

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

VICE MEDIA CANADA INC. And BEN MAKUCH

APPELLANTS

-and-

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

RESPONDENT

-and-

CANADIAN MUSLIM LAWYERS ASSOCIATION

INTERVENER

FACTUM OF THE INTERVENER,

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

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PART I- OVERVIEW

1. The determination of the legal principles and values in this case will have far reaching consequences beyond the particular facts. The legal test for the issuance of a warrant or production order for journalistic source materials should be enhanced. The test should specifically factor the role of the press in holding institutions accountable and protecting the public against misconduct by powerful state or private entities.
2. The factors as set out in *Canadian Broadcasting Corp. v Lessard*¹ should be contextually interpreted to provide elevated protection for journalist sources that assist the press with exposing both private actor and government misconduct. The more serious the misconduct exposed by the journalist with aid of their source, the higher the protection should be for the source materials against search and seizure.
3. With respect to journalist source communications, the balancing test under the third *Lessard* factor should require that a production order or warrant is issued only when the public interest in the investigation of an offence clearly overrides the journalist's right to privacy *and* the public's right to know about misconduct. The long term consequences of granting the order should be factored as well.
4. Further, the judge authorizing the order should summarize the relevant factors applied to the test in a brief memorandum that can be considered by a reviewing court. This summary is useful given the important, complex and competing interests that can be at stake.

¹ [*Canadian Broadcasting Corp. v Lessard*](#), [1991] 3 SCR 421, 67 CCC (3d) 517 [*Lessard*].

PART II- FACTS

5. The CMLA does not take any position on the facts.

PART III- STATEMENT OF ARGUMENT

6. In *Lessard*, the Court articulated nine factors to be considered when deciding whether to issue a search warrant or production order against the media. Of particular concern is the third factor which requires a “balancing” approach.²
7. The court has recognized that the balancing of competing interests is a “difficult and complex process”³ as the media are entitled to “special consideration”⁴ in light of their important information gathering role in democratic society which enables the public to make informed assessments of significant issues.⁵ Distinct from searches of individuals or personal property of other private citizens, searches of the press can have long-term adverse consequences on the development of sources.

a) Freedom of the Press and Accountability

8. One of the core purposes of freedom of the press is to prevent the abuse of official power by exposing misdeeds⁶ which is especially important given the government’s ability to institutionalize misconduct.⁷ The role of the media in exposing state misconduct is

² *Ibid* at para 47.

³ *Ibid* at para 46.

⁴ *Ibid*.

⁵ [Canadian Broadcasting Corp. v New Brunswick \(Attorney General\)](#), [1991] 3 SCR 459 at para 31, 85 DLR (4th) 57 [New Brunswick].

⁶ Sandra Davison & David Herrera, [“Needed: More than a Paper Shield”](#) (2012) 20 Wm & Mary Bill Rts J 1277 at para 1.

⁷ Vince Blasi, [“The Checking Value in First Amendment Theory”](#) (1977) 2:3 Am B Found Res J 521 at 538.

especially important for vulnerable groups and marginalized populations who are at a heightened risk of being subject to state or private actor misconduct.

9. Canadians can only hold the government, law enforcement, and powerful corporations accountable for their actions if they have access to meaningful information as a basis to assess those actions. As Justice O'Connor stated in the *Arar Commission Report*:

Exposure to public scrutiny is unquestionably the most effective tool in achieving accountability for those whose actions are being examined and in building public confidence in the process and resulting decision.⁸

10. For racial, religious, ethnic, and sexual orientation minorities that experience discrimination by the state or exploitive private entities, laws that may diminish the press's ability to expose that misconduct renders them even more vulnerable to abuse.⁹
11. Journalists foster relationships with sources, sometimes unsavoury, to expose facts about wrongdoing, unfairness and injustices that are improperly concealed from the public or affected groups. Given this role in holding institutions accountable, it is important that enhanced factors be established to help balance the interests at stake in issuing production orders or warrants for journalistic materials. It is foreseeable that in some cases, the state will want to seize material meant to expose misconduct.
12. A few examples serve to illustrate the tensions. First, the press recently performed this pro-social accountability function by exposing NSA domestic surveillance practices

⁸ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar, Analysis and Recommendations* (Ottawa: Privy Council 2006) at 304.

