SCC Court File No:

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

Applicants
(Appellants)

- and -

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

Respondent
(Respondent)

MEMORANDUM OF FACT AND LAW OF THE APPLICANTS

(Rule 25(1) of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

A. Overview: Issues of Public Importance Raised by the *Lessard* Balancing Analysis in the Context of Journalist-Source Communications

1. This case raises fundamental questions of public importance about how to balance the media's constitutionally-protected right to gather news and the interests of the state in prosecuting crime. These issues go to the heart of a journalist's role in a free and democratic society.

2. More than 25 years ago in *Lessard* and *New Brunswick*, this Court mandated a "balancing" between these two interests, based upon a "careful", "delicate" and "complex" inquiry, as the centerpiece of nine factors to be considered before granting a search warrant or production order against an innocent media outlet or journalist.[1] The courts below purported to apply that test in this case. In fact, however, they are just the latest in a long line of cases demonstrating that the balance required by this Court in *Lessard* has not been borne out in practice.

3. This Court has never addressed how the *Lessard* balancing test should apply in a case involving journalist-source communications.[2] On this critical issue, there is a jurisprudential void. In *Lessard* and *New Brunswick*, law enforcement authorities sought to obtain VHS tapes and photographs taken by the media at violent public protests. No journalist-source relationship existed between the media and the protestors caught on film. In *National Post*, this Court dealt with a request for production of a brown paper envelope and contents, given to a journalist by a confidential source, which this Court found to be the *actus reus* of the offence in question. Again, however, no other details were sought about the journalist's communications with the source.[3]

4. Here, law enforcement seeks an order to compel an innocent journalist and media outlet, which are not being investigated by any government agency, to produce every available record of their communications with an individual whom the journalist spent months cultivating as a source. These communications are part of the media's core news gathering activities protected by section 2(b) of the *Charter*. Neither *Lessard/New Brunswick*, nor *National Post*, address how to

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1 ***Canadian Broadcasting Corp. v. Lessard***, [1991] 3 S.C.R. 421, http://canlii.ca/t/1fsh1, ***Canadian Broadcasting Corp. v. New Brunswick (Attorney General),*** [1991] 3 S.C.R. 459, http://canlii.ca/t/1fsh3 ["*New Brunswick*"]

2 The applicants use the term "journalist-source communications" to refer to communications between a journalist and a source who is not a confidential source. The protections sought have already been extended by this Court in ***R. v. National Post*** [2010] 1 S.C.R. 477, http://canlii.ca/t/29l77 [*"National Post"*] to confidential journalist-source relationships. However, the "Wigmore" privilege at common law, on which this extension was based, is not only, or even primarily, about protecting the identity of a source, or other protected speaker. It is about protecting the content of communications in a relationship, and other aspects of those relationships, which our law has decided should be "sedulously fostered".

3 ***R. v. National Post***, supra, footnote 1.

deal with the chilling effects that arise in the increasingly common scenario where law enforcement seeks this kind of direct access to journalist-source communications for the purpose of prosecuting the source. Moreover, neither *Lessard/New Brunswick,* nor *National Post,* deal with the balancing implications where the state seeks records of a journalist's text messages – a type of communication this Court has recognized attracts heightened privacy interests.

5. At the same time, the law enforcement interest in this case is attenuated. The Production Order in issue is meant to gather evidence for prosecution of an alleged terrorist thought to be operating somewhere in the Middle East, who has been charged *in absentia* with six terrorism-related offences. The accused is not in custody, his whereabouts are unknown, and a trial appears highly unlikely. It is unclear if he is even alive. In addition, the police have already gathered a significant amount of similar evidence to that sought by the Order in issue.

6. Against this backdrop, the decisions below give short shrift to the chilling effect on the ability of journalists to gather and report important news stories, and place an unjustified high value on law enforcement's interests, without explanation or analysis. They are not alone in that regard. As far as the applicants are aware, of all the decisions since *Lessard* dealing with orders targeting material in the hands of the media, the balancing analysis has favoured the media only once. Both the procedures followed and the substantive analysis applied by lower courts across Canada have tilted the "balance" firmly in favour of law enforcement.

7. This is not a balance at all. It is a rubber stamp, rather than the "careful," "delicate" and "complex" inquiry mandated by this Court in *Lessard*.

8. The time is ripe for this Court to revisit the *Lessard* balancing test. It has never done so, and clarification is desperately needed. Many key questions remain unanswered or are the subject of conflicting appellate decisions.

