2008) 29:4 Cardozo L Rev 1381 at 1383.

[96] *Denis*, *supra* note 6 at para 49.

[97] *Ibid*.

The third factor — impact of disclosure on the journalistic source and on the journalist — also presents evidentiary limitations. Chief Justice Wagner seems to recognize this in stating that "[a]ssessing the impact of disclosure on the journalistic source and on the journalist will be particularly challenging."[98] Similar to "freedom of the press," he acknowledges that disclosure will generally have an adverse effect on a journalistic source thus seeming to create a baseline presumption of harm.[99] He further posits that inferences of harm may be made from such factors as the context of the case or the nature of the information sought.[100] This might be a meaningful inquiry if for example, the journalistic source has provided information that in itself appears likely to constitute a criminal offence. Otherwise, it is difficult to imagine a spectrum of consequences that could be ascertained with any degree of certainty. Chief Justice Wagner makes a distinction between journalistic sources who might suffer "relatively minor personal or professional inconveniences,"[101] as opposed to dismissal or violent reprisals. But how can a court determine what an employer might or might not do to an identified journalistic source, or how these actions might impact the personal life of the journalistic source more generally?

The central factors in the public interest balancing factors under the *JSPA*, with few exceptions, takes place in an evidentiary vacuum where inferences of fact are typically impossible or weak. It will be an exceptional case where the importance of the evidence to a central issue in the proceeding can be positively established on a balance of probabilities. Even then, certain baseline presumptions seem to apply, namely, there will always be some negative impact on the journalist and journalistic source and on freedom of the press. The burden here is for the party seeking disclosure to show that the negative impacts on these factors are minimal. Therefore, if we are to apply the reverse onus strictly, then it seems journalistic source privilege comes very close to a presumption against disclosure as articulated by Justice Abella.

Our main concern, however, is that courts will not properly apply the reverse onus. Under the common law, courts tended to place little significance on (and even fail to mention) the burden of proof in journalistic sources cases.[102] Moreover, Justice Binnie in *National Post* explicitly disavows the role of onus. In outlining the fourth step of the Wigmore test, he states: "I expect that onus will rarely play a pivotal role at the fourth step where '[t]he exercise is essentially one of common sense and good judgement.'"[103] This is concerning *dicta* for a legislative reform where reversing the onus is the central tenet. Perhaps because of a

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[98] *Ibid* at para 50.

[99] *Ibid*.

[100] *Ibid* at para 51.

[101] *Ibid*.

[102] Historically, the Canadian common law on journalistic source privilege has been inconsistent in the civil context. Some cases questioned the existence of such a privilege: see e.g. *McInnis v University Students' Council of University of Western Ontario*, 1984 CanLII 2173 (ONSC). Only three cases mention that there is an onus placed on the person seeking to maintain confidentiality (*Stringam Denecky v Sun Media*, 2016 ABQB 292 at para 22; *Canwest Publishing Inc v Wilson*, 2012 BCCA 181 at para 30 [*Canwest Publishing*]; *Ching v Young*, 2020 BCSC 1284 at paras 18–19). Four other cases mention the Wigmore test but fail to mention onus (*Rocca Enterprises Ltd v University Press of New Brunswick Ltd*, 1989 CanLII 8142 (NBKB); *Bouaziz v Ouston*, 2002 BCSC 1297; *Wasylyshen v Canadian Broadcasting Corporation*, 2005 ABQB 902 [*Wasylyshen*]; *Crown Trust Co v Rosenberg*, 38 CPC 109 (ONSC). Of the above seven cases, only two courts found in favour of upholding journalistic source privilege (*Canwest Publishing*, *ibid*; *Wasylyshen*, *ibid*). One notable to exception to courts minimizing the role of onus is *Stewart*, *supra* note 46 and accompanying text.

[103] *National Post*, *supra* note 12 at para 60 [citation omitted].

"common sense" approach or an institutional bias of judges to admit all relevant evidence to a proceeding,[104] journalists are usually unsuccessful when attempting to protect their newsgathering function[105] or journalistic sources[106] under the common law.

Early indications are that some courts may either ignore, or not adequately apply, the reverse onus under section 39.1 of the *CEA*.[107] In *R. v. Edmundson*,[108] a journalist's interview notes with a journalistic source were sought by an accused charged with sexual assault. The accused alleged that the journalistic source was the same as one of the Crown's witnesses. Finding similarities in the witness police statement with that of the source's allegations contained in the published news story, the court drew a "reasonable" inference that it was the same person, and ordered disclosure. On this basis, the trial Court determined that the identity of the source would be revealed at trial as a Crown witness, and therefore freedom of the press was minimally impacted.[109] No mention is made of the role of onus.

