Court File No.37574

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

B E T W E E N:

VICE MEDIA CANADA INC. AND BEN MAKUCH

APPELANT

-and-

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

RESPONDENT

-and-

CANADIAN CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN MUSLIM LAWYERS ASSOCIATION, CANADIAN BROADCASTING CORPORATION, COALITION, INTERNATIONAL COALITION

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FACTUM OF THE INTERVENER
THE ATTORNEY GENERAL OF ONTARIO

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PART I:
OVERVIEW OF ARGUMENT

1. Historically, in Canada, criminal investigation and investigative journalism have acted in tandem – appropriately opening doors to public view in order to uncover crime and corruption. This Honourable Court and, most recently, Parliament have acted to particularize the balance which needs to be struck when these equally valid democratic tools intersect. This Court set out the foundational framework in the companion cases of *Canadian Broadcasting Corporation v. Lessard*[1] and *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*.[2] In 2010, the Court in *R. v. National Post*[3] undertook a careful re-examination of the *Lessard* balancing test in the context of confidential sources, considering an amplified expert record on the use and importance of secret sources and the modern realities of journalism today. The Court restated that the public interest in freedom of expression, while of immense importance, is not absolute and must be balanced with other important public interests such as the investigation and suppression of crime. The Court reaffirmed that the *Lessard* test provided a suitable framework to assess s. 8 *Charter* reasonableness in a s. 2(b) *Charter* context.

2. The common law as it stands recognizes the special position of media and achieves proportionality in striking a balance among competing interests. The *Lessard* test requires issuing justices to consider *all* the circumstances before granting a judicial authorization directed at the media. This includes consideration of the factors relating to the special role media plays in democratic society and any concerns of a negative impact or "chill" on media interests. Therefore, the present framework provides adequate room for a proper balancing of the important competing interests, including any chilling effect.

3. The common law has now been eclipsed by the statutory protections Parliament has enacted to recognize the special position of media. The *Journalistic Sources Protection Act*[4] amended both the *Canada Evidence Act* and the *Criminal Code*. The *Criminal Code* amendments set out a detailed procedural regime to be followed when police seek judicial authorization relating to journalistic sources or journalistic material including "objects, documents or data".

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[1] [1991] 3 S.C.R. 421 [*Lessard*].
[2] [1991] 3 S.C.R. 459 [*New Brunswick*].
[3] [2010] 1 S.C.R. 477 [*National Post*].
[4] *Journalistic Sources Protection Act*, S.C. 2017, c.22 [*JSPA*].

The statutory framework codifies many aspects of the *Lessard* balancing test. While the operation of the new provisions will be determined by future cases, the statutory scheme represents Parliament's view of how competing interests should be balanced when the state seeks to obtain material from the media.

4. As an intervener in this appeal, the Attorney General of Ontario will address the arguments that the *Lessard* test, and its related procedural issues regarding searches, should be reformed. The Attorney General of Ontario will argue that the special consideration the media has been afforded by the common law, and will be afforded by the new statutory regime, sufficiently protects freedom of expression while ensuring that an appropriate balance is struck between the competing public interests.

PART II:
STATEMENT OF POSITION

5. The Attorney General of Ontario submits that the common law framework does not need to be changed or reformed in light of the special consideration it provides to the media. Over the years, layers of benefits have been granted to the media beyond the protections afforded to average litigants, witnesses, businesses and home owners. The common law has conferred a special status on the media with accompanying procedural safeguards. As such, it will serve well as an underlying basis for the interpretation of the new statutory regime which supersedes it.

PART III:
BRIEF OF ARGUMENT

A. 1991 – The Media's Special Status

6. This Court in *Lessard* and *New Brunswick* recognized the tension between press freedom and police investigation. *Charter* section 2(b) freedom of "…expression, including freedom of the press and other media of communication" and a heightened media expectation of privacy underlying the *Charter* section 8 "…right to be secure against unreasonable search and seizure" provided a dual backdrop for the various reasons of the justices, and for the ultimate decision of the Court to mandate additional balancing of factors in media cases beyond the ordinary protections afforded to the rest of society.

