Court File No. 37574

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

B E T W E E N :

VICE MEDIA CANADA INC. and BEN MAKUCH

APPELLANTS
(Appellants)

- and -

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

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 - OVERVIEW

1. The British Columbia Civil Liberties Association (the "BCCLA") invites this Court to develop the broadly-stated balancing exercise at the heart of the *Canadian Broadcasting Corp v Lessard*[1] analysis into a more precise set of factors that judges should consider when determining whether to issue (or quash) a search warrant or production order that targets journalists.

2. The balancing articulated in *Lessard*, and more recently in the *Criminal Code*[2] with the enactment of the *Journalistic Sources Protection Act*,[3] requires determining in the circumstances whether the state's interest in the investigation and prosecution of a criminal offence outweighs a journalist's right to privacy in gathering and disseminating information. While this Court has stressed the importance of the media and of freedom of expression in broad terms, where these public interests have been weighed directly since *Lessard*, law enforcement has prevailed in nearly every case. Too often, only lip service is paid to the importance of free expression and the independence of the media.

3. The articulation by this Court of a more rigorous analytical framework will serve to guide authorizing judges in the exercise of their judicial discretion under the *Lessard* test and will better protect the public interest. These submissions draw on domestic case law and recent legislation to suggest a number of factors that should be considered on each side of the scale, so as to ensure a proper balance is struck between the investigation and prosecution of crime and the vital role the media play in society.[4]

PART II - INTERVENER'S POSITION ON THE QUESTIONS IN ISSUE

4. The BCCLA intervenes to make submissions regarding factors that should be considered when courts apply the *Lessard* balancing test. It takes no position on the outcome of the appeal.

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[1] *Canadian Broadcasting Corp v Lessard*, [1991] 3 SCR 421 ["*Lessard*"].
[2] *Criminal Code*, RSC 1985, c. C-46, s. 488.01(3)(b).
[3] *Journalistic Sources Protection Act*, SC 2017, c.22 ["*JSPA*"].
[4] The BCCLA notes that some of these factors suggested were effectively considered by this Court in *R v National Post*, 2010 SCC 16 ["*National Post*"]. Because that decision applied the Wigmore factors, including a balancing of competing public interests under the fourth Wigmore factor, the evaluation of the balancing test under *Lessard* was unnecessary. See paras 66-67.

PART III - STATEMENT OF ARGUMENT

5. This Court has emphasized the "vital role" of the media in a democratic society[5] and the fact that "[t]he public interest in free expression will *always* weigh heavily in the balance."[6] Yet, in almost every case where courts have engaged in a *Lessard* balancing exercise, the public interest in protecting the media's freedom of expression, right to privacy and role in Canadian democratic society has yielded to the public interest in investigating crime. Orders targeting the media have been quashed for failure to provide full and frank disclosure or sufficient information (or for other, more technical reasons), but in only one case[7] has an order been quashed because the balancing of public interests was determined to weigh in the media's favour.[8]

6. Such an outcome is very concerning because ss. 2(b) and 8 of the *Charter*, and society's interest both in a free and independent press and in the investigation and prosecution of crime, should result in the granting of production orders that target journalists only in exceptional circumstances. In exercising judicial control over production orders and similar authorizations targeting media organizations, judges must ensure that the vital role the media play in society is properly recognized and weighed. Performing this role depends on the media being as free and independent from state influence and interference as possible. It is only through a rigorous and comprehensive balancing of "all of the circumstances", that the media's role, and the public's interest in freedom of the press, will be adequately protected.

7. In particular, the BCCLA submits that:

(a) when assessing the public interest in the investigation and prosecution of crime, the authorizing judge should consider:

(i) the seriousness and nature of the offences and the urgency of obtaining the information or material sought;

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[5] *Lessard*, *supra* at p. 445 and *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1991] 3 SCR 459 ["*CBC v New Brunswick*"] at p. 481.
[6] *National Post*, *supra* at para 64. [Emphasis in original]
[7] *Canadian Broadcasting Corp v Manitoba (Attorney General)*, 2008 MBQB 229, ["*CBC v Manitoba* (MBQB)"] aff'd 2009 MBCA 122 ["*CBC v Manitoba* (MBCA)"].
[8] The respondent argues at paragraph 44 of its factum that there have been seven cases in which orders have been quashed or denied through application of the *Lessard* framework and "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. However, in six of those cases, it was not necessary to engage in the balancing of public interests because the orders were denied as the material on which the applications were based were held not to constitute full and frank disclosure or to be insufficient to allow the court to exercise its discretion or failed to properly identify the material sought.