This kind of oversight underscores the importance of articulating a clear standard. We believe analytical clarity is better served if courts conceptualize the reverse onus according to the *dicta* of Justice Abella in *Denis*: "absent exceptional circumstances, a presumption of protection for journalistic sources will prevail."[110] This articulation avoids nebulous notions of evidentiary weight and focuses on whether there are compelling reasons to justify disclosure. As such, it offers a workable standard by which courts can analyze public interest balancing under the *JSPA*.[111]

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[104] Freedman, *supra* note 95 at 1388.

[105] Only once in the 25 years prior to that case has the balancing exercise been struck in favour of the media for criminal production orders. This does not include decisions where the orders were quashed for procedural or technical reasons: *R v Vice Media Canada Inc*, 2018 SCC 53 (Factum of the Appellant at para 3).

[106] We found three cases: *Stewart*, *supra* note 46; *Wasylyshen*, *supra* note 102; *Canwest Publishing*, *supra* note 102.

[107] So far, of the two cases that have applied the *JSPA* (*supra* note 4; *CEA*, *supra* note 5, s 39.1), only one concerned an unidentified journalistic source. In *R v Vitranen*, 2022 BCSC 1029 (unpublished), aff'd 2022 BCCA 246, leave to appeal to SCC refused, 40286 (23 February 2023), the accused was charged with sexually assaulting the complainant, whose identity was under court seal. The accused sought information in the possession of a journalist (an interview with complainant) for his defence. However, the identity of the journalistic source (the complainant) was already known to the parties. In other words, the confidentiality of the source was already breached prior to the proceedings. In these circumstances, the Court ordered disclosure. Section 39.1(2) allows a journalist to challenge the disclosure of information is it "identifies or is likely to identify" the journalistic source. As the journalistic source was already known, section 39.1 arguably does not even apply to these facts.

[108] 2023 ONSC 2206 (the trial decision is under seal and therefore is unpublished, however, the appeal to the Ontario Superior Court provides reasons for upholding the trial court's decision: 2023 ONSC 4236, leave to appeal to SCC refused, 40933 (11 January 2024) [*Emundson* ONSC]).

[109] *Edmundson* ONSC, *ibid* at para 14.

[110] *Denis*, *supra* note 6 at para 71.

[111] Arguably, this conceptualization of the onus may encourage journalists to tender more evidence. Reverse onus is usually premised on the idea that the person upon whom the burden is placed is the one in the best position to access, or present, the relevant evidence. This makes sense when the issue is whether there are reasonable alternative means to acquire the information, or whether the evidence is important to a central issue in the proceeding. However, the journalist will always be in a better position to speak to the motivation of the source, or the consequences that might flow to a whistleblower who is outed. The incentive should be for both sides to tender as much evidence as possible on this point since, otherwise, there is so little to work with in such cases.

B. THE IMPORTANCE OF THE INFORMATION TO A CENTRAL ISSUE IN THE PROCEEDING

In this part, we focus on the importance of the information or document to a central issue in the proceeding. The majority in *Denis* identified two issues of analysis under this factor: (1) that the information relate to a (not the) central issue; and (2) that "the more crucial the information being sought is to the resolution of a 'central issue' in the proceeding, the more it can be characterized as important and the more disclosure will be justified."[112] In our view, this also captures what, at common law, is referred to as the "probative value of the evidence" sought.

The onus is on the applicant to supply as much evidence as possible to prove that this factor weighs in their favour. The trial court evidence in *National Post* is exemplary of the extent to which evidence on this issue should be tendered by the applicant. In that case, the police tendered evidence that forensic testing, in particular DNA from saliva or fingerprinting from the documents, might help reveal the identity of the forger. According to the journalistic source (X), the original envelope of the bank document was discarded, meaning that the existing envelope would not have the sought-after saliva of the perpetrator on the stamp. As for fingerprinting, the document had been extensively handled by several individuals, including McIntosh, the editor-in-chief, the deputy editor, and a lawyer. At cross-examination, the officer tendering evidence in support of the application stated that "[t]he more the documents are manipulated, the [less] likely the chance of getting fingerprints off it" and that it was a "remote and speculative possibility" that the loan document had the forger's fingerprints on them.[113]

The trial judge, after considering the evidence presented, concluded it was unlikely forensic analysis of the document, or envelope, would successfully identify the person who committed the forgery. This holding was overturned, and the evidence considered probative by the majority in *National Post*. However, with respect, this kind of evidentiary record simply does not support that the evidence is probative to identifying the perpetrator of the forged document, even on a "common sense" basis.

