SCC Court File No. 37574

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

VICE MEDIA CANADA INC. and BEN MAKUCH

Applicants (Applicants)

- and -

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

Respondent (Respondent)

FACTUM OF THE APPELLANTS, VICE MEDIA CANADA INC. and BEN MAKUCH
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I – STATEMENT OF FACTS

A. Overview

1. More than 25 years ago in *Lessard*[1] and *New Brunswick*[2], this Court mandated a "balancing" between the rights to gather, disseminate and receive news and the interests of the state in prosecuting crime, when police seek access to a journalist's work product. This was to be a "delicate" balance, based on a "careful" and "complex" inquiry, involving nine factors. The courts below purported to apply this test. In fact, the decisions in appeal are just the latest in a long line of cases demonstrating that the balance required by this Court in *Lessard* has not been borne out in practice.

2. This case involves an extraordinary request by police for production of unpublished communications in the form of text messages between an innocent journalist and a source, for use directly as evidence in a criminal prosecution against the source. The issue of access by police to unpublished communications between a journalist and a source has not been addressed by this Court. No journalist-source relationship existed in *Lessard* and *New Brunswick,* and no details were sought about the journalist's communications with the source in *National Post*.[3]

3. Despite the uncontradicted evidence filed in this case addressing the chilling effects that arise from direct access to journalist source communications for prosecution purposes, the courts below serially imposed and upheld the production order as requested, completely and unconditionally. In so doing, they purported to apply the *Lessard* balancing test. This outcome is in keeping with the trend in this type of case. With one exception, all decisions since *Lessard* that balance those competing interests when reviewing orders targeting material in the hands of the media have been decided firmly in favour of law enforcement.

4. This is not a balance at all, nor is it the "careful," "delicate" and "complex" inquiry mandated by this Court in *Lessard*. It is a rubber stamp.

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[1] ***Canadian Broadcasting Corp. v. Lessard***, [1991] 3 S.C.R. 421 ["*Lessard*"].
[2] ***Canadian Broadcasting Corp. v. New Brunswick (Attorney General)***, [1991] 3 S.C.R. 459 ["*New Brunswick*"].
[3] ***R. v. National Post***, [2010] 1 S.C.R. 477 (SCC) ["*National Post*"].

5. The Appellants submit that the balancing test from *Lessard* is not working, and its continued use risks further eroding the fundamental rights under s. 2(b) of the *Charter*. A recent Parliamentary enactment, the recommendations of at least one important public inquiry, and recent developments in the law of other jurisdictions suggest that reform by this Court to better protect journalist-source communications is warranted.

6. At a minimum, the Appellants submit this Court should revisit the *Lessard* balancing test. As the decisions outlined below demonstrate, the current test is deficient for at least three reasons.

7. First, the substantive analysis applied by lower courts across Canada has tilted the balance in favour of law enforcement, both by failing to recognize or give proper weight to the constitutionally protected free expression interests, and by giving undue and overriding priority to the interests of law enforcement.

8. Second, the procedures adopted in the courts below contribute to the imbalance by encouraging *ex parte* applications, even in an absence of urgency. Without an opportunity to hear from the media, the issuing courts are simply not able to conduct the necessary balancing. The problem is compounded by applying a highly deferential standard of review to the resulting orders.

9. Third, the invariable refusal to allow the public and media access to the informations to obtain without a court order means that the merits of the courts' decisions cannot be meaningfully debated outside the courtrooms in which they are made.

10. The decision in this case will shape not only whether and how our law protects communications between journalists and their sources and other journalistic work products, but also how it protects the role of media in free and democratic societies, specifically in providing Canadians with independent and informed reporting on issues of public importance.

B. Factual Background

11. Vice Media Canada Inc. and its Canadian parent company ("**Vice Canada**") are leaders in producing high quality original stories and content for Canadian youth audiences on their multimedia network of websites, TV channels, films and mobile platforms.

12. Ben Makuch is a news reporter and video producer for Vice Canada.[4] His reporting has focused on issues relating to cyber security, signals intelligence, terrorism and particularly ISIS.[5]

1. Makuch's journalist-source communications and articles

13. Around April 2014, a video was posted on YouTube that appeared to show young men in the Middle East ripping up their western passports and pledging allegiance to ISIS. It was widely viewed by internet users and reported by media. One of the recruits, shown ripping up his Canadian passport, was later identified by media as Farah Mohammed Shirdon, formerly of Calgary. Shirdon was 21 years old. He was believed to have left Canada in March 2014 to join ISIS in Iraq or Syria.[6]

14. Shortly after the video appeared, Makuch – who had been monitoring and communicating with a network of suspected terrorists via social media accounts for some time as part of his reporting – identified and began following social media accounts of an ISIS fighter whom he believed to be Shirdon. These accounts identified the fighter only as "Abu Usamah". Makuch also learned that Abu Usamah might be willing to speak with someone from Vice Canada.[7]

15. Makuch obtained contact information for Abu Usamah's Kik messenger account, a free instant text messaging mobile chat application known for its features providing user anonymity ("**Kik**").

16. In early May 2014, Makuch began sending messages to that account via Kik. Over the next five months, Makuch and Abu Usamah exchanged several messages. Through these communications, Makuch developed a relationship of trust with him – he answered Makuch's

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[4] **Reasons for Decision of the Superior Court of Justice** ("SCJ Reasons") at para. 3, Appellants' Record ("AR"), Tab 3 at p. 9.
[5] **Affidavit of Ben Makuch sworn December 22, 2015** ("Makuch Affidavit") at para. 4, AR, Tab 9 at p.84.
[6] **Makuch Affidavit** at paras. 6, 9, AR, Tab 9 at pp. 85 - 86.
[7] **Makuch Affidavit** at paras. 5 - 7, 18, AR, Tab 9 at pp. 84 - 85.

questions and provided Makuch with information. Abu Usamah does not appear to have given the same kind of in-depth interview access to any other journalist, or to police.[8]

17. In June 2014, Vice Canada published the first of three articles by Makuch about these Kik message exchanges. The article states that Makuch's source "identified himself as Abu Usamah", and did not confirm his origins in Calgary or his identity as Farah Shirdon. However, in all three articles published between June and October 2014, Makuch drew the connection between Abu Usamah and Shirdon, and based his work in large part on his electronic communications through Kik.[9] Together, the stories provide readers with a rare glimpse into why a young man appears to have left a comfortable life in Canada to join the front lines of ISIS. They also provide the perspective of someone who now appears to be on the "inside" of a major terrorist group, addressing matters such as the group's recruitment efforts, media strategy, staffing, organization and grievances with various countries, including Canada.[10]

18. After Makuch's articles, an interview was conducted between Abu Usamah/Shirdon and a reporter for Vice Canada's parent company in the US. The interview was conducted over Skype on September 23, 2014 and was picked up and republished by other media outlets.[11]

2. The *ex parte* production order for journalist-source communications

19. On February 13, 2015, on an *ex parte* application brought by the RCMP pursuant to what was then ss. 487.012(1) and (3) of the *Criminal Code*, Justice Nadelle of the Ontario Court of

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[8] **Makuch Affidavit** at para. 8, AR, Tab 9 at p. 86. Shirdon had a brief exchange of messages with a *Toronto Star* reporter: see Exhibit "F" to the **Makuch Affidavit**, AR, Tab 9F at p. 125. Shirdon appears to have completely refused to speak to other journalists: see the **Information to Obtain sworn by Constable Grewal (redacted and publication ban text highlighted version)** ("ITO") at para. 39(mm)(vii), AR, Tab 11 at p. 212.

[9] **SCJ Reasons** at paras. 2 - 3, AR, Tab 3 at p. 9; Exhibit "C" to the **Makuch Affidavit**, AR, Tab 9 at pp. 84 - 85.

[10] Exhibits "C", "D" and "E" to the **Makuch Affidavit**, AR, Tabs 9C, 9D, 9E.

[11] **Makuch Affidavit** at paras. 11 - 12, AR, Tab 9 at p. 86.

Justice issued a production order that required Vice Canada and Makuch to turn over all records relating to Makuch's electronic communications with Shirdon (the "**Production Order**").[12]

20. The Production Order required Vice Canada and Makuch to produce, among other things, "paper printouts, screen captures or any other computer records of all communications between Makuch or any employee of [Vice] and Shirdon aka Abu Usamah over Kik messenger."[13] There is no dispute that the only material that Makuch or Vice Canada have in their possession in relation to the Production Order, and would have to turn over to the RCMP, consists of the Kik communications between Makuch and his source.[14]

21. The only evidence before the issuing court was an Information to Obtain ("**ITO**") sworn by Constable Grewal of the RCMP. The ITO provides details of an extensive history of social media posts in support of ISIS, that are attributed to Shirdon or Abu Usamah, featuring numerous comments similar to those made in the Kik communications published by Makuch and Vice Canada.[15] The ITO also provides a detailed analysis of those posts, and other "open source" internet postings attributed to Shirdon, including the April 2014 video of him burning his Canadian passport and the Skype interview conducted on September 23, 2014, in which Shirdon admits his involvement in ISIS, makes threats, and provides other evidence of criminal activity. Specifically, and consistent with Makuch's articles, the ITO identifies the user name "Abu Usamah" with several social media accounts, including a Kik account, and associates that user name with Shirdon.

22. The ITO alleges that the information available to the RCMP at that time provided "reasonable grounds to believe" that Shirdon had committed four offences related to his participation in, and facilitation of, the activities of ISIS.[16]

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[12] *Criminal Code,* R.S.C., 1985, c. C-46, ss. 487.012(1) and (3). The present-day equivalent of this provision is s. 487.014.
[13] **SCJ Reasons** at para. 1, AR, Tab 3 at p. 9; **Order of Justice Nadelle dated February 13, 2015** ("Production Order") at paras. 2(b) and 2(c), AR, Tab 1 at p. 3.
[14] **SCJ Reasons** at para. 21, AR, Tab 3 at p. 14.
[15] **ITO** at paras. 11-14, 35-39, 60(g), 60(h), AR, Tab 11 at pp. 146, 166 – 214, 238.
[16] **ITO** at para. 61, AR, at Tab 11 at p. 239.

23. The ITO appears to confirm that, at the time it was sworn in February 2015, Shirdon was still with ISIS in Syria. However, subsequent filings suggest that by February 2016 his exact whereabouts were unknown, and it was unclear whether he was even still alive.[17]

24. The ITO makes only vague reference to any consequences of the Production Order on the media's ability to gather and report news.[18]

25. Importantly, the ITO also suggests that Canadian investigators had already obtained access to information directly from the service provider, Kik Interactive Inc., apparently including some metadata concerning the location of Abu Usamah/Shirdon at the time of various posts, but not including the content of the posts.[19]

26. On these facts it is clear that the only information targeted by the Production Order sought, that was not already available to the RCMP either from Makuch's articles or from the Kik messenger service provider, is the content of the unpublished communications between Makuch and his source.

