File Number: 37574

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

BETWEEN:

VICE MEDIA CANADA INC. AND BEN MAKUCH

APPELLANTS
(Appellants)

and

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

and

ATTORNEY GENERAL OF ONTARIO, CANADIAN CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN MUSLIM LAWYERS ASSOCIATION, CANADIAN BROADCASTING CORPORATION, COALITION, INTERNATIONAL COALITION

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: STATEMENT OF FACTS

Overview

1. Eight years ago, in *R. v. National Post*,[1] this Court stated that "[t]he public has the right to every person's evidence. That is the general rule." In this case, a judge issued a production order requiring the appellants, Vice Media Canada Inc. ("Vice") and Ben Makuch ("Makuch"), to turn over to the police highly reliable evidence relating to the commission of serious terrorism offences. In response, Makuch, a journalist, and Vice, a media company, brought an application to quash the production order. They argued that the order unduly interferes with their right to freedom of the press. Unsuccessful in the courts below, they now appeal to this Court. On the one hand, they say that the common law framework governing searches of the media is deficient and should be reformed.[2] They argue that the framework fails to sufficiently safeguard the constitutional guarantee of freedom of the press, that it is "a rubber stamp", and that the lower courts require more guidance. Yet, at the same time, while they support a call to reform the test, they ultimately agree that the common law framework, "properly construed and applied"[3], is sufficient to safeguard freedom of the press in this case. The appellants also seek, almost parenthetically, to set aside non-publication and sealing orders that were imposed in respect of the Information to Obtain filed in support of the production order.

2. The common law framework needs no reform by this Court. The current framework, first articulated by this Court in *Canadian Broadcasting Corporation v. Lessard*,[4] and *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*[5] and recently re-affirmed in *National Post*, protects freedom of expression. In *Lessard*, this Court laid down nine conditions which provide a suitable framework for assessing the reasonableness of any search of a journalist or media organization. Recognizing that the circumstances will vary from case to case, those conditions require that the issuing justice assess all of the circumstances in a particular case, carefully consider the special position of the media in democratic society, and ultimately ensure that a balance is struck between the public interest in the investigation and prosecution of crimes

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[1] [2010] 1 S.C.R. 477, para. 1 [*National Post*].
[2] Appellants' Factum, paras. 5-9.
[3] Appellants' Factum, paras. 138-139.
[4] [1991] 3 S.C.R. 421 [*Lessard*].
[5] [1991] 3 S.C.R. 459 [*New Brunswick*].

and the public interest in freedom of the press.[6] The *Lessard* framework is a principled and flexible framework which seeks to mitigate any potential "chilling effect" that an order might have on the ability of the media to gather and disseminate the news.

3. Contrary to the appellants' submissions, the courts have not been acting as "rubber stamps", favouring the interests of law enforcement at the expense of freedom of expression. The appellants' proposed reforms are unworkable, unnecessary, and require this Court to overturn its previous decisions. The appellants have provided no compelling reason to overturn this Court's settled jurisprudence. Indeed, Parliament recently, in the *Journalistic Sources Protection Act*, enacted a statutory framework that essentially codifies the common law principles developed by this Court.[7] The production order is reasonable, as are the non-publication and sealing orders. The appeal should be dismissed.

4. The respondent does not accept much of the appellants' recital of facts, which include argument, factual errors, and material that does not form part of the record in the courts below (see Appellants' Factum, para. 34). The respondent emphasizes and relies on the facts set out below.

Facts

i) Farah Shirdon and His Interactions with Vice Media

5. Farah Shirdon ("Shirdon") left Canada on March 14, 2014 and travelled to Turkey. One month later, on April 15, 2014, a propaganda video of the terrorist group ISIS surfaced on the internet. Shirdon appeared in the video at one point, tore up his Canadian passport, and threw it into a fire. He stated, among other things, "…with help from Allah, we are coming to slaughter you."[8]

6. Shortly afterwards, in May, 2014, the appellant Makuch established contact with Shirdon over the internet. Over the next few months, Makuch had a number of text exchanges with Shirdon using a social media platform known as "Kik" text messaging service.[9] Kik is a mobile messenger

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[6] *Lessard*, pp. 444-445. See also: *New Brunswick*, pp. 475-476.
[7] *Journalistic Sources Protection Act*, S.C. 2017, c.22 [*JSPA*].
[8] Information to Obtain of Constable Grewal [ITO], Appellants' Record, Tab 11, p. 159, para. 30(e).
[9] *Reasons of the Court of Appeal*, Appellants' Record, Tab 7, paras. 7-9 [*Vice Media (CA)*]; *Reasons of the Application Judge*, Appellants' Record, Tab 3, para. 3 [*Vice Media (SCJ)*].

application that allows users to communicate with each other using user names, rather than phone numbers.[10]

7. Between June and October 2014, the appellants published three articles about Shirdon's involvement with ISIS. The articles were based in large part on Makuch's text exchanges with Shirdon.[11] The articles reported that Shirdon had made various admissions to Makuch about Shirdon's activities with ISIS, his extremist beliefs, and his travel to both Syria and Iraq. The articles included some direct quotes from Shirdon's exchanges with Makuch, such as: "…fighting is prescribed upon Muslims both offensive and defensive…"; "Blood has to flow…Attack us in our homes, we shall do the same." But other admissions made by Shirdon were truncated or paraphrased by Makuch in the articles. For example, in his June 23, 2014 article, Makuch wrote: "In another exchange in May, he told me he was an ISIS spokesperson."[12]

8. Makuch never promised Shirdon confidentiality, nor did he ever try to keep Shirdon's identity confidential. In fact, although Shirdon had used the user name "Abu Usamah" in his communications with Makuch, Shirdon identified himself to Makuch as the Canadian who had burned his passport in the online propaganda video.[13] Makuch believed that he was communicating with Shirdon and readily identified him as Shirdon in his articles. Indeed, after Makuch's initial stories with Shirdon were published, the Vice office in New York conducted a video interview with Shirdon over Skype. The Skype interview, which included Shirdon's admission that he was the Canadian in the ISIS video and his threat that further attacks were coming to the United States, was posted on the Vice website and YouTube on September 23, 2014.[14] In that video, Shirdon's face was clearly visible for all the world to see.[15]

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[10] ITO, Appellants' Record, Tab 11, p. 189, para. 36(q).
[11] *Vice Media (SCJ)*, para. 3.
[12] Appellants' Record, Tab 9, *A Chat with the Canadian ISIS Member Who Burned His Passport on YouTube*, June 23, 2014, pp. 100-101; Appellants' Record, Tab 9, *The Canadian Jihadist Told Us Canada Isn't Immune to ISIS Attacks*, October 7, 2014, p. 119.
[13] Appellants' Record, Tab 9, *A Chat with the Canadian ISIS Member Who Burned His Passport on YouTube*, June 23, 2014, p. 100.
[14] ITO, Appellants' Record, Tab 11, pp. 221-222, para. 45. See also: *Affidavit of Ben Makuch*, Appellants' Record, Tab 9, p. 86, para. 11.
[15] ITO, Appellants' Record, Tab 11, p. 147, para. 16; pp. 221-222, paras. 45-47.

ii) The R.C.M.P Investigation and the Production Order

9. The RCMP began investigating Shirdon for various terrorism-related offences when the ISIS video first surfaced on the internet. They conducted an extensive investigation. One investigative step they took was to obtain records from Kik Interactive under a production order. Those records showed that Shirdon's phone was associated with the Kik user account that had been used to communicate with Makuch. The police were, however, unable to obtain the content of the text communications between Shirdon and Makuch, because the Kik platform does not store the content of its users' messages.[16]

10. In February 2015, several months after the publication of Makuch's October article about Shirdon, the RCMP sought a production order directed at the appellants for documents and data related to their communications with Shirdon. The Information to Obtain (ITO) submitted in support of the application for the production order was lengthy (102 pages) and set out the deponent's reasonable grounds for believing that Shirdon had committed various terrorism offences, namely: (1) participating in the activities of a terrorist group (s. 83.18); (2) leaving Canada to participate in the activities of a terrorist group (s. 83.181); and (3) committing indictable offences – uttering threats/murder – for a terrorist group (s.83.2).[17]

11. The ITO clearly identified the targets of the production order as a journalist and a media company and provided a detailed summary of the articles, the Skype interview, and Shirdon's communications with Makuch. The ITO explained that the police were unable to obtain the content of Shirdon's text messages from Kik and set out the basis for the deponent's belief that Makuch, as a journalist, would have saved Shirdon's communications. In short, the ITO stated that there was no source, other than the appellants, that could provide a record of Shirdon's text messages with Makuch. Finally, the ITO stated that the police had not notified the appellants of the law enforcement interest in the material, because there was no basis for believing that the appellants would cooperate with the police and there was a risk that they could move the material to a location outside the reach of a Canadian court.[18]

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[16] ITO, Appellants' Record, Tab 11, pp. 226-227, 234, 241-242, paras. 53(a-d), 54, 67.
[17] ITO, Appellants' Record, Tab 11, p. 148, para. 18.
[18] ITO, Appellants' Record, Tab 11, pp. 214-226, paras. 40-52; pp. 241-242, para. 67; pp. 242-243, para. 71.