9. These questions include whether a chill in the case of journalist-source communications can be presumed or needs to be proven, and whether publishing some information from a source significantly attenuates any chill. This Court should also address the impact of an order that authorizes the seizure of a journalist's private work product by requiring the production of his/her notes or interview recordings, or commonly–used modern means of communications, such as text messages and emails. Finally, on the other side of the balancing ledger, this Court should resolve the dispute amongst appellate courts as to the degree of scrutiny lower courts should give to the probative value of the evidence requested by police when conducting the balancing analysis.

10. Clarity is also required on the proper standard of review for *ex parte* orders that infringe upon protected news-gathering activities. Without an opportunity to hear from the media, the issuing courts are simply not in a position to conduct the balancing that was mandated by this Court in *Lessard*. On review, most lower courts – including the courts below in this case – apply the traditional and highly deferential *Garofoli* standard. Recognizing the difficulty of this approach in the context of the nuanced inquiry required by *Lessard*, some courts have suggested that a modified formulation of the test should apply. This Court has yet to address this split in the jurisprudence, which will have important implications across the country.

11. These consequential and unresolved questions regarding the substance and procedure of the *Lessard* balancing test lie at the heart of this case. They are questions of first impression for this Court. And they will arise even more frequently in the future, as journalists make increasing use of electronic communications to obtain information from sources who are in adversarial relationships with the state, and as the technological means of doing so continue to evolve.

12. Ultimately, leave should be granted in this case to consider how the *Lessard* balancing analysis should apply to journalist-source communications in the modern era of news reporting. The stakes are high. The law is unsettled. The results of the decided cases are concerning. These issues are recurring and this Court's guidance is necessary.

B. Brief Factual Background

13. Vice Media Canada Inc. ("Vice") is a media company that produces stories and content for its multimedia network of websites, TV channels, films and mobile platforms. Ben Makuch is a news reporter and video producer for Vice.[4] His reporting has focused on issues relating to cyber security, signals intelligence, terrorism and particularly ISIS.[5]

1. Makuch's Journalist-Source Communications and Articles

14. Around April 2014, a video was posted on YouTube that appeared to show young men in the Middle East ripping up their western passports and pledging allegiance to ISIS. It was widely viewed by internet users. One of the recruits, shown ripping up his Canadian passport, was later

4 **Reasons for Decision of MacDonnell J. dated March 29, 2016** ("Reviewing Court Reasons") at para. 3, Application for Leave to Appeal ("A.L.A."), Tab 2C at p.15

5 **Affidavit of Ben Makuch sworn December 22, 2015** ("Makuch Affidavit") at para. 4, A.L.A., Tab 6 at p.321

identified by media outlets as Farah Mohammed Shirdon, formerly of Calgary. Shirdon was 21 years old, and believed to have left Canada in March 2014 to join ISIS in Iraq or Syria.[6]

15. Shortly after the video appeared, Makuch – who had been monitoring social media accounts used by suspected terrorists for some time as part of his reporting – identified and began following social media accounts of an ISIS fighter whom he believed to be Shirdon. These accounts identified the fighter only as "Abu Usamah". Makuch also learned that Abu Usamah might be willing to speak with someone from Vice.[7]

16. Makuch obtained contact information for Abu Usamah's Kik Messenger instant text messaging service ("Kik"). In early May 2014, Makuch began sending text messages to that account via Kik. Over the next five months, Makuch and Abu Usamah exchanged several messages. Through these communications, Makuch developed a relationship of trust with him: he answered Makuch's questions and provided Makuch with information. Abu Usamah does not appear to have granted the same kind of access to any other journalist, or to police.[8]

17. In June 2014, Vice published the first of three articles by Makuch about these conversations. The article states that Makuch's source "identified himself as Abu Usamah", and did not confirm his origins in Calgary or his identity as Farah Shirdon. However, in all three articles published between June and October 2014, Makuch drew the connection between Abu Usamah and Shirdon, and based his work in large part on his electronic communications through Kik.[9] Together, the stories provide their readers with a rare glimpse into why a young man appears to have left a comfortable life in Canada to join the front lines of ISIS. They also provide the perspective of someone who now appears to be on the "inside" of a major terrorist group, addressing matters such as the group's recruitment efforts, media strategy, staffing, organization and grievances with various countries, including Canada.[10]

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6 *Ibid.* at paras. 6, 9

7 **Makuch Affidavit** at paras. 5-7, 18, A.L.A., Tab 6 at pp.321-322

8 *Ibid.* at para. 8. Shirdon had a brief exchange of messages with the *Toronto Star*'s Michelle Shephard: see Exhibit "F" to the **Makuch Affidavit**, A.L.A., Tab 6. He appears to have refused to speak to other journalists at all: see ITO (redacted) at para. 39(mm)(vii), A.L.A., Tab 5 at pp.286-287