(ii) the content of the material sought, including its necessity and likely probative value to the investigation and prosecution; and

(iii) whether there are alternative sources of the information sought;

(b) on the other side of the ledger, when assessing the public interest in the media's privacy right in gathering and disseminating the news, the authorizing judge must consider:

(i) the ambit and specificity of the order or warrant sought;

(ii) the nature of the material sought; and

(iii) the seriousness of the chilling effect on the media's role that will result from granting the order.

A. The public interest in the investigation and prosecution of crime

8. In *Lessard*, both Cory J. and McLachlin J. stated that the public interest lies in ensuring that crimes do not go uninvestigated or unprosecuted, not in the police having access to every scrap of evidence that might exist.[9] Though important, the public interest in the investigation of crime must not be viewed so broadly as to eclipse all else.

i) Seriousness and nature of the crime and urgency

9. The starting point for any evaluation of an application for a production order should be consideration of the seriousness of the offences under investigation and how urgently the information sought is required for the investigation and/or prosecution of those offences.

10. Courts should not encourage police to seek evidence from media outlets where the crime under investigation is a relatively more minor one by granting invasive orders in those circumstances. The public has an interest in the investigation and prosecution of crime, but that interest increases as the seriousness of the crime in issue increases.

11. Similarly, an intrusive order compelling a media organization to turn over information that has been shown to be important to the investigation and prosecution of a serious crime is

[9] *Lessard*, *supra* per Cory J at p. 447: "…society has every right to expect that [a crime that has been committed] will be investigated and, if appropriate, prosecuted" [Emphasis added] and per McLachlin J at p. 454: "What we are faced with, then, is the delicate task of finding the proper balance between the public interest in the right of the press to conduct its activities free from state interference, and the public interest in seeing that those guilty of offences are charged and convicted." [Emphasis added].

more likely to be justified where there is a real and tangible urgency to the situation. If the matter is not an urgent one, consideration of the necessity of the information sought from the media, and of possible alternative sources of information, should then weigh more heavily.

12. In *CBC v New Brunswick*, for example, the crime in issue was the throwing of Molotov cocktails at a building, which "not only damaged the property but constituted a potential threat to the lives and safety of others."[10] As this Court noted, this was a serious and violent crime; its investigation was important. In addition, there was an urgency to the investigation because the demonstrations in the midst of which the Molotov cocktails had been thrown were ongoing.[11] Timely investigation might have prevented further risk of harm to people and property.

ii) Necessity and probative value of the material sought

13. The case law shows that while the seriousness of the offence and the urgency of its investigation should be considered in every application for a judicial authorization that targets journalists, the more important factor will usually be the necessity and probative value of the material sought.[12]

14. In *CBC v New Brunswick*, the material sought was video footage journalists had recorded of the demonstration at and around the time that the Molotov cocktails had been thrown. Similarly, video recordings or photographs of violent or disruptive demonstrations or riots in public spaces were also the material targeted in *Lessard*, *R v CBC*,[13] *The Vancouver Sun v British Columbia*,[14] *CTV Inc c Barbès*[15] and *CBC v Newfoundland*.[16] In each of these cases, law enforcement sought material that was likely to contain direct visual evidence of individuals on public streets engaged in the alleged criminal activity under investigation.

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[10] *CBC v New Brunswick*, *supra* at p. 476.
[11] *Ibid*.
[12] That said, if a production order targeting a media outlet is sought in the course of the investigation of a minor shoplifting offence, for example, it is unlikely that even very probative evidence will be sufficient to outweigh the public interest in preserving the privacy of the media.
[13] *R v Canadian Broadcasting Corporation* (2001), 52 OR (3d) 757 (CA) ["*R v CBC*"].
[14] 2011 BCSC 1736.
[15] 2008 QCCS 3992 ["*CTV Inc c Barbès*"].
[16] *Canadian Broadcasting Corporation v Newfoundland* (1994), 119 Nfld & PEIR 140 (NL SCTD), ["*CBC v Newfoundland*"] where the RCMP sought video of a violent demonstration inside a Department of Fisheries building.