12. The production order was granted by a provincial court judge, pursuant to ss. 487.012(1) and (3) of the *Criminal Code* (now s. 487.014). A sealing order was also granted, under s. 487.3 of the *Code*. The production order gave the appellants sixty days to produce records of the communications between Shirdon and Makuch.[19]

13. On September 24, 2015, the RCMP charged Shirdon *in absentia* with six terrorism-related offences, including leaving Canada to participate in the activities of a terrorist group, participating in the activities of a terrorist group, two counts of instructing a person to carry out terrorist activity, and two counts of committing an indictable offence – uttering death threats – for the benefit of a terrorist group.[20] Shirdon has not yet been arrested.

iii) The *Certiorari* Application in Superior Court

14. The appellants brought a *certiorari* application in the superior court to quash the production order, and, in the alternative, an application to revoke or vary the order under s. 487.0193 of the *Code*. They also brought an application to set aside the sealing order. It was common ground at the hearing of the applications that the only things possessed by the appellants that were subject to the production order were screenshots of the "Kik" text exchanges with Shirdon.[21]

15. MacDonnell J. dismissed the application to quash the production order. He correctly identified the principles laid down by this Court in *Lessard* for searches of the media. He applied a modified *Garofoli* standard of review to reflect the fact that the search at issue involved the media and the authorizing justice was, therefore, required to give special consideration to the vital role of the media and to take into account the *Lessard* principles.[22] MacDonnell J. stated, at para. 13:

> …bearing in mind that the authorizing justice is required to give special consideration to the vital role of the media in a democratic society and to take into account the principles listed by Justice Cory in *Lessard*, the justice on a review must ask whether, on the basis of what was before the authorizing justice, he or she could have found the issuance of the production order against a media target to be reasonable: *Canadian Broadcasting Corp. v. Manitoba (Attorney General), supra*, at paragraph 70. [Emphasis Added]

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[19] ITO, Appellants' Record, Tab 11, p. 243, para. 72; pp. 244-245, paras. 74-75.
[20] *Affidavit of Corporal Ross*, Appellants' Record, Tab 10, p. 140, para. 4.
[21] *Vice Media (SCJ)*, para. 23. See also: *Vice Media (CA)*, para. 12.
[22] *Vice Media (SCJ)*, paras. 6-13, 27-29, 43-47.

16. MacDonnell J. concluded that the authorizing justice could have "determined that the balance between the interests of law enforcement and the media's right to freedom of expression favoured making the production order." In coming to this conclusion, MacDonnell J. noted that: (1) the bulk of the information that Shirdon communicated to Makuch had been published by the appellants; (2) the screen captures were important evidence in relation to very serious allegations and were highly reliable evidence that did not require second-hand interpretation; and (3) the production order was calculated to not disrupt or interfere with the work of Makuch or Vice.[23]

17. MacDonnell J. found that Shirdon's statements about his involvement in ISIS to Makuch were, on their face, "evidence of the commission of the offences under investigation."[24] MacDonnell J. held that the authorizing justice was entitled to take into account the fact that there was no alternative source for this information, that Shirdon was not a confidential source, and that the communications were made with the understanding that they would be shared. He further held:

> Indeed, the only reasonable inference appears to be that Shirdon regarded Mr. Makuch and Vice Media as the channels through which he would speak to the whole world. I accept that this is not a complete answer to the applicants' concerns but it is a factor that tends to attenuate them.[25]

18. With respect to the sealing order, MacDonnell J. set aside much of it, apart from limited portions that had been redacted on the basis of national security (which were never challenged), a few small portions revealing intended investigative steps contained in two sub-paragraphs, and the identity of one innocent third party. However, MacDonnell J. found that Shirdon's right to a fair trial would be jeopardized if the information in the ITO relating to Shirdon's involvement with ISIS were to be published. MacDonnell J., therefore, made a temporary non-publication order in respect of that information. He provided that his order would expire upon Shirdon's discharge at a preliminary inquiry, or at the end of his trial. Furthermore, if Shirdon was not arrested, the order could be re-visited in two years (i.e. March 29, 2018).[26]

iv) The Decision of the Court of Appeal for Ontario

19. The appellants appealed MacDonnell J.'s decision refusing to quash the production order and his decision varying the sealing order and imposing a non-publication order. With respect to

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[23] *Vice Media (SCJ)*, paras. 44-47.
[24] *Vice Media (SCJ)*, paras. 21, 35.
[25] *Vice Media (SCJ)*, para. 43.
[26] *Vice Media (SCJ)*, paras. 125, 132.

the production order, they argued that the application judge should have applied a more interventionist standard of review and substituted his opinion for that of the issuing justice. They contended that the application judge failed to take the potential "chilling effect" of the production order into account and that the police should have been required to demonstrate that the evidence they sought was necessary for a trial of Shirdon. With respect to the non-publication order, they argued that it was not a reasonable alternative and should not have been made.

20. A number of interveners intervened in support of the appellants, advancing the argument that the *Lessard* framework should be "restructured" to give greater weight to the s. 2(b) guarantee of freedom of expression in the *Charter*.[27]

21. Doherty J.A., writing for a unanimous court, dismissed the appeal. Turning first to the production order, Doherty J.A. rejected the argument that the application judge should have applied a more interventionist standard of review. He stated that the standard applicable to the review of search warrants and similar investigative tools was settled by this Court in ***R. v. Garofoli***: a reviewing court is only entitled to quash the order if, having regard to the record as amplified on review, no judge acting reasonably could have concluded that the order should be made. Doherty J.A. observed that, in *National Post*, this Court applied that very standard of review to a warrant targeting the media.[28]

22. Doherty J.A. stated that there were three good reasons why the *Garofoli* standard of review should apply to <u>all</u> motions to quash warrants and similar orders, including those targeting the media: (1) a warrant or production order is a presumptively valid court order, and a *de novo* examination of the order's merits would be inconsistent with the existence of a valid order; (2) the deferential *Garofoli* standard is consistent with the statutory standard of review for production orders in s. 487.0193(4) of the *Code*; and, (3) the nature of the decision made by the issuing justice, which involves the weighing of evidence and the exercise of discretion, invites a deferential standard of review.[29]

23. The court below rejected the appellants' argument that the application judge should have set aside the production order. Doherty J.A. held that MacDonnell J. had "expressly recognized

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[27] *Vice Media (CA)*, paras. 5, 31.
[28] *Vice Media (CA)*, paras. 19-23.
[29] *Vice Media (CA)*, paras. 24-27.

that special considerations arose when a media outlet was the target of the production order", and had considered at length the factors identified in *Lessard* and *New Brunswick*. Doherty J.A. stated, "It was reasonable, on this record, to find the balancing of the competing interests favoured making the production order." He agreed with MacDonnell J.'s characterization of the evidence sought and held that "the material could provide important and highly reliable evidence to support very serious criminal charges."[30]

24. In particular, Doherty J.A. rejected the argument that the application judge had ignored the potential "chilling effect" of the production order. Doherty J.A. held that the application judge had been alive to the concerns about the potential "chilling effect" of a production order and had specifically identified factors that tended to significantly reduce any potential "chilling effect" in the circumstance of the case.[31]

25. Doherty J.A. also rejected the appellants' suggestion that a court reviewing a production order should take into account whether the evidence sought is required for trial for two reasons. First, such orders are granted during the investigative phase, well before anyone could hope to assess what the Crown does or does not need to prove its case at trial. Second, such an approach would improperly blur the line between judge and prosecutor "by assigning judges the job of deciding whether the prosecution has sufficient evidence to prove its case."[32]

26. Finally, the court did not agree that there was any need to "restructure" the *Lessard* framework. Doherty J.A. stated:

> When the state exercises its powers to search and seize, reasonableness is the constitutional litmus test. The place to be searched and the nature of the material to be seized are important considerations in that reasonableness assessment. The *Lessard* factors recognize the significance of those considerations. They also recognize that the ultimate assessment is of necessity a fact-specific one. Any attempt to exhaustively enumerate all relevant factors, or to define them narrowly, is doomed to fail. In my view, the present approach provides adequate room for a proper balancing of the important competing interests which must be considered

[30] *Vice Media (CA)*, paras. 33-35.
[31] *Vice Media (CA)*, paras. 37-38.
[32] *Vice Media (CA)*, paras. 40-41.

> in a case in which the state seeks to compel production of material from the media.[33] [Emphasis Added]

27. With respect to the sealing order, Doherty J.A. found that the investigative steps contained in two, sealed sub-paragraphs of the ITO were "obvious" steps and should be disclosed. He found that the sealing order made to protect an innocent third party was reasonable. With respect to the non-publication order, Doherty J.A. said that it was clear that parts of the ITO would impact adversely on Shirdon's fair trial rights if published, but it was less clear how other parts would have the same impact. Since the parties had not made any submissions as to which specific portions could be disclosed without harming Shirdon's right to a fair trial, the court declined to set aside the non-publication order. Instead, the court invited the parties to provide a proposed order to the court, if they were able to come to a consensus. In the alternative, the court stated that the appellants could bring an application in Superior Court to vary the non-publication order under s. 487.3(4) of the *Code*.[34]

v) Recent Developments

28. Since the decision of the Court of Appeal was released, conflicting reports as to whether Shirdon is dead or alive have surfaced (none of which are properly before this Court, since they do not form part of the record). Shirdon has been erroneously reported as dead on at least one other occasion. Indeed, the appellant Makuch reported in August 2014 that Shirdon had been killed, only to have Shirdon surface in the Skype interview with Vice one month later.[35]

29. The *Journalistic Sources Protection Act* (*JSPA*) also came into force on October 18, 2017. The *JSPA* amended both the *Canada Evidence Act* and the *Criminal Code* to protect the confidential sources of journalists. Under the *JSPA*, warrants and production orders directed at journalists may only be issued by a superior court judge or a judge as defined in s. 552 of the *Code*. A judge may issue the warrant or production order if the pre-conditions for issuance have been met, and if he or she is satisfied that: (a) there is no other way by which the information sought can

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[33] *Vice Media (CA)*, para. 32.
[34] *Vice Media (CA)*, paras. 53-60.
[35] *Affidavit of Ben Makuch*, Appellants' Record, Tab 9, p. 122.

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.[36]

PART II: QUESTIONS IN ISSUE

30. The appellants raise many questions in issue in their factum, but the respondent reframes the questions in issue as follows:

(1) Did the court below err in concluding that the production order is reasonable under the *Lessard* framework for searches of the media?

(2) Did the court below err in varying the sealing order and in declining to set aside the non-publication order?

31. The respondent's position in answer to these questions in issue is as follows:

(1) The production order is reasonable, having regard to all of the circumstances. The *Lessard* framework provides a robust framework for balancing the public interest in freedom of expression, the public interest in the investigation and prosecution of crime, and the accused's right to make full answer and defence. The courts below correctly applied the *Lessard* framework and the appropriate standard of review. In particular: (i) no "chilling effect" on freedom of the press should be presumed in the circumstances of this case; (ii) prior publication favoured production of the statements; (iii) the public interest in the investigation of the offences was high; (iv) the standard of review is well settled; and (v) the decision to issue an order *ex parte* lies within the discretion of the issuing justice.