27. On September 24, 2015, before receiving any documents from Vice Canada or Makuch in response to the Production Order, the RCMP charged Shirdon *in absentia* with six terrorism offences, including the four offences identified in paragraph 61 of the ITO.[20]

3. The reviewing courts uphold the Production Order

28. On March 1, 2016, Vice Canada and Makuch challenged the Production Order in the Ontario Superior Court of Justice (the "**SCJ**") by way of *certiorari*, arguing, among other things, that turning over journalist-source communications for use against the source in a prosecution would have severe chilling effects on the media's ability to gather and report news. Vice Canada

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[17] **Affidavit of Corporal Ian Cameron Ross sworn February 10, 2016** at paras. 4, 7, AR, Tab 10 at pp. 140 – 141; **Reasons for Decision of the Court of Appeal for Ontario dated March 22, 2017** ("Court of Appeal Reasons") at para. 8, AR, Tab 7 at pp. 60-61; **SCJ Reasons** at para. 2, AR, Tab 3 at p. 9.

[18] **ITO**, AR, at Tab 11.

[19] **ITO** at para. 53(I), AR, Tab 11 at p. 232.

[20] **Makuch Affidavit** at para. 15, AR, Tab 9 at p. 87.

and Makuch further argued that the issuing judge failed to properly balance the *Lessard* factors, including the remoteness of any prospect of trial, the probative value of the materials sought by the Production Order, and the availability of evidence to support any charges from other sources.

29. Makuch's uncontracted and unchallenged evidence is that an order requiring him to provide notes or interviews for the purposes of a criminal investigation would inhibit his ability to gather news. He swore that this is particularly so for sources within the network of militants that he had spent more than a year monitoring, and with whom he had invested significant time and effort to build relationships of trust.[21]

30. In upholding the Production Order, the SCJ acknowledged that the material sought amounted to "recordings of communications" between a journalist and his source, but made no reference to Makuch's evidence or to the broader concern that such orders would have a chilling effect.[22] Instead, the SCJ simply held that Shirdon was not a confidential source, and that the bulk of information in the communications had already been published by Makuch in his articles.[23]

31. The SCJ characterized the Kik communications as "important evidence in relation to very serious allegations". The reviewing judge did not consider the fact that similar information was available from other sources (*i.e.* Shirdon's social media history, and directly from Kik Interactive Inc.), nor the incremental probative value of the Kik communications, nor even whether Shirdon was still alive or ever likely to face trial.[24] Ultimately, the reviewing judge concluded that the proper standard of review was that set out by this Court in *Garofoli* – whether the Production Order was one that the issuing justice "could have" made after consideration of the *Lessard* factors – and upheld it on that basis.[25]

32. Vice Canada and Makuch appealed to the Court of Appeal for Ontario. Ten media, free expression and civil rights groups intervened in support of their cause.

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[21] **Makuch Affidavit** at paras. 17 - 19, AR, Tab 9 at pp. 87 - 88.
[22] **SCJ Reasons** at para. 36, AR, Tab 3 at p. 18.
[23] **SCJ Reasons** at paras. 43 - 44, AR, Tab 3 at p. 19 - 20.
[24] **SCJ Reasons** at para. 46, AR, Tab 3 at p. 20.
[25] **SCJ Reasons** at para. 47, AR, Tab 3 at p. 20.

33. The Court of Appeal discussed the proper standard of review and confirmed that the *Garofoli* standard was appropriate.[26] The Court of Appeal did not acknowledge Makuch's evidence of a chilling effect, nor did it accept that a chilling effect indeed exists in this case. It simply concluded that the reviewing judge "implicitly addressed that concern as it existed on the facts of this case by identifying factors that tended to significantly reduce the potential 'chilling effect'."[27]

4. Events since the Court of Appeal decision

34. In September 2017, the Canadian Press and other media reported that U.S. Central Command, which oversaw U.S. military operations in Syria and Iraq, had confirmed that Shirdon was killed in Mosul, Iraq by an airstrike on July 13, 2015.[28] Despite such reports, the Respondent declined to confirm that the Production Order will not be enforced, and so these proceedings continue.

PART II – QUESTIONS IN ISSUE

35. This Appeal raises the following questions:

(a) What principles should govern the analysis of the media interests in a case of a search warrant or production order targeting journalist-source communications? More specifically:

1. is the balancing envisioned by this Court in *Lessard* being realized in practice by the issuing and reviewing courts below?

2. how should courts assess and weigh the negative or "chilling" impact of such a production order on the media's news-gathering abilities, including impacts on sources, on public audiences, and on journalists?

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[26] **Court of Appeal Reasons** at paras. 18 - 27, AR, Tab 7 at pp. 63 - 67.
[27] **Court of Appeal Reasons** at para. 38, AR, Tab 7 at p. 72.
[28] For example, see news articles at: https://globalnews.ca/news/3722685/canadian-jihadi-farah-mohamed-shirdon-killed-in-iraq-airstrike-in-2015-u-s-military/ and http://calgaryherald.com/news/local-news/prominent-calgary-isis-fighter-recruiter-farah-mohamed-shirdon-killed-in-2015-us-centcom.

3. must these chilling effects be proven by evidence, or can they be presumed from the circumstances?

4. should the analysis be different in a case involving a "confidential source", who has specifically requested and been given a promise of anonymity by the journalist, or should it apply to all sources?

5. what are the privacy interests protected by s. 8 of the *Charter* in these circumstances, and how should they be weighed in the balance?

6. what effect, if any, should prior publication of some or all of the material communications have on the assessment of the negative or "chilling" effects of producing the out-takes and other unpublished work products?

(b) What principles should govern the analysis of the law enforcement interests in such a case, and specifically:

1. how (if at all) should courts assess and weigh the probative value and usefulness of the material sought, in terms of their actual value to a criminal investigation or the prosecution of a crime?

2. how should the courts weigh the prospects of a trial occurring or not occurring, specifically in this case in the context of crimes allegedly committed by persons outside Canada and of proceedings commenced *in absentia*?

(c) What procedures should be followed by issuing and reviewing courts when conducting their review, and in particular:

1. should the issuing courts normally require notice to media or journalists targeted by the order sought, and if so what standards of urgency or other public interests would justify proceeding *ex parte*?

2. is the RCMP's application premature?

3. what standard of review should the superior courts apply in the review of *ex parte* production orders or search warrants targeting the media?

(d) Can these issues be addressed under a reformed *Lessard* "balancing" process, or should this Court devise a new test or process more consistent with the role of a free press in modern Canadian society?

(e) Whether the courts below properly approached the review of the *ex parte* publication ban over material filed in support of the request for the Production Order, specifically in terms of opinions of the affiant of the ITO regarding the evidentiary value of information already available to the RCMP?

PART III – STATEMENT OF ARGUMENT

A. The Media Interests and their Assessment

1. The *Lessard* balancing test is not working

36. In *Lessard*, a majority of this Court articulated nine factors for courts to consider when deciding whether to issue a search warrant or production order targeting an innocent journalist or media outlet and, if so, on what terms. Leaving aside those factors that relate to the satisfaction of statutory conditions and other requirements to be met by investigators, the heart of the *Lessard* test as it relates to media interests is the "balancing" analysis required under the third factor, and related considerations as follows:

> 3) The justice of the peace should **ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination**. It must be borne in mind that the media play a vital role in the functioning of a democratic society. Generally speaking, the news media will not be implicated in the crime under investigation. They are truly an innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant. (emphasis added)

> 6) If the information sought has been disseminated by the media in whole or in part, this will be a factor which will favour the issuing of the search warrant.
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> 7) If a justice of the peace determines that a warrant should be issued for the search of media premises, consideration should then be given to the imposition of some conditions on its implementation, so that the media organization will not be unduly impeded in the publishing or dissemination of the news.[29]

37. This Court emphasized that the media are entitled to "particularly careful" and "special" consideration because of the importance of their role in a democratic society[30] before any search warrant or production order is issued. The balancing of interests is "a difficult and complex process"[31] that is "always a difficult and delicate task."[32]

38. More than 25 years later, even where journalist-source communications have not been in issue, lower courts have been misapplying, or failing to apply, the balancing test established in *Lessard*. Rather than give careful consideration to media interests, lower courts give short shrift to the pernicious effects of warrants and production orders on the media's ability to gather or report the news.[33] The decisions of the courts below are typical in this respect.

39. This Court has repeatedly held that the media's news-gathering activities are part of the free speech interests protected by s. 2(b) of the *Charter*.[34] As this Court stated in *New Brunswick*:

> The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our

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[29] ***Lessard***, *supra* note 1, at para. 15.
[30] ***Lessard,*** *supra* note 1, at para. 46. See also ***New Brunswick,*** *supra* note 2, at paras. 21, 32.
[31] ***Lessard***, *supra* note 1, at para. 46.
[32] ***New Brunswick***, *supra* note 2, at para. 34.
[33] See, for example, ***Toronto Star v. The Queen***, 2017 ONSC 1190 at paras. 31 - 32 ["*Toronto Star*"]; ***CBC v. SPPC et al.***, Superior Court of Quebec File No. 500-36-008128-160 (March 17, 2017) at paras. 72-74, ["*SPPC*"], Appellants' Brief of Authorities ["Appellants' BOA"] Tab 2; ***CTV v. Attorney General of Canada***, 2015 BCPC 65 at para. 48 ["*CTV (BCPC)*"]; ***CTV v. Her Majesty the Queen***, 2015 ONSC 4842 at paras. 42 - 43 ["*CTV (SCJ)*"]; ***HMTQ v. Meigs et al.***, 2003 BCSC 1816 at para. 62 ["*Meigs*"].
[34] ***Hill v. Church of Scientology***, [1995] 2 S.C.R. 1130 at p. 1183; ***National Post,*** *supra* note 3, at para. 33.

> society to make an informed assessment of the issues which may significantly affect their lives and well-being. The special significance of the work of the media was recognized by this Court in *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, at pp. 1339-40. The importance of that role and the manner in which it must be fulfilled give rise to special concerns when a warrant is sought to search media premises.[35]

40. Indeed, as was noted by Justice McLachlin (as she then was) in her dissenting judgment in *Lessard*, this "special" role of the press in our democracy had been recognized long before the *Charter*:[36]

> The history of freedom of the press in Canada belies the notion the press can be treated like other citizens or legal entities when its activities come into conflict with the state. Long before the enactment of the *Charter*, the courts recognized the special place of the press in a free and democratic society. In England the matter was succinctly summarized by Denning M.R. in *Senior v. Holdsworth, Ex parte Independent Television News Ltd.*, [1976] 1 Q.B. 23 (C.A.), at p. 34:
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> > . . .there is the special position of the journalist or reporter who gathers news of public concern. The courts respect his work and will not hamper it more than is necessary.

41. Against this backdrop, the Appellants submit that decisions such as those below, which conduct their analysis of the media interests in the *Lessard* balancing test solely on the basis of privacy interests protected by s. 8 of the *Charter* and fail to give any weight to the expressive and societal interests protected by s. 2(b) of the *Charter*, are out of step with the directions provided by this Court.

42. As a result, the Crown has to date experienced near-perfect success in its attempts to seize material from the media – including journalist-source communications. As far as the Appellants are aware, leaving aside cases where the Crown has failed to meet statutory conditions and other procedural requirements confirmed by other *Lessard* factors, in all the reported and unreported

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[35] ***New Brunswick***, *supra* note 2, at para. 31; ***Edmonton Journal v. Alberta (Attorney General)***, [1989] 2 S.C.R. 1326; and see ***Lessard***, *supra* note 1, at para. 61.
[36] ***Lessard***, *supra* note 1, at para. 61.

decisions applying the balance of interests mandated by *Lessard*, the balance has been struck in favour of the media only once.[37] This is not a balance at all.

