

IN THE SUPREME COURT OF CANADA

(On Appeal from the court of Appeal for the Province of Ontario)

BETWEEN:

VICE MEDIA CANADA INC. and BEN MAKUCH

Appellants

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

AND:

**ATTORNEY GENERAL OF ONTARIO,
CANADIAN MUSLIM LAWYERS ASSOICATION,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,
CANADIAN CIVIL LIBERTIES ASSOCIATION,
COALITION, INTERNATIONAL COALITION**

Interveners

**FACTUM OF THE INTERVENER,
CANADIAN BROADCASTING CORPORATION
(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*)**

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PART I – OVERVIEW

1. As set out in Part II of the Appellants' factum, this appeal examines, among other issues, the procedures followed by courts when reviewing search warrants and production orders issued over journalistic material¹, and asks what standard of review should be applied in those circumstances.

2. The Respondent takes the view that the deferential standard of review set out in *Garofoli*² is “settled”, and that this appeal seeks to overturn established precedent without “compelling reasons to do so”. However, this argument fails to acknowledge that the newly passed *Journalistic Sources Protection Act* (“*JSPA*”) has changed the legal and societal landscape regarding these types of reviews, and that the *status quo* is no longer appropriate.

3. The present state of the law encourages sources and journalists to rely more heavily on the cloak of confidentiality to avail themselves of additional legal protections against police search and seizure. An over-use of confidential sources will erode the public’s faith in the media, and freedom of expression and freedom of the press will be adversely affected, including the public’s right to receive information.

PART II – QUESTION IN ISSUE

4. The submissions of Canadian Broadcasting Corporation/Radio-Canada (“CBC/Radio-Canada”) will be limited to the question of the appropriate level of protection afforded to non-confidential journalistic material *vis-a-vis* the level of protection afforded to journalistic source³ material. The answer to this question must respect freedom of expression and freedom of the press, including the right of the public to receive information. CBC/Radio-Canada proposes an appropriate test to review *ex parte* production orders or search warrants targeting non-confidential journalistic material.

¹ “Material” comprises “documents” as defined *Journalistic Sources Protection Act*, SC 2017, c 22, s 2, and any other journalistic work product. [*JSPA*].

² *R. v Garofoli*, [1990] 2 SCR 1421.

³ “journalistic source” means a source that confidentially transmits information to a journalist on the journalist’s undertaking not to divulge the identity of the source, whose anonymity is essential to the relationship between the journalist and the source, as defined *Journalistic Sources Protection Act*, SC 2017, c 22, s 2. [*JSPA*].

5. It is CBC/Radio-Canada’s position that the law must provide for a standard of review for orders affecting non-confidential journalistic material that matches the statutory standard that now exists under the *JSPA* for journalistic source material.

PART III - ARGUMENT

Background

6. The law surrounding police access to journalistic material has developed since 1991.⁴ Search warrants and production orders over journalistic material are subject to “special considerations”⁵ for the media due to the importance of their role in a democratic society.

7. The current status of the law is that an order to seize journalistic material should only be issued where the issuing judge is satisfied the public interest in the suppression of crime outweighs the privacy interests at play in the course of newsgathering and news dissemination. While the weight given to whether the source of the information is confidential or not differs from case to case, this balancing of interests was confirmed to be at the heart of the analysis by this Court as recently as 2010⁶.

8. Notwithstanding these special considerations, the Chamberland Commission in Québec, tasked with examining police searches and surveillance of journalists, found a systemic lack of sensitivity, knowledge, and precaution by police with regard to “journalists’ work in collecting information and protecting their sources” during the investigation phase⁷. And furthermore, the courts meant to apply these considerations in issuing search warrants and production orders appear almost universally to favour the police in their analysis⁸.

9. Prior to the *JSPA*, a media entity wishing to challenge a warrant or production order could seek to have it reviewed, revoked or varied. Most courts, including the courts below in this matter, apply the deferential *Garofoli* standard in their review. Under that standard, courts conduct a theoretical analysis of what the seized evidence might contain, and place the burden of proof on the media applicant to show that the issuance of the warrant or production order was not reasonable in the circumstances.