15. In *National Post*, the material sought was what was believed to be forged documents apparently intended to implicate a former Prime Minister in scandal and the envelope in which the documents were delivered to a reporter. The police sought this material to conduct forensic analysis with a view to identifying the forger. As Binnie J. noted, this constituted the *corpus delicti*: physical evidence at the centre of the offence under investigation.[17]

16. In contrast, in *Dunphy*, police sought a reporter's written and electronic notes and recordings relating to interviews he had conducted with Paul Gravelle, the alleged head of a criminal organization.[18] It was believed that Mr. Gravelle's criminal organization was behind the double murder of a criminal defence lawyer and her husband. Mr. Dunphy's newspaper had published several articles about the murders relying on information provided by Mr. Gravelle.

17. The material sought in *Dunphy* was a reporter's private work product thought to contain information relating to the crimes under investigation. The relatively limited probative value of this material – as compared to the direct visual evidence of alleged criminal activity sought in *Lessard* and other similar cases – appeared to have been important to Glithero J.'s decision not to grant the production order sought. He held that there was no evidence that Mr. Dunphy's notes contained any information not already the subject of the articles he published, and he viewed the application as a "fishing expedition".[19]

18. Similarly, in *CBC v Manitoba*, the material sought was not direct visual evidence of the alleged crimes being committed – in that case the accused had been charged with assaulting his sister and a police officer. Instead, the police sought footage of a press conference at which the accused had commented on the alleged crime and one-on-one interviews conducted with him.

19. There was a suggestion that the accused had made inculpatory statements in the presence of reporters. The media targets had aired and published stories about the press conference, including broadcasting parts of the footage recorded. Even so, neither the reviewing judge nor the Court of Appeal was convinced that the material sought would afford evidence that was sufficiently probative to warrant a production order against the media.

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[17] *National Post*, *supra* at para 77.
[18] *R. v. Dunphy*, 2006 CanLII` 6575 (ON SC) ["*Dunphy*"].
[19] *Ibid* at para 48.

20. The BCCLA submits that *Lessard* and *CBC v New Brunswick*, and the more recent decisions in cases like *CBC v Manitoba* and *Dunphy*, stand for the principle that the necessity and probative value of the journalistic material sought through a production order or search warrant must be carefully assessed and weighed. The material sought in *Lessard* and *CBC v New Brunswick* was necessary to the police investigation into the criminal activity captured on video by the media; it was likely to be highly and directly probative to the crimes under investigation in a way that no other information or evidence could be. In *CBC v Manitoba* and *Dunphy*, on the other hand, the material sought was tangential to the crimes under investigation and there was no evidence that it was necessary, especially given the availability of other sources of similar information, as discussed below.

iii) Alternative sources of the information sought

21. Even where the crime under investigation is serious and the information sought is likely to be probative, if there are alternative sources of that information, the judge should exercise their discretion not to issue an order targeting the media. With the enactment of the *JSPA*, authorizing judges must be satisfied that "there is no other way by which the information can reasonably be obtained."[20]

22. In *Lessard* this Court held that it was not constitutionally required that other sources of information be mined before a search warrant could be issued against a media organization. But the majority also held that the person seeking judicial authorization should "ordinarily disclose" the existence or non-existence of alternative sources and that "reasonable efforts" to obtain the information from any other sources had been "exhausted".[21]

23. The courts in both *Dunphy* and *CBC v Manitoba* held that the police could and should have made more effort to obtain the information they sought from non-media sources. This failure, in combination with others, resulted in the denial or quashing of the authorization sought. Courts should be cognizant and give due weight to the concern that the media is not, and should not be, an investigative arm of the state. Enabling the police to effectively use the media as an investigative tool fundamentally undermines the important role that the media plays in democracy.