43. It is also in stark contrast to this Court's decisions since *Lessard*, which only further highlight the importance of a free press to Canada's democratic order, and the need to protect the media's ability to gather and report the news free from state intrusion. In *National Post*, for example, this Court not only confirmed that news-gathering is worthy of constitutional protection[38] and that the relationship between journalists and their sources is protected by a case-by-case privilege,[39] it also recognized the myriad of ways in which production orders and search warrants targeting the media can disrupt news gathering (adopting, in part, Justice McLachlin's dissenting opinion in *Lessard*).[40]

44. Simply put, when it comes to protecting the interests of the media in the context of search warrants and production orders, this Court and the lower courts are on diverging paths. This is perhaps unsurprising, as this Court has not yet had the opportunity to provide lower courts with

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[37] For a full list of cases where search warrants and production orders were made against the media, see **Appendix 1** to this memorandum. As far as the Applicants are aware, the only case where the *Lessard* balancing analysis has favoured the media and resulted in the order sought being denied is ***R. v. CBC***, 2009 MBCA 122 ["*CBC (MBCA)*"]. In the few cases where warrants or orders were quashed, it was for technical reasons separate and apart from the balancing analysis: see, for example, ***CBC v. Her Majesty the Queen***, 1994 CanLII 4430 (N.L. SCTD) (failure to make full and frank disclosure); ***CBC (NL)***, 2005 NLTD 218, aff'd 2007 NLCA 62, (failure to make full and frank disclosure) [*"CBC (NL)"*]; ***R. v. Dunphy***, 2006 CanLII 6575 (ON S.C.) (failure to meet statutory requirements) ["*Dunphy*"]; ***Corporation Sun Média c. Barbès***, 2008 QCCS 3996, (insufficient evidence in ITO), ["*Barbès*"].

[38] ***National Post,*** *supra* note 3, at para. 33.

[39] ***National Post,*** *supra* note 3, at para. 52.

[40] ***National Post,*** *supra* note 3, at para. 78.

further guidance on how to apply the *Lessard* factors in the context of journalist-source communications.[41]

45. The Appellants submit that issuing and reviewing courts should be directed to go further in protecting freedom of the press under the *Charter* and s. 2(b), including a broader consideration of the important relationship between journalists and their sources, and the types of journalistic work products that warrant protection in the *Lessard* balancing.[42] Rather than simply relying on the reasonableness of a search under s. 8 of the *Charter* when considering an *ex parte* production order or search warrant of a media outlet, Courts should give broader protection to journalists under s. 2(b), based on the factors and considerations outlined below.

2. The chilling effect on journalist-source communications

46. Since *Lessard* and *New Brunswick*, this Court and some other courts in Canada have increasingly recognized a "chilling" effect that results when police or other state agencies are allowed to gain access to material in the hands of the media. Courts in the United Kingdom, Europe, the United States, New Zealand and other jurisdictions with similar legal systems to our own have also reached the same conclusion. These decisions consistently identify the same, recurring factors as contributing to this "chill", and the same devastating impacts on the media's core news gathering activities protected by s. 2(b) when orders such as the Production Order are made by issuing and reviewing courts.

47. In this case, for the first time, this Court must assess this "chill" in the context of an order to produce unpublished communications with an individual whom the journalist spent months cultivating as a source. The Appellants submit that these unpublished journalist-source

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[41] The focus of this Court's decision in ***National Post,*** *supra* note 3, was on establishing a case-by-case privilege framework for confidential sources. This Court adverts to the *Lessard* factors in only in a single passing paragraph: see para. 87.

[42] See Oliphant, Benjamin "**Freedom of the Press as a Discrete Constitutional Guarantee**," *McGill Law Journal*, vol. 59, no. 2, 2013, p. 283-336; Cameron, Jamie, "**Of Scandals, Sources and Secrets: Investigative Reporting, National Post and Globe and Mail,"** *Supreme Court Law Review* (2011), 54 S.C.L.R. (2d), p. 233.

communications are work products that lie at the very heart of the media's protected news-gathering role. The following review of the decided case law confirms that all the interests already recognized as contributing to this "chilling" effect apply with full force to the compelled disclosure of such communications. The Appellants submit that this Appeal provides a vital opportunity to draw these elements together from the decided cases, and to recognize their cumulative impacts on free expression and the fundamental role of a free press in Canada.

48. Beginning with *Lessard* and *New Brunswick*, police in those cases sought to obtain VHS tapes and photographs taken by media at violent public protests. No journalist-source relationship existed between the media and the protesters caught on film. No evidence of "chilling effect" was led. Yet many of the judgments in this Court recognized that, even in these circumstances, a chilling effect on free expression could be inferred. Many courts since have drawn a dangerous and inapt analogy between the active interplay of trust and expression involved in journalist-source communications and the photographic or video recording of public events in *Lessard* and *New Brunswick.*[43] In terms of chilling effect, as noted by La Forest J. in *Lessard*,[44] the Appellants submit there is a world of difference between the two.

49. Next, in *National Post*, this Court dealt with a request for production of a brown paper envelope and contents, given to a journalist by a confidential source, which this Court found to be "the very *actus reus* of the alleged crime".[45] Again, no details were sought about the journalist's communications with the source. Nevertheless, with the benefit of an extensive record of evidence, this Court unanimously accepted that a "chilling" effect arises, at least where the order seeks evidence to identify sources who are "confidential" in the sense that they have requested and been promised anonymity.

50. Cases in other jurisdictions have consistently recognized the "chilling" effect that arises in these circumstances. Lord Denning stated the rationale for not compelling disclosure of media

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[43] See, for example, ***CTV (BCPC)***, *supra* note 33, at para. 48; ***CTV (SCJ)***, *supra* note 33, at para. 43; ***R. v. Erickson***, [2002] O.J. No. 3341 (S.C.J.) at para. 41, Appellants' BOA Tab 5.
[44] ***Lessard***, *supra* note 1, at pp. 430 - 432.
[45] ***National Post,*** *supra* note 3, at para. 77.

sources as follows:

> The reason is because, if they were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans would not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power — in companies or in government departments — would never be known.[46]

51. As the First Circuit Court of Appeals has recognized in *United States v. LaRouche Campaign*, several distinct interests comprise this "chilling" effect on journalists and their sources, as follows:

> The other four interests named are "the threat of administrative and judicial intrusion" into the newsgathering and editorial process; the disadvantage of a journalist appearing to be "an investigative arm of the judicial system" or a research tool of government or of a private party; the disincentive to "compile and preserve nonbroadcast material"; and the burden on journalists' time and resources in responding to subpoenas. There is some merit to these asserted First Amendment interests. We discern a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly, compelled. To the extent that compelled disclosure becomes commonplace, it seems likely indeed that internal policies of destruction of materials may be devised and choices as to subject matter made, which could be keyed to avoiding disclosure requests or compliance therewith rather than to the basic function of providing news and comment. In addition, frequency of subpoenas would not only preempt the otherwise productive time of journalists and other employees but measurably increase expenditures for legal fees. Finally, observing Justice Powell's essential concurring opinion in *Branzburg*, "certainly, we do not hold ... that state and federal authorities are free to annex the news media as an investigative arm of government." 408 U.S. at 709, 92 S.Ct. at 2671 (quotations omitted).[47]

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[46] ***British Steel Corp v. Granada Television Ltd,*** [1981] AC 1096 at p. 1129, Appellants' BOA Tab 1. See also ***Ashworth Security Hospital v. MGN Limited***, [2002] UKHL 29 at paras. 38, 61; and see ***Goodwin v. United Kingdom***, (1996) 22 EHRR 123 (European Court of Human Rights) at para. 39; ***Branzburg v. Hayes***, 408 U.S. 665 (1972) at p. 725 - 736; ***Zurcher v. Stanford Daily***, 436 U.S. 547 (1978) at pp. 564, 572, cited by La Forest J. in ***New Brunswick*** *supra* note 2; ***Hager v. Attorney-General***, [2015] NZHC 3268 at paras. 101, 122.

[47] ***United States v. LaRouche Campaign***, 841 F.2d 1176, 1182 (1st Cir. 1988); and see ***Gonzales v. Nat'l Broadcasting Co.***, 194 F.3d 29, 35 (2d Cir. 1999); ***United States v. Burke***, 700 F.2d 70,

52. Canadian cases have recognized these same interests as contributing to a "chilling" effect.

53. For example, in her dissent in *Lessard,* Justice McLachlin recognized "the chilling effect seizure might have on informants" or the sources themselves.[48] Justice La Forest, in his concurring opinion in *New Brunswick,* drew the same inference.[49] In *National Post,* this Court unanimously adopted and applied this analysis in recognizing a presumptive chilling effect for confidential sources.

54. In *R. v. CBC,* the Manitoba Court of Appeal took this analysis a step further and explained how the appearance that journalists are acting as "deputies" or agents of the police when conducting interviews, gathering information, and stories also contributes to this chilling effect. In so doing, the "chill" not only affects sources, but also results in a broader erosion of the public's perception of the media's independence and impartiality:

> …Production orders against the media casually given can have a chilling effect on the appearance of independence and on future actions of members of the public and the press. There may be a resulting loss of credibility and appearance of impartiality... The media should be the last rather than the first place that authorities look for evidence. There should be a clear, compelling, "demonstrated necessity to obtain the information" to avoid the impression that the media has become an investigative arm of the police.[50]

55. Finally, it has been recognized that the chill from ordering journalistic material turned over to the state comes not only from impacts on sources and audiences, but from impact on journalists as well. This approach recognizes that reporters may be deterred from recording or preserving their work, or may resort to self-censorship to conceal the fact that they possess information of interest to police, in an effort to protect sources and to preserve their ability to gather news in the

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77 (2d Cir. 1983); ***United States v. Cuthbertson***, 630 F.2d 139, 147 (3d Cir. 1980). ["*Cuthbertson*"]; ***Schoen v. Schoen***, 5 F.3d 1289, 1294 (9th Cir. 1993) ["*Schoen*"]; ***Gastman v. North Jersey Newspapers Co.***, 603 A.2d 111, 112 (N.J. App. 1992); and many other decisions at first instance.

[48] ***Lessard***, *supra* note 1, at para. 66 (*per* McLachlin J, dissenting).
[49] ***New Brunswick,*** *supra* note 2, at para. 32.
[50] ***CBC (MBCA)***, *supra* note 37, at para. 74; La Forest J. raised a similar concern in ***Lessard***, *supra* note 1, at para. 7.

future.[51] In his concurring opinion in *Lessard,* Justice Laforest noted that this kind of chilling effect on journalists is "self-evident". He stated:

> In my view, the threat to the freedom of the press that would result from unrestrained searches of certain journalistic material goes beyond the merely speculative. I would draw a line, however, between films and photographs of an event and items such as a reporter's personal notes, recordings of interviews and source "contact lists.[52]

56. In *New Brunswick,* the majority of this Court implicitly agreed with Justice Laforest's suggestion to draw a line at a reporter's work product, when they wrote:

> Whether the search of a media office can be considered reasonable will depend on a number of factors including the nature of the objects to be seized, the manner in which the search is to be conducted and the degree of urgency of the search. It is of particular importance that the justice of the peace consider the effects of the search and seizure on the ability of the particular media organization in question to fulfil its function as a news gatherer and news disseminator.[53]

57. The chill resulting from orders targeting the ability of journalists to speak to confidential sources has also been explicitly recognized by Parliament in recent amendments to the *Criminal Code* and the *Canada Evidence Act*, contained in the *Journalistic Sources Protection Act*.[54] In addition, that Act recognizes a general right of journalists "to privacy in gathering and disseminating information." It also provides a more stringent approach any time the police want to obtain a production order or search warrant against a media outlet "relating to a journalist's communications or an object, document or data relating to or in the possession of a journalist."[55]

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[51] ***National Post,*** *supra* note 3, at para. 78; ***Lessard***, *supra* note 1, at para. 66 (*per* Justice McLachlin, dissenting).