⁹ Tavia Grant, "Report submitted to Ottawa highlights police abuse against Indigenous women", The Globe and Mail (June 19, 2017) Online: The Globe and Mail, <https://www.theglobeandmail.com>; John Paul Tasker, "Missing and murdered inquiry commissioners to review police conduct and 'investigate the investigations'", CBC News (Sep 21, 2017) Online: CBC News, <http://www.cbc.ca>; Brian Hill, "Number of RCMP sexual harassment, discrimination claims rise to 2,400 women", The Globe and Mail (Jan 26, 2018) Online: The Globe and Mail, <https://www.theglobeandmail.com>.

through former NSA employee, Edward Snowden. That investigative journalism shed light on widespread violations of Constitutional rights and abuses of power by the US government (and potentially nations that they share information with), against their private citizens. It opened our eyes to the extent that security agencies can use technology to engage in illegal surveillance without accountability. This information would not have been revealed had it not been for the ability of journalists to work with an inside source, also accused of exposing state secrets, free from seizure of their source materials.¹⁰

13. Second, serious concerns could arise about faulty science that is contributing to wrongful convictions. For instance, a journalist may be able to expose a cover-up, bias, or misconduct by a pathologist by working with an inside source that is prepared to spill secrets, even if doing so is prohibited by law. For instance, Dr. Charles Smith, the former head of pediatric forensic pathology at Sick Kids Hospital for over twenty years was later found during the *Goudge Inquiry*¹¹ to have engaged in long term flawed and biased work that contributed to numerous wrongful convictions. It is plausible that in that type of situation, had a journalist been able to develop a source to expose this grave misconduct earlier, lives could have been saved.

14. Third, consider the controversy over the police mishandling of Missing and Indigenous women or the investigation of an alleged serial killer targeting the LGBTQ

¹⁰ Glenn Greenwald, “NSA collecting phone records of millions of Verizon customers daily”, The Guardian (June 5, 2013) Online: The Guardian, <https://www.theguardian.com>; Glenn Greenwald, “XKeyscore: NSA tools collect ‘nearly everything a user does on the internet’”, The Guardian (July 31, 2013) Online: The Guardian, <https://www.theguardian.com>; Barton Gellman, “U.S., British intelligence mining data from nine U.S internet company in broad secret program”, The Washington Post (June 5, 2013) Online: The Washington Post, <https://www.washingtonpost.com>.

¹¹ *Inquiry into Pediatric Forensic Pathology in Ontario*. The Honourable Stephen T. Goudge. Commissioner. October 1, 2008.

neighbourhood in Toronto.¹² In those scenarios, investigative journalism may develop an inside source that has access to sensitive information about discriminatory practices within policing that contribute to unfair case prioritization or resource allocation.

However, if an individual provides this source information to the media, their conduct may be considered by the state to be violating laws thereby resulting in a police application to search the journalists' source communications.

15. Similarly, a CSIS employee may wish to expose state misconduct or systemic discrimination within the organization which would be in contravention of the *Canadian Security Intelligence Service Act*.¹³ Since CSIS employees are excluded from protection under the *Public Servants Disclosure Protection Act*,¹⁴ a lack of protection of journalist-source communications could deter an employee that has witnessed serious misconduct within the institution from speaking to the media to expose the wrong-doing.

16. It is not realistic to expect that all insiders that work with the press will request confidentiality. In some instances, that request will be futile as the information exposed could only come from a particular source or witness with specific knowledge.

b) The “Chilling Effect” on Journalism

17. Failure to adequately protect the press from production orders or search warrants in circumstances such as those noted above can result in a “chilling effect” which is

¹² Shree Paradkar, “Gay village disappearances and police behaviour show ‘whose lives are disposable and whose lives are not’”, The Toronto Star News, (Feb 1, 2018) Online: The Toronto Star News, <http://www.thestar.com>; Marcus Gee, “Are Toronto Police playing the blame game with the Brice McArthur Case?”, The Globe and Mail, (Feb 27, 2018) Online: Globe and Mail, <https://www.theglobeandmail.com>.