9 **Reviewing Court Reasons** at paras. 2-3, A.L.A., Tab 2C at p.15; Exhibit "C" to the **Makuch Affidavit**, A.L.A., Tab 6 at pp.336-337 [Article 1 p.2-3 of 12]

10 Exhibits "C" "D" and "E" to the **Makuch Affidavit**, A.L.A., Tabs 6C, 6D and 6E

2. The *Ex Parte* Production Order for Journalist-Source Communications

18. On February 13, 2015, on an *ex parte* application brought by the RCMP brought pursuant to what was then ss. 487.012(1) and (3) of the *Criminal Code*, Justice Nadelle of the Ontario Court of Justice issued a production order that required Vice and Makuch to turn over all records relating to Makuch's electronic communications with Shirdon ("Production Order").[11]

19. The Production Order required Vice and Makuch to produce, among other things, "paper printouts, screen captures or any other computer records of all communications between Makuch or any employee of [Vice] and Shirdon aka Abu Usamah over Kik messenger."[12] There is no dispute that the only material that Makuch and Vice have in their possession in relation to the Production Order, and would have to turn over to the RCMP, consists of screenshot records of the Kik messenger communications between Makuch and his source.[13]

20. The only evidence before the issuing court was an Information to Obtain ("ITO") sworn by Constable Grewal of the RCMP. The ITO provides details of Shirdon/Abu Usamah's extensive history of social media posts in support of ISIS, featuring numerous comments similar to those made in the communications with Makuch.[14] The ITO makes only vague reference to any consequences of the Production Order on the media's ability to gather and report news.

21. On September 24, 2015, the RCMP charged Shirdon in *absentia* with six terrorism offences. His exact whereabouts are unknown, and it is unclear whether he is even still alive.[15]

3. The Courts Below Uphold the Production Order

22. On March 1, 2016 Vice and Makuch challenged the Production Order in the Ontario Superior Court of Justice by way of *certiorari*, arguing (among other things) that turning over journalist-source communications for use against the source in a prosecution would have severe chilling effects on the media's ability to gather and report news. Vice and Makuch further argued that the judge who issued the Production Order failed to conduct a proper balancing test and failed

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11 R.S.C., 1985, c. C-46. The present-day equivalent of this provision is s. 487.014.

12 **Reviewing Court Reasons** at para. 1, A.L.A., Tab 2C at p.15; **Order of Justice Nadelle dated February 13, 2015** ("Production Order") at paras. 2(b) and 2(c), A.L.A., Tab 2A at p.9

13 **Reviewing Court Reasons** at para. 21, A.L.A., Tab 2C at p.20

14 **Information to Obtain sworn by Constable Grewal (redacted version)** ("ITO") at paras. 11-14, 35-39, 60(g), 60(h) A.L.A., Tab 5 at pp.220, 240-277, 312

15 **Affidavit of Corporal Ian Cameron Ross sworn February 10, 2016** at paras. 4, 7, A.L.A., Tab 7 at pp.377-378; **Reasons for Decision of the Court of Appeal for Ontario dated March 29, 2017** ("Court of Appeal Reasons") at para. 8, A.L.A., Tab 2G at p.65; **Reviewing Court Reasons** at para. 2, A.L.A., Tab 2C at p.15

to take into account the appropriate considerations mandated by *Lessard*, including the probative value of the evidence sought.

23. Specifically, Makuch gave sworn evidence that an order requiring him to provide notes or interviews for the purposes of a criminal investigation would inhibit his ability to gather news. He swore that this is particularly so for sources within the network of militants that he had spent more than a year monitoring, and with whom he had invested significant time and effort to build relationships of trust.[16] Makuch's evidence on this point is unchallenged.