[52] ***Lessard***, *supra* note 1, at paras 27, 29.

[53] ***New Brunswick***, *supra* note 2, at para. 32.

[54] Enacted by Parliament in 2017 as **Bill S-231**.

[55] Such a search warrant or production order may only be issued by a judge if: (a) there is no other way by which the information can reasonably be obtained; and (b) the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information.

58. The Appellants submit that all of these authorities, and the factors that create the "chill", apply with equal force to police orders targeting unpublished journalist-source communications.

59. In her dissent in *Lessard*, Justice McLachlin recognized the inherent risk in compelling journalists to turn over any "press material", which would of course include journalist-source communications. She stated: "[the] prospect of seizure of press material in future cases without the imposition of conditions to protect press freedom and the identity of informants . . . creates the chilling effect."

60. A recent public inquiry in Quebec (the "**Chamberland Commission**") has resulted in comments to that effect, and recommendations to address these issues, including the enactment of a law providing broader protection for journalistic materials and sources than is provided by the new Federal Law. In particular, the Commission's Report:

(a) characterized the issue squarely in terms of the right of the public to be informed by, as much as any right to confidentiality of, source materials:

> *"C'est* ***le droit du public à l'information****, ingrédient essentiel de la démocratie, qui rend nécessaire la protection du matériel et des sources journalistiques. Il s'agit de confirmer dans une loi que le journalisme est au service du droit du public à l'information plutôt qu'au service de la police et des tribunaux"* (p. 176, emphasis added)

(b) accepted that the protection should apply to all journalists' work product **even if the identification of a journalistic source is not in question**:

> *"La règle proposée va plus loin que la Loi sur la protection des sources journalistiques en matière criminelle, car elle permettrait aux journalistes de s'opposer à la divulgation d'un renseignement ou d'un document* ***même si l'identification d'une source journalistique n'est pas en cause****."* (p. 180, emphasis added)

(c) and noted that, even in the context of such legislative reform, the continuing role of the courts is essential:

> "*Le privilège relatif au secret des sources journalistiques est une création des tribunaux, et sa mise en œuvre, dans le cadre d'une enquête ou d'un procès, dépend des circonstances propres à chaque cas*." (p. 123)[56]

61. In this case, Makuch's unchallenged evidence was that the production order would harm his ability to gather and report the news. He stated:

> Even for non-confidential sources, it is critical for my work that individuals do not view me as an agent of the police or that the information they provide me will be used for purposes of a police investigation. Some people are prepared to talk to me and tell me things, but are not prepared to talk to police. If individuals that I interview for my stories are aware that everything they tell me could be provided to police, I believe that they will be much less inclined to answer my questions and provide me with information, particularly sensitive information that may not be intended for publication. Sometimes, sources tell me information that is off the record and not meant for publication.
>
> Before I published any stories about them, I spent more than a year monitoring and researching the social media networks and accounts of militants and jihadists in order to understand how they operate and who they are. It took a significant amount of time and effort for me to build trust and relationships with many of my sources in these networks before they would speak with me. I do not believe that they would have spoken to me if they knew that my notes or interviews would be provided to police for purposes of a criminal investigation, including Shirdon. Other individuals that I contacted did not agree to be interviewed for purposes of my stories.[57]

62. Even the investigating officer acknowledged this chilling effect by stating in his sworn ITO:

> It is a reasonable inference that [Vice Canada] would not be able to stage this kind of interview with a purported member of a terrorist group if they

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[56] On November 11, 2016, the Québec government created la *Commission d'enquête sur la protection de la confidentialité des sources journalistiques*, which resulted in the following report on December 14, 2017: **https://www.cepcsj.gouv.qc.ca/accueil.html**.

[57] **Makuch Affidavit** paras. 17 - 18, AR, Tab 9 at pp. 87 - 88.

had a reputation for immediately handing original evidence to the police.[58]

63. Yet none of the courts below referred to or considered any of this evidence.

64. The Appellants submit that lower courts' consistent failure to appreciate – or, in the case at bar, to address at all – these chilling effects on journalist-source communications, and more broadly on the special role of the press protected by s. 2(b) of the *Charter*, will only change if this Court recognizes a presumptive chilling effect in **all** cases involving journalist-source communications, and reinforces the strength of that presumption according to the circumstances of the case.[59]

65. The public's ability to be informed about important legal issues will be threatened if people involved in the criminal justice system are unwilling to talk to members of the media, knowing their comments may be later used against them in court. The public will be less informed, and accordingly the possible debates and flow of information will be stymied. [60]

3. A chilling effect should be presumed in all cases

66. The Appellants submit that evidence should not be required to establish a chill in the case of orders seeking access to the contents of journalist-source communications or a journalist's notes or recordings. Neither *Lessard* nor *New Brunswick* addressed this issue except to note the absence of evidence before this Court.

67. In *National Post*, however, after receiving a very full record of evidence, including expert evidence, this Court found that a chilling effect can be presumed, at least where an order targets

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[58] **ITO** at para. 71, AR, Tab 11 at pp. 242 - 243.

[59] As Justice McLachlin pointed out in her dissent in ***Lessard***, *supra* note 1, the "prospect of seizure of press material in future cases without the imposition of conditions to protect press freedom and the identity of informants . . . creates the chilling effect."

[60] One study has found that newspapers in American states with journalist-protecting shield laws do more investigative reporting and win more awards for their reporting than those in states without such laws: see Wirth, Eileen M., "Impact of State Shield Laws on Investigative Reporting," 16 Newspaper Research J. 64 (1995), Appellants' BOA Tab 6.

the identity of a journalist's confidential source. The Appellants submit that, both as a matter of logic and of law, this same effect can be presumed whenever the state compels information or records from the media for use against sources. As Justice La Forest stated in *Lessard*:

> I have little doubt, too, that the gathering of information could in many circumstances be seriously inhibited if government had too ready access to information in the hands of the media. That someone might be deterred from providing information to a journalist because his or her identity could be revealed seems to me to be self-evident.[61]

68. The same can be said if unpublished communications with a journalist can be revealed. While strength of that presumption and the effects of the chill may well vary depending on the circumstances, the key fact of a chill should not have to be proven.

69. This Court and others have held that evidence of a chilling effect is not always necessary.[62] Scientific or quantitative evidence of a chilling effect on news gathering is inherently difficult, if not impossible, to measure and provide. Just as the Court in *National Post* was prepared to accept that confidential sources will be more reluctant to come forward if their identities are revealed, the Court in this case should clarify that **every** source – and particularly those in an adversarial relationship with the state – will be more reluctant to come forward if journalists are routinely compelled to turn over records of their communications to the state.

70. In *CBC (MBCA)*, the Manitoba Court of Appeal was prepared to recognize (without requiring evidence) the chilling effects that result from police requiring production from journalists of communications received from a source, even where those communications had taken place in a public press conference. The Appellants submit that this Court should endorse the same approach as an appropriate response to the interests arising under s. 2(b) of the *Charter*.

4. Confidential and non-confidential sources should be treated the same

71. The Appellants submit that the distinction drawn by the courts below between sources who have requested anonymity, and those who have not, is unworkable.

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[61] ***Lessard***, *supra* note 1, at p. 430 - 431.

[62] ***R. v. Khawaja***, [2012] 3 S.C.R. 555 (SCC) at para. 79; ***St. Elizabeth Home Society v. Hamilton (City)***, 2008 ONCA 182 at para. 32.

72. A large plurality of U.S. "shield laws" which provide legislated protection for journalistic sources, including Washington, New York, Illinois and California, are either silent as to this distinction, or expressly grant protection equally to confidential or non-confidential sources.[63]

73. In *Schoen v. Schoen*, the Ninth Circuit Court of Appeals provided the following compelling reasons in support of enforcing a law providing protection to both:

> [T]he compelled disclosure of non-confidential information harms the press' ability to gather information by damaging confidential sources' trust in the press' capacity to keep secrets and, in a broader sense, by converting the press in the public's mind into an investigative arm of prosecutors and the courts. It is their independent status that often enables reporters to gain access, without a pledge of confidentiality, to meetings or places where a policeman or a politician would not be welcome. If perceived as an adjunct of the police or of the courts, journalists might well be shunned by persons who might otherwise give them information without a promise of confidentiality, barred from meetings which they would otherwise be free to attend and to describe, or even physically harassed if, for example, observed taking notes or photographs at a public rally.[64]

74. In *United States v. Cuthbertson*, the Third Circuit Court of Appeals applied the statutory protection even where the sources consented to the release of journalists' work product which recorded their communications:

> In this case, the government has obtained waivers from all of its witnesses permitting disclosure of their statements held by CBS. CBS asserts,

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[63] **Alabama Code § 12-21-142; Alaska Stat. § 09.25.300 and § 09.25.390; Ariz. Rev. Stat. § 12-2237; Ark. Code Ann. § 16-85-510; Cal. Evid. Code § 1070; Delaware Code tit. 10 § 4320-26(5); Georgia Code § 24-9-30; [Illinois] 735 Ill. Comp. Stat. § 5/8-902(c); Indiana Code § 34-46-4-2; Kansas Stat. Ann. § 60-481; Ky. Rev. Stat. Ann. § 421.100; Louisiana R.S. 45:1452; Michigan Comp. Laws § 767A.6(6); Montana Code Ann. § 26-1-902; Nebraska Rev. Stat. § 20-146; Nev. Rev. Stat. NRS 49.275; New Jersey Rev. Stat. § 2A:84A-21; New York Civil Rights Law § 79-h (b); North Dakota Cent. Code § 31-01-06.2; Ohio Rev. Code § 2739.04,** and **2739.12; Oklahoma Stat. tit. 12, § 2506; Oregon Rev. Stat. § 44.520; [Pennsylvania] 42 Pa. C.S.A. § 5942(a); S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208; Vermont Stat. Ann. tit. 12, § 1615(2)(b); Washington Rev. Code § 5.68.010.**

[64] ***Schoen***, *supra* note 47.

> however, that the privilege also protects unpublished material held by it regardless of the confidentiality of the source.
>
> We do not think that the privilege can be limited solely to protection of sources. The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes. Like the compelled disclosure of confidential sources, it may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege. Therefore, we hold that the privilege extends to unpublished materials in the possession of CBS. Of course, the lack of a confidential source may be an important element in balancing the defendant's need for the material sought against the interest of the journalist in preventing production in a particular case.[65]

75. Similarly, as noted, the recent report of the Chamberland Commission recommends that Quebec adopt legislative protection for journalists' source materials even if the identification of a journalistic source is not in question. Part of the Chamberland Commission's rationale for this is its finding that ethical and professional codes used by journalists in Quebec (as elsewhere) discourage granting confidentiality to a source unless there are "exceptional" circumstances.[66] Hence, a judge-made rule that gives protection only, or more strongly, when a promise of anonymity has been given, will undermine this salutary ethical rule.