Moreover, reasonable inferences of probative value must be balanced against the other factors, bearing in mind that the onus in on the person seeking disclosure. In *Edmundson*, for example, the Court made a "reasonable" inference that the journalistic source and the Crown witness were the same individual.[114] When discounting the impact of disclosure on freedom of the press, this inference became established fact. The Court did not consider the impact on freedom of the press, or the journalistic source, if the "same person" assumption was wrong. Nor did the Court consider the chilling effect of compelling disclosure of the journalist notes, or heed the reverse onus.[115] The reasonable inference of the probative value of the evidence prematurely decided the matter.

Courts should critically assess all available evidence that might support an inference that the information sought is central to the proceeding. The strength of these inferences must be

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[112] *Denis*, *supra* note 6 at para 44.
[113] *National Post*, *supra* note 12 at para 136, Abella J, dissenting.
[114] *Emundson* ONSC, *supra* note 108. See also the text accompanying notes 108–109.
[115] *Vice Media*, *supra* note 16 and accompanying text.

balanced against the negative impacts on freedom of the press and on journalistic sources, including the possibility an inference may be wrong. In this process, of course, the onus of proof must be discharged by the person seeking disclosure.

C. FREEDOM OF THE PRESS

At the other end of the public interest balancing spectrum is that of preserving journalistic source confidentiality. Two of the criteria listed in the *JSPA* pertain directly to this side of the ledger: freedom of the press and the impact of disclosure on the journalistic source and on the journalist. According to Chief Justice Wagner, freedom of the press includes consideration of the public interest news value of the information. The overarching concern under this head must be to, as much as possible, ameliorate the chilling effect against journalistic sources sharing information with journalists.[116]

The reverse onus — or better yet, the presumption against disclosure save exceptional circumstances — if interpreted properly should, over time, offer would-be sources greater confidence that their identity will not be revealed by a court. The chilling effect is also ameliorated by creating certainty about *ex ante* procedures that assure a greater measure of deference by courts to a journalist's promise of confidentiality. This would require courts to consider the context in which promises of confidentiality are offered by a journalist.

Under both the common law and the *JSPA*, courts determine only whether information is communicated under a promise of confidentiality, which is essential to the relationship between the journalist and the source. The *JSPA* adds, as a threshold condition, that a journalist eligible to invoke *JSPA* protections be one whose "main occupation" is to work for the media "for consideration." Cumulatively, these threshold requirements might imply that all working journalist who promise confidentiality to their sources are eligible for the same level of protection under the *JSPA*, regardless of the context in which source confidentiality is offered.

There is a rationale for limiting the inquiry to only these factors. A source may be approaching a journalist for the first time and should not be held responsible for the reputation or practices of the journalist they seek out. It therefore makes sense that a baseline protection should be afforded to journalistic sources without considering additional context.

At the same time, it is worth contemplating the benefit of providing incentives both to encourage sources to contact reputable journalists, and for journalists to use best practices when relying on confidential news sources. These incentives would advance freedom of the press in the public interest by better ensuring that information is reliable and accurate, as well as offer would-be journalistic sources greater certainty that their anonymity will be preserved.

There are three kinds of contextual considerations that should matter: (1) the journalistic standards used both to promise confidentiality to a source and in publishing their allegations; (2) the professional reputation and record of the journalist; and (3) the reliability of the source. Deficiencies in these areas should not work against confidentiality, as (again) journalistic

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[116] *Ibid*.

sources may be oblivious to much of it. However, greater deference should be shown by courts when these factors work in favour of journalistic source.

In terms of reputation, a justifiable distinction can be made between journalists and news organizations who publish gossip or have a track record of seeking to "scoop" a story at the expense of following proper journalistic procedures to ensure accuracy. Similarly, when a source has, according to a reputable journalist, provided accurate information on prior occasions, this should have some bearing on the reliability of the information and even, to an extent, the motivations of the journalistic source.