24. In upholding the Production Order, the reviewing judge acknowledged that the material sought amounted to "recordings of communications" between a journalist and his source, but made no reference to Makuch's evidence or to the broader concern that such orders would have a chilling effect.[17] Instead, the reviewing judge simply held that Shirdon was not a confidential source and that the bulk of information in the communications had already been published by Makuch in his articles.[18]

25. When it came to weighing the interests of law enforcement, the reviewing judge characterized the Kik screenshots as "important evidence in relation to very serious allegations". He did not consider whether similar information was available from other sources (*i.e.* Shirdon's social media history), the probative value of the Kik screenshots, or even whether Shirdon was still alive or ever likely to face trial.[19] Ultimately, the reviewing judge concluded that the Production Order was one the issuing justice "*could* have" made after consideration of the *Lessard* factors, and upheld it on that basis.[20]

26. Vice and Makuch appealed to the Court of Appeal for Ontario, which upheld the Production Order. Ten media, free expression and civil rights groups intervened in support of their cause. The Court of Appeal discussed the proper standard of review and concluded that the *Garofoli* ("could have") standard was appropriate.[21] The chilling effect of the Production Order is dealt with only briefly in the Court of Appeal's reasons: nowhere does the Court of Appeal acknowledge Makuch's evidence of a chilling effect, or accept that a chilling effect indeed exists in this case. The Court of Appeal concluded that the reviewing judge "implicitly addressed that

16 **Makuch Affidavit** at paras. 17-19, A.L.A., Tab 6 at Pp.324-325
17 **Reviewing Court Reasons** at para. 36, A.L.A., Tab 2C at p.24
18 *Ibid.* at paras. 43-44, A.L.A., Tab 2C at pp.25-26
19 *Ibid.* at para. 46, A.L.A., Tab 2C at pp.26
20 *Ibid.* at para. 47, A.L.A., Tab 2C at p.26 (emphasis in original)
21 **Court of Appeal Reasons** at paras. 18-27, A.L.A., Tab 2G at pp.68-72

concern as it existed on the facts of this case by identifying factors that tended to significantly reduce the potential 'chilling effect'."[22]

27. When asked to evaluate the significance, if any, of the Kik screenshots to law enforcement's interest in prosecuting Shirdon and the prospects of such a prosecution ever reaching trial, the Court of Appeal effectively refused to scrutinize the Crown's position and accepted it at face value. The Court of Appeal suggested that to do otherwise would be "to seriously confuse the role of those who investigate and prosecute crime with the role of those who adjudicate the cases brought by the prosecution against individuals."[23]

PART II – QUESTIONS IN ISSUE

28. The question before this Court is whether this case raises a question of public importance, such that leave to appeal ought to be granted. This case raises the following questions of public importance:

A. What principles should govern the "balancing" analysis in a case of a search warrant or production order targeting journalist-source communications? More specifically:

   1. how should courts assess and weigh the negative or "chilling" impact of such a production order on the media's news-gathering abilities?

   2. how (if at all) should courts assess and weigh the probative value and usefulness of the material sought, in terms of their actual value to a criminal investigation or the prosecution of a crime?

B. What standard of review should the superior courts apply in the review of *ex parte* production orders targeting the media, in order to ensure due consideration and weight is given to the *Lessard* factors?

PART III – STATEMENT OF ARGUMENT

A. The Balancing Consistently Tilts Towards Law Enforcement, and Must be Revisited

29. In *Lessard*, a majority of this Court articulated nine factors for courts to consider when deciding whether to issue an order targeting the media and, if so, on what terms. The heart of the *Lessard* approach is the "balancing" analysis required under the third factor:

> 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**

22 *Ibid.* at para. 38, A.L.A., Tab 2G at p.77

23 *Ibid.* at para. 41, A.L.A., Tab 2G at p.78

> **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. Generally speaking, the news media will not be implicated in the crime under investigation. They are truly an innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant.[24]

30. This Court has never considered how this balance applies as between the media's interests in gathering news and the state's interests in prosecuting criminal activity, in the context of an order seeking journalist-source communications.[25] In practice, lower courts have been misapplying, or failing to apply, the balancing test established in *Lessard.* It is critical that this Court address this recurring issue, and provide guidance for the test's modern application. .

31. In *Lessard*, this Court emphasized that the media are entitled to "particularly careful" and "special" consideration because of the importance of their role in a democratic society[26] before any search warrant or production order is issued. The balancing of interests is "a difficult and complex process"[27] that is "always a difficult and delicate task."[28]

32. More than 25 years later, it is clear that the balancing exercise envisioned in *Lessard* has not been borne out in practice. Far from being given particularly careful consideration, even where journalist-source communications are at stake, lower courts give short shrift to the pernicious effects of warrants and production orders on the media's ability to gather or report the news.[29] On the other side of the balancing scale, courts engage in little scrutiny when it comes to the purported value of the material to law enforcement.[30] The decisions of the courts below are typical in both respects.

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24 ***Lessard*** at para. 15 (emphasis added).

25 Neither *Lessard*, nor *New Brunswick*, involved journalist-source communications (or sources at all). In *National Post*, the production order did not involve a request for journalist-source communications; instead, the forged document and envelope being sought by the RCMP were "the very *actus reus* of the alleged crime" (para. 77).