76. The Appellants submit that a distinction drawn on this basis is also inconsistent with this Court's recognition in *National Post* that journalist-source privilege is properly analyzed as a case-by-case privilege based upon the *Wigmore* criteria.[67] In other such recognized privileges – for example the religious communications privilege – protection is not limited only to the penitent's identity, or only if an express promise of anonymity is requested by the penitent: rather it extends to the entirety of the communications that occur in the context of any given faith relationship. Similarly, it is submitted, the protections extended at common law for journalist-source communications must in principle extend to the entire relationship, whether or not an express promise of confidentiality has been requested or given.

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[65] ***Cuthbertson***, *supra* note 47.

[66] ***Commission d'enquête sur la protection de la confidentialité des sources journalistiques*** dated December 14, 2017, pp. 39 - 40.

[67] ***National Post,*** *supra* note 3, at para. 52.

77. Notably in this case, the source used a pseudonym, and a secure messenger service, and chose not to confirm his identity, although asked to do so.

78. If sources must request that their identities be kept confidential to have their communications shielded from access-at-will by law enforcement, this will have a severe impact on the flow of this information, and the ability of journalists to do their jobs. The impact of cases like this will be felt in newsrooms across the country.

5. The privacy interests in a modern journalist's work product

79. The "chill" related to state intrusions into journalist-source communications primarily engages interests protected by s. 2(b) of the *Charter*, concerning the expressive and informational rights and freedoms of sources, the media, and ultimately the public and society at large. These interests are ***separate from and in addition to*** these s. 8 privacy interests. The Appellants submit that both must be given independent and incremental weight in the balancing or they are, in effect, being given no weight at all.

80. The Appellants respectfully submit that the Court of Appeal in this case erred by ignoring these important interests, and conducting the balancing required by *Lessard* solely with reference to the s. 8 privacy rights engaged and the "reasonableness" of the Production Order.[68]

81. In addition, the Court of Appeal failed to acknowledge that the s. 8 privacy interests at stake are ***both*** those of both the journalist and the source.

82. In terms of the privacy interests of the innocent journalist, as noted, the *Journalistic Sources Protection Act* now explicitly recognizes and reinforces these interests. The Production Order seeks to obtain copies of Makuch's unpublished Kik communications with Shirdon. Those are the 21st century equivalent of an interview recording, effectively providing a transcript of the discussions between Makuch and Shirdon conducted via Kik messenger. They are Makuch's work product.

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[68] **Court of Appeal Reasons** at para. 22, AR, Tab 7 at p. 65.

83. Production orders seeking a "reporter's work product" (as described by Justice La Forest in *Lessard*) increase the chilling effects already discussed.

84. An analogy can be drawn, in some respects, between the "zone of privacy" created around lawyer work product and that of journalists. Just as the protection of lawyer work product serves the broader public interests related to the functioning of our justice system, so journalists' work products should be protected to serve the broader public interests in the free exchange of ideas related to our democratic institutions and to individual human flourishing. Both the lawyer's role in our justice system, and the role of media in our democracy relate, in different ways, to our search for truth through the processing and communication of information in a public forum. In both cases, the work products originate in communications within a relationship of some confidence, recognized as warranting protection in our law, whether it be between a lawyer and client or between a journalist and a source. While it must be acknowledged that at the level of privilege, lawyer-client communications and work products are protected as a class, while those involving journalists are protected only on a case-by-case basis, the *Lessard* balancing does not operate at the level of a privilege. It is a balancing of interests, and the interests protected in the case of lawyer work products are the same as those for journalists.

85. In the recent *Lizotte* case, this Court acknowledged the "chilling effect" that the disclosure of lawyer work product would have. Citing from the United States Supreme Court, the chilling effect was explained as follows:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.[69]

86. The same chilling effect that this Court accepts for lawyer work product exists equally for the work product of journalists. It is essential that journalists work with a certain degree of privacy, free from unnecessary intrusion by the state. Proper reporting demands that journalists speak to various sources, assemble information, sift through it, and plan their news story. This work is

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[69] ***Lizotte v. Aviva Insurance Company of Canada***, 2016 SCC 52 at para. 55.

reflected in interviews, statements, notes, drafts – the journalist's work products – that are identical in form to lawyer work products.

87. This is particularly important in the era of modern electronic communications. The Court has recognized that such electronic records can include additional (and often private) information beyond the image or words published, including the physical locations of parties involved, the time and date the records were made, and other meta-data.[70] This data would potentially be producible in cases like this one where wholesale production of the records in their native formats is requested and ordered.

88. Turning to the privacy interests of the suspect/source, this Court has noted recently that there can be a heightened privacy interest in text messages.[71] In *Marakah*, the majority of this Court confirmed that the sender of a text message has a sufficient expectation of privacy in the content of the message, given the inherently private nature of text communication, despite the risk that recipients can disclose the message.[72]

89. Except, perhaps, to the extent that complete text conversations are published by the journalist, the Appellants submit that this analysis should be applied to journalist-source communications. By well-known convention, specifically referred to in Makuch's evidence,[73] journalist-source communications may well include "off the record" statements by the source, which are not to be published at all, or "not for attribution" statements, that may be published but only without attribution to the source. They may include background, explanation, illustration, analogy, and even outright speculation, which both parties to the communication understand are not suitable for publication at all, but which are nevertheless part of the investigative inquiry to which the communications contribute.

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[70] ***R. v. Cole***, [2012] 3 S.C.R. 34 (SCC) at para. 96.
[71] ***R. v. TELUS Communications Co.***, [2013] 2 S.C.R. 3 (SCC); ***R. v. Jones***, 2017 SCC 60; ***R. v. Marakah***, 2017 SCC 59 ["*Marakah*"].
[72] ***Marakah***, *supra* note 71, at paras. 34 - 37 and 40 - 44.
[73] **Makuch Affidavit** at paras. 17 - 18, AR, Tab 9 at p. 87 - 88.

90. As such, any order for production of the communications at issue in this case ought to have considered in the balance these continuing privacy interests of Shirdon, at least in the unpublished conversations, in combination with any metadata obtained from Kik messenger.

91. Moreover, the same kinds of privacy interests in the text communications in issue belong equally to Makuch, himself. Those communications would, for example, reveal the techniques he used to gain the trust of this very unusual and interesting source, as well as questions he asked or suggestions he made which did not find their way into the published articles. Parts of those unpublished communications could have been about other persons or stories he was interested in or was pursuing, unconnected either to the articles about Shirdon or the offences alleged against him.

92. For all these reasons, the Appellants submit that, quite apart from the s. 2(b) interests at stake, the privacy interests of both the journalist and the source should have been weighed much more heavily than is apparent from the reasons of the courts below.

6. Prior publication does not weaken the chilling effect

93. Finally, the Appellants submit that prior publication of journalist-source communications sought by a production order or warrant in advance of trial should not attenuate the media interests at stake, but rather should attenuate the interests of law enforcement in obtaining the information.

94. While both *Lessard* and *New Brunswick* gave significant weight to prior publication, to the point of making it a separate "factor" in the list to be considered, it is submitted that this can only be justified on the facts of those cases: that is, by the presence of an imminent risk to public safety, and by the absence of any journalist-source interests in the photographs and videos sought.

95. In *Lessard,* this Court held that "[i]f the information sought has been disseminated by the media in whole or in part, this will be a factor which will favour the issuing of the search warrant."[74] At the same time, however, this Court stressed in *New Brunswick* that "[t]he factors which may be

[74] ***Lessard***, *supra* note 1, at para. 47.

vital in assessing the reasonableness of one search may be irrelevant in another."[75] The Appellants submit that these statements should now be reconciled by limiting them to the facts.

96. In her dissent in *Lessard,* Justice McLachlin provided the following strong articulation of why prior publication should be irrelevant to the balancing of interests required, at least in a case of journalist-source communications:

> I cannot accept that the fact that a portion of the material seized may have been published negates the chilling effect seizure might have on informants and the press itself. The fact that a portion of the material has been published does not negate the fact that other portions adversely affecting the privacy of press informants may be disclosed as a consequence of the search. But more fundamentally, it is the prospect of seizure of press material in future cases without the imposition of conditions to protect press freedom and the identity of informants which creates the chilling effect. The fact that some of the material may have been published in no way diminishes such fears. [76]

97. The courts below – and courts across the country[77] – are quick to equate prior publication with the absence of a chilling effect. They use it as a basis to require production, even of journalist-source communications. Such an approach short-circuits the balancing analysis under *Lessard*. The Appellants submit that a more nuanced view of prior publication is required.

98. Prior publication should not displace the presumptive chill that flows from a production order targeting journalist-source communications. In this context, the "chill" does not come from being identified in published material; it comes from a source's knowledge that all information and documents he or she provides to a journalist can be used to assist the state in a prosecution against him or her, including discussions that may be "off the record" or not for attribution. Depending on the circumstances, a lack of prior publication may exacerbate the chill, but the fact of prior publication cannot significantly attenuate it.

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[75] ***New Brunswick***, *supra* note 2, at para. 38.
[76] ***Lessard***, *supra* note 1, at p. 20.
[77] See, for example, ***Meigs***, *supra* note 33, at paras. 46 - 48; ***CTV (BCPC)***, *supra* note 33, at para. 19; ***CTV (SCJ)***, *supra* note 33, at paras. 42 - 43; ***SPPC***, *supra note 33,* at para. 65, Appellants' BOA Tab 2.

99. The prior publication factor should also play a less important role given the realities of modern modes of communication. *Lessard* and *New Brunswick* were decided in the context of protestors (not sources) committing criminal activity in public view, which was captured by the media in photographs and videotapes: a record of past events – nothing more. Lower courts must be sensitive to modern realities when considering the intrusiveness of the search in question, recognizing that the records sought may contain meta-data and other unpublished information.

100. Finally, the prior publication factor does little to address the chilling effect on journalists, based upon the privacy interest journalists have in their work product, which is vital to their constitutionally-protected role of gathering news and informing the public, regardless of whether any information contained in that material has been published.

B. The Interests of Law Enforcement

1. The prospects of any eventual trial

101. The Production Order is meant to gather evidence for a future prosecution of an alleged terrorist thought to have been operating somewhere in the Middle East, who has been charged *in absentia* with six terrorism-related offences. The accused is not in custody, his whereabouts are unknown, and a trial appears highly unlikely. It is unclear if he is even alive.

102. In these circumstances, the Appellants submit this Court should address the need to take account of *whether there will be a trial at all.* Here, the chances of that trial are remote. Shirdon has been charged *in absentia*, but he cannot be tried *in absentia* absent some degree of cooperation on his part,[78] and there is nothing to suggest that will be forthcoming.

103. Indeed, if the news reports that U.S. Central Command has confirmed Shirdon was killed in a coalition airstrike on July 13, 2015 were accepted, there would no longer be any legal or factual basis to enforce the Production Order.

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[78] Sections 650 and 650.01 of the **Criminal Code**.

104. Yet the courts below gave no weight – indeed did not even refer – to the remoteness of any prospect of trial, on the facts of this case as they stood at any stage. Equally, the RCMP gave no weight to the U.S. Central Command's disclosure, when it occurred.