The journalistic standards used for promising confidentiality to sources, and for publishing their allegations, should also be considered. Based on published codes of conduct at CBC and Globe and Mail, as well Canadian Association of Journalists, best practices for offering confidentiality include the following:

- Whether the disclosed information is of sufficient value such as to outweigh the lack of transparency and accountability about the source.[117]

- Promising confidentiality to a source only as a last resort when they refuse to be attributed for fear of reprisal.[118]

- Communicating to the journalistic source that confidentiality may not be maintained if disclosure is ordered by a court, or if there is a belief the source has knowingly misled them.[119]

- The use of multiple confidential sources or, in exceptional circumstances, only one with consultation with the editorial team.[120]

- The quality of the source, in particular whether the journalist has a trusted relationship with the source, who has been reliable and accurate in the past;[121] and whether efforts are made to establish the credibility of the source or corroborate the information provided.[122]

- Sources should be relied upon for information, not opinion, and should not be quoted.[123]

- Assessing the degree of hardship or reprisal a source may experience if their identity is revealed, such that confidentiality is warranted.[124]

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117 *The Globe and Mail*, *Editorial Code of Conduct* (2022), online (pdf): [perma.cc/XBB2-HXKT] [*Globe and Mail, Editorial Code*]; CBC, "Journalistic Standards and Practices," online: [perma.cc/WHU5-GDJC] [CBC, "Journalistic Standards and Practices"].

118 Patricia Elliott et al, *Ethics Guidelines* (The Canadian Association of Journalists, 2023), online (pdf): [perma.cc/HCF6-WE8W].

119 *Ibid*.

120 *Ibid*; *Globe and Mail*, *Editorial Code*, *supra* note 117.

121 *Ibid*.

122 CBC, "Journalistic Standards and Practices," *supra* note 117; Elliott, *supra* note 118.

123 *Ibid*.

124 *Ibid*.

- The managing editor must know the name of the source and the nature of the confidential agreement before a story is published.[125]

- Whether it is possible (without jeopardizing confidentiality) to disclose generic information about a source, for example "senior military source," and whether they might have a possible bias.[126]

These safeguards, when followed, offer strong (though not absolute) assurances that published confidential source information is accurate, in the public interest, and relied upon only as a last resort.

This approach promises to encourage the use of robust journalistic standards by eschewing a "race to the bottom," where journalists engage in less and less ethical practices to get the story out quicker or "beat the scoop."[127] More robust standards also creates predictability for journalists and their sources as they will be better able to promise (or not promise) confidentiality to their sources in light of the practices they have (or have not) followed.[128] As a result, would-be informants know that their confidentiality is better protected by going with a reputable and ethical journalist or news organization that exercises due diligence before publishing allegations.

Again, *National Post* nicely illustrates how these contextual considerations should be relevant to an assessment of the "freedom of press" factor in the *JSPA*. Andrew McIntosh was a reputable and respected multiple award-winning investigative journalist. His source who provided the forged document, X, was a proven reliable source to him on prior occasions in the Shawinigate affair. The decision to promise confidentiality to the source was made in collaboration with the editor-in-chief of the National Post. Moreover, the terms of when confidentiality would be set aside by the journalist (including a belief that the source was lying) was communicated to the journalistic source.[129] Importantly, the National Post did not accept the loan document at face value and attempted to verify its authenticity with the bank, at which point the story was leaked to other media outlets. Indeed, the story likely never would have been published had this verification process played out and the story not leaked.

While these factors were not relevant to the majority in *National Post*, Justice Abella in dissent offered a different, and in our opinion more compelling, view:

> Where, as here, the journalist has taken credible and reasonable steps to determine the authenticity and reliability of his source, one should respect the professional judgement and pause, it seems to me, before trespassing on the confidentiality which is the source of the relationship.[130]

This kind of deference to the high professional and ethical standards of journalists and new organizations, which did not gain traction under the common law, would better serve to protect confidential sources and promote the publishing of accurate stories. As well, judicial

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[125] *Ibid*.
[126] Elliott, *supra* note 118.
[127] David Abramowicz, "Calculating the Public Interest in Protecting Journalists' Confidential Sources" (2008) 108:8 Colum L Rev 1949 at 1983.
[128] *Ibid* at 1982.
[129] *National Post*, *supra* note 12 at para 128, Abella J, dissenting.
[130] *Ibid* at para 130, Abella J, dissenting.

assessments of journalistic standards and practices are not unknown to Canadian law. The defence of responsible journalism in Canadian defamation law invites judicial assessment of,[131] and deference to,[132] editorial practices.

VI. THE CASE OF THE CSIS WHISTLEBLOWERS

In this section, we apply our proposed analytical framework to the high-profile case of the CSIS journalistic sources who leaked allegations of China's interference in Canada's political system to two media outlets. The controversy over Chinese interference dates back to November of 2022, when general concerns on the issue were raised by senior CSIS personnel before a parliamentary committee.[133] This was followed by news reports, based on CSIS sources, in both the Globe and Mail and Global News that Prime Minister Trudeau had been advised by CSIS that the Chinese consulate in Toronto had meddled in 11 ridings in the 2019 election, though apparently without affecting the results.[134] In February 2023, the Globe and Mail reported the details of a "sophisticated" Chinese strategy of attempting to influence Canada's 2021 election with the goal of securing a (more China-friendly) Liberal government.[135] This reporting is based on the Globe and Mail journalist's access to top secret documents presumably provided by CSIS confidential news sources.