(2) The court below did not err in varying the sealing order and in refusing to set aside the non-publication order. Freedom of expression is not absolute, and, when required, it will yield to other important public interests, such as the right of an accused person to a fair trial.

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[36] *Journalistic Sources Protection Act*, *supra* note 7, s. 3.

PART III: ARGUMENT

A. THE PRODUCTION ORDER IS REASONABLE

(1) The *Lessard* Framework Balances the Public Interest in the Investigation and Prosecution of Crime and Freedom of Expression

32. The appellants' claim that the *Lessard* framework is "not working" is premised on the assumption that *Lessard* does not protect s. 2(b) rights sufficiently.[37] To the contrary, it does. Safeguards outlined by this Court in *Lessard* provide adequate protection to ensure a strong, vibrant, and independent press.[38]

33. The s. 2(b) *Charter* guarantee of freedom of expression, which includes "freedom of the press and other media of communication", is not absolute. Although of immense importance in a democratic society, freedom of expression at times may need to be balanced against, and may need to yield to, other important interests, such as the public interest in the investigation and prosecution of crime or the right of an accused person to a fair trial.[39]

34. In *Lessard* and *New Brunswick*, media organizations made video recordings of demonstrations during which criminal acts occurred. Portions of those recordings were then broadcast on television. When the police obtained warrants to seize the video recordings in their entirety, the media organizations sought to quash the warrants on the basis that they were unreasonable interferences with freedom of the press. This Court recognized that searches of media organizations have the potential to interfere with the gathering and dissemination of the news and, therefore, articulated a framework for assessing the reasonableness of such searches.

35. Cory J., for the majority in both cases, held that s. 2(b) of the *Charter* does not import any new or additional requirements, rather, it provides a backdrop against which the reasonableness of any search of the media must be evaluated.[40] He highlighted the discretionary nature of the prior judicial authorization process as a safeguard against unreasonable searches. He stated that, even if

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[37] Appellants' Factum, para. 5.
[38] *R. v. Canadian Broadcasting Corp.*, 2001 CanLII 24044 (ON CA) [*R. v. CBC (ONCA)*], leave to appeal refused [2001] 2 S.C.R. vii (note).
[39] *National Post*, para. 5. See also: *Vice Media (CA)*, para. 1.
[40] *New Brunswick*, pp. 475-476; *National Post*, para. 82.

the statutory pre-conditions for issuance have been met, the authorizing justice must still consider all of the circumstances and give careful consideration to the effect that a proposed search would have on the ability of the media to gather and publish news.[41] If a search would impede the media in fulfilling its function as a gatherer and disseminator of news, it should only be authorized "where a compelling state interest is demonstrated."[42]

36. In *Lessard*, Cory J. laid down the following factors that must be taken into account by an authorizing justice whenever the police propose to search the media:

(1) The statutory pre-conditions for issuance of the order must be met.

(2) If the statutory pre-conditions have been satisfied, the issuing justice should then consider all of the circumstances in determining whether to exercise his or her discretion to issue the order.

(3) The issuing justice "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", bearing in mind the vital role of the media in democratic society and the fact that the media are ordinarily an innocent third party.

(4) The affidavit filed in support of the request must contain sufficient detail to enable the issuing justice to properly exercise his or her discretion.

(5) The affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted.

(6) If the information sought has been disseminated by the media in whole or in part, this is a factor favouring authorization of the search.

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[41] *New Brunswick*, p. 476; *Lessard*, p. 444.
[42] *New Brunswick*, p. 476.

(7) If the justice decides to authorize the search, consideration should be given to the imposition of conditions on its implementation, "so that the media will not be unduly impeded in the publishing or dissemination of the news."[43]

37. Applying this framework, the Court upheld the warrants in both *Lessard* and *New Brunswick*.

38. The *Lessard* framework thus expressly takes into account the important role played by the media in Canadian society. It provides a flexible framework that is responsive to the myriad and varying circumstances that may arise from case to case. It requires that careful consideration be given not only to the decision to authorize the search, but also to the conditions that should be imposed to minimize any negative impact on the media's ability to gather and disseminate the news. At the heart of the framework lies the judicial discretion to refuse to issue a warrant or production order, even if the statutory pre-conditions for issuance have been met – a discretion that may only be exercised after all of the circumstances have been considered and the competing interests balanced.

39. In particular, the "alternative sources" principle – the fifth factor in the framework – helps to restrain undue interference with freedom of the press. This principle has been part of Canadian law since 1977.[44] It requires that if a search is going to interfere with a right as fundamental as freedom of the press, it should only be granted if the evidence sought is not reasonably available from an alternative source.[45]

40. Any framework that depends on the exercise of discretion and the balancing of interests will always be subject to the criticism that it is imprecise and lacks predictability. But the *Lessard* framework is no different than many other legal tests in this respect. The exercise of discretion and the balancing of competing interests are core and routine judicial functions, as recognized by Abella J. in *National Post* at para. 114:

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[43] *Lessard*, p. 445.
[44] *National Post*, para. 66; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, pp. 889-890 [*Descôteaux*]; *Pacific Press Ltd. v. R.*, [1977] B.C.J. No. 1138 (BC SC) (QL).
[45] *National Post*, para. 66; *Descôteaux*, pp. 890-891; *R. v. Serendip Physiotherapy Clinic*, 2004 CanLII 39011 (ON CA), paras. 30-31.

> …judges rarely have the luxury of applying absolute rules and adjudicate of necessity in fields of law bounded by designated borders within which discretion is exercised based on the particular circumstances of the case. In other words, balancing competing interests, with all its inherent nuance and imprecision, is a core and routine judicial function. [Emphasis Added]

41. The *Lessard* framework has worked effectively and was re-affirmed by this Court in 2010 in *National Post*.[46] In that case, a warrant was issued that authorized the police to seize evidence (an envelope and forged document) from the appellant. The appellant brought an application to quash the warrant on the basis that it was an unreasonable search. This Court assessed the warrant through the lens of the *Lessard* framework and upheld it as reasonable.

(2) The *Lessard* Framework has a Strong Track Record

42. The appellants contend that courts across Canada, including the courts below, have been "misapplying or failing to apply" the balancing required by *Lessard*. They go on to say that the courts have given "short shrift" to the pernicious effects of search orders on the media's ability to gather and disseminate the news,[47] that the Crown has a "near-perfect"[48] record, and that the *Lessard* framework has essentially become a rubber stamp for the police. These broad statements are unfair and unsupported by the authorities. A review of the reported cases reveals that the *Lessard* framework has been working as intended and effectively balances the competing interests. In many instances, the balance has favoured the media and freedom of expression.

43. The appellants incorrectly claim that the balancing required by *Lessard* has been struck in favour of the media only "once."[49] Closer scrutiny of the reported cases illustrates otherwise.

44. A review of the cases reported since *Lessard* and *New Brunswick* reveals a total of seventeen cases where a court applied the *Lessard* framework to assess the reasonableness of a search warrant or production order authorizing a search of the media.[50] In seven of the reported cases, the

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[46] *National Post*, paras. 31-33, 79.
[47] Appellants' Factum, para. 38.
[48] Appellants' Factum, para. 42.
[49] Appellants' Factum, para. 42.
[50] **Orders upheld**: *CBC/Radio-Canada c. Joly*, 2017 QCCS 5136; *R. v. Toronto Star Newspapers Ltd.*, 2017 ONSC 1190 [*Toronto Star Newspapers Ltd.*]; *R. v. Meigs*, 2003 BCSC 1816; *Groupe TVA inc. c. Lavoie*, [2003] J.Q. no 16242 (QC CS) (QL); *R. v. CBC (ONCA)*, *supra* note 38; *R. c. Société Radio-Canada*, [1999] J.Q. No. 2320 (QC CA) (QL); *CTV Television Network Ltd. v. Canada (Attorney General)*, [1994] O.J. No. 2449 (ON CJ) (QL) [*CTV Television Network Ltd.*];

reviewing court quashed or denied the warrant or production order.[51] In other words, in over forty percent of the reported cases, the *Lessard* factors resulted in the balance being struck in favour of the media.

45. Five other reported cases dealt with applications to quash subpoenas *duces tecum* served on journalists, which required them to bring documents or notes to court.[52] In two of those cases, the courts took note of the principles articulated in *Lessard* and quashed the subpoenas.[53]

46. Cases like *Canadian Broadcasting Corp. v. Manitoba (Attorney General)*[54], *Canadian Broadcasting Corp. v. Newfoundland & Labrador*[55], and *R. v. Dunphy*[56] are just a few examples from the reported cases demonstrating that the *Lessard* framework is a robust framework that effectively protects freedom of the press.

47. In *CBC v. Manitoba*, the police obtained a production order that required the media to provide audio and video recordings from a press conference where a suspect had made inculpatory statements. The reviewing judge quashed the production order because the police failed to provide sufficient information to the issuing justice that would allow the justice to consider and balance the relevant *Lessard* factors. In particular, the police had failed to address the availability of "alternative sources" of the information sought, such as eyewitness interviews. The decision of the reviewing judge was affirmed on appeal.[57]

Societé Radio-Canada c. Cuddihy, 1992 CanLII 3568 (QC CA); *R. v. Canadian Broadcasting Corp.*, [1992] O.J. No. 2229 (ON CJ) (QL; *Société Radio-Canada c. Gaudreault*, [1992] J.Q. no 48 (QC CA) (QL). See also the cases referred to in footnote 51 below.