7. Both cases concerned the execution of search warrants on CBC premises seeking *non-confidential* real evidence of crime. *Lessard* arose out of the occupation (with damage) of the Pointe-Claire, Quebec post office, while *New Brunswick* concerned demonstrations on Fraser Co. pulp and paper premises (where a Molitov cocktail was thrown starting a fire). The CBC had been on scene in both instances. Therefore, in the ordinary course of their business they acquired and then aired video recordings of the events and the participants. Justice Cory explained in *Lessard* why special status was required in this context:

> The weighing and balancing which must be undertaken will vary with the facts presented on each application. Certainly in every case the requirements of s. 487 of the Code must be met. *However, this is not the end of the matter.* Even after the statutory conditions have been met it may still be a difficult and complex process to determine whether a search warrant should be issued. For example, a greater degree of privacy may be expected in a home than in commercial premises which may be subject to statutory regulation and inspection. At the same time, *among commercial premises, the media are entitled to particularly careful consideration*, both as to the issuance of a search warrant and as to the conditions that may be attached to a warrant *to ensure that any disruption of the gathering and dissemination of news is limited as much as possible.* The media are entitled to *this special consideration* because of the importance of their role in a democratic society. [Emphasis added][5]

8. A consideration within these interests was the issue of the potential effect police searches could have on future investigative journalism. Balancing via recognition of the special interests was found, in part, to be necessary to *address* and *resolve* any risk of a chilling effect on persons coming forward to provide information to journalists, either on the record or in confidence. In *Lessard*, Justice LaForest recognized the concern: "I have little doubt, too, that the gathering of information could in many circumstances be seriously inhibited if government had too ready access to information in the hands of the media. That someone might be deterred from providing information to a journalist because his or her identity could be revealed seems to me to be self-evident."[6] However, Justice L'Heureux-Dube was of the view that appropriately addressing the particular circumstances of the case was sufficient,[7] citing with approval *Zurcher v. Stanford Daily* which ruled in part "Properly administered, the preconditions for a warrant -- probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness -- should afford sufficient protection against the harms that are assertedly

[5] *Lessard*, para. 46.
[6] *Lessard*, para. 3.
[7] *Lessard*, para. 23.

threatened by warrants for searching newspaper offices."[8] Finally, in dissent, after listing this and related concerns, the (then) Chief Justice wrote "…it is the prospect of seizure of press material in future cases *without the imposition of conditions* to protect press freedom and the identity of informants which creates the chilling effect."[9] [Emphasis added] The result being that a so called "chilling effect" has, from first instance, been a factor to be considered by this Court, the resolution being that it should be assuaged by appropriate *case specific* consideration and conditions.

9. In order to give procedural content to the media's special status in this context, and in order to guide future interaction between investigators and the press in analogous circumstances, Justice Cory went on to list in *New Brunswick*[10] and to incorporate in *Lessard*[11] a nine point guideline. Beyond the somewhat more obvious directions, for example that the ordinary search warrant requirements (of reasonable grounds) be met, a number of *foundational directions* of lasting importance were set out:

> a) In exercising the discretion to issue the justice of the peace should <u>*balance*</u> *the state interest in investigation* <u>*against*</u> <u>*the media right to privacy*</u>;
>
> b) Ordinarily the warrant should <u>*not*</u> *issue if* <u>*alternate sources*</u> *for the information have* <u>*not been shown to be exhausted*</u>; and,
>
> c) <u>*Conditions*</u> should be imposed, *such as sealing*, so that the media organizations are not unduly impeded and the process can be reviewed.

As has been seen, from its inception, the *Lessard* test was designed to consider any "chilling" impact on the media and to protect freedom of expression. Further, the foundational directions mandate a fact-specific flexible analysis which provides adequate room for proportionate balancing of the crucial competing interests. The framework places a higher burden on police as they must pursue and exhaust all alternate sources of the information. Indeed, the mandatory consideration of all of the circumstances in a given case, including the specific impact on news

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[8] *Zurcher v. Stanford Daily* 436 U.S. 547 (1978), p. 565.
[9] *Lessard*, para. 67
[10] *New Brunswick*, para. 44.
[11] *Lessard*, para. 47.

gathering and dissemination activities of the target media premise, guarantees full and rigorous analysis of the important press interests engaged.[12]

B. 2010 – The Case-by-Case Privilege for Confidential Sources

10. About twenty years later, this Court had the opportunity to reconsider the *Lessard* test, and the broad special media status it had recognized, within the circumstances of an assertion of *confidentiality* or *privilege*. In *National Post*, in a criminal general warrant context, and in *Globe and Mail v. Canada (Attorney General)*,[13] in a testimonial civil context, this Court recognized the special interest in journalist source relationships. None of the parties or interveners asserted an absolute protection for journalistic sources, the debate focusing on the scope of a qualified privilege. Finding roots within *Charter* freedom of expression, the notion of a class based privilege was rejected, but a case-by-case privilege was confirmed. In Justice Binnie's words in *National Post*: "The investigation and punishment of crime is vital in a society based on the rule of law but so is the freedom of the press and other media of communication. The general principle that the public has the right to every person's evidence is not absolute. Narrow exceptions have been recognized to further precisely defined and overriding public interests."[14]