On 25 February 2023, Global News journalist Sam Cooper reported a specific, and explosive, allegation — based on three CSIS sources — that Han Dong, a Liberal Member of Parliament from Toronto, was affiliated with the Chinese government's interference network:

> Three weeks before Canada's 2019 federal election, national security officials allegedly gave an urgent, classified briefing to senior aides from Prime Minister Justin Trudeau's office, warning them that one of their candidates was part of a Chinese foreign interference network.
>
> According to sources, the candidate in question was Han Dong, then a former Ontario MPP whom Canadian Security Intelligence Service had started tracking in June of that year.
>
> National security officials also allege that Dong, now a sitting MP re-elected in 2021, is one of at least 11 Toronto-area riding candidates allegedly supported by Beijing in the 2019 contest. Sources say the service also believes Dong is a witting affiliate in China's election interference networks.
>
> Three sources with knowledge of the investigation said Dong emerged as a successor to MP Geng Tan as the 2019 Liberal candidate in ways the service found suspicious. These sources spoke to Global News on the condition of anonymity, which they requested because they risk prosecution under the Security of Information Act.

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[131] *Grant v Torstar*, 2009 SCC 61 at para 114 (the status and reliability of a source, including confidential sources, is a factor to be assessed in whether due diligence was exercised prior to the publication of false and defamatory information).

[132] *Ibid* (in assessing whether the inclusion of a defamatory statement was justifiable, "generous scope" is to be afforded to editorial choice, at para 118).

[133] Globe Staff & Steven Chase, "A Timeline of China's Alleged Interference in Recent Canadian Elections," *The Globe and Mail* (9 March 2023), online: [perma.cc/ANQ8-ZY6C] (on 3 November 2022).

[134] *Ibid* (on 7 November 2022 and 21 December 2022).

[135] *Ibid* (on 17, 18, and 20 February 2023).

> CSIS allegedly had intelligence that Beijing preferred Han Dong to Tan. "The Consulate was not pleased with Geng Tan's performance," a national security official aware of the service's investigation told Global News.
>
> The service relied on surveillance and wiretap evidence as well as human-source reporting, sources said.
>
> In late September, about 48 hours before the federal election nomination deadline, CSIS urged Trudeau's team to rescind Dong's candidacy, a national security official said.
>
> Sources alleged that Dong frequently called Chinese officials in Ontario and "was considered a close friend of the Toronto Consulate."[136]

Shortly thereafter, CSIS head David Vigneault announced an internal investigation to identify the CSIS whistleblowers leaking classified information to the press.[137]

On 22 March 2023, Sam Cooper reported more allegations:

> Liberal MP Han Dong, who is at the centre of Chinese influence allegations, privately advised a senior Chinese diplomat in February 2021 that Beijing should hold off freeing Michael Kovrig and Michael Spavor, according to two separate national security sources.
>
> Both sources said Dong allegedly suggested to Han Tao, China's consul general in Toronto, that if Beijing released the "Two Michaels," whom China accused of espionage, the Opposition Conservatives would benefit.
>
> …
>
> Dong also allegedly recommended that Beijing show some progress in the Kovrig and Spavor cases, the two sources said. Such a move would help the ruling Liberal Party, which was facing an uproar over China's inhumane treatment of Kovrig and Spavor.
>
> Dong, who represents the Toronto-area riding of Don Valley North, was the one to initiate the discussion with the consul general, the two sources said, adding that Dong stipulated at the outset that it was both a personal and a work-related conversation.[138]

Dong denied the allegations in both stories. He would later step down from the Liberal caucus and then initiate defamation proceedings against Global News for these allegations.[139] Those proceedings are not directly relevant to our analysis.

Instead, our question is: how would a court apply the *JSPA* should the RCMP seek to compel Sam Cooper and Global News to reveal their sources or hand over documentation that is likely to identify them? The *JSPA* would come into play should the RCMP open an investigation into breaches of section 4 of the *Security of Information Act*, a federal act which

[136] Sam Cooper, "Liberals Ignored CSIS Warning on 2019 Candidate Accused in Chinese Interference Probe: Sources," *Global News* (25 February 2023), online: [perma.cc/9RZ2-3T74].

[137] *Chase*, *supra* note 130 (on 6 March 2023).

