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## Presentation to the Senate Standing Committee on Legal and Constitutional Affairs

### **Bill S-231 – Protection of Journalistic Sources**

Remarks By: Rachel Huntsman, (RNC Legal Counsel) and  
Supt. Kevan Stuart (Calgary Police Service)  
CACP Law Amendments Committee

**Canadian Association of Chiefs of Police**

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## **Introduction**

Distinguished members of the Committee, thank you for the invitation to speak on the important issues relating to Bill S - 231.

I am Rachel Huntsman, legal counsel to the RNC and I am here on behalf of the Law Amendments Committee of the Canadian Association of Chiefs of Police and I am speaking on behalf of the President and CACP members.

I am joined here at the table by Superintendent Kevan Stuart with the Calgary Police Service.

## **Overview**

Let me begin by stating that the importance of the press in a democratic society has been repeatedly affirmed through Canadian legal history. Section 2(b) of the Charter specifically protects the freedom of the press and freedom of expression. In the case of R. v National Post, the SCC confirmed that the journalist-source privilege would be decided on a case-by-case basis following the four Wigmore criteria. The SCC unanimously ruled that the onus of proof rests on the media to meet all four Wigmore criteria before the journalist source privilege arises.

## **Position of CACP on Bill S -231**

The CACP is of the view that the SCC has provided sufficient guidance to us through jurisprudence in this area, most notable in the National Post case; however, should Parliament deem it necessary to enact legislation to codify a regime to protect journalist sources on a case-by case basis consistent with the National Post decision, we offer the following comments:

- **Timing of the Bill-** Arising from recent events in Quebec concerning police investigations involving journalists, the Government of Quebec on November 11, 2016 created a Commission of Inquiry on the Protection of the Confidentiality of Journalist Sources with a one year mandate. The CACP questions whether this Committee might benefit from hearing the recommendations of the Commission when considering this Bill.
- **Reversal of Burden of Proof:** In the National Post case, the media accepted the burden of proof on the first three Wigmore criteria but argued that the onus should shift to the Crown to show why disclosure should be ordered on the fourth step. The Court called this a “three steps forward and one step backward argument” and firmly rejected it on the basis that it presupposes that a journalist source privilege arises after the third step and then is subject to rebuttal by the opposing party at the fourth step. Although the SCC has clearly ruled on who bears the onus of proof and why, the proposed amendment to section 39 of the Canada Evidence Act now reverses this onus of proof. The SCC clearly stated that if the media is advancing the proposition that the public interest in protecting its secret source outweighs the public interest in the criminal investigation, the burden of persuasion lies on the media. The proposed amendment to Section 39 of the Canada Evidence Act should not reverse the onus of proof.

- **Definition of Journalist:** Testimony before this Committee shows that there has been much debate about the definition given to the term “Journalist” in Bill S-231 and as well, what is meant by the term media within this definition. This definition is very broad and needs to be carefully considered and clarified. If lawyers, Senators and representatives of the media are having this debate, imagine the challenges faced by the front line police officer. This definition is pivotal because all the other sections of the proposed legislation hinge on this definition. In addition, the proposed amendment in section 488.02(2) requires the police officer to give notice to the relevant media outlet. How is a media outlet defined? In this digital age, this will be very challenging for the police. In the world of Twitter and Facebook are the administrators of social media sites to be considered media outlets?
  
- **The Proposed Warrant Amendments to Section 488 are problematic.**
  - (1) The Bill’s amendments to the Warrant provisions have created a completely separate process for journalists even if the criminal investigation has nothing to do with their profession. For instance, if a journalist is the target of a criminal investigation such as impaired driving causing bodily harm and the police require a search warrant to seize an exhibit, there is now a separate process created for the individual who happens to be a journalist ? Although the intent of this section could not have been to create a special

protection for a citizen who happens to be a journalist, which does not exist for any other citizen of Canada, this section does precisely that.

- (2) Secondly, how is the police officer to know that the subject of the investigation is a journalist? Although all citizens have a right to silence, should there be an onus on the citizen to identify him or herself as a journalist?
- (3) Notice provisions should not be legislated but should be left to the discretion of the issuing justice.
- (4) The Criminal Code permits search and seizure without warrant where grounds exist for a warrant but by reason of exigent circumstances it would be impracticable to obtain a warrant. The proposed wording “Despite any other provision of this Act or any other Act of Parliament...” eliminates this important search and seizure provision.

## **Conclusion**

In conclusion, the recommendation of the CACP is to remain with the protections provided by the Supreme Court of Canada most notable in the case of the National Post. Furthermore, it may be of value to this Committee to await the findings of the Quebec Commission of Inquiry before moving ahead with this Bill.

- Thank you and I look forward to answering any questions you have.