¹³ *Canadian Security Intelligence Service Act*, RSC 1985, c C-23, s. 19(1); Michelle Shephard, “Five CSIS employees are accusing the spy agency of Islamophobia, racism and homophobia in a \$35 million lawsuit”, The Toronto Star News, (July 13, 2017) Online: The Toronto Star News, <http://www.thestar.com>; Nazim Baksh & Devin Heroux, “‘My life was ripped apart’: Two Calgary Muslim men say CSIS wrongfully targeted them”, CBC News Calgary, (Nov 22, 2017) Online: CBC news, <https://www.cbc.ca>

¹⁴ *Public Servants Disclosure Protection Act*, SC 2005, c 46, s2(1).

especially significant for vulnerable groups. This effect is grounded in the fragile basis on which sources come forward to disclose sensitive but important information to journalists about misconduct in various settings.¹⁵

18. When the state targets journalists' communications it becomes more difficult for the press to gather and retain important information about organizations and groups shrouded in secrecy.¹⁶ It makes it more difficult for the press to get leads as it makes it less likely that people will speak freely both on *and off* the record about important information pertaining to wrongdoing by state or private actors.

19. Also, journalists may cease making written or permanent records for fear that they will be seized by police which may also affect the accuracy of the material reported and will prevent future reference to these written accounts. Editors may alter their policies and may decide not to print a story or photograph so that the police will not become aware of their possession of information or documents.¹⁷

20. Furthermore, providing police access to journalistic material may give rise to doubts as to the impartiality of the press which is supposed to be the independent eye and ear of the citizenry.¹⁸ Overall, undue governmental influence increases the chilling effect on the press which can be detrimental for vulnerable groups who do not possess the political and social capital to otherwise be heard.

c) Enhanced Legal Thresholds for Journalistic Material

¹⁵ Simon Kupa, "[Charter-Ing a Course: National Post, Journalist-Source Privilege and the Future of Canada's Charter "Press Clause"](#) (2011) 69:2 UT Fac L Rev 68 at para 63.

¹⁶ Christie A. McNeill, "[Search and Seizure of the Press](#)" (1996) 34 Osgoode Hall LJ 175 at para 13.

¹⁷ *Ibid* at para 14.

¹⁸ *Ibid* at para 16.

21. Non-confidential information is often the source of government interest. While it does not possess the same level of statutory protection as confidential sources, the worry about journalistic autonomy remains.¹⁹ A journalist's decision to publish some but not all of the information gathered should not necessarily mean that all privacy interest in the source information is lost.
22. The media operates through acquiring information, editing and processing, and then dissemination.²⁰ They encourage off the record discussions that may still be documented but never published in order to be accurate and thorough. The choice of what to publish and what not to publish is an integral part of a free press. Meaningful protection of the press requires a reasonable "shield" against incursions into each of these practices.
23. In cases where an offence may have been committed by the source to expose grave wrongdoing against the public, the legal threshold for search and seizure of journalist materials should be high: that a production order or warrant is issued only when the public interest in the investigation of an offence clearly overrides the journalist's right to privacy *and* the public's right to know about misconduct.
24. The public's right to know should be interpreted both through the filter of the importance of current case and the long-term value of the public's ability to receive similar information from investigative journalism, free from state intrusion.
25. This nuanced and contextual weighing analysis is required especially when there are major competing rights at stake. The public's access to information can save lives from violations of dignity or physical harm. The justice should also turn their mind to whether

¹⁹ David McCraw, "[Found and Lost: Reclaiming the Press Privilege for Nonconfidential Information](#)" (2016) 80:4 Alb L Rev 1297 at 1315.

²⁰ "[Charter-ing a Course](#)", *supra* note 15 at para 38.

granting the order would impede the press's ability to expose when fundamental principles, values, and norms are being violated. This requires the justice to consider if granting the warrant will damage the public's access to this vital information in the long-term.

26. As this court has previously stated, to be of public interest, the subject matter should be "one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens."²¹

27. The exposure of private actor or state misconduct especially when related to vulnerable groups and systemic discrimination should add weight to the side of the scale that protects the public's right to know.

28. Similarly, if an individual's personal safety is in jeopardy due to state misconduct, then the public's right to know and the protection of the journalist source communications for future investigations are especially high. The potential pro-social value for this type of journalism can be anticipated through case studies of Arar, Khadr, or Abdelrazik.²²

29. Concerns about police investigations being undermined are not an inevitable consequence when protection is only available to legitimate media activity tied to the purpose underlying freedom of the press. Recognition of a more nuanced legal threshold that factors these circumstances would also be in accordance with the spirit of the *Journalistic Sources Protection Act*.²³ This Act which recently became law should be used as an

²¹ *Grant v Torstar Corp*, 2009 SCC 61 at para 105, [2009] 3 SCR 640.