[138] Cooper, "Secret Advice," *supra* note 2.

[139] *Dong v Global News*, 2024 ONSC 353 [*Dong*] (Statement of Claim). As the defamation action falls under provincial jurisdiction, the *JSPA* does not apply.

makes it an offence to communicate classified information to an unauthorized third party.[140] In these circumstances, the RCMP would likely seek both the documents shared with Sam Cooper, and the identity of CSIS officials who supplied him this information. The ensuing analysis is based on incomplete information as we do not know the evidence that would be produced in such a case. However, based on news reports, Global News' statement of defence, and special rapporteur David Johnston's first report into foreign interference, we can at least paint a partial picture of how this case might unfold.

The initial *JSPA* thresholds appear to be satisfied as Sam Cooper was employed as an investigative journalist for Global News (he is therefore a "journalist"), and was provided information by three CSIS sources on the condition, and promise, of confidentiality (thus, each is a "journalistic source"). If the RCMP seeks the identity of, or documentation likely to identify, the journalistic source, a journalist may object thereby triggering the *JSPA*'s protection mechanisms. Section 39.1(7) of the *CEA* permits disclosure if the "information or document cannot be produced in evidence by other reasonable means,"[141] and that the person seeking disclosure satisfies the public interest balancing exercise. The burden of proof is on the RCMP to satisfy both inquiries. We will assume that there are no alternative means to acquire the information and now turn to public interest balancing.

A. IMPORTANCE OF THE INFORMATION TO A CENTRAL ISSUE

On the administration of justice side of public interest balancing, courts are to assess the importance of the information or document to a central issue in the proceeding. In our hypothetical, the RCMP is investigating whether section 4 of the *Security of Information Act* has been violated, namely, whether classified information has been shared with an unauthorized third party. The information shared with the journalist is therefore indisputably central and important to the investigation. If that information is captured by section 4 (which seems highly probable) then of course the identity of the perpetrators is also central and important to the investigation. While the RCMP would have to submit sufficient evidence to prove these points, it seems likely they would be successful since the nature of the information shared constitutes the offence and the persons who shared it are the perpetrators. The value under this factor, therefore, is high.

Another factor to consider on this side of the ledger is the nature and seriousness of the offence under investigation. Section 4 is an indictable offence with a maximum punishment of 14 years imprisonment. The presumed rationale for criminalizing the sharing of classified information to outside sources is that it may compromise our national security by revealing governments or individuals who are being investigated by CSIS and the nature and methods of those investigations. This helps our adversaries by telling them what we know and do not know about their activities. As CSIS head David Vigneault told a House of Commons committee, leaks to the media "reveal sensitive sources, methodologies and techniques," and

[140] *Security of Information Act*, *supra* note 5, s 4. A national security advisor to the Prime Minister intimated that a such a prosecution might happen: Christian Paas-Lang, "The Source Behind Foreign Interference Leaks 'Will Be Found' and Punished, PM's Security Adviser Says," *CBC News* (22 June 2023), online: [perma.cc/33EH-QXD7].

[141] *CEA*, *supra* note 5.

"threaten operations and even the physical safety and security of human sources and employees."[142] Once again, the value under this factor is quite high.

B. FREEDOM OF THE PRESS/IMPACT ON JOURNALIST AND JOURNALISTIC SOURCE

On the preserving confidentiality of the journalistic source side of public interest balancing, an equally compelling case can be made. Here we assess the "freedom of the press" and "impact of disclosure on the journalistic source and the journalist" factors. In *Denis*, Chief Justice Wagner emphasized the indispensable role of confidential news sources who assist journalists in bringing important public interest stories to the light of day. In fact, Chief Justice Wagner went so far as to suggest that this factor "will quite often weigh against disclosure of the journalistic source's identity."[143] There might be exceptions, however, such as when a source is acting contrary to the public interest, for example, by sharing deliberately false information. In such cases, freedom of the press would not have the same weight.

At this point, there is no indication that the motivations of the Global News whistleblowers are anything but high-minded. In the Statement of Defence, the allegation is that the journalistic sources relied upon

> [C]hose to disclose sensitive national-security information on a principled basis because they thought that it was strongly in the public's interest to have the information so that the government's role and actions in combating foreign interference could be evaluated. The sources considered that the serious risks associated with disclosing this information were outweighed by the public importance of the information.[144]

The sources' goal appears to be protecting Canada's national security. This would support preserving their confidentiality.