11. In assessing whether journalist source privilege would be found in any given case the onus was left on the media agency or journalist seeking suppression to establish application by reference to the four "Wigmore" criteria. The Court summarized these well-known criteria, emphasizing the fourth factor: 1) the communication must *originate in a confidence*; the confidence must be *essential to the relationship*; the relationship must be one which should be "*sedulously fostered*"; and, fourth, the court must consider whether the public interest served by *protecting the identity of the informant* from disclosure <u>*outweighs*</u> the public interest in getting at *the truth*.[15]

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[12] *Lessard* has been cited with approval internationally, by the UN because it <u>*does*</u> provide special protection to media. See General Assembly, 70th Sess, 8 September 2015, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/70/361 at p. 11.

[13] *Globe and Mail v. Canada (Attorney General)*, [2010] 2 S.C.R. 592.

[14] *National Post*, para. 26.

[15] *National Post*, para. 53

12. On request, in *National Post*, this Court also addressed the issue of notice to the media. The majority declined to require that notice be given to the media in all cases, opting instead to emphasize that the issuing justice has the discretion to require it. Justice Binnie, for the majority, concerned about the need to "…ensure that the evidence is not made to disappear…." wrote "There will be cases of urgency or other circumstances supporting the need to proceed *ex parte*. In the absence of such circumstances the issuing judge may well conclude that it is desirable to proceed on notice to the media organization rather than *ex parte*."[16] He went on to say that when the decision has been made to proceed *ex parte* "…adequate terms must be inserted in any warrant to protect the special interest of the media…."[17] In dissent, Justice Abella asserted that the "operating presumption" should be the provision of notice.[18] Taken as a whole, media interests are to be considered initially and *beyond* the issuance stage. Consistent with the decision of the majority in *National Post* not to depart from the traditional model of *ex parte* hearings and the related need for appropriate conditions, Justice Doherty in the court below in this case, explained how established procedures provide the media with the full opportunity to put forward their case against a production order after issuance but *before* the police are permitted access to the material.[19] Media interests are considered and protected throughout the process. Owing to the need for delicate balancing of vital competing concerns, the provision of notice remains discretionary, being appropriately dependant on whether the circumstances allow for it and whether alternate media sensitive conditions may be imposed.

C. 2017 – Enhanced Special Status Through Legislation

13. It was on this broad and more than adequate common law foundation that, in late 2017, Parliament erected an even more comprehensive media edifice. One must note that the *JSPA* amended both the *Canada Evidence Act* and the *Criminal Code*. The *Canada Evidence Act* amendments included definitions, under subsection 39.1(1), of both "journalist" and "journalistic

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[16] *National Post*, para. 83.
[17] *National Post*, para. 84.
[18] *National Post*, paras. 144-145. It is significant that in *National Post*, the Justice of the Peace knew the media agency had requested notification but decided to proceed without notice.
[19] *R. v. Vice Media Inc. and Ben Makuch*, 2017 ONCA 231, para. 23. See *R. v. Canadian Broadcasting Corp*, (2001) 52 O.R. (3d) 757 (C.A.) for a fuller discussion of the safeguards present in the traditional *ex parte* model including the possibility that the failure on the part of the issuing justice to provide notice could found jurisdictional error.

sources". These definitions are to be used for the purposes of defining the scope of the new *Canada Evidence Act* protection of journalistic sources during the course of trials (or other proceedings) *and*, by way of incorporation into the *Criminal Code* amendments, to also inform the scope of the legislative protection of journalistic sources with respect to search orders. Parliament has now also recognized the *special status* of the media. And, in doing so it has endeavored to regulate media interaction at all of the investigative and the prosecutorial stages of the criminal process.

14. The new *Canada Evidence Act* section 39.1 provides journalists with protections when they are "before a court, person or body with the authority to compel the disclosure of information". Under subsections (2) to (9) a framework has been established to facilitate a journalist objecting to the dissemination of information which may identify a journalistic source. Subsection (2) allows an objection with respect to information or documentation "before a court". As such, it captures and controls the dissemination of confidential information through court proceedings (by way of testimony or by the filing of documents). Subsection (7) incorporates the key ingredients developed at common law with respect to the determination of whether the assertion of journalistic source privilege ought to be sustained in the specific circumstances of the case. Discretionary dissemination of the information may occur so long as, under subsection (a) the information cannot be otherwise produced and under subsection (b) the public interest in dissemination "outweighs" the public interest in preserving confidentiality.[20]