26 ***Lessard*** at para. 46. See also ***New Brunswick*** at paras. 21, 32.

27 ***Lessard*** at para. 46.

28 ***New Brunswick*** at para. 34

29 See, for example, ***Toronto Star v. The Queen***, 2017 ONSC 1190 at paras. 31-32, http://canlii.ca/t/gxlwp ["*Toronto Star*"]; ***CBC v. SPPC et al.***, Superior Court of Quebec File No. 500-36-008128-160 (March 17, 2017) at paras. 72-74, ["*SPPC*"]; ***CTV v. Attorney General of Canada***, 2015 BCPC 65 at para. 48, http://canlii.ca/t/gh0gr ["*CTV (BCPC)*"]; ***CTV v. Her Majesty the Queen***, 2015 ONSC 4842 at paras. 42-43, http://canlii.ca/t/gkvlw ["*CTV (SCJ)*"]; ***HMTQ v. Meigs et al.***, 2003 BCSC 1816 at para. 62, http://canlii.ca/t/1g74b ["*Meigs*"].

30 See, for example, ***SPPC*** at paras. 69-70; ***CTV (BCPC)*** at para. 35; ***Meigs*** at para 63; ***CTV (SCJ)*** at para. 35; ***The Vancouver Sun v. British Columbia***, 2011 BCSC 1736 at para. 73, http://canlii.ca/t/fpd09 ["*Vancouver Sun*"].

33. As a result of this asymmetrical approach, the Crown has experienced near-perfect success in its attempts to seize material from the media – including journalist-source communications. As far as the applicants are aware, of the all the reported and unreported decisions since *Lessard* dealing with police or crown seizure of material from the media, the balance struck has favoured the media only once.[31] This is not a balance at all.

34. Meanwhile, this Court's decisions since *Lessard* only further highlight the importance of the media in Canada's democratic order, including the need to protect the media's ability to gather and report the news, and the ways in which state conduct can undermine this ability. In *National Post*, for example, this Court confirmed that news-gathering is worthy of constitutional protection[32], and recognized the myriad of ways in which orders targeting the media can disrupt news gathering (adopting, in part, McLachlin J's dissenting opinion in *Lessard*).[33]

35. Simply put, when it comes to protecting the interests of the media in the context of search warrants and production orders, this Court and the lower courts are on diverging paths. The balancing approach established in *Lessard* may be sound in principle, but it is not working in practice. This is perhaps unsurprising, as this Court has never had the opportunity to provide lower courts with further guidance on how to apply the *Lessard* factors in the context of journalist-source communications.[34]

36. The time is ripe for this Court to address the growing chasm between the balancing analysis required by *Lessard* and the lower courts' approach to routinely granting warrants or production orders targeting the media. This case provides an ideal vehicle for these issues, since it squarely raises:

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31 For a full list of cases where search warrants and production orders were made against the media, see Appendix 1 to this memorandum. As far as the applicants are aware, the only case where the *Lessard* balancing analysis has favoured the media and resulted in the order sought being denied is ***R. v. CBC***, 2009 MBCA 122, http://canlii.ca/t/26zx1 ["*CBC (MBCA)*"].

In the few remaining cases where warrants or orders were quashed, it was for technical reasons separate and apart from the balancing analysis: see, for example, *CBC v. Her Majesty the Queen*, 1994 CanLII 4430 (N.L. SCTD), http://canlii.ca/t/1nm5n (failure to make full and frank disclosure); ***R. v. Canadian Broadcasting Corporation***, 2005 NLTD 218, http://canlii.ca/t/1m85p, aff'd 2007 NLCA 62, http://canlii.ca/t/1t417 (failure to make full and frank disclosure) [*"CBC (NL)"*]; ***R. v. Dunphy***, 2006 CanLII 6575 (ON S.C.), http://canlii.ca/t/1mqqk (failure to meet statutory requirements) ["*Dunphy*"]; ***Corporation Sun Média c. Barbès***, 2008 QCCS 3996, http://canlii.ca/t/20mmd (insufficient evidence in ITO), ["*Barbès*"].

32 ***National Post,*** at para. 33

33 *Ibid.* at para. 78

34 The focus of this Court's decision in *National Post* was on establishing a case-by-case privilege framework for confidential sources. This Court adverts to the *Lessard* factors in only in a single passing paragraph: see para. 87.