Under "freedom of the press," Chief Justice Wagner includes the importance of the story for the public's right to know: "[T]his criterion will help the court identify news reports that relate fundamentally to the public's right to be informed because, for instance, they are central to the democratic experience of a free society."[145] It is hard to exaggerate the public interest importance of the stories sourced to the CSIS whistleblowers. The allegations have created one of the most serious controversies at the federal level of government in recent memory and, in late 2023, led to the creation of a public inquiry on foreign interference.[146] Moreover, the nature of the allegations themselves, namely, foreign meddling in our political system, is "central to the democratic experience of a free society."[147]

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142 Robert Fife & Steven Chase, "CSIS Investigating Who Leaked Information of China's Election Interference," *The Globe and Mail* (3 March 2023), online: [perma.cc/ZP5S-8F9J].

143 *Denis*, *supra* note 6 at para 47.

144 *Dong*, *supra* note 139 (Statement of Defence at para 17) [*Dong Statement of Defence*]. A similar, and more detailed sentiment, is expressed by the Globe and Mail whistleblower (who may or may not be part of the Global News group) in an opinion piece: "Why I Blew the Whistle on Chinese Interference in Canada's Elections," *The Globe and Mail* (updated 20 March 2023), online: [perma.cc/Q5V7-NR34]).

145 *Denis*, *supra* note 6 at para 48.

146 Prior to this, a special rapporteur was appointed to investigate the matter.

147 *Denis*, *supra* note 6 at para 48.

Prescriptively, we have argued that "freedom of the press" should consider the actual standards and practices used by the journalist in relying upon confidential sources, as well as the reputation of the journalist and reliability of the journalistic source. The Statement of Defence sheds some light on these considerations. Sam Cooper is a journalist with 17 years experience, and has "spent years investigating, researching and reporting on Chinese interference within Canada. Over the past several years, Cooper has developed relationships with various credible sources within CSIS and the larger intelligence community."[148] Cooper has "tested, scrutinized, critically evaluated and relied on these sources to develop and support stories addressing foreign interference."[149] Further, "much of what was initially reported based on intelligence from confidential sources has since been established as correct" including that Dong had unofficial conversations with the Chinese consulate about the Two Michaels, and there were irregularities in his nomination as a Liberal candidate in the 2019 election possibly tied to the Chinese consulate.[150]

Notwithstanding this, it is not clear whether the specific allegations against Dong are accurate.[151] David Johnston, who as special rapporteur had access to classified information, found that Dong discussed the Two Michaels with the Toronto Chinese consulate, "but did not suggest to the official that the PRC extend their detention."[152] To this, Cooper has replied that "the story stands."[153] An important factual allegation is in dispute that creates a large question mark for our analysis in terms of the nature and accuracy of the information shared by Cooper's confidential sources.

In terms of the standards used in relying upon confidential sources, the Statement of Defence states that, to avoid prosecution, the sources insisted upon confidentiality.[154] The information provided was checked and verified with other sources and documentation to assess credibility. Further,

> Published allegations were based on information from two or three sources with knowledge of CSIS investigations into foreign interference. Where information from a confidential source was reported, that information was confirmed by reference to at least one additional confidential source who was independent from the original source.[155]

In sum, and based on the allegations contained in the Statement of Defence, this case involves an experienced journalist using reliable sources, who appropriately extended

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148 *Dong Statement of Defence*, *supra* note 144 at para 11.
149 *Ibid*.
150 *Ibid* at para 15.
151 The initial report of the Foreign Interference Commission concluded that there was foreign interference in the 2019 and 2021 elections, and comments in some detail on the evidence surrounding interference in Han Dong's nomination campaign and election: *Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions: Initial Report* (Ottawa: Foreign Interference Commission, 2024) at 112.
152 Canada, Department of Democratic Institutions, *First Report – The Right Honourable David Johnston, Independent Special Rapporteur on Foreign Interference* (Ottawa: DDI, 23 May 2023) at 26, online (pdf): [perma.cc/7LZP-H389].
153 Alex Ballingall, "Former Global News Journalist Defends Reporting on Chinese Political Interference: 'The Story Stands'," *Toronto Star* (20 June 2023), online: [perma.cc/9743-6WXA].
154 *Dong Statement of Defence*, *supra* note 144 at para 17.
155 *Ibid* at para 18.

confidentiality to his sources and cross-referenced published allegations with at least one other source. The freedom of the press factor seems very high.

The final factor to consider is the impact of the disclosure on the journalistic source and the journalist. Here, disclosure would expose these journalistic sources to prosecution and possible imprisonment, and likely termination of employment, in addition to other negative professional, financial, and personal consequences. Possible impacts for the journalist are that his sources may dry up once he has been associated with a disclosure. Again, the value on this factor appears high.