105. In this respect, and others, lower courts and police consistently maintain that the "interests of the state in the investigation and prosecution of crimes" are important and must prevail. Lower courts almost inevitably accept law enforcement's purported need for the material at face value, without scrutiny, as occurred in this case.[79]

106. The Appellants submit this, again, is not the "balancing" mandated by this Court 25 years ago.

107. This Court has yet to address the extent to which it is appropriate to examine the prospects of a trial ever occurring. Just as the strength of the chilling effect on media varies according to certain factors, so too does the strength of law enforcement's interests in the production orders and search warrants sought. For the *Lessard* balancing to work as this Court intended, the Appellants submit that courts must carefully and critically examine, consider and weigh all of the variables that impact the strength of the state's interests in the investigation and prosecution of crimes, including whether there is any real prospect of trial.

108. Even if confirmation of Shirdon's death cannot be conclusively confirmed, he is not in custody, and his whereabouts are unknown to law enforcement. All these factors strongly militate against compelling Makuch and VICE Canada to provide the Kik messages to the RCMP at the present time.

2. The probative value of the information sought

109. Second, the Appellants submit that, even if it is determined that the material sought may ultimately be usable at a trial of a criminal prosecution, the probative value of the material (beyond meeting the statutory conditions) must be examined.

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[79] See footnote 33, *supra*.

110. When asked to evaluate the significance, if any, of the Kik messages to law enforcement's interests in Shirdon, the Court of Appeal effectively refused to scrutinize the prosecution's position and accepted it at face value. The Court rejected outright the Appellants' suggestion that the Court should assess the probative value or require a demonstrated need for the evidence sought by the Production Order:

> To suggest that a judge can foreclose police access to relevant evidence otherwise producible in law, because the judge thinks the prosecution does not need the evidence to prove its case, is to seriously confuse the role of those who investigate and prosecute crime with the role of those who adjudicate the cases brought by the prosecution against individuals.[80]

111. By refusing to examine the probative value of the material sought, the Court of Appeal essentially determined, *a priori*, that the law enforcement interests favouring disclosure cannot be second-guessed or weighed in any meaningful way for the purposes of the *Lessard* balancing. The Appellants submit this is an error of law.

112. For example, before any evidence from Shirdon/Abu Usamah's unpublished Kik exchanges with Makuch could be entered into evidence against him, the trial court would have to assess whether his s. 8 *Charter* rights would be infringed by its admission. The trial court would also have to determine that the Crown had proven beyond a reasonable doubt that Abu Usamah was, in fact, Shirdon.

113. In addition, it is pure speculation on the part of the RCMP and the courts below to suggest that there is anything in the unpublished exchanges containing any evidence of criminal wrongdoing. Any suggestion by the RCMP or Crown that the documents sought by the Production Order will afford additional evidence relevant to the charges against Shirdon is "mere suspicion, conjecture, or hypothesis" and in that sense, is a fishing expedition.[81] In fact, none of the six terrorism charges against Shirdon specifically relate to any statements or comments made by Shirdon to Makuch in their Kik messages, and published in Makuch's articles.

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[80] **Court of Appeal Reasons** at para. 41, AR, Tab 7 at p. 73.
[81] ***Dunphy***, *supra* note 37, at para. 48.

114. In *R v. Baltovich [Finkle v. Ontario]*, Justice Watt (then of the SCJ) considered whether a subpoena of a reporter's notes, interviews, and materials created while writing a book about a famous criminal case might yield material evidence for the prosecution. In finding that the subpoena was a "fishing expedition", Justice Watt noted:

> The standard that the issuing authority was to apply was not whether Derek Finkle could give material evidence. And it was not whether Derek Finkle had documents that could be of assistance to the prosecution at Robert Baltovich's trial. The test that the issuing authority was bound to apply on the basis of Detective Wilkinson's say so, was whether Derek Finkle was likely to give material evidence at Robert Baltovich's trial. The material presented must establish this probability, not a mere possibility.[82]

115. Similarly, in *CBC (MBCA)*, the Manitoba Court of Appeal noted the absence of "any evidence of the alleged inculpatory statements" sought by the production order and concluded that the RCMP proceeded "on the basis of conjecture."[83]

116. Given these legal hurdles, the Appellants submit that the determination by the SCJ that the material sought constitutes "important evidence in relation to very serious allegations" is at best premature, and at worst simply wrong.

117. In addition, the Appellants submit that the value of the material sought should be considered incrementally, against the backdrop of other material that is, or could reasonably be expected to be, available and admissible at an eventual trial. As outlined in paragraphs 35 - 39 of the ITO, the RCMP has already gathered a significant amount of other evidence of Shirdon's alleged crimes that is similar to that sought by the Production Order, through Shirdon's own social media accounts. The ITO makes plain that Shirdon has been public and explicit about expressing his involvement with ISIS on multiple social media platforms over many months.[84] The material sought from Vice Canada and Makuch is, at best, potentially more of the same type of evidence the RCMP has already obtained and detailed in the ITO. The RCMP in no way explained why the material sought was ***necessary*** to an eventual trial, in the sense of making the difference between acquittal and conviction.

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[82] ***R v. Baltovich [Finkle v. Ontario]*****,** [2007] O.J. No. 3506 (Ont S.C.J.) at para. 93.
[83] ***CBC (MBCA)***, *supra* note 37, at para. 65.
[84] **ITO** at paras. 35 - 39, AR, Tab 11 at pp. 166 - 214.

118. Based on the ITO, it is clear the RCMP gathered numerous inculpatory statements by Shirdon that will be used as evidence to support the terrorism charges he is facing. The fact that the RCMP already has adequate alternative evidence must be a relevant factor in reviewing the Production Order. This is not a situation where the Kik chats are evidence of the actual criminal acts alleged against Shirdon, or are the only available evidence to prove an essential element of the offences charged.

119. When the information or evidence sought from a reporter is duplicative of the evidence already available and not reasonably necessary for providing proof of the offences, a production order against a media outlet should not be issued.[85]

120. Indeed, the Appellants submit that this Court should adopt the standard of "investigative necessity" required for the issuance of *ex parte* wiretaps from section 186(1)(b) of the *Criminal Code* and apply it to all applications for production orders and search warrants against media outlets and journalists who are not targets of a criminal investigation. This Court has mandated the following approach to the assessment of "investigative necessity" in a wiretap context:

> …[t]he authorizing judge stands as the guardian of the law and of the constitutional principles protecting privacy interests. The judge should not view himself or herself as a mere rubber stamp, but should take a close look at the material submitted by the applicant. He or she should not be reluctant to ask questions from the applicant, to discuss or to require more information or to narrow down the authorization requested if it seems too wide or too vague. The authorizing judge should grant the authorization only as far as need is demonstrated by the material submitted by the applicant. The judge should remember that the citizens of his country must be protected against unwanted fishing expeditions by the state and its law enforcement agencies. Parliament and the courts have indeed recognized that the interception of private communications is a serious matter, to be considered only for the investigation of serious offences, in the presence of probable grounds, and with a serious testing of the need for electronic interception in the context of the particular investigation and its objects (cf. *Smyk*, *supra*, at p. 74). There must be, practically speaking, no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry. [86] (emphasis added)

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[85] ***Canadian Broadcasting Corporation v. Newfoundland***, 1994 CanLII 4430 (NL SCTD)*;* ***Canadian Broadcasting Corporation v. R. et al.,*** 1987 CanLII 5185 (NL SCTD) at para. 26.
[86] ***R. v. Araujo***, [2000] 2 S.C.R. 992, 2000 SCC 65 (CanLII) at para. 29.

121. While the case before this court does not involve a wiretap, courts have used the standard of "investigative necessity" in several cases cited which are similar to the facts at issue here.[87]

122. When an ITO, such as the one in this case, fails to explain the relevance and reasons why a production order is needed to issue against a media outlet, it should be quashed. In *CTV Inc. v. Barbès and SPVM*, the Superior Court of Quebec quashed search warrants issued on a media outlet for photographs and video footage of riots because the issuing judge and ITO failed to take into account the *Lessard* factors and the ITO failed to provide any information to assist the issuing judge in deciding whether to issue search warrants on the media outlet.[88]

123. The facts of this case lay plain the problem with the prevailing approach taken by lower courts in assessing the law enforcement side of the balancing equation. In this case, it was (and remains) premature to assign *any* value to the law enforcement interest given the remote possibility of Shirdon actually standing trial, the other available evidence, and the lack of urgency. Yet without applying the necessary degree of scrutiny, law enforcement interests were uncritically accepted as weighing heavily in the balance. The result is a Production Order for unnecessary evidence in support of a prosecution that will, in all likelihood, never proceed.

C. The Procedures Followed by Issuing and Reviewing Courts

1. No *ex parte* orders without a showing of urgency

124. The Appellants submit that before any judge or justice issues a production order or warrant against the media on an *ex parte* application, this Court should require that the court be satisfied that the order serves an urgent purpose to protect the public.

125. In *New Brunswick*, for example, this Court held that the throwing of Molotov cocktails at a building "not only damaged the property but constituted a potential threat to the lives and safety of others."[89] Depending on the gravity of the offence and the risk of further criminal activity in

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[87] See, for example, the cases cited at footnotes 36, 50, 85, *supra*.
[88] ***Barbès***, *supra* note 37, at para. 28.
[89] ***New Brunswick***, *supra* note 2, at para. 34.

Canada, an order may have significant benefits in these circumstances, in terms of quickly investigating the identity of offenders and apprehending them in order to protect the public.

126. In other situations, however, without an opportunity to hear evidence and argument from the media, issuing courts are not conducting any balancing using the *Lessard* factors, which this Court has stated is a requirement. Only one side of the story is heard. Only one set of interests is weighed. Against this backdrop, it is not surprising that such *ex parte* orders are almost always granted.[90]

127. In this regard, the Court should take guidance from the *Journalistic Sources Protection Act*, which expressly requires that applications for production by the media of information which could identify a confidential source be made on notice to the media affected.[91]

128. In this case, the urgency and timing of the Production Order were not considered.

2. The RCMP's application is premature

129. Related to the issue of whether the application should have been made on notice rather than *ex parte*, but distinct therefrom, the Appellants submit further that the application was premature.

130. Even if one assumes that Shirdon will eventually stand trial, that will not happen for many years. The RCMP have not explained why they require the material from Vice Canada and Mr. Makuch ***now***. Even if the request for production might ultimately be proper, there are less intrusive alternatives to that followed in the present case. The Crown could subpoena Makuch to bring copies of the Kik messages to trial, or it could request a production order once a trial date is set. Although such a subpoena or order may still be contested as having a chilling effect, at least the interests of the state in advancing a prosecution, and any defences to be asserted by Shirdon, would have crystallized.[92] At this stage, they remain contingent, if not speculative.

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[90] Recent statistics from the **Service de Police de la Ville de Montreal** suggests that such orders are granted routinely by justices of the peace on an *ex parte* basis: see p. 41.

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

[92] This was the approach taken by the Crown in ***Toronto Star***, where a production order was sought in late December 2016 for a trial slated to occur in March 2017. In his majority opinion in

131. The Production Order was premature and should not have been issued while Shirdon is still at large, in light of the important constitutional rights at stake and the abundance of similar evidence the police have already gathered. In these circumstances, a production order should only be considered as a possibility when Shirdon is in custody, scheduled to go to trial, and the evidence is truly necessary to obtain a conviction.

3. The standard of review

132. On review, given the constitutionally protected interests at stake when the state seeks journalist-source communications, the Appellants submit it is inappropriate and artificial to engage in a hypothetical debate about whether an *ex parte* production order "could have" been made. The only question a reviewing court should ask in these cases is whether the production order *should* have been made, on a proper application of the *Lessard* factors, including the balancing analysis. Anything less is an affront to the interests protected by s. 2(b) and 8 of the *Charter*.