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[20] *Criminal Code*, s. 488.01(3)(a).
[21] See the fifth *Lessard* factor: *CBC v New Brunswick*, *supra* at p. 481; *Lessard*, *supra* at p. 445.

24. Where it is clear that law enforcement has access to evidence that is at least similar to that being sought from the media, it is incumbent on the person seeking authorization to clearly and compellingly articulate why the material sought from the journalist is necessary for the investigation and why it is more probative than the information already gathered.

25. Furthermore, the availability of relatively inexpensive and more powerful investigative and research tools to law enforcement today was hardly imagined 20 or 30 years ago when the events in issue in *Lessard* (1987), *CBC v New Brunswick* (1988) and *National Post* (2001),[22] took place.[23] In addition to the state's own capabilities, the proliferation of privately-owned closed circuit television cameras and smart phones with increasingly powerful camera and recording capabilities means that the state has potential access to many times more alternative sources of information than was the case less than a generation ago. The BCCLA submits that courts should be more reticent to issue search warrants and production orders targeting media organizations than ever before.

B. The public interest in the media's privacy right in gathering and disseminating information

26. This Court has recognized that when striking the appropriate balance, the media's right to privacy in the course of news gathering and news dissemination must be recognized in order to give effect to its "vital role" in the functioning of democracy. The following considerations for the authorizing judges should assist in giving effect to this role.

i) The nature of the material sought

27. An important distinction is to be drawn between material that constitutes the product of a journalist's research and investigation, to which a high expectation of privacy and confidentiality attaches, and material that is more akin to an eyewitness account of events that occurred in a

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[22] See *National Post*, *supra* at para 12. In addition, the sealed "plain brown envelope" is an ancient form of journalistic sourcing.
[23] In addition to the application of judicial notice and common sense, see *R v Jones*, 2017 SCC 60 at para 111 (per Abella J, dissenting), citing *R v Carty*, 2014 ONSC 212. At para 9 of *R. v. Carty*, the court held: "Advancing technology in the cellular telephone industry and the ubiquitous nature of mobile phones have provided new and rather rich sources of evidentiary material for criminal investigators. Statistics kept by the Canadian Wireless Telecommunications Association reveal the astounding growth of the industry. In 1985 there were 6,000 wireless subscribers in Canada. By the year 2000, there were 8,731,220 subscribers. By the third quarter of 2013 there were 27,306,013. The current population of Canada is something in the order of 35 million people. Mobile phones have clearly infiltrated Canadian society in arresting fashion."

public space. In *Lessard*, La Forest J. highlighted the distinction between "films and photographs of an event and items such as a reporter's personal notes, recordings of interviews and source 'contact lists'".[24] In his view, "barring exigent circumstances," courts should be more reticent to permit the seizure of materials in the latter category because essentially unfettered access to material such as a reporter's personal notes hampers the press's ability to carry out its function.[25]

28. As noted above, courts have granted applications seeking the media's raw footage of demonstrations or riots that occurred in public spaces. In addition to the likelihood of the heightened probative value of such material, there is a lowered privacy interest in it when compared to information obtained by a journalist mining human and documentary sources.

29. In *CBC v Manitoba* (MBCA), the Court of Appeal approved of the reviewing judge's inference that any video-recorded interviews the media conducted with the accused were "private".[26] The reviewing judge in that case remarked that, depending on the circumstances, where a television journalist records an interview, the "use of a microphone and the videocassette or audiocassette on which the interview is recorded, may be analogous to a print journalist's use of a pen and notebook," noting that "great care" should be taken before issuing an order providing access to the contents "of such professional and private material."[27] These comments are equally or more pertinent to electronic exchanges between a journalist and their source.