C. POSSIBLE RESOLUTION

The above factor analysis indicates that the stakes are high on both sides of public interest balancing. Disclosure promises to provide the RCMP with both the evidence and the identity of perpetrators to a serious offence in which sensitive information about intelligence gathering methods and targets are exposed. On the other hand, proper and rigorous procedures were followed by an experienced journalist who used reliable sources to expose a serious controversy in the public interest. Moreover, the consequences for disclosure are severe for these whistleblowers.

One could conclude that concerns on both sides are evenly balanced and therefore the reverse onus should favour non-disclosure. It may also be helpful to consider the nuance of the information published by Global News, and the implications arising from that. Sensitive national security information, when leaked, will always have deleterious effects on intelligence operations. The fact that the Chinese consulate was exposed as a target of intelligence scrutiny, for example, compromises the ability of CSIS to continue spy operations there. However, nothing more than general allegations are shared in the published stories. There is no mention of methods, or names, or the publishing of transcripts or other documentation supporting the allegations. Global News published the allegations without specifically referencing any more detail than essential to reveal the substance of the allegations.

These facts stand in contrast to high profile US case of *Grand Jury (Miller)*,[156] where George W Bush administration officials leaked the name of a CIA agent to the press. That controversy began when Joseph Wilson, a former Ambassador, publicly challenged the claim by the Bush Administration that Iraq was seeking to purchase uranium from Niger for nuclear warheads. On assignment from the CIA, Wilson went to Niger to investigate the truth of this allegation and found no credible evidence to support it (findings which he then published). Shortly thereafter, news reports surfaced that Wilson was suggested for the assignment by his wife, CIA agent Valerie Plame. These stories were sourced to two senior Bush administration officials. The disclosure of the identity of a CIA agent is a serious criminal offence in the US.

Justice Tatel, in one of three concurring opinions, ruled in favour of disclosure of the identity of the sources. His reasons for doing so shed light on our case.[157] A similar public interest balancing takes place under US federal common law. On the facts of this case, Justice

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[156] *Grand Jury (Miller)*, *supra* note 7.
[157] *Ibid* at 986ff.

Tatel finely tuned the public interest balancing to weigh the news value of the story, on the one hand, against the harm caused by leaking the name of a CIA agent, on the other. In particular, the news value considers the "value and concern to the public at the time of publication" which here was considered "slight" insofar as it suggests a biased selection process for the Niger mission.[158]

On the other hand, identifying a CIA agent with 20 years in the field jeopardized her covert activities, and endangered friends and associates from whom she gathered information from in the past. These concerns are echoed in the rationale for the law criminalizing the identification of CIA agents, namely,

> [T]he loss of vital human intelligence which our policymakers need, the great cost to American taxpayers of replacing intelligence sources lost due to such disclosures, and the greatly increased risk of harm which continuing disclosures force intelligence officers and sources to endure.[159]

The case of the CSIS whistleblowers is materially different from the facts in *Grand Jury (Miller)*. Both Global News and the Globe and Mail minimized harm to intelligence operations in the way that the allegations were conveyed in their reports. Names, documents, methods, or other specifics were never disclosed thus minimizing harm to Canada's national security. On the other hand, the CSIS whistleblowers brought to the public's attention a controversy that has resulted in a public inquiry. The news value in other words appears to outweigh the harm caused to Canada's national security interests, based on available information.

VII. CONCLUSION

The legal history of journalistic source protection in Canada is a grim one. Courts have been quick to recognize the importance of the press to a functioning democracy, but slow to protect the sources that so often provide them with the information they need to perform this role. Depending on how courts interpret the *JSPA*, the legislation may or may not represent a departure from this trajectory. For this to happen, courts will need to appreciate the evidentiary significance of the reverse onus.

More than that, the remedial nature of the *JSPA* must be given its due. The purpose of this law is to protect bona fide journalistic sources and aid journalists in fulfilling their role in our democracy. Potentially identifying information must be at least inferentially probative to a central issue in the proceeding before courts consider whether to order its disclosure. Even more critically, freedom of the press must be a meaningful factor in the calculus, and not just a rhetorical trope. This should include judicial deference to the context in which a promise of confidentiality is offered to a source, including the reputation and experience of the journalist, the reliability of the source, and the journalistic procedures and standards employed. As Canada's foreign interference scandal shows, especially as contrasted with the US *Grand Jury (Miller)* case, a strong — albeit not absolute — journalistic source privilege might best serve the public interest.

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158 *Ibid* at 1002.
159 *Ibid* at 1001–1002.