A. the chilling effect implications of seizing journalist-source communications – an issue this Court has not addressed, and one that will have significant implications for media outlets, law enforcement and potential news sources and news consumers;

B. the question of whether and under what circumstances the state should be allowed to invade the 21st century technological equivalents of a journalist's notebook and interview recordings. This issue was raised in *obiter* by La Forest J's concurring opinion in *Lessard*[35], but has not since been revisited by this Court;

C. the degree of scrutiny that should be applied when reviewing law enforcement's interest in obtaining the material sought, and its actual value to an investigation or (in this case) to assist in prosecuting Shirdon in a trial that may never take place.

37. The stakes are high – not just for Vice and Makuch, but for news gatherers and news audiences of all kinds. Journalist-source communications are the lifeblood of a free and vibrant press. If sources must request that their identities be kept confidential to have their communications shielded from access-at-will by law enforcement, it will have a severe impact on the flow of this information, and the ability of journalists to do their jobs. The impact of cases like this will be felt in newsrooms across the country.

38. The public importance of issues relating to the ability of journalists to gather news and speak to sources without the interference of law enforcement is confirmed by an ongoing public inquiry in Quebec[36] and legislative initiatives in Parliament[37], both of which were prompted by police surveillance of journalists and concerns for protecting confidential sources. But neither the inquiry, nor the proposed legislation, address protections for communications with sources who have not expressly requested confidentiality. If such protections are to be meaningfully recognized and enforced, then that message must come from this Court.

39. Those protections require restoring the true meaning of balancing envisioned in *Lessard.* As this Court noted in the context of *ex parte* judicial authorizations of wiretaps, an issuing judge

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35 ***Lessard*** at paras. 5, 7.

36 On November 11, 2016, the Québec government created la *Commission d'enquête sur la protection de la confidentialité des sources journalistiques*, but the focus of the Commission is on the protection of confidential sources: https://www.cepcsj.gouv.qc.ca/la-commission/mandat-de-la-commission/

37 On April 11, 2017, the Senate passed Bill S-231 (*Journalistic Sources Protection Act*), which is currently at the first reading stage in the House of Commons. Again, however, the focus of the bill is on confidential sources: http://www.parl.ca/LegisInfo/BillDetails.aspx?Bill=S231&Language=E&Mode=1&Parl=42&Ses=1

"should not view himself or herself as a mere rubber stamp".[38] Where the state seeks to seize records of journalist-source communications, this result depends on this Court clarifying how both sides of the balancing ledger – the harm to the media's ability to gather and report news, and the benefit to law enforcement's prosecution of crimes – should be weighed and assessed.

1. The Chilling Effect in the Case of Journalist-Source Communications

40. A major reason why lower courts consistently come down on the side of law enforcement's interests over those of the media, is their failure to appreciate – or, in the case at bar, to address at all – the chilling effect of orders targeting the media.

41. The facts of this case allow this Court to provide much-needed guidance in this area by elaborating on (i) whether evidence is required, and the effect of uncontradicted evidence, in establishing a chill in the case of orders seeking production of journalist-source communications; (ii) the impact of an order intruding on a journalist's private work product; and (iii) whether prior publication should be considered to attenuate that chilling effect or intrusion, or to attenuate the interests of law enforcement in obtaining access before trial.

A chilling effect should be presumed in all journalist-source communication cases

42. This Court in *National Post* recognized a presumptive chilling effect for confidential sources. In cases of journalist-source communications, however, most courts pay little more than lip service to a potential chilling effect on sources, without actually weighing it heavily, or at all, in the balancing equation.[39] This will only change if this Court recognizes a presumptive chilling effect in **all** cases involving journalist-source communications, and reinforces the strength of that presumption according to the circumstances of the case.[40]

43. In cases of journalist-source communications, this Court has never answered the question of whether a chilling effect can be presumed (and the strength of any such presumption). Faced with this jurisprudential void, many courts have drawn a dangerous and inapt analogy between the active interplay of trust and expression involved in journalist-source communications and the

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[38] *R. v. Araujo*, [2000] 2 SCR 992, 2000 SCC 65 (CanLII), http://canlii.ca/t/5231

39 See footnote 30, *supra*.

[40] As Justice McLachlan pointed out in her dissent in *Lessard*, the "prospect of seizure of press material in future cases without the imposition of conditions to protect press freedom and the identity of informants . . . creates the chilling effect."

photographic or video recording of public events in *Lessard* and *New Brunswick.*[41] In terms of chilling effect, there is a world of difference between the two. Indeed, there was no journalist-source relationship between the media and those caught on film in *Lessard* and *New Brunswick*.