⁴ *Canadian Broadcasting Corp v Lessard*, [1991] 3 SCR 421. [*Lessard*].

⁵ *Ibid.*

⁶ *R. v. National Post*, [2010] 1 SCR 477 at para 59. [*National Post*].

⁷ Québec, Commission d’Enquête sur la confidentialité des sources journalistiques, *Report Overview* (Québec, Publications du Québec, 2017) at 3, ([online](#)) [*Commission d’Enquête*].

⁸ Factum of the Appellants at paragraph 42.

10. It is this *status quo* that the Crown suggests is “working” and should not be lightly set aside. However, that argument completely ignores the position of the *JSPA* in the legal and societal landscapes, and its consequence on free expression and freedom of the press.

The Public is Better Served by Transparent Media

11. It is generally understood among journalists that the use of confidential sources should be limited to the rarest of cases:

We normally identify sources of information. But we may use unnamed sources when there is a clear and pressing reason to protect anonymity, the material gained from the confidential source is of strong public interest, and there is no other reasonable way to obtain the information. When this happens, we explain the need for anonymity.⁹

12. CBC/Radio-Canada recognizes in its *Journalistic Standards and Practices* that the use of confidential sources also has an impact on its obligations to its audience:

We make every effort to disclose the identity of interviewees and to give the context and explanations necessary for the audience to judge the relevance and credibility of their statements. In exceptional cases and for serious cause, we may decide to withhold such information in whole or in part. In such cases we explain the situation to the audience without disclosing the information that must be kept secret.¹⁰

13. The public will not simply accept the news at face value, but requires some assurances of the accuracy of what is being reported. Academics have found “[o]ffering full attribution provides an implicit promise to the reader: This information is true and you can go and ask the source to verify our work”.¹¹

14. An over-reliance on, or improper use of, confidential sources calls the credibility of both the media and the source into question:

Even in the more likely cases in which anonymous information is true, the public still has fewer reasons to trust the veracity of the information. Some research shows that

⁹The Canadian Association of Journalists, “Ethics Guidelines,” (June 11) CAJ Ethics Advisory Committee, ([online](#))

¹⁰ CBC/Radio-Canada, “Journalistic Standards and Practices,”(2017) “Sources: Identification of Interviewees” ([online](#))

¹¹ Matt J. Duffy & Carrie Packwood Freeman, “Anonymous Sources: A Utilitarian Exploration of their Justification and Limited Use” (2011) 26:4 *Journal of Mass Media Ethics* 297.

the audience perceives articles with anonymous sources as less credible than reports with names attribution.¹²

15. Maintaining trust in the media is more important now than ever. In the era of so-called “fake news”, the blurred line between what is true and what is not has eroded confidence in the media.¹³ And the public’s loss of faith that the media is able to report the news accurately and truthfully is intimately associated with the deterioration of freedom of expression:

De-legitimation [of the media] also weakens other fundamental institutional supports of freedom of expression. The concept of the rule of law—central to freedom of expression—depends on the existence of the possibility of consensus on fact-based inquiry.... The capacity of the press to contribute to this can be placed in jeopardy by persistent questioning of its status.¹⁴

16. Therefore, the law must not create a situation where the use of confidentiality becomes the norm rather than the exception. Rather, the law must adapt in a manner that is consistent with the *Charter*.

The Law Encourages Requests for Confidentiality

17. To address the lack of sensitivity toward media interests such as that uncovered by the Chamberland Commission, and to codify the balance mandated by this Court,¹⁵ Parliament enacted the *JSPA*. The *JSPA* reinforces freedom of expression and freedom of the press in the context of police search and seizure of journalistic material.

18. The *JSPA* establishes a regime for the issuance of warrants or production orders for journalistic material, under which a judge of a superior court of criminal jurisdiction or as defined by s. 552 of the *Criminal Code* can issue the order.¹⁶ Seizure will only be ordered after satisfying

¹² *Ibid.*

¹³ Hunt Alcott & Matthew Gentzkow, “Social Media and Fake News in the 2016 Election,” (2017) 31:2: Spring 2017 *Journal of Economic Perspectives* 211 at 216. In a graph titled Trends Related to Fake News, the researchers state that those expressing a “great deal” or “fair amount” of faith in the media declined from over 55% in 1998 to less than 40% in 2014.