133. This Court has yet to address whether *Garofoli,* or a modified standard of review, should apply in the context of an order targeting journalist-source communications.[93] Most courts, like those below, have applied *Garofoli* and adopted a "narrow" scope of judicial review.[94] Some courts have suggested that without the issuing court having information before it that relates to the media's interests, balancing is impossible and deference is inappropriate.[95] Others have applied a

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Lessard, *supra* note 1, Justice Cory also noted that the "degree of urgency of the search" and whether there is an "urgent need to obtain evidence" are factors to consider when determining if a search warrant against a media outlet is justified.

[93] In ***National Post***, *supra* note 3, this Court simply noted that "the reviewing judge is generally bound, in deciding this issue, to afford a measure of deference to the determination of the issuing justice": see para. 80.

[94] ***The Vancouver Sun v. British Columbia***, 2011 BCSC 1736 (CanLII) at paras. 6, 52; ***Toronto Star*** at paras. 35-36; ***Meigs***, *supra* note 33, at paras. 58, 62; ***R. v. Canadian Broadcasting Corp.*** (1992), 77 C.C.C. (3d) 341, 1992 CarswellOnt 115 (OCJ Gen. Div.) at para. 28, Appellants' BOA Tab 4.

[95] ***R. v. Canadian Broadcasting Corporation***, *supra* note 37, at paras. 72, 74, aff'd **2007 NLCA 62** at paras 29, 35 - 40; ***Barbès***, *supra* note 37, at para. 28.

"modified *Garofoli* test" amounting to something more searching than the "could have" standard, but less than *de novo* review.[96]

134. The Court of Appeal below refused to deviate from the *Garofoli* standard. Writing for the panel, Justice Doherty explained: "While no doubt additional considerations come into play with a media target, I do not see how they make a reasonableness assessment more difficult, or less appropriate."[97] But the reasonableness assessment ("could have been made") ***is*** more difficult and less appropriate, precisely because of the delicate and often complicated nature of the *Lessard* balancing exercise.

135. However, the analysis in other cases in the Court of Appeal below has been inconsistent. In *CBC (ONCA)*, Justice Moldaver did not refer to *Garofoli* and explained intervention was appropriate if the issuing judge "failed to give adequate or any consideration to a pertinent factor".[98] In this case, the same Court – without referencing *CBC (ONCA)* – explicitly endorsed *Garofoli*, but then confusingly added: "Practically speaking, the more significant the material placed before the reviewing judge, the more the review will take on the appearance of a *de novo* assessment of the merits."[99]

136. The Manitoba Court of Appeal resolved this divergence in the case law in *CBC (MBCA)*, by applying a modified *Garofoli* standard of review and upholding a decision to quash a production order seeking material in CBC's file, stating:

> the reviewing judge properly concluded that before issuing an order that would give access to the contents of such material that might be in the possession of the media, such access should only be granted after a meaningful consideration and balancing of all relevant factors and circumstances. Since no reference to such material was made in the information to obtain, the authorizing judge could not

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[96] ***CBC (MBCA),*** *supra* note 37, at para. 34.

[97] **Court of Appeal Reasons** at para. 22, AR, Tab 7 at p. 65.

[98] ***R. v. Canadian Broadcasting Corp***. (2001), 52 O.R. (3d) 757 (C.A.) at para. 54. At footnote 2, Moldaver JA added: "I leave for another day whether an enlarged standard of review might be warranted in circumstances involving different facts and/or different *Charter* considerations."

[99] **Court of Appeal Reasons** at para. 23, AR, Tab 7 at p. 65.

> possibly have considered and balanced the relevant factors as required by the Supreme Court. [100]

137. What these conflicting statements from appellate and reviewing courts suggest is that there is a genuine struggle in how to reconcile the standard approach to reviewing *ex parte* orders with the difficult, complex and delicate balancing exercise required by *Lessard*. This Court should provide clarity, so that reviewing courts across the country can approach these important questions with consistency and predictability.

D. Can the *Lessard* balancing test be adapted to journalist-source communication

138. In the Court of Appeal below, intervenors argued that the *Lessard* balancing test is simply inadequate to properly protect s. 2(b) interests when police seek access to journalists' file materials. They proposed fundamental reform of our law.

139. While the Appellants strongly support that position, they also submit that the facts of this case do not require such radical reforms. Properly construed and applied to the facts at bar, the *Lessard* test should have resulted in the courts below refusing to grant the Production Order at this stage, for all of the reasons set out above.

E. The Publication Ban

140. In ordering the publication ban, Justice MacDonnell did not consider that Shirdon is not in Canada, that he will likely never be arrested, or that information about his connection to terrorism is readily available online and in the public domain. Justice MacDonnell did not consider whether the decision had the effect of conscripting a media company and a journalist into assisting a criminal investigation or the ramifications of this decision on freedom of the press. Justice MacDonnell did not consider whether there was evidence that the Crown needed this information in order to prosecute Shirdon, or whether the information should only be sought if and when Shirdon was actually prosecuted.

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[100] ***CBC (MBCA),*** *supra* note 37, at para. 67.

141. In the SCJ and before the Court of Appeal, the Appellants and several intervenors argued that the ITO submitted in this case should be unsealed, without any publication ban of the affiant's opinions regarding the evidentiary value of information already available to the RCMP. The Appellants and the intervenors specifically relied upon the "openness principle" mandated by s. 2(b) of the *Charter*, ss. 135 and 137 of the *Courts of Justice Act*, and numerous decisions of this Court which develop and apply the "*Dagenais/Mentuk* test". The Appellants maintain this position, notwithstanding the minor revisions to the scope of the publication ban made by the Court of Appeal.[101]

PART IV – SUBMISSIONS ON COSTS

142. The Appellants have not sought costs of these proceedings at any stage in the Courts below, and do not seek costs before this Court.

PART V – NATURE OF THE ORDER SOUGHT

143. The Appellants respectfully request:

(a) that this appeal be allowed;

(b) that the Production Order be quashed;

(c) that the Publication Ban be quashed, and the application for its issuance be dismissed; and

(d) That the Appellants' application to the SCJ to set aside the sealing order over the ITO be granted, without any publication ban over any of the information contained therein.

February 26th, 2018 ALL OF WHICH IS RESPECTFULLY SUBMITTED,

M. Philip Tunley / Iain A.C. MacKinnon / Jennifer P. Saville
Counsel to the Appellants

[101] **Court of Appeal Reasons** at paras. 51 – 60, AR, Tab 7 at p. 76 - 81.

Appendix 1

Cases where production orders or search warrants have been upheld against the media

NO.	CASE	BRIEF DESCRIPTION OF ORDER
1.	*CBC v. SPPC et al.*, Superior Court of Quebec File No. 500-36-008128-160 (March 17, 2017)	Production order for recordings of a journalist's telephone conversations with two sources, later charged with fraud and corruption
2.	*CTV v. Attorney General of Canada*, 2015 BCPC 65	Production order for video and audio recordings and notes created during media interviews with a source charged with failure to stop at the scene of an accident causing bodily harm or death
3.	*CTV v. Her Majesty the Queen*, 2015 ONSC 4842	Production order for media interviews with a source charged with failing to provide the necessaries of life
4.	*CTV v. IIO*, 2013 BCPC 252	Production order for all video footage relating to an incident where a police officer shot and killed an armed man
5.	*Global TV v. Alberta*, 2013 ABPC 342	Production order for all video and audio recordings and electronic material that resulted from various communications between journalist and persons of interest in a murder investigation
6.	*Groupe TVA Inc. c. Réjean Lavoie* (Cour Supérieure REJB 2003-50466)	Search warrant of media premises to obtain video of a demonstration
7.	*HMTQ v. Meigs et al.*, 2003 BCSC 1816	Search warrant of media premises for a video tape recording of man in custody, awaiting trial on criminal charges
8.	*R. v. Canadian Broadcasting Corp.* (1992), 77 C.C.C. (3d) 341, 1992 CarswellOnt 115 (OCJ Gen. Div.)	Search warrant of media premises to obtain unpublished videos and photographs of riot
9.	*R. v. Canadian Broadcasting Corporation* (2001), 52 O.R. (3d) 757 (C.A.)	Search warrant of media premises to obtain film or photographs of demonstration

NO.	CASE	BRIEF DESCRIPTION OF ORDER
10.	*R. v. National Post*, [2010] 1 S.C.R. 477 (SCC)	Search warrant compelling production of document alleged to be forged and envelope
11.	*The Vancouver Sun v. British Columbia*, 2011 BCSC 1736	Production order for digital photographs or video files of Stanley Cup riots
12.	*Thomson Reuters Canada Ltd. v. The Queen*, 2013 ONCJ 568	Production order for all email communications between journalist and source, for use in a Competition Bureau investigation
13.	*Toronto Star v. The Queen*, 2017 ONSC 1190	Production order for recordings of a media interview with a source facing a number of charges

PART VI – TABLE OF AUTHORITIES

NO.	AUTHORITY	REFERRING PARAGRAPH(S)
1.	*Ashworth Security Hospital v. MGN Limited*, [2002] UKHL 29	50
2.	*Branzburg v. Hayes*, 408 U.S. 665 (1972)	50
3.	*British Steel Corp v. Granada Television Ltd*, [1981] AC 1096	50
4.	*Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421 (SCC)	1, 2, 3, 4, 5, 6, 36, 40, 42, 43, 48, 53, 55, 59, 67, 95, 96, 130
5.	*Canadian Broadcasting Corporation v. Newfoundland*, 1994 CanLII 4430 (NL SCTD)	119
6.	*Canadian Broadcasting Corporation v. R. et al.*, 1987 CanLII 5185 (NL SCTD) *Canadian Broadcasting Corporation v. R. et al.*, 1987 CanLII 5185 (NL SCTD)	119
7.	*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459 (SCC)	1, 2, 37, 39, 50, 53, 56, 95, 125
8.	*CBC v. Her Majesty the Queen*, 1994 CanLII 4430 (N.L. SCTD)	42
9.	*CBC v. Her Majesty in Right of NL et al*, 2005 NLTD 218 (CanLII) aff'd 2007 NLCA 62	42
10.	*CBC v. SPPC et al.*, Superior Court of Quebec File No. 500-36-008128-160 (March 17, 2017)	38, 97
11.	*Corporation Sun Média c. Barbès*, 2008 QCCS 3996	42, 122, 133
12.	*CTV v. Attorney General of Canada*, 2015 BCPC 65	38, 48, 97
13.	*CTV v. Her Majesty the Queen*, 2015 ONSC 4842	38, 48, 97