44. By contrast, in *National Post*, this Court found that a chilling effect can be presumed where an order targets the identity of a journalist's confidential source.

45. However, neither *Lessard/New Brunswick* nor *National Post* addressed how to deal with the chilling effect in the common and recurring scenario where law enforcement seeks access to the content of journalist-source communications or a journalist's notes or recordings.

46. Whenever the state seeks to compel information or records from the media for use against their own sources, a chilling effect should be presumed as a matter of logic and of law. The strength of that presumption will necessarily vary depending on the circumstances, but the key fact of a chill should not have to be proven in every case.

47. This Court and others have held that evidence of a chilling effect is not always necessary.[42] Scientific or quantitative evidence of a chilling effect on news gathering is inherently difficult, if not impossible, to measure and provide. Just as the Court in *National Post* was prepared to accept that confidential sources will be more reluctant to come forward if their identities are revealed, the Court should clarify that every source – and particularly those already in an adversarial relationship with the state – will be more reluctant to come forward if journalists are routinely compelled to turn over all records of their communications to the state. This is precisely the danger whenever journalists or media organizations are compelled to serve as the *de facto* "investigative arm of the police"[43].

48. But this effect is not limited to the source. In *CBC (MBCA)*, the Manitoba Court of Appeal explained how this chilling effect also results in a broader erosion of the public's perceptions of the media's independence and impartiality:

> …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... The media should be the last rather than the first place that

41 See, for example, ***CTV (BCPC)*** at para. 48; ***CTV (SCJ)*** at para. 43; ***R. v. Erickson***, [2002] O.J. No. 3341 (S.C.J.) at para. 41

42 ***R. v. Khawaja***, [2012] 3 S.C.R. 555 at para 79, http://canlii.ca/t/fv831; ***St. Elizabeth Home Society v Hamilton (City)***, 2008 ONCA 182 at para 32, http://canlii.ca/t/1w3l4

43 ***Lessard*** at para. 7 (*per* La Forest J)

> 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.[44]

The Manitoba Court of Appeal stands virtually alone in recognizing (without requiring evidence) these dangers of the chilling effect in a case of journalist-source communications, and in demonstrating a serious commitment to weighing these media interests in the balancing analysis.

49. Even if this Court were to disagree with *CBC (MBCA)*, and to find that the connection between the seizure of journalist-source communications and a chilling effect to be "too attenuated"[45] such that affirmative evidence of a chilling effect must be adduced, then it is important for the media, law enforcement and lower courts, to have that clarity. It will have a significant impact on how parties approach these cases, and how courts across the country decide them. It may also influence how willing sources and potential sources may be to provide information to journalists "on the record", or at all.

50. A separate question is how lower courts must assess evidence of a chilling effect based on personal experience and knowledge, rather than scientific study. In this case, Mr. Makuch filed unchallenged affidavit evidence that the production order would harm his ability to gather and report the news, based on his own experience as a journalist. Even the investigating officer acknowledged this chilling effect by stating in his sworn ITO, "It is a reasonable inference that [Vice] would not be able to stage this kind of interview with a purported member of a terrorist group if they had a reputation for immediately handing original evidence to the police." Yet none of the courts below even referenced or considered this evidence.

51. This Court should address the significance of direct evidence of the chilling effect in cases of journalist-source communications, and whether ignoring such evidence amounts to a reversible error, given the importance of the chilling effect in the balancing analysis.

Intrusion into a journalist's work product strengthens the chilling effect

52. This Court should also consider whether orders seeking a "reporter's work product" (as described by La Forest J in *Lessard*) strengthens the chilling effect, and whether this impact can be presumed or must be proven. This is particularly important in the era of modern electronic communications.

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44 ***CBC (MBCA)*** at para 74

45 See, for example, ***Moysa v. Alberta (Labour Relations Board)***, [1989] 1 S.C.R. 1572, http://canlii.ca/t/1ft5v

53. The chill from ordering journalist-source communications turned over to the state comes not just from the impact of those orders on sources and audiences, but from their impact on journalists as well. In *National Post*, a majority of this Court endorsed the multi-faceted and realistic conception of the chilling effect put forward by McLachlin J (as she then was) in her dissenting opinion in *Lessard*.[46] This approach recognizes that the impact of the chilling effect is not limited to sources. Reporters may be deterred from recording or preserving their work, or may resort to self-censorship to conceal the fact that they possess information of interest to police, in an effort to protect sources and to preserve their ability to gather news in the future.[47]

54. This aspect of the chilling effect is closely linked to the concerns raised in La Forest J's concurring opinion in *Lessard*, where he accepted (without evidence) that a chilling effect would result if the police sought to seize aspects of a "reporter's work product" such as "a reporter's personal notes, recordings of interviews and source contact lists".[48]

55. Yet despite La Forest's concurrence in *Lessard* and the majority's views in *National Post*, this important aspect of the chilling effect receives virtually no attention in lower court decisions. Its implications have never been addressed by a majority this Court (nor did such implications arise on the facts in *Lessard*, *New Brunswick or National Post*). This case, however, is different: the Kik text message records that Makuch has been ordered to produce are the 21st century equivalent of an interview recording, and comprise a journalist's work product.