[51] **Orders quashed**: *Vancouver Sun v. British Columbia*, 2011 BCSC 1736; *Canadian Broadcasting Corp. v. Manitoba (Attorney General)*, 2009 MBCA 122 [*CBC v. Manitoba*]; *Presse ltée (La) v. Barbès*, 2008 QCCS 3991; *Canadian Broadcasting Corp. v. Newfoundland & Labrador*, 2007 NLCA 62 [*CBC v. Newfoundland & Labrador*]; *R. v. Dunphy*, [2006] O.J. No. 850 (ON SC) (QL) [*Dunphy*]; *Canadian Broadcasting Corp. v. British Columbia*, 1994 CanLII 3342 (BC SC); *Canadian Broadcasting Corp. v. Newfoundland*, 1994 CanLII 4430 (NL SC).

[52] *R. v. Baltovich* [*Finkle v. Ontario*], [2007] O.J. No. 3506 (ON SC) (QL) [*Baltovich*]; *Ehman v. Saskatchewan (Attorney General)*, [1994] S.J. No. 2002 (SK QB) (QL) [*Ehman*]; *R. v. Canadian Broadcasting Corp.*, 2006 ONCJ 54; *R. v. Erickson*, [2002] O.J. No. 3341 (ON CJ) (QL); *R. v. Hughes (Ruling No. 3)*, [1998] B.C.J. No. 1694 (BC SC) (QL).

[53] *Baltovich*; *Ehman*.

[54] *CBC v. Manitoba*, *supra* note 51, paras. 70-77.

[55] *CBC v. Newfoundland & Labrador*, *supra* note 51, paras. 31-38, 54.

[56] *Dunphy*, *supra* note 51, para. 56.

[57] *CBC v. Manitoba*, *supra* note 51, paras. 70-77.

48. In *CBC v. Newfoundland & Labrador*, the Newfoundland Court of Appeal upheld the quashing of a search warrant authorizing a search of CBC premises. The police were seeking video recordings of behind-the-scenes interviews conducted prior to a strike, because they believed that certain statements were made that amounted to counselling the commission of an indictable offence. The reviewing judge quashed the warrant because the police had failed to provide the issuing justice with sufficient information to allow the justice to conduct the necessary balancing and to determine the conditions that should be placed on the execution of the warrant.[58]

49. *Dunphy* involved an *inter partes* application for a production order that was brought by the Crown.[59] The court applied the *Lessard* factors and declined to order that a reporter produce his notes relating to interviews of a murder suspect. The request was dismissed for two reasons. First, the court was not satisfied that the statutory preconditions for issuance had been met. Second, the court was not satisfied that the police had no alternative sources for the information sought.[60]

50. Cases such as these demonstrate that courts are careful when it comes to protecting freedom of the press and duly consider the special position of the media in Canadian society. The *Lessard* framework is not a rubber stamp, nor have the courts been acting like rubber stamps.

51. It is worth noting that over the almost three-decade span since *Lessard* was decided, there has not been a large number of reported cases involving production orders or search warrants directed at the media in criminal cases. This suggests that the police have exercised restraint and understand the special position of the media in Canadian society.

52. In any event, the fact that the public interest in the investigation and prosecution of crime has tended, somewhat, to prevail on review does not mean that the *Lessard* framework is deficient or unbalanced. In each of the reported cases where the order was upheld, the public interest in law enforcement was high – the police were seeking to obtain video recordings of criminal acts, or video or audio recordings of statements made by accused persons about the crimes in question. And in each case, the information had been published and put into the public domain by the media

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[58] *CBC v. Newfoundland & Labrador*, *supra* note 51, paras. 31-38, 54.
[59] *Dunphy*, *supra* note 51, para. 2.
[60] *Dunphy*, *supra* note 51, paras. 48-52.

– the orders at issue, therefore, had little to no impact on the gathering and dissemination of the news.

53. In other words, the circumstances in all of these reported cases were similar to those in *Lessard* and *New Brunswick*, where this Court upheld the warrants as reasonable. In each of the reported cases, the reviewing courts carefully considered and applied the *Lessard* factors. Not surprisingly, they came to the same conclusion as this Court reached in both *Lessard* and *New Brunswick*. Contrary to the submissions of the appellants, courts have not been giving "short shrift" to the effect that judicial authorizations have on the media's ability to gather and report the news.[61]

54. Relying on reported cases does not give a full picture in any event. We do not know on how many occasions justices have refused to authorize searches of the media, or on how many occasions they have amended or added conditions to minimize any adverse impact on freedom of the press. The Chamberland Commission, however, recently examined a number of cases in Québec involving searches of the media or journalists and rejected the suggestion that issuing justices acted as rubber stamps, noting that, on several occasions, justices had declined or amended orders sought by the police.[62]

55. The *Lessard* framework effectively balances the public interest in the investigation and prosecution of crime and the public interest in freedom of expression, when these two important public interests come into conflict. Experience demonstrates that the framework works as intended. Indeed, as described in paragraph 29 above, the principles articulated by this Court in *Lessard*, *New Brunswick* and *National Post* have been codified in the recently enacted *JSPA*.

56. This Court does not lightly depart from its precedents, unless there are compelling reasons to do so. Compelling reasons may be found when a "precedent has become unworkable, when its

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[61] Indeed, in every single one of the cases cited by the appellants in support of their "short shrift" argument at para. 38 of their factum, the courts gave careful consideration to the *Lessard* factors. At least two of those cases were also exemption applications under former s. 487.015, where the test is very different than on an application to quash a production order.

[62] Québec, *Commission d'enquête sur la protection de la confidentialité des sources journalistiques, Rapport* (Québec: Les publications du Québec, 2017), pp. 155-156.

validity has been undermined by subsequent jurisprudence or when it has been decided on the basis of considerations that are no longer relevant." [63]

57. No compelling reason has been shown for departing from the principles set out in *Lessard*, *New Brunswick*, and *National Post*. The framework has not been shown to be unworkable, its validity has not been undermined by subsequent jurisprudence, and none of the considerations on which the precedents were based can be said to be no longer relevant. The framework should be re-affirmed yet again.

(3) The Courts Below Properly Applied the *Lessard* Framework

58. The courts below properly applied the *Lessard* framework and were correct in concluding that the production order was reasonable in the circumstances. There was no basis to presume that the production of Shirdon's statements to Makuch would have a "chilling effect" on freedom of the press. Shirdon was not a confidential source and Makuch had published the bulk of the information received from Shirdon, both factors which tended to attenuate any "chill." Moreover, the public interest in the production of Shirdon's statements is high, the standard of review is well settled, and the decision whether to issue an order *ex parte* lies in the discretion of the issuing justice.

(a) There was no basis to presume that production of Shirdon's statements to the police would have a "chilling effect" on freedom of the press

59. In *National Post*, this Court recognized that requiring the media to disclose information that would identify their secret or confidential sources has an impact on freedom of the press, because such sources could dry-up in the future, making it difficult for the media to engage in investigative journalism. Accordingly, this Court held that, in some situations, the public interest in protecting a secret source from disclosure will outweigh other public interests. But whether a journalist-secret source privilege arises in the circumstances of a particular case is determined on a case-by-case basis by applying the four criteria of the well-known Wigmore test.[64] [Note: The *JSPA* now applies to the determination of journalist-confidential source privilege. See paragraph 73 below.]

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[63] *United States of America v. Sriskandarajah*, [2012] 3 S.C.R. 609, paras. 18-20; ***R. v. Henry***, [2005] 3 S.C.R. 609, para. 44.
[64] *National Post*, paras. 33-34, 50-64.

60. The appellants in this case now propose that, regardless of the circumstances, a chilling effect on freedom of the press must be presumed any time that a "journalist" is compelled to produce information that he or she obtained from a non-confidential source. This Court should reject this proposition because it is both unworkable and founded on speculative assertion, rather than evidence.

61. The appellants' proposition is unworkable in practice because the s. 2(b) *Charter* right to freedom of expression, including freedom of the press and other media of communication, is enjoyed by "everyone", not just mainstream or established media organizations. Freedom of the press and other media of communication is a broad concept embracing a wide and diverse array of individuals and their activities. The reporter writing for an established newspaper, the book author, the freelance podcaster broadcasting on the internet, and the "citizen journalist" blogging and tweeting on social media websites all enjoy the same right to freedom of the press and other media of communication.

62. Determining who is, and who is not, entitled to lay claim to being a "journalist" is an exercise fraught with ambiguity and difficulty. Unlike most professions, "journalists" are not subject to formal accreditation and are not regulated by any professional organization. There is no uniform code or standard of journalism to which every "journalist" must adhere. Given the "heterogeneous and ill-defined group of writers and speakers"[65] entitled to the *Charter* guarantee of freedom of the press and other media of communication, it is simply unworkable to presume a "chilling effect" on freedom of expression whenever the police seek information that a "journalist" obtained from a non-confidential "source."

63. In *National Post*, this Court rejected the notion that a journalist-secret source class privilege should be recognized at common law and held that journalist-secret source privilege should be determined on a case-by-case basis. One of the reasons for rejecting the creation of a class privilege was the fact that "journalism" captures such a disparate group of persons and their activities. As Binnie J. stated at para. 43:

> Journalistic-confidential source privilege has not previously been recognized as a class privilege by our Court (*Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572 (S.C.C.)), and has been rejected by courts in other common law

[65] *National Post*, para. 40.

> jurisdictions with whom we have strong affinities. The reasons are easily stated. First is the immense variety and degrees of professionalism (or the lack of it) of persons who now "gather" and "publish" news said to be based on secret sources. In contrast to the legal profession there is no formal accreditation process to "licence" the practice of journalism, and no professional organization (such as a law society) to regulate its members and attempt to maintain professional standards. Nor, given the scope of activity contemplated as journalism in *Grant v. Torstar Corp*., could such an organization be readily envisaged.

64. The Court refused to recognize a class privilege for the "journalist-secret source" relationship, because not every relationship between a "journalist" and his or her "secret source" is necessarily deserving of the same level of protection. The relationship between a blogger and his confidential source might be deserving of less protection than the relationship between a professional journalist and her confidential source. The Court decided that it is preferable to assess the public interest in fostering the particular relationship at issue on a case-by-case basis.[66] Existence of a privilege is not presumed.

65. Similarly here in the case on appeal, no "chilling effect" on freedom of expression should be presumed whenever the police seek to obtain information that a "journalist" obtained from a non-confidential source. That is not to say that a "chilling effect" could never arise in the circumstances of a particular case. There may well be circumstances where a production order would have a "chilling effect" on freedom of expression, but that should be left for determination on a case-by-case basis.