15. In addition to incorporating the definitions of "journalist" and "journalistic sources", the new *Criminal Code* sections 488.01 and 488.02 lay out a series of specific requirements and considerations with respect to investigative searches. Some aspects of the legislation go beyond the existing common law, the overall result being an exceptionally broad effort to govern the law of search in the journalistic context. In particular, section 488.01 includes:

a) In subsection (2), a list of the applicable search instruments; the generally applicable circumstances – where the informant knows the material sought "relates to a journalist's communications or an object, document or data relating to or in the

[20] The incorporation of the *Lessard* framework.

possession of the journalist"; and the sole *new venue* for such orders – the Superior Court;

b) Subsection (3) lays out the test granting the Superior Court the discretion to issue an order if satisfied that: (a) there is no other way to garner the information; and, (b) the public interest in the prosecution of crime "outweighs" the journalist's right to privacy[21];

c) Subsection (4) adds the *new* discretionary procedural protection of the "special advocate", an individual the application judge may order appointed for the purpose of making media based "observations" during the issuance process;

d) Subsection (5) and (6) act in concert to carve out an exception and permit issuance for information "…in relation to the commission of an offence by a journalist.";

e) Subsection (7) specifically permits the discretionary imposition of conditions "…to protect the confidentiality of journalistic sources and to limit the disruption of journalistic activities.";

f) Subsection (9) contemplates and governs circumstances where during the execution of non-journalistic locations investigators happen upon broadly defined journalistic material. If this occurs, the material must not be examined and must be sealed; and,

g) Finally, subsection (10) gives broad powers to the subsection (9) application judge, including confirming, varying, further examining the material under section 488.02 or retroactively revoking the authorization all together.

16. Beyond these provisions, section 488.02 installs an <u>*entirely new*</u> *post-issuance, post-execution procedure* applicable to any journalistic material obtained: by way of a journalist search order; or an exceptional order targeting a journalist as a suspect; or by happenstance in the ordinary course. The particulars include:

a) Under subsection (1) sealing and maintenance of the material by the court;

b) Under subsection (2) the express prohibition from access to the material by the investigators absent notice to the relevant media personnel or institution;

[21] The further incorporation of the *Lessard* framework in the search context.

c) Under subsection (3) granting the media the authority to apply to prevent the dissemination of the material within 10 days of receiving notice;

d) If a media application is made, under subsections (4) and (5) disclosure is prohibited unless the court is satisfied in its discretion that: (a) the materials are otherwise unavailable; and, (b) the public interest in the investigation and prosecution of criminal law "outweighs" the journalists right to privacy[22]; and,

e) Finally, subsection (6) allows the application judge to examine the material in order to determine, under subsection (7), whether it should not be disclosed and returned, or whether it should be disclosed to the investigators with appropriate restrictions and conditions.

D. 2018 and Beyond - The Current Principles and Protections

17. Taken as a whole, the new legislation amplifies the common law developed by this Court. The special status of the media has been more than simply assured, it has been enshrined in comprehensive legislation governing both investigation and prosecution. More particularly, the *Lessard* framework – which demands the balancing of the competing interests, including any applicable chilling effect, in last resort situations – has been, in the search context, embedded at *both* the issuance *and* the access stages. The ongoing use of this Court's test ensures that investigations may only intrude into the media sphere as a last option in important cases where the public interest in doing so is weighty. Indeed, Parliament has even delicately refined the issue of notice. At the issuance stage, under s. 488.01, a special advocate can be consulted.[23] And, at the access stage, under s. 488.02 (in conjunction with the related requirements of non-examination and sealing) notice invites media participation before the issue of the final dissemination of potentially confidential material is made based on a final application of the *Lessard* principles.

[22] The second incorporation of the *Lessard* framework in the search context.
[23] It is of some note that there is no bar at the issuance stage to the police and/or the Crown, in appropriate circumstances, choosing to provide notice.

18. There is no need to reform the *Lessard* framework. It was carefully designed to recognize and to protect the special role of the media in our democratic society. Recognized in accordance with international standards, the *Lessard* framework effectively strikes the proper and delicate balance between two vitally important public interests – the public interest in the suppression of crime and the public interest in the publication of accurate and pertinent information. Indeed, the *Lessard* framework not only underlies Parliament's new and comprehensive statutory regime, but it will be the guiding force in the interpretation of the new legislation in future cases which engage the intersection of the vital and complementary democratic tools of criminal investigation and investigative journalism.

PART IV:
SUBMISSIONS AS TO COSTS

19. The Attorney General of Ontario makes no submissions as to costs.

PART V:
ORDER REQUESTED

20. It is the position of the Attorney General of Ontario that the issues in this case be resolved in accordance with the foregoing submissions.

ALL OF WHICH is respectfully submitted this 7th day of May, 2018.

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PART VI:
AUTHORITIES CITED

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