NO.	AUTHORITY	REFERRING PARAGRAPH(S)
14.	*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (SCC)	39
15.	*Gastman v. North Jersey Newspapers Co.*, 603 A.2d 111, 112 (N.J. App. 1992)	51
16.	*Gonzales v. Nat'l Broadcasting Co.*, 194 F.3d 29, 35 (2d Cir. 1999)	51
17.	*Goodwin v. United Kingdom*, (1996) 22 EHRR 123 (European Court of Human Rights)	50
18.	*Hager v. Attorney-General*, [2015] NZHC 3268	50
19.	*Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 (SCC)	39
20.	*HMTQ v. Meigs et al.*, 2003 BCSC 1816	38, 97, 133
21.	*Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52	85
22.	*R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65	120
23.	*R v. Baltovich [Finkle v. Ontario]*, [2007] O.J. No. 3506 (Ont S.C.J.)	114
24.	*R. v. Canadian Broadcasting Corp.* (2001), 52 O.R. (3d) 757 (C.A.)	135
25.	*R. v. Canadian Broadcasting Corp.* (1992), 77 C.C.C. (3d) 341, 1992 CarswellOnt 115 (OCJ Gen. Div.)	133
26.	*R. v. CBC*, 2009 MBCA 122	42, 54, 115, 136
27.	*R. v. Cole*, [2012] 3 S.C.R. 34 (SCC)	87
28.	*R. v. Dunphy*, 2006 CanLII 6575 (ON S.C.)	42, 113
29.	*R. v. Erickson*, [2002] O.J. No. 3341 (S.C.J.)	48

NO.	AUTHORITY	REFERRING PARAGRAPH(S)
30.	*R. v. Jones*, 2017 SCC 60	88
31.	*R. v. Khawaja*, [2012] 3 S.C.R. 555 (SCC)	69
32.	*R. v. Marakah*, 2017 SCC 59	88
33.	*R. v. National Post* [2010] 1 S.C.R. 477 (SCC)	3, 38, 39, 49, 76
34.	*R. v. TELUS Communications Co.*, [2013] 2 S.C.R. 3 (SCC)	88
35.	*Schoen v. Schoen*, 5 F.3d 1289, 1294 (9th Cir. 1993)	51, 73
36.	*St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182	69
37.	*The Vancouver Sun v. British Columbia*, 2011 BCSC 1736	133
38.	*Toronto Star v. The Queen*, 2017 ONSC 1190	38, 130, 133
39.	*United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983)	51
40.	*United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980)	74
41.	*United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988)	51
42.	*Zurcher v. Stanford Daily*, 436 U.S. 547 (1978)	50

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NO.	DOCUMENT TITLE	REFERRING PARAGRAPH(S)
43.	Cameron, Jamie, "Of Scandals, Sources and Secrets: Investigative Reporting, National Post and Globe and Mail," *Supreme Court Law Review* (2011), 54 S.C.L.R. (2d), p. 233	45

NO.	DOCUMENT TITLE	REFERRING PARAGRAPH(S)
44.	*Commission d'enquête sur la protection de la confidentialité des sources journalistiques*, Report dated December 14, 2017	60, 75
45.	Oliphant, Benjamin "Freedom of the Press as a Discrete Constitutional Guarantee," *McGill Law Journal*, vol. 59, no. 2, 2013, p. 283-336	45
46.	Wirth, Eileen M., "Impact of State Shield Laws on Investigative Reporting," 16 Newspaper Research J. 64 (1995)	65

PART VII – STATUTES AND REGULATIONS

NO.	DOCUMENT TITLE	REFERRING PARAGRAPH(S)
47.	Bill S-231	54
48.	Criminal Code (R.S.C., 1985, c. C-46)	19, 57 and 120
49.	Journalistic Sources Protection Act, SC 2017, c 22	57, 82, 127 and 129
US Statutes and Codes		
50.	Alabama Code § 12-21-142	72
51.	Alaska Stat. § 09.25.300 and § 09.25.390	72
52.	Arizona Rev. Stat. § 12-2237	72
53.	Arkansas Code Ann. § 16-85-510	72
54.	California Evid. Code § 1070	72
55.	Delaware Code tit. 10 § 4320-26(5)	72
56.	Georgia Code § 24-9-30	72
57.	[Illinois] 735 Ill. Comp. Stat. § 5/8-902(c)	72
58.	Indiana Code § 34-46-4-2	72
59.	Kansas Stat. Ann. § 60-481	72
60.	Kentucky Rev. Stat. Ann. § 421.100	72
61.	Louisiana R.S. 45:1452	72
62.	Michigan Comp. Laws § 767A.6(6)	72
63.	Montana Code Ann. § 26-1-902	72
64.	Nebraska Rev. Stat. § 20-146	72
65.	Nevada Rev. Stat. NRS 49.275	72

NO.	DOCUMENT TITLE	REFERRING PARAGRAPH(S)
66.	New Jersey Rev. Stat. § 2A:84A-21	72
67.	New York Civil Rights Law § 79-h (b)	72
68.	North Dakota Cent. Code § 31-01-06.2	72
69.	Ohio Rev. Code § 2739.04, and 2739.12	72
70.	Oklahoma Stat. tit. 12, § 2506	72
71.	Oregon Rev. Stat. § 44.520	72
72.	[Pennsylvania] 42 Pa. C.S.A. § 5942(a)	72
73.	South Carolina Code Ann. § 19-11-100	72
74.	Tennessee Code Ann. § 24-1-208	72
75.	Vermont Stat. Ann. tit. 12, § 1615(2)(b)	72
76.	Washington Rev. Code § 5.68.010	72

Criminal Code, R.S.C. 1985, c. C-46 (current)

General production order
487.014 (1) Subject to sections 487.015 to 487.018, on ex parte application made by a peace officer or public officer, a justice or judge may order a person to produce a document that is a copy of a document that is in their possession or control when they receive the order, or to prepare and produce a document containing data that is in their possession or control at that time.

Conditions for making order
(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that

(a) an offence has been or will be committed under this or any other Act of Parliament; and

(b) the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence.

Ordonnance générale de communication
487.014 (1) Sous réserve des articles 487.015 à 487.018, le juge de paix ou le juge peut, sur demande *ex parte* présentée par un agent de la paix ou un fonctionnaire public, ordonner à toute personne de communiquer un document qui est la copie d'un document qui est en sa possession ou à sa disposition au moment où elle reçoit l'ordonnance ou d'établir et de communiquer un document comportant des données qui sont en sa possession ou à sa disposition à ce moment.

Conditions préalables
(2) Il ne rend l'ordonnance que s'il est convaincu, par une dénonciation sous serment faite selon la formule 5.004, qu'il existe des motifs raisonnables de croire, à la fois :

(a) qu'une infraction à la présente loi ou à toute autre loi fédérale a été ou sera commise;

(b) que le document ou les données sont en la possession de la personne ou à sa disposition et fourniront une preuve concernant la perpétration de l'infraction.

Criminal Code, R.S.C. 1985, c. C-46 (at the time Production Order was issued)

487.012 (1) A justice or judge may order a person, other than a person under investigation for an offence referred to in paragraph (3)(*a*),

(*a*) to produce documents, or copies of them certified by affidavit to be true copies, or to produce data; or

(*b*) to prepare a document based on documents or data already in existence and produce it.

487.012 (1) Sauf si elle fait l'objet d'une enquête relative à l'infraction visée à l'alinéa (3)a), un juge de paix ou un juge peut ordonner à une personne :

(a) de communiquer des documents — originaux ou copies certifiées conformes par affidavit — ou des données;

(b) de préparer un document à partir de documents ou données existants et de le communiquer.

Communication à un agent de la paix

Production to peace officer
(2) The order shall require the documents or data to be produced within the time, at the place and in the form specified and given

(*a*) to a peace officer named in the order; or

(*b*) to a public officer named in the order, who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament.

Conditions for issuance of order
(3) Before making an order, the justice or judge must be satisfied, on the basis of an ex parte application containing information on oath in writing, that there are reasonable grounds to believe that

(*a*) an offence against this Act or any other Act of Parliament has been or is suspected to have been committed;

(*b*) the documents or data will afford evidence respecting the commission of the offence; and

(*c*) the person who is subject to the order has possession or control of the documents or data.

Terms and conditions
(4) The order may contain any terms and conditions that the justice or judge considers advisable in the circumstances, including terms and conditions to protect a privileged communication between a lawyer and their client or, in the province of Quebec, between a lawyer or a notary and their client.

Power to revoke, renew or vary order
(5) The justice or judge who made the order, or a judge of the same territorial division, may

(2) L'ordonnance précise le moment, le lieu et la forme de la communication ainsi que la personne à qui elle est faite — agent de la paix ou fonctionnaire public nommé ou désigné pour l'application ou l'exécution d'une loi fédérale ou provinciale et chargé notamment de faire observer la présente loi ou toute autre loi fédérale.

Conditions à remplir
(3) Le juge de paix ou le juge ne rend l'ordonnance que s'il est convaincu, à la suite d'une dénonciation par écrit faite sous serment et présentée *ex parte*, qu'il existe des motifs raisonnables de croire que les conditions suivantes sont réunies :

(a) une infraction à la présente loi ou à toute autre loi fédérale a été ou est présumée avoir été commise;

(b) les documents ou données fourniront une preuve touchant la perpétration de l'infraction;

(c) les documents ou données sont en la possession de la personne en cause ou à sa disposition.

Conditions
(4) L'ordonnance peut être assortie des conditions que le juge de paix ou le juge estime indiquées, notamment pour protéger les communications privilégiées entre l'avocat — et, dans la province de Québec, le notaire — et son client.

Modification, renouvellement et révocation
(5) Le juge de paix ou le juge qui a rendu l'ordonnance — ou un juge de la même circonscription territoriale — peut, sur demande présentée *ex parte* par l'agent de la paix ou le fonctionnaire public nommé dans l'ordonnance, la modifier, la renouveler ou la révoquer.

revoke, renew or vary the order on an *ex parte* application made by the peace officer or public officer named in the order.

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

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

- (*a*) freedom of conscience and religion;
- (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (*c*) freedom of peaceful assembly; and
- (*d*) freedom of association.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Libertés fondamentales

2. Chacun a les libertés fondamentales suivantes :

- *a*) liberté de conscience et de religion;
- *b*) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;
- *c*) liberté de réunion pacifique;
- *d*) liberté d'association.

Fouilles, perquisitions ou saisies

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

Courts of Justice Act, R.S.O. 1990, c. C.43

Public hearings

135 (1) Subject to subsection (2) and rules of court, all court hearings shall be open to the public.

Exception

(2) The court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public.

Disclosure of information

(3) Where a proceeding is heard in the absence of the public, disclosure of information relating to the proceeding is not contempt of court unless the court expressly prohibited the disclosure of the information.

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Audiences publiques

135 (1) Sous réserve du paragraphe (2) et des règles de pratique, les audiences des tribunaux sont publiques.

Exception

(2) Le tribunal peut ordonner le huis clos si la possibilité qu'une personne subisse un préjudice important ou une injustice grave justifie une dérogation au principe général de la publicité des audiences des tribunaux.

Divulgation de renseignements

(3) La divulgation de renseignements concernant une instance à huis clos ne constitue pas un outrage au tribunal, à moins que le tribunal ne l'interdise formellement.

Documents publics

137 (1) Quiconque a acquitté les droits prévus peut examiner un document déposé au greffe dans une instance civile devant un tribunal, à moins qu'une loi ou une ordonnance du tribunal ne l'interdise.

Documents confidentiels

(2) Le tribunal peut ordonner qu'un document déposé dans une instance civile soit traité comme un document confidentiel, qu'il soit fermé et qu'il ne fasse pas partie du dossier public.

Accès au répertoire

(3) Quiconque a acquitté les droits prévus peut examiner tout répertoire des instances

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

civiles introduites ou des jugements inscrits établi par un tribunal.

Copies

(4) Quiconque a acquitté les droits prévus peut obtenir une copie des documents qu'il a le droit d'examiner.