66. The appellants' proposition also rests on speculative assertion, rather than evidence. While courts can take judicial notice of self-evident facts[67], and can in some situations infer a chilling effect from "known facts and experience"[68], the "chilling effect" advanced in the case on appeal is not something that can be presumed on the basis of logic and experience. In *Moysa v. Alberta (Labour Relations Board)*, *supra*, a reporter argued that requiring him to testify and reveal his non-confidential sources would lead to a "drying-up" of news sources, but this Court declined to find any such link in the absence of evidence. Sopinka J. stated, at p. 1581:

> [T]he appellant has not demonstrated that compelling journalists to testify before bodies such as the labour relations board would detrimentally affect journalists'

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[66] *National Post*, para. 57.
[67] *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572, p. 1581.
[68] *R. v. Khawaja*, [2012] 3 S.C.R. 555, para. 79.

> ability to gather information. No evidence was placed before the court suggesting that such a direct link exists. While judicial notice may be taken of self-evident facts, I am not convinced that it is indisputable that there is a direct relationship between testimonial compulsion and a "drying-up" of news sources as alleged by the appellant. [Emphasis Added]

67. In *National* Post, there was an extensive evidentiary record filed in support of the claim that disclosure of the identities of journalists' confidential sources would compromise freedom of expression.[69] There is no such record filed in support of the "chilling effect" asserted here by the appellants.

68. Moreover, even if one might reasonably presume that confidential sources would be reluctant to come forward if their identities are disclosed too readily, the same cannot be said for non-confidential sources. Non-confidential sources speak to journalists knowing that their information and identities may be published and put into the public domain. It is difficult to see how providing the same information to the police will have a chilling effect on freedom of the press. As one American academic wrote:

> The problem of determining what First Amendment interests may be compromised by subpoenas for nonconfidential information in civil and criminal cases is trickier to solve. As the Idaho Supreme Court noted in *State v. Salsbury*, it seems to be a stretch to suggest that subpoenas for nonconfidential information, such as unaired outtakes of the scene of a fatal accident, will damage the free flow of information by discouraging the press from covering similar stories. Justice Stewart in his *Branzburg* dissent tied the privilege for confidential information to the free flow of information by suggesting that in order to provide important information to the public, the press needed informants and, therefore, needed a privilege to protect those informants. While suggesting that informants might stop talking to reporters without a privilege seems logical when the informants wish to remain anonymous, it is not as apparently logical to suggest the same thing would happen if journalists disclosed nonconfidential information from known sources.[70] [Emphasis Added]

69. A number of American courts have agreed that requiring journalists to disclose information from their non-confidential sources does not reasonably have any chilling effect on the ability of the media to obtain information from similar sources in the future. For example, in *United States v. Smith*, 135 F. 3d 963 (5th Cir. 1998), the court stated:

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[69] *National Post*, paras. 33, 84.

[70] Anthony L. Fargo, "The Journalist's Privilege for Nonconfidential Information in States without Shield Laws" (Summer 2002) 7 Comm. L. & Pol'y. 241, pp. 271-272.

> [T]here is little reason to fear that on-the-record sources will avoid the press simply because the media might turn over nonconfidential statements to the government. Presumably, on-the-record sources expect beforehand that the government, along with the rest of the public, will view their nonconfidential statements when they are aired by the media. WDSU–TV's fears that nonconfidential sources will shy away from the media because of its unholy alliance with the government are speculative at best.[71] [Emphasis Added]

See also, *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988), where the court stated, at p. 1181:

> We have been referred to no authoritative sources demonstrating or explaining how any chilling effect could result from the disclosure of statements made for publication without any expectation of confidentiality.[72]

70. There is no evidence in the record from which one can reasonably infer that production of Shirdon's admissions to Makuch would have a "chilling effect" on freedom of expression. Makuch's belief expressed in his affidavit that sources might be reluctant to talk to him in the future is simply a speculative opinion on his part.

71. The presumption of a chilling effect is not only illogical and unsupported by any evidence, it runs contrary to experience since *Lessard* was decided. Courts have from time to time compelled the disclosure of information obtained by journalists from non-confidential sources, yet there is no evidence that this has impacted adversely on the ability of the media to gather and disseminate the news. As long ago as 1994, a reporter was required to produce notes and video recordings of an interview with a criminal suspect.[73] On a number of occasions since then, reporters have recorded and published interviews with persons accused or suspected of crimes.[74] In each instance, the

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[71] 135 F.3d 963 (5th Cir. 1998), p. 970.

[72] 841 F.2d 1176 (1st Cir. 1988), p. 1181 [*LaRouche*]. See also: *State v. Salsbury*, 924 P.2d 208 (Sup. Ct. Idaho 1996); *United States v. Jennings*, 1999 WL 438984 (U.S.D.C., N.D. Ill., E.D.) [*Jennings*]; *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003). Even those courts that recognize the possibility of a chill in respect of information from nonconfidential sources acknowledge that the absence of a promise of confidentiality is a factor tending to diminish the journalist's and public's interest in non-disclosure: *Schoen v. Schoen*, 5 F.3d 1289 (9th Cir. 1993), pp. 1295-1296; *United States v. Cuthbertson*, 630 F.2d 139 (3rd Cir. 1980), p. 147.

[73] *CTV Television Network Ltd.*, *supra* note 50.

[74] *Toronto Star Newspapers Ltd.*, *supra* note 50; *R. v. CTV*, 2015 ONSC 4842; *Global TV Calgary v. Alberta*, 2013 ABPC 342.

media was required to produce the recording of the interview to the police. Yet, despite this, the orders have had no discernible "chilling effect" on the ability of the media to conduct similar interviews and to gather and disseminate the news. The appellant Makuch does not seem to have encountered any "chilling effect" in his interviews with Shirdon. To the contrary, as found by the application judge, Shirdon was eager to use Makuch as his conduit to communicate his extremist beliefs in support of ISIS to the whole world.

72. The absence of any discernible "chilling effect" makes sense. When a person is given no promise of confidentiality, expects no confidentiality, and voluntarily speaks to the media about a crime, that person expects that their statements will be published for all to see, including the police. Providing the statements to the police in their original form, rather than in the form of a television broadcast or newspaper article, is unlikely to cause any "chill."

73. The distinction between confidential and non-confidential sources is real and significant. Parliament recently acknowledged the distinction between the two in the *JSPA*. The Act protects the "journalistic source", defined under the Act as a person who provides information to a "journalist" on the journalist's undertaking not to disclose their identity. A "journalist" is defined under the Act as a person whose main occupation is to contribute directly, for consideration, to the collection, writing, or production of information for dissemination by the media, or any other person who assists such a person. Under the Act, a "journalist" can object to the disclosure of documents seized under warrant or production order on the basis that they would tend to identify a journalistic source. The documents may be disclosed if a judge is satisfied that the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information, and that the information cannot be reasonably obtained in any other way. Contrary to what is implied in the appellants' factum, no protection is extended to non-confidential sources under the Act.[75]

74. The appellants, however, suggest that the "chill" arising from compelled disclosure of non-confidential information extends beyond the drying-up of sources. They say that if the media is seen to be an investigative arm of the state, then the public will no longer see them as independent and objective. And they say that journalists may change their practices in order to avoid having to

[75] S.C. 2017, c. 22.

comply with production orders. In support of their argument, they note, correctly, that some courts have said that orders against the media "casually given" can have a chilling effect on the appearance of independence and the future conduct of members of the public and the media.[76]

75. The whole point of the *Lessard* framework, though, is to ensure that search warrants and production orders against the media are not "casually given." The framework calls for a careful consideration of the privacy interests of the media in gathering and disseminating the news, and a balancing of competing interests. There is little reason to believe that orders granted under the *Lessard* framework have any chilling effect on freedom of expression.

76. As set out above in paragraphs 44-45 there have been few reported cases in the three decades since *Lessard* was decided, suggesting that searches of the media are relatively rare. Reasonable and informed members of the public are not likely to view the media as an arm of the police, simply because the media complies with a court order requiring the production of evidence of a criminal offence. As Cory J. stated in *Lessard*, all members of the community, including the media, have an interest in seeing that crimes are investigated and prosecuted.[77] In *National Post*, Binnie J. dismissed a similar concern raised by the media as "overly dramatic" and emphasized that editors and journalists do not "cease to be members of the community in which they live." [78]

77. Given the relative rarity of such orders, it is also difficult to believe that they have any impact at all on journalistic practices.[79] The *Lessard* framework has been part of the fabric of Canadian law since 1991. One would have thought that if orders granted under that framework had a "chilling effect" on journalistic practices, there would be some evidence of that. But there is none.

78. Again, the position of the respondent is not that an order for the production of non-confidential information from the media can never have an impact on freedom of the press. Nor is the position of the respondent that a journalist enjoys no reasonable expectation of privacy in his or her work product. One can readily conceive of situations where a production order would

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[76] *CBC v. Manitoba*, *supra* note 51, para. 74; *Lessard*, per LaForest J., p. 430; *LaRouche*, *supra* note 72, p. 1182.
[77] *Lessard*, p. 446.
[78] *National Post*, para. 90.
[79] *Jennings*, *supra* note 72, para. 4.

interfere with the media's ability to gather and disseminate the news – for example, where a production order seeks production of a reporter's notes prior to publication. The respondent's position simply stated is that there is no basis to presume that a production order will have a chilling effect on freedom of the press in every instance, regardless of the circumstances. *Lessard* provides the proper framework for assessing the impact of a proposed production order, having regard to all of the circumstances of the particular case.

79. The courts below were correct that the fact that Shirdon was not a confidential source is a factor tending to attenuate any concerns about a "chilling effect" and to favour production of his statements to the police.

(b) Prior Publication is a Factor that Favours Production

80. The appellants assert that prior publication "should not attenuate the media interests at stake, but rather should attenuate the interests of law enforcement."[80] With respect, this makes no sense. It also is contrary to the holdings of this Court in *Lessard* and *New Brunswick*. Prior publication is an important factor that tends to favour the public interest in the investigation and prosecution of crime.