²² *Report of the Events Relating to Maher Arar, Analysis and Recommendations*, supra note 8; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 24, [2010] 1 S.C.R. 44; Michelle Shephard, *Guantanamo's Child: The Untold Story of Omar Khadr* (John Wiley & Sons 2008).; Murray Brewster, "CSIS worked to thwart diplomatic efforts to secure Abdelrazik's release, documents suggest", CBC News, (April 17,2018) Online: CBC news, <https://www.cbc.ca>; Jim Bronskill, "CSIS scores poor marks in handling of Abdelrazik case", Global News Ottawa (October 31, 2013) Online: Global News, <https://www.globalnews.ca>.

²³ *Journalistic Sources Protection Act*, SC 2017 c 22 s3.

interpretive tool and an indication of Parliament’s aims to protect journalistic sources so that media rights are not infringed unnecessarily by the police.²⁴ Naturally, the availability of alternate sources for the information sought by the police can be considered as well in the weighing.²⁵

d) Other Jurisdictions Better Protect the Public’s Right to Know and the Privacy of the Press

30. These thresholds have also been recognized in other jurisdictions. For example, in the *Police and Criminal Evidence Act* in the United Kingdom, non-confidential journalistic materials are considered “special procedure” material.²⁶ In order to obtain this material, the police must establish that “other methods of obtaining the material have been tried without success” or are “bound to fail” and disclosure is in the public interest given the circumstances of the investigation and the media’s interests.²⁷

31. Similarly, eighteen states and the District of Columbia in the United States protect non-confidential information either explicitly or by implication by not limiting protection to confidential sources or information.²⁸ Most of these states provide a qualified privilege for non-confidential information, modeled after US Supreme Court Justice Stewart's dissenting opinion in *Branzburg v. Hayes* requiring the police to show that the information is relevant, there is a lack of alternative sources, *and that there is compelling and overriding interest in the information.*²⁹ The *compelling interest* requirement is a

²⁴ [Debates of the Senate \(Hansard\)](#), 41st Parl, 1st Sess, No 150 (5 December 2016).

²⁵ [Lessard](#), *supra* note 1 at p.446.

²⁶ [Police and Criminal Evidence Act 1984](#), c 60 s 13, 14.

²⁷ *Ibid* at [schedule 1 s2](#).

²⁸ Anthony L. Fargo, [“The Journalist’s Privilege for Nonconfidential Information in States with Shield Laws”](#) (2002) 7 Communication Law and Policy 241 at 256.

²⁹ *Ibid*; [Branzburg v Hayes](#), (1972) 408 US 665, 92 S Ct 2646 (USSC) at p. 725.

contextual analysis of both the government's interest in acquiring the information and the public's interest in accessing the information.

e) Standard of Review and Judicial Summaries

32. A reviewing judge should consider if the issuing judge carefully considered the public's right to know in order to properly give effect to the nature of the rights at stake.

33. Because the issuing judge is required to engage in a distinct analysis of a complex and lengthy Information to Obtain (ITO), it is expected that they will study the ITO and take notes. Upon review and subject to an unsealing process, it would be useful to counsel and the reviewing judge if the issuing justice prepared a written summary explaining the basis for granting the order. In particular, an issuing judge should be encouraged to write a summary that can be assessed by counsel and the appellate Court.

f) Conclusion

34. An enhanced legal framework is necessary to affirm the value of investigative journalism in the modern era. The role that journalists play in holding institutions accountable and exposing misconduct is especially important for vulnerable groups who are more often subject to this misconduct. The media is vital in disseminating important information about institutions that are shrouded by internal secrecy.³⁰

PART IV – COSTS

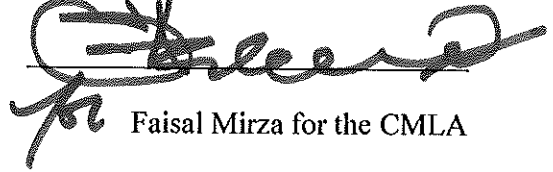
35. The Intervener does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

36. The CMLA requests 5 minutes of oral argument or as otherwise ordered by the Court.

³⁰ [*Debates of the Senate \(Hansard\)*](#), *supra* note 25.

All of which is respectfully submitted this 3rd day of May, 2018


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SUPREME COURT OF CANADA
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