¹⁴ UNESCO, *World Trends in Freedom of Expression and Media Development*, 2017/2018 Global Report at 117 (Paris: UNESCO, 2018).

¹⁵ *Lessard supra* note 4; *Globe and Mail v. Canada (Attorney General)*, [2010] 2 SCR 592; *National Post supra* note 6.

¹⁶ *JSPA supra* note 1, *Criminal Code*, RSC 1985, c C-46 s. 488.01(2). [*Criminal Code*].

a two-part test: a) the material cannot be reasonably obtained through any other means; 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.¹⁷ As no search will have been executed by police at the request stage, the Court must engage in a theoretical analysis without the benefit of the media position on the actual journalistic material in issue.

19. Once the order is executed, all seized materials are then sealed with the court for a ten day period. The affected media are given an opportunity to object to the disclosure of the materials to the police. Such an objection may only be made if disclosure is likely to reveal the identity of a confidential source.¹⁸

20. At this point material relating to a journalistic source is entitled to a *de novo* analysis by a judge of the court that issued the warrant or order. That analysis places the onus on the party seeking disclosure to establish as a matter of fact that the seized material satisfies the test for disclosure. The reviewing judge shall hear the media's position and may examine the actual materials if the judge considers it necessary to the determination of the issue.¹⁹ The reviewing judge shall only order disclosure if a) there is no other means through which the information could be reasonably 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 information²⁰.

21. The amendments arising from the *JSPA* do not provide for such an analysis of non-confidential journalistic material, nor does the Common Law. As a result, the current state of the law is that journalistic source material is entitled to more protections against police seizure than non-confidential journalistic material. Without this Court's intervention, the analysis for other journalistic material might be subject only to the *Garofoli* standard - which places the onus on the media to establish if the initial order was not "reasonable".

22. As a result of the gap in the law, it is reasonable to conclude that sources will insist on confidentiality for no reason other than to avoid being dragged into a criminal process upon a theoretical request of the police; they will want at least to ensure the materials they provide to journalists are in fact looked at by a judge to determine whether disclosure is proper in the circumstances.

¹⁷ *JSPA supra* note 1, *Ibid* at s. 488.01(3).

¹⁸ *Ibid*, *Ibid* at 488.02(3).

¹⁹ *Ibid*, *Ibid* at s. 488.02(5) and (6).

²⁰ *Ibid*, *Ibid* at s. 488.02(5)

23. In order to encourage transparency in the media wherever possible, and to give full meaning to freedom of expression and freedom of the press, this Court must find the same test applies to the review of non-confidential journalistic material as the *JSPA* applies to the analysis of journalistic source material.

Effect of the JSPA on the Public’s Right to Receive Information

24. Any analysis of issues affecting the media must recognize that freedom of expression “protects listeners as well as speakers”²¹. Therefore, this Court must consider the present issue from the perspective of the public, which has a corresponding right to receive information.

25. CBC/Radio-Canada submits that the present state of the law creates a system under which journalistic source material is granted greater protections against police seizure than non-confidential journalistic documents. As a result of these additional protections, it is reasonable to conclude that sources will more often insist on confidentiality agreements to lessen the likelihood of becoming involved in a criminal proceeding.

26. In the end, CBC/Radio-Canada and other media will be forced to make a decision: tell the story, but omit essential details as to the identity of a source, where they otherwise would be included in the report; or don’t tell the story at all. Either way, the public’s right to information will be diminished.

27. This choice is at odds with the media’s ethical obligations to the public to tell the story as completely as possible by relying on confidential sources only as the exception and not the rule, and will likely lead to the loss of the media’s status as a trusted source of information for Canadians.

28. Unless the law evolves in a manner which encourages public accountability of the media to the fullest possible extent, the resultant over-use of confidentiality by the media will be detrimental to the free flow of information in a democratic society, and will lead to an eventual absence of trust in the press, and a consequential negative impact on freedom of expression and freedom of the press.