81. In both *Lessard* and *New Brunswick*, this Court said that prior publication is an important factor that weighs in favour of an order requiring the media to produce the evidence of a crime. Cory J., stated, in *Lessard*:

> In any event, once the news media have published the gathered information, that information then passes into the public domain. The publication of that information is a very important factor for the justice of the peace to consider. This is something that favours the issuing of a search warrant. When a crime has been committed and evidence of that crime has been published, society has every right to expect that it will be investigated and, if appropriate, prosecuted.[81]

82. The appellants argue that publication does not "displace the presumptive chill." However, in *New Brunswick*, this Court held that publication significantly attenuates any "chilling effect" on freedom of expression:

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[80] Appellants' Factum, para. 93.
[81] *Lessard*, pp. 446-447; see also *New Brunswick*, pp. 476-477.

> The media argue that the issuance of a search warrant would have the effect of "drying up" their sources of information. In my view, that argument is seriously weakened once the media have placed the information in the public domain. They can then no longer say, in effect, "I know that a crime was committed; I have relevant information that could assist in its investigation and prosecution, but I'm not going to assist you towards that end." Once the information has been made public, it becomes difficult to contend there would be a "chilling effect" on the media sources if that information were also disclosed to the police.[82] [Emphasis Added]

83. The fact of publication does attenuate "the media interests at stake" and favours the granting of a production order. If the media have gathered and published the news, they have exercised their right to freedom of expression. It is difficult to see how requiring the media to produce non-confidential information to the police after publication would have any residual chilling effect on freedom of expression.

84. The appellants try to draw an analogy between the "work product" of a journalist and a lawyer's work product. In many respects, the analogy is deeply flawed. The common law recognizes that a class privilege – "litigation privilege" – attaches to a lawyer's work product because that privilege fosters the adversarial process and the administration of justice.[83] No similar class, or even case-by-case, privilege has ever been recognized in respect of a journalist's "work product." But in one respect, the analogy is helpful. The lawyer's litigation privilege comes to an end once the litigation is complete, because the privilege is no longer needed after that point to promote the adversarial process.[84] Even accepting that journalists need to enjoy privacy in their work product so they can gather and prepare the news, why would that rationale not end with publication? Looking at the so-called "work product" at issue here, the screenshots of Shirdon's text communications with Makuch, how does protecting that "work product" continue to foster freedom of expression after publication? The answer is that it does not do so. Publication significantly attenuates the media's right to privacy in gathering and disseminating the news.

85. The appellants' reliance on McLachlin J.'s footnote to her dissent in *Lessard* is also misplaced. McLachlin J. was there expressing her concern that publication of material provided by "press informants" (i.e., confidential sources) should not result in the disclosure of unpublished material that could tend to identify them, without the imposition of conditions to protect press

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[82] *New Brunswick*, p. 477.
[83] *Lizotte c. Aviva Cie d'assurance du Canada*, [2016] 2 S.C.R. 521, paras. 1, 19, 36, 53.
[84] *Blank v. Canada (Department of Justice)*, [2006] 2 S.C.R. 319, para. 58.

freedom and the identity of informants. That concern has now been addressed through the recognition of a journalist-secret source privilege in *National Post* (and now in the *JSPA*). Moreover, the concern does not arise on the facts of this case, given that Shirdon was not a secret source.

86. The appellants further assert that prior publication should play a less important role given the "realities of modern modes of communication." This argument in unclear, but it appears they suggest that the records at issue may contain meta-data (i.e., data about data) or other unpublished information, in contrast to the material at issue in both *Lessard* and *New Brunswick* which they characterize as "a record of past events-nothing more."[85] The simple answer to this, however, is that what the police seek here – the screenshots of text messages – is indeed a "record of past events – nothing more." There is nothing to support the suggestion that there is any "meta-data" contained in the screenshots, let alone any "meta-data or unpublished information" that somehow elevates the privacy interests at stake above those that would arise in any other search of a media organization.

87. Finally, to the extent that the appellants suggest that the text messages might contain "off-the-record" or confidential communications with Shirdon, they are contradicted by their own record. The appellant Makuch, in his affidavit, never claimed that Shirdon's text messages contained anything of the sort. What the appellant Makuch did say was that his articles contained "all relevant information and comments that Shirdon made", supporting the application judge's finding that the appellants published the "bulk" of information obtained from Shirdon.

88. The courts below were correct that the prior publication in this case is a factor favouring production to the police.

(c) <u>The Public Interest in Producing Shirdon's Statements is High</u>

89. The appellants also argue that the courts below failed to properly assess the interests of law enforcement. They say that the courts failed to consider the "prospects of any eventual trial", which they say is remote because Shirdon is out of the country. And they complain that the production order is a "fishing expedition" and assert that the police are required to show that the material sought is "necessary to an eventual trial, in the sense of making the difference between acquittal

[85] Appellants' Factum, para. 99.

and conviction."[86] Finally, they go on to say that this Court should impose an investigative necessity requirement, requiring that the police show there is no other reasonable alternative method of investigation before they can obtain anything from a journalist.

90. The appellants' argument has no merit. First, their argument reflects a fundamental misunderstanding of the role of the police and the purpose of criminal investigations. The role of the police is to investigate crimes. The whole point of the investigative phase is to gather and preserve the evidence in order to determine what, if any, crimes have been committed. The "prospects" of a future trial is not a relevant factor during the investigative phase. Second, the production order here is not a "fishing expedition." The police are seeking to obtain highly reliable evidence relating to serious terrorism offences, which they cannot obtain from any other source. They are not required to go further and establish that the prosecutor will actually need that evidence to prove the case at trial; nor are they required to exhaust all other investigative avenues.

(d) <u>The "prospects" of a trial is not a relevant factor during the investigative phase</u>

91. In *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, this Court recognized, at para. 20, that the "prompt and comprehensive" investigation of offences is essential to fulfilling the purpose of the *Criminal Code* – the promotion of a safe, peaceful and honest society. The Court stated that the role of the police in our criminal justice system is to investigate crimes by gathering and preserving "all the relevant evidence", to determine responsibly whether charges should be laid, and to present the evidence to prosecutorial authorities who then decide whether to advance a prosecution. Search warrants and production orders are important investigative tools that allow the police to gather and preserve the evidence and carry out their role. As this Court stated in *CanadianOxy*, at paras. 21-24:

> 21 At the investigative stage the authorities are charged with determining the following: What happened? Who did it? Is the conduct criminally culpable behaviour? Search warrants are a staple investigative tool for answering those questions, and the section authorizing their issuance must be interpreted in that light.
>
> 22 The purpose of s. 487(1) is to allow the investigators to unearth and preserve as much relevant evidence as possible. To ensure that the authorities are able to perform their appointed functions properly they should be able to locate, examine and preserve all the evidence relevant to events which may have given rise to criminal liability. It is not the role of the police to investigate and decide whether the essential elements of an offence are made out — that decision is the role of the

[86] Appellants' Factum, para. 117.

> courts. The function of the police, and other peace officers, is to investigate incidents which might be criminal, make a conscientious and informed decision as to whether charges should be laid, and then present the full and unadulterated facts to the prosecutorial authorities…
>
> . . . . .
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> 24 It is important that an investigation unearth as much evidence as possible. It is antithetical to our system of justice to proceed on the basis that the police, and other authorities, should only search for evidence which incriminates their chosen suspect.[87] [Emphasis Added]

92. In many cases, the criminal investigation does not end when the charges are laid. The collection and preservation of evidence by the police often will, and should, continue after an accused is charged. As this Court said in *R. v. Storrey*, in a passage cited with approval in *CanadianOxy* at para. 23, "The continued investigation will benefit society as a whole and not infrequently the arrested person."[88]

93. As the court below correctly held, when a justice is determining whether or not to issue a warrant or production order during the investigative phase, the "prospects" of trial is not a relevant consideration. At that stage, the police are gathering and preserving evidence with a view to determining whether the alleged offence was committed and whether charges should be laid. It is impossible to even attempt to assess the likelihood or prospects of a trial at that point, as this Court acknowledged in *CanadianOxy* when it cited with approval the following passage from the decision of the Ontario Court of Appeal in *R. v. Church of Scientology*:

> Police work should not be frustrated by the meticulous examination of facts and law that is appropriate to a trial process.... There may be serious questions of law as to whether what is asserted amounts to a criminal offence.... However, these issues can hardly be determined before the Crown has marshalled its evidence and is in a position to proceed with the prosecution.[89]

94. The fact that a suspect is absent from the country, and may be unlikely to return, is not a relevant consideration during the investigative phase. It is still crucial that the police seize and

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[87] *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, paras. 20-24 [*CanadianOxy*]. See also: *Descôteaux*, *supra* note 44, pp. 890-891.
[88] *CanadianOxy*, para. 23, citing *R. v. Storrey*, [1990] 1 S.C.R. 241.
[89] *CanadianOxy*, para. 22, quoting *R. v. Church of Scientology*, [1987] O.J. No. 64 (ON CA) (QL) with approval.

preserve the evidence, so that justice will not be thwarted in the event that the suspect does return. A suspect's absence from Canada should not be permitted to act as a bar to the completion of a police investigation. The case on appeal is a good illustration of this point. Shirdon is a citizen and entitled to return to Canada at any time. The fact that he may have told Makuch that he did not intend to return ought not to foreclose the police from gathering and preserving the evidence for use against Shirdon, should he decide to return or be arrested somewhere and extradited back to Canada.

95. In the alternative, even if the "prospect" of a trial is a relevant factor for consideration by an issuing justice, the fact of Shirdon's absence from Canada was fully set out in the ITO and was before the issuing justice.

96. The appellants assert that a trial in this case is unlikely. They improperly seek to rely upon a media report that does not form part of the record in the courts below, and which was not even published until months after the decision of the Court of Appeal was handed down. That media report says that an unnamed American official claimed that Shirdon is dead. The appellants advance the unfounded allegation that the police must have known of the substance of that claim before the media report was ever published. None of this is properly before this Court and none of it should be considered in deciding this appeal.