30. An explicit promise of confidentiality given to a source will be an important, additional element militating against production, as explained in *National Post*, but it is the journalist's right to privacy in their work product, and the protection of that privacy from state intrusion, that is at the heart of the public interest in a free press. Police should not have easy access to the private work product of journalists even if it has been gathered or recorded for the purpose of publication. The privacy interest journalists have in their notes, recordings and other materials is fundamental to their vital role as news gatherers and disseminators. Society benefits from a press that is able to report intelligently and resourcefully about issues of public importance. Society is deprived of that benefit the more closely intertwined the media are with law enforcement. A

[24] *Lessard*, *supra* at p. 431.
[25] *Ibid*, *supra* at p. 432.
[26] *CBC v Manitoba* (MBCA), *supra* at para 56.
[27] *CBC v Manitoba* (MBQB), *supra* at para 102.

press whose private work product is easily co-opted and appropriated by the state harms the public interest.

ii) Ambit of the production order sought

31. Applications for production orders targeting media organizations should be narrowly tailored. They should seek only material that is necessary to the investigation and that will cause minimal harm to the targeted media organization's privacy interest. This is evident from the case law.

32. The order sought in *Lessard* sought video footage only of the events under investigation: "Videotape on which persons were filmed causing damage to the interior of the Post Office…".[28] In *National Post*, the items sought were restricted to the allegedly forged documents and the plain brown envelope containing them.[29] By contrast, in a 2007 case, a decision quashing a search warrant targeting the CBC was upheld in part because the application failed to address "why the police needed the whole of the four hours of tape", when the stated purpose was to obtain footage of specific remarks believed to have been recorded.[30]

33. The public interest in freedom of expression and the related privacy rights of the press demands that applications that seek material beyond what is necessary should militate against granting the order. While the doctrine of severability applies to these authorizations, in the balancing of competing public interests, if the police seek a sweeping type of order, this should compel the authorizing judge to take a more critical view of the request and accord more weight to the media's right to be free from state interference and intrusion in the conduct of its work.

iii) The chilling effect on journalists, their sources and free expression

34. Authorizing courts should recognize that every production order (or search warrant) should be considered, presumptively, to have a chilling effect on news gathering and news dissemination. In a particular case, depending on the facts in issue, that effect may be higher or lower and it may be more or less grounded in particular evidence. However, it must be taken as a

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[28] *Lessard*, *supra* at p. 440.
[29] *National Post*, *supra* at paras 2, 13, 21.
[30] *R v Canadian Broadcasting Corporation*, 2007 NLCA 62, at para 41. See also the comments at para 53 in *Dunphy*, *supra*.

given that court-ordered seizure by the state of journalists' work product will almost always be detrimental to the media's ability to carry out its vital role in a functioning democratic society.

35. Echoing the comments of Justices La Forest[31] and McLachlin,[32] the MBCA articulated the possible chilling effect if the media's "special role" is not properly recognized:

> ...Production orders against the media casually given can have a chilling effect on the appearance of independence and on future actions of members of the public and the press. There may be a resulting loss of credibility and appearance of impartiality. "Allowing the state to look to the press as a ready source of evidence can only interfere with the legitimate efforts of the press to gather and, ultimately, disseminate news".... The media should be the last rather than the first place that authorities look for evidence. There should be a clear, compelling, "demonstrated necessity to obtain the information" to avoid the impression that the media has become an investigative arm of the police.[33]

36. If production orders are too frequently sought and too frequently or easily granted, journalists, who are trained to have as much of what they publish "on the record" as possible, may be encouraged to make broader promises of confidentiality more often as a means of better protecting their sources and their work product. This would undermine the openness and transparency that is fundamental to a properly functioning news media and society.

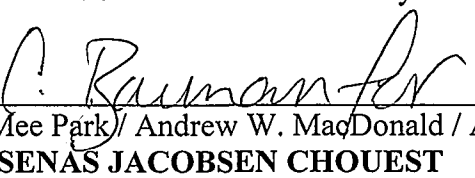
PART IV - SUBMISSIONS ON COSTS

37. The BCCLA does not seek costs and submits that it should not be liable to pay costs.

PART V - REQUEST FOR ORAL ARGUMENT

38. The BCCLA has been granted leave to make oral argument not exceeding five minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of May 2018.



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[31] *Lessard*, *supra* at p. 431.
[32] *Ibid* at p. 452. This passage was quoted in full by this Court in *National Post* at para 78
[33] *CBC v Manitoba* (MBCA), *supra* at para 74. See also paras 102ff of the reasons below in that case.

PART VI - TABLE OF AUTHORITIES

AT PARA.

Jurisprudence

Legislation/Regulations/Rules