Recognizing the Chilling Effect in America

29. The Respondent contends that non-confidential sources will not insist on confidentiality when speaking with the media merely because their documents may be seized by police. To make

²¹ *Ford v. Quebec (Attorney General)*, [1988] 2 SCR at para 59.

that point, the Respondent relies on an article published in the United States²². However, that article points to the evident chilling effect where information relating to non-confidential sources is not protected by shield laws.

30. Contrary to the Respondent's interpretation of the article, its author argues that First Amendment rights are best protected where states recognize journalists' privilege over confidential and non-confidential material. In fact, the paragraph following the one cited in its factum supports the opposite conclusion to the proposition advanced by the Respondent:

In particular, the need to protect the news-gathering process from unwarranted intrusion—in other words, protection of the press's autonomy—seems to be a more fertile ground for a privilege for non-confidential material.²³

31. The Respondent also overstates the holding of *United States v LaRouche Campaign*. In that decision, the court actually recognized the negative impact that a commonplace issuance of subpoenas over non-confidential journalistic material could have on the journalistic process:

[I]nterests named are "the threat of administrative and judicial intrusion" into the newsgathering and editorial process; [and] the disadvantage of a journalist appearing to be "an investigative arm of the judicial system"... these are legitimate concerns.²⁴

32. Furthermore, the decision in *United States v. Smith*²⁵, cited by the Respondent, is considered by academics to be out of step with other courts on source protection:

Most other circuits disagree with the Fifth Circuit's argument that confidentiality is a prerequisite to privilege, and instead focus on the burden that compelled disclosure would place on the news gathering process²⁶

33. And, at least one Federal District Court in the United States has recognized that distinguishing between confidential and non-confidential sources is immaterial to the issue of

²² Factum of the Respondent at paragraph 68, reference to Anthony L. Fargo, "The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws", (2002) 7:3 Comm. Law & Pol'y at 272.

²³ *Ibid.*

²⁴ *United States of America v. the Larouche Campaign, et al.*, F Supp 1265 (D Mass 1988).

²⁵ Respondent's Factum at paragraph 69.

²⁶ Michael Fitzsimmons, "Defending the Informers: The Media's Right to Protect Non-Confidential Source Information Following *United States v. Smith*", (1999) 6:2 Vill L Rev 295 at 318.

whether sources will be willing to speak with the media if it is known their information might become part of a police investigation:

Although no confidential source or information is involved, this distinction is irrelevant to the chilling effect enforcement of the subpoena would have on the flow of information to the press and public.²⁷

Recognizing the Chilling Effect in Canada

34. These concerns about a chilling effect are also supported by a UNESCO report citing studies which agree that absent protections from state interference, journalists are finding their sources have become more reluctant to speak.²⁸

35. This same report was relied on by the Chamberland Commission in recommending that all journalistic material be subject to a shield law²⁹. In the Canadian context, with the adoption of the *JSPA*, we see the media engaging in very public efforts to protect the identity of confidential sources.³⁰ Consequently, it is reasonable to believe that sources will insist on confidentiality agreements in order to shield themselves against unwanted police intervention. In fact, it appears from statements made to the media by Senator Claude Carignan, sponsor of the Bill leading to the *JSPA*, that such an outcome is precisely what it was intended to do: “It’s sending a message to the population that they will be protected if they ask for protection from the journalist...It will probably help the media to receive more information...”³¹.

36. This over-reliance on confidential sources will erode public trust in the media, resulting in an adverse effect on freedom of expression and freedom of the press.

Adapting the Law to Discourage Improper Use of Confidential Sources

37. The purpose of the *JSPA* was outlined by Senator Carignan on its second reading, before the Senate: “Codification would result in a single process that respects the distinctness of the media and freedom of the press while adopting a uniform approach across the country”.³²

²⁷ *United States v Blanton*, 534 F Supp 295 (SD Fla 1982); Cited with approval in *Kidwell v. McCutcheon*, 962 F. Supp. 1477 (S.D. Fla. 1996).