97. Suffice it to say, though, that this is not the first time that Shirdon has been reported dead. As set out above in paragraph 28, the appellant Makuch himself reported that Shirdon was dead in the summer of 2014, and Shirdon subsequently surfaced in an interview – very much alive – with the appellant Vice. Furthermore, the media report that the appellants attempt to rely upon goes on to quote another individual who doubts that Shirdon is dead. At best, all one can say is that there are conflicting reports and nothing is certain. The police should be allowed to complete their investigation and to preserve the evidence.

(e) <u>The evidence sought is relevant and necessary to the investigation</u>

98. The appellants' claim that the production order amounts to a "fishing expedition" is devoid of merit. Both courts below were satisfied that the evidence sought was highly relevant evidence relating to serious terrorism offences that Shirdon is alleged to have committed. The relevance of the evidence is patently obvious. It is trite to say that the admissions of an accused person often are the most compelling evidence in a criminal prosecution.

99. As the courts below held, there is no alternative source from which the police can obtain Shirdon's admissions to Makuch. In that sense, the material sought is "necessary" to the police investigation of the offences.

100. Production orders directed at the media are already subject to the "alternative sources" principle, as explained above in paragraphs 36-39. It is inappropriate to go further and import the statutory standard of investigative necessity for wiretap authorizations into the process for issuing production orders. In *New Brunswick*, the Court held that the special position of the media does not import any new or additional procedural requirements into the search warrant process.[90]

101. Furthermore, investigative necessity in the context of wiretap authorizations is a statutory requirement, not a constitutional one.[91] It is not required for authorizations that are issued for the investigation of terrorism offences: *Code*, s. 185(1.1)(c). The production order at issue in the case on appeal was issued in relation to the investigation of terrorism offences. It would be bizarre to import the investigative necessity standard into the process for issuing the production order, when that standard would not apply to a wiretap authorization to investigate the same offences.

102. The appellants suggest, however, that the police are in possession of other evidence that is similar to Shirdon's statements to Makuch. They say the evidence sought is, therefore, not needed for trial. In particular, they point to the fact that the police were able to gather social media posts, which the police believe were posted by Shirdon, from other websites.

103. The appellants may well consider that the social media posts are "similar" to the evidence sought, but the crucial point is that the evidence sought is not the same as that in the possession of the police. The police are entitled, indeed expected, to gather all of the relevant evidence, so they can provide it to the prosecutor who can then in turn decide whether to advance a prosecution and, if so, determine which evidence to call to prove the case at trial. As Doherty J.A. correctly held, it is not the role of the issuing justice to determine whether the prosecutor will actually need the evidence sought to prove the case at trial. Realistically, that is an impossible task for an issuing justice at the investigative phase. It would require that the justice weigh and consider all of the evidence in the hands of the police, forecast what other evidence might be obtained, and anticipate

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[90] *New Brunswick*, p. 475; *National Post*, para. 82.
[91] *R. v. Lucas*, 2014 ONCA 561, leave to appeal refused [2015] 1 S.C.R. viii (note).

all of the vagaries and vicissitudes of the trial process. In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, Lamer J. (as he then was) observed, "It will often be difficult to determine definitively the probative value of a particular thing before the police investigation has been completed."[92]

104. This point is readily illustrated in the case on appeal. For example, the appellants claim that the police already have "enough" evidence because they have social media posts that are believed to have been posted by Shirdon. However, the fact that police may have grounds to believe that Shirdon posted messages to certain websites does not mean that a prosecutor would be able to prove authorship and authenticity of those social media posts to a standard that would satisfy a trier of fact. In contrast, establishing the authenticity and authorship of the communications with Makuch may be far simpler. Those kind of assessments are appropriately made by a prosecutor when the investigation has been completed, not by an issuing justice during the investigative phase.

105. The appellants also assert that the police provided no reason to think that any of Shirdon's unpublished statements would afford evidence of his crimes. However, Shirdon's statements and their ultimate value can only be properly assessed by examining his admissions in their entirety. An argument similar to that being made by the appellants was put forward in *R. v. Toronto Star Newspapers Ltd.*, 2017 ONSC 1190, and was rejected. Morgan J. stated in that case, at para. 25:

> The necessity of reviewing statements made by an accused person in their full context was articulated emphatically by the Court of Appeal in *R. v. Mallory*, 2007 ONCA 46 (Ont. C.A.), at para 203:
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> > It is well accepted that if the crown tenders the statement of an accused, it cannot pick and choose those parts of the statement that it would like the jury to hear; it must take 'the good with the bad', and both the 'good' and the 'bad' are admitted for their truth, for and against the accused. Moreover, a party wishing to adduce a statement must put in as much of the statement as is necessary to permit a fair understanding of the individual utterances.[93]

106. The fact that the appellants did not publish Shirdon's statements in their entirety does not limit the scope of the police investigation; "…the newspaper's editorial decision as to how much to publish does not serve to define the scope of a police investigation."[94]

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[92] *Descôteaux*, *supra* note 44, p. 889.
[93] *Toronto Star Newspapers Ltd.*, *supra* note 50, para. 25.
[94] *Toronto Star Newspapers Ltd.*, *supra* note 50, para. 33.

107. The public interest in the investigation and prosecution of Shirdon's alleged offences is high, regardless of the fact that he is not currently in the country. The courts below did not err in their assessment of this important public interest.

(f) <u>The Standard of Review is Well Settled</u>

108. The standard of review applicable to search warrants and production orders is settled. This Court should reject the appellants' invitation to introduce a more interventionist standard for investigative orders directed against the media. The newsroom is not entitled to greater protection than the bedroom.

109. The standard of review applicable to wiretap authorizations, search warrants, production orders and the like was settled in *R. v. Garofoli*. That standard is simply stated: the order under review is presumptively valid and the reviewing judge is not entitled to substitute his or her view for that of the authorizing justice; if, based on the record before the authorizing judge as amplified on review, the reviewing judge concludes that the authorizing judge could have issued the order, then the reviewing judge should not interfere.[95] This Court in *National Post* applied this standard of review to an investigative order directed at the media.[96]

110. A deferential standard is appropriate for the review of search warrants and production orders for two reasons. First, the order under review is presumptively valid. If the authorizing justice <u>could have</u> issued the order, then there is no basis to call its validity into question. Second, decisions involving the exercise of discretion invite a deferential standard of review. The weighing and balancing of factors is the essence of the exercise of judicial discretion.[97]

111. Courts have had no difficulty applying the *Garofoli* standard to the review of warrants and production orders directed against the media. They recognize that the standard of review has to be applied with the *Lessard* factors in mind. As set out in paragraph 15 above, the application judge accurately stated the appropriate standard of review, as did Doherty J.A.

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[95] *R. v. Garofoli*, [1990] 2 S.C.R. 1421, p. 1452; *R. v. Araujo*, [2000] 2 S.C.R. 992, paras. 51-53; *R. v. Morelli*, [2010] 1 S.C.R. 253, paras. 40-43.
[96] *National Post*, para. 80.
[97] *R. v. Lacasse*, [2015] 3 S.C.R. 1089, para. 49.

112. Yet again, the appellants call upon this Court to overturn established precedent for no good reason.

(g) The decision whether to issue an order *ex parte* is left to the discretion of the issuing justice

113. The appellants argue that no order against a journalist should be issued *ex parte*, except in exigent circumstances. This very same argument was advanced and rejected in *National Post*.

114. Former section 487.012(3) of the *Criminal Code* (now s. 487.014) expressly provides that applications for production orders are *ex parte*. An authorizing justice does, however, have a discretion to proceed on notice.[98]

115. In *National Post*, Binnie J., writing for the majority, held that the decision whether to issue a search warrant directed at the media *ex parte* lies within the discretion of the authorizing justice. If the authorizing justice decides to proceed *ex parte*, then he or she must ensure that terms are added to the warrant to protect the special position of the media and to afford them sufficient time and opportunity to seek review of the warrant, should they wish to do so. Binnie J. stated:

> …in *New Brunswick* the majority of this Court held that the special position of the media did not "import any new or additional [procedural] requirements" (p. 475). McLachlin J., dissenting in *Lessard*, observed that "[i]n some cases", a justice may wish to hear from media representatives on whether a warrant should issue (p. 457). In her view, notice was a matter of discretion and did not rise to a constitutional requirement. See also *R. v. Serendip Physiotherapy Clinic* (2004), 73 O.R. (3d) 241 (C.A.).[99]

116. The appellants advance no good reason why this Court should depart from its decision in *National Post*. The traditional model of *ex parte* applications for warrants and production orders followed by judicial review provides adequate protection to the media.[100] As Doherty J.A. noted in the court below:

> The negative impact of the *ex parte* proceeding is countered by the media's right to move to revoke the warrant or production order before they turn the material over to the police: s. 487.0193(1). The media is entitled to place additional material before the reviewing judge to be considered in determining whether the warrant or production order should have issued. Practically speaking, the more significant the material placed before the reviewing judge, the more the review will take on the

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[98] *R. v. CBC (ONCA)*, *supra* note 38, para. 29.
[99] *National Post*, paras. 80-86.
[100] *R. v. CBC (ONCA)*, *supra* note 38, paras. 6, 54-55.

> appearance of a *de novo* assessment of the merits. Under the established procedures, the media has a full opportunity to put forward its case against the production order before the police access the material.[101]

117. In this regard, Doherty J.A.'s remarks echo those of Moldaver J.A. (as he then was) in *R. v. Canadian Broadcasting Corp.* (2001), 52 O.R. (3d) 757 (Ont. C.A.), at para. 6:

> I am inclined to the view that with the added safeguards enumerated in *CBC v. New Brunswick (Attorney-General), supra*, the traditional model [of *ex parte* applications] provides adequate protection to ensure a strong, vibrant and independent media, free to carry out its important role in our society without unwarranted state intrusion.

118. The appellants are mistaken in thinking that the recently enacted *JSPA* lends any support to their argument. Under that Act, there is no provision for notice to the affected media outlet or journalist before a warrant or production order is issued. Indeed, the Act provides that the judge may "request that a special advocate present observations in the interests of freedom of the press."[102] The discretion to appoint a special advocate contemplates an *ex parte* proceeding.

119. The Act further provides that any document that is obtained under a warrant or production order must be sealed and deposited with the court. If an officer wishes to examine any of the sealed documents, notice must be provided to the media. The media then has ten days to apply to the court for an order that the document not be disclosed on the basis that it will likely identify a confidential source. Again, the Act contemplates that the initial process of issuing the warrant or production order is *ex parte*. If that initial process was an *inter partes* hearing, the claim that documents were privileged would be raised at the hearing and there would be no need for a subsequent application.

120. The issuing justice was entitled to exercise his discretion in favour of issuing the production order *ex parte*. The ITO explained why the police were seeking to proceed *ex parte* in the circumstances of the case. In particular, the police were concerned that the appellants were unlikely to cooperate and could take steps to move the evidence beyond the reach of a Canadian court. Moreover, the production order gave the appellants sixty days to decide whether to comply with

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[101] *Vice Media (CA)*, para. 23.
[102] *JSPA*, s. 3.

the order. This gave them ample time to bring their application for review. The special position of the media was protected by the issuing justice.

Conclusion

121. The production order at issue in the case on appeal is reasonable. The Court of Appeal did not err in concluding that the balancing of the competing interests favoured making the production order. This ground of appeal should be dismissed.

B. THE COURT OF APPEAL DID NOT ERR IN VARYING THE SEALING ORDER AND DECLINING TO SET ASIDE THE NON-PUBLICATION ORDER

(a) The non-publication order is necessary to protect Shirdon's fair trial rights

122. This Court should not entertain the appellants' challenge to the non-publication order. In the court below, the appellants and the interveners both challenged the order on a "broad basis" and did not make submissions directed at specific portions of the ITO. As noted in paragraph 27 above, Doherty J.A. invited the appellants to reach a consensus with the respondents about which parts of the non-publication order should be lifted, or to bring an application varying the order (pursuant to s. 487.3(4) of the *Criminal Code*).[103] The appellants did neither. Given that the parties did not avail themselves of the opportunity to make specific submissions, and to pursue alternative remedies, this Court should not intervene.

123. In the alternative, the respondent's position is that MacDonnell J. properly issued the non-publication order and the appellants have shown no basis to interfere with it. MacDonnell J. understood the importance of a free press and the open court principle. He began his reasons by fully recognizing that the analysis starts with the presumption that full public access should be permitted.[104] He relied upon the well-known *Dagenais*/*Mentuck*[105] test that applies to all discretionary orders limiting freedom of expression and freedom of the press.[106] MacDonnell J.

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[103] *Vice Media (CA)*, paras. 59-61.
[104] *Vice Media (SCJ)*, para. 55. See also: *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, para. 18 [*Toronto Star Newspapers Ltd. (SCC)*]; *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175, pp. 189-190.
[105] *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835 [*Dagenais*]; *R. v. Mentuck*, [2001] 3 S.C.R. 442 [*Mentuck*]. See also: *Toronto Star Newspapers Ltd. (SCC)*; Section 487.3 of the *Criminal Code*, R.S.C. 1985, c. C-46, as amended.
[106] *Vice Media (SCJ)*, para. 59.

considered the positions of each party and thoroughly addressed the competing *Charter* rights in his reasons.

124. There was ample evidence before MacDonnell J. to support his conclusion that publication would result in a serious risk to the proper administration of justice. The 102 page ITO is a detailed summary of police-gathered evidence supporting allegations of terrorism offences. The allegations formed the foundation for the conclusion that evidence about Shirdon's alleged involvement with ISIS might "alarm" the public and pose a serious risk to his right to a fair trial and an impartial jury.[107] Moreover, it was completely proper for MacDonnell J. to consider the impact publication may have on the rights of an absent accused. As this Court made clear in *Mentuck*: "The consideration of unrepresented interests must not be taken lightly especially where *Charter*-protected rights… are at stake."[108]

125. MacDonnell J. correctly found that the salutary effects of the order outweighed any deleterious effects to freedom of expression. The deleterious effects were tempered by two factors: first, the order was temporary, expiring upon discharge at a preliminary inquiry or at the end of trial (he also invited the media to re-visit the ruling on March 29, 2018[109]); second, the non-publication order was not absolute. The media may still publish basic information about the production order, as well as parts of it that are not subject to any order at all. MacDonnell J. relied upon this Court's decision in *Toronto Star* that partial publication may make journalists' work more difficult, but it does not prevent them from conveying basic, relevant information.[110]

126. MacDonnell J. also properly considered whether alternative measures would mitigate the risks he identified to Shirdon's fair trial rights. In the circumstances, he was correct to conclude that a non-publication order was the least restrictive alternative. Unlike a sealing order, where nobody would have access to the information, a non-publication order permits both access and review. That means that the ITO is available for the media, and the public, to examine. The non-publication order struck the appropriate balance between Shirdon's fair trial rights and the public's right to access court records.

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[107] *Vice Media (SCJ)*, paras. 86-88. See also: *Dagenais*, *supra* note 105, pp. 877, 882-883.
[108] *Mentuck*, *supra* note 105, paras. 37-38.
[109] *Vice Media (SCJ)*, para. 132.
[110] *Vice Media (SCJ)*, para. 126.

127. In drawing this distinction between a non-publication order and a sealing order, MacDonnell J. relied upon the decisions of the Ontario Court of Appeal in *Ottawa Citizen Group Inc. v. Canada* and the Quebec Court of Appeal in *R. v. Flahiff*. In both those cases, the courts found a meaningful difference between the two types of orders, including the fact that non-publication orders allow for access, knowledge, and scrutiny of the information.[111] He also referred to the Ontario Superior Court decision in *R. v. National Post* that emphasized the value of access to the courts. That value is that justice must not only be done, but be seen to be done. In that sense, a non-publication order permits a member of the public, including the media, to attend court hearings and look at court documents to ensure that the rights of all parties are being respected.[112]

128. The Court of Appeal agreed. Doherty J.A. noted that in cases where a non-publication order is made, the media may still publish information that is valuable to Canadians. For instance, the media may choose to publish the identity of the target, the nature of the materials sought by the investigative order, and they may also comment on and criticize the nature and scope of the order made.[113] Further, having access to the information permits the media to begin drafting their stories and articles, in preparation for the lifting of the order. As noted above, the media may also publish the portions of the ITO not subject to a non-publication order.

129. Doherty J.A. emphasized that non-publication orders should not be seen to be "available for the asking." He recognized that such orders are a significant intrusion on the open court principle and must be justified on the facts of the case. In this case, the non-publication order was made for good reason. The ultimate goal of the criminal justice system is to ensure that trials are scrupulously fair. This Court has recognized that non-publication and sealing orders, in the proper circumstances, serve the important right of ensuring juror impartiality and to try an accused based solely on the evidence admitted in court in accordance with the trial judge's instructions. In *Toronto Star Newspapers Ltd. v. Canada*, [2010] 1 S.C.R. 721, at para. 32, Deschamps J., speaking of mandatory publication bans at bail hearings, made the following comments about averting the potential for jury bias at bail hearings and preliminary inquiries:

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[111] *Ottawa Citizen Group Inc. v. Canada*, 2005 CanLII 18835 (ON CA); *R. v. Flahiff*, [1998] J.Q. No. 2 (QC CA) (QL), paras. 30, 40-43. See also: *R. v. CTV*, 2013 ONSC 5779; *R. v. Hennessey*, 2008 ABQB 312; *R. v. Twitchell*, 2009 ABQB 644.
[112] *Vice Media (SCJ)*, para. 23.
[113] *Toronto Star Newspapers Ltd. v. R.*, [2010] 1 S.C.R. 721, para. 38.

> In both these types of proceedings, the evidentiary threshold is far lower than proof beyond a reasonable doubt. The Crown need tender only enough evidence to make out a *prima facie* case, and the defence may for strategic reasons choose not to call witnesses or otherwise challenge the Crown's evidence. It follows that the publication of proceedings at the preliminary hearing may result in a one-sided view of the case that could have an impact on trial fairness. [Emphasis Added]

130. This rationale for restricting publication applies equally to information contained in an ITO. ITOs contain a summary of incriminating evidence gathered by police during the early stages of an investigation. They may include hearsay, and potentially inadmissible evidence such as bad character evidence or statements from witnesses that will never be called at trial. In the appropriate circumstances, a non-publication order will be an important safeguard protecting the right to a fair trial. This is especially so in the age of the Internet and in cases like the present one, where media attention is high. The non-publication order in this case is an effective means to prevent prospective jurors from being exposed to prejudicial information that may be inadmissible at trial.

(b) The limited sealing order is necessary to prevent prejudice to an innocent third party

131. The appellants also challenge the sealing order imposed on information that would identify an innocent third party. As noted in paragraph 27 above, Doherty J.A. affirmed the sealing order, concluding that MacDonnell J. applied the correct legal principles and provided a reasonable basis for the order. The appellants have not demonstrated a basis to interfere with Doherty J.A.'s conclusion.

132. MacDonnell J.'s sealing order was reasonable and grounded in the evidence. He recognized that s. 487.3(2)(a)(iv) of the *Code* provides a basis to seal information, if disclosure would "prejudice the interests of an innocent person." This case fits squarely within the language of that provision. MacDonnell J. found as a fact that the innocent third party feared for his or her safety and that finding of fact is a sufficient basis for the sealing order.

133. The court below did not err in varying the sealing order and in declining to set aside the non-publication order. This ground of appeal should be dismissed.

PART IV: SUBMISSIONS CONCERNING COSTS

134. The respondent makes no submission as to costs.

PART V: NATURE OF ORDER SOUGHT

135. That this appeal be dismissed, without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Ottawa, in the Province of Ontario, this 23rd day of April, 2018.

_____
Croft Michaelson, Q.C.
Counsel for the respondent

_____
Sarah Shaikh
Counsel for the respondent

PART VI: TABLE OF AUTHORITIES

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