²⁸ UNESCO, “Protecting Journalism Sources in the Digital Age,” (2017)(UNESCO Publishing) (online) : <http://unesdoc.unesco.org/images/0024/002480/248054E.pdf> , pp.103-104

²⁹ *Commission d’Enquête supra* note 7 at 174.

³⁰ *Denis c. R*, 2018 QCCA 611 (CanLii).

³¹ Lisa Taylor et al, “Understanding Canada’s New Shield Law for Confidential Sources”, Oct. 23, 2017, J-Source (online): <http://j-source.ca/article/understanding-canadas-new-shield-law-confidential-sources/>

³² [Senate Debates](#), 42nd Parl. 1st Sess. Vol. 150 Dec 5, 2016 online: (Sen. Claude Carignan).

38. However, the approach adopted in fact creates a dual process: one for journalistic source material, and another for non-confidential journalistic material. At present, search warrants or orders for non-confidential journalistic documents are subject to various means of review which often apply the *Garofoli* standard.

39. This standard of review is no longer appropriate as it reinforces the problematic two-tier analysis afforded to journalistic material. In other words, this standard of review serves to unintentionally encourage sources and journalists to seek refuge in protections afforded to confidential sources that do not otherwise exist for non-confidential sources.

40. This approach undermines confidence in the media, and will subsequently erode the very cornerstone of freedom of expression that comes from fact-based inquiry on matters of public interest provided by a trustworthy press. Therefore, the Common Law rule must be revisited, in keeping with *Charter* principles:

Where the principles underlying a common law rule are out of step with the values enshrined in the *Charter*, the courts should scrutinize the rule closely. If it is possible to change the common law rule so as to make it consistent with *Charter* values, without upsetting the proper balance between judicial and legislative action that I have referred to above, then the rule ought to be changed.³³

41. In *Lessard*, this Court found that a justice of the peace issuing a search warrant of a media premises is required to evaluate the impact a search may have on the rights of the media to collect and report on the news:

The justice of the peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination. It must be borne in mind that the media play a vital role in the functioning of a democratic society.³⁴

42. CBC/Radio-Canada submits the Court can, and should establish a new standard of review for requests to seize non-confidential journalistic material that mimics the provisions of the *JSPA*. Such an approach is consistent with the balancing of interests contemplated in *Lessard*, but also adapts the Common Law in a manner that is necessarily consistent with the *Charter*.

³³ *R. v. Salituro*, [1991] 3 SCR 654 at para 17.

³⁴ *Lessard supra* note 4.

43. This new standard of review would give full effect to that balance; it would replace the theoretical analysis and would occur in real terms. The court would have access to input from the affected parties to assist in determining which of the competing interests should prevail in any particular application over non-confidential journalistic material and, if necessary, to the material in issue. The new standard would also place the onus on the party requesting non-confidential journalistic material be disclosed to meet the test set out in the meets the same test as for journalistic source material. In other words, such a change does not “upset the proper balance between judicial and legislative action”, and therefore “ought to be changed”.³⁵

Summary

44. In short, the CBC/Radio-Canada position may be summarized as follows:

- a) Public trust in the media is a cornerstone of free expression and freedom of the press, and a distrust of the media strikes at the very essence of a democratic society;
- b) Public trust in the media is fostered when confidential sources are used only as the exception rather than the rule;
- c) The law must be developed in a manner that fosters freedom of expression and freedom of the press, by encouraging public trust in the media;
- d) However, the present state of the law is that confidential sources are provided more protection from state intrusion than non-confidential sources, thereby encouraging an over-use of confidentiality in the media;
- e) Therefore, this Court must evolve the Common Law to bridge the gap in the law by creating a standard to revise orders affecting non-confidential journalistic material that mimics the test available under the *Journalistic Sources Protection Act* for journalistic source material.

PARTS IV - SUBMISSIONS ON COSTS

45. The Intervener Canadian Broadcasting Corporation does not seek costs and asks that no costs be awarded against it.

PART V – ORDER REQUESTED

46. The Intervener Canadian Broadcasting Corporation makes no submissions on the merits of the appeal.

All of which is respectfully submitted this 9th day of May, 2018.

³⁵ *Supra*, note 33.



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PART VI – TABLE OF AUTHORITIES

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