56. This Court has an established track record of revisiting its prior decisions to explain how legal principles articulated in another era should apply in the context of modern technology, including by recognizing the heightened privacy interest in text messages.[49] The Court has also recognized that electronic records can include additional (and often private) information beyond the image or words published, including the physical locations of parties involved, the time and date the records were made, and other meta-data.[50] The time has come to bring that same lens to the work of journalists and the media when it comes to the *Lessard* balancing analysis.

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46 ***National Post*** at para 78; ***Lessard*** at para 66 (*per* McLachlin J, dissenting)

47 *Ibid.* Technically, these observations were made in the context of a search warrant case, but (like the rest of the factors articulated in *Lessard*) many of them apply with equal force to production orders.

48 ***Lessard*** at paras 27, 29. It may be argued the majority implicitly agreed with La Forest J when they wrote: "Whether the search of a media office can be considered reasonable will depend on a number of factors including the nature of the objects to be seized" (emphasis added): ***New Brunswick*** at para 32.

49 ***R. v. TELUS Communications Co.***, [2013] 2 S.C.R. 3, http://canlii.ca/t/fwq20

50 ***R. v. Cole***, [2012] 3 S.C.R. 34 at para. 96, http://canlii.ca/t/ft969

Prior publication does not weaken the chilling effect

57. The courts below – and courts across the country[51] – are quick to equate prior publication with the absence of a chilling effect. They use it as a basis to require production, even of journalist-source communications. Such an approach short-circuits the balancing analysis under *Lessard*. This Court should address whether a more nuanced view of prior publication is required.

58. In *Lessard*, this Court held that "[i]f the information sought has been disseminated by the media in whole or in part, this will be a factor which will favour the issuing of the search warrant."[52] Perhaps anticipating the limits of the prior publication factor, however, this Court stressed in *New Brunswick* that "[t]he factors which may be vital in assessing the reasonableness of one search may be irrelevant in another."[53] These statements leave it far from clear whether or not this Court has recognized that prior publication eliminates the chilling effect in all cases.

59. Prior publication should not displace the presumptive chill that flows from a production order targeting journalist-source communications. In this context, the "chill" does not come from being identified in published material; it comes from source's knowledge that all information and documents he or she provides to a journalist can be used to assist the state in a prosecution against them, including discussions that may be "off the record" or not for attribution. Depending on the circumstances, a lack of prior publication may exacerbate the chill, but the fact of prior publication cannot significantly attenuate it.

60. The prior publication factor should also play a less important role given the realities of modern modes of communication. *Lessard* and *New Brunswick* were decided in the context of protestors (not sources) committing criminal activity in public view, which was captured in photographs and videotapes: a record of past events – nothing more. Lower courts must be sensitive to modern realities when considering the intrusiveness of the search in question, recognizing that the records sought may contain meta-data and other unpublished information.

61. Finally, the prior publication factor does little to address the chilling effect on journalists, based upon the privacy interest journalists have in their work product, which is vital to their constitutionally-protected role of gathering news and informing the public, regardless of whether any information contained in that material has been published.

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51 See, for example, ***Meigs*** at paras. 46-48; ***CTV (BCPC)*** at para. 19; ***CTV (SCJ)*** at paras. 42-43; ***SPPC*** at para. 65

52 ***Lessard*** at para. 47

53 ***New Brunswick*** at para 38

2. The Value of the Information Sought to Law Enforcement

62. At the same time that lower courts have downplayed or ignored the chilling effect from warrants or production orders on media targets, they have consistently concluded that the "interests of the state in the investigation and prosecution of crimes" are important and must prevail. Lower courts almost inevitably make this determination by accepting law enforcement's purported need for the material at face value, without scrutiny, as occurred in this case.[54]

63. This Court has never directly addressed the extent to which it is appropriate to examine the probative value of the material sought by the state for the purposes of prosecuting a source (beyond meeting the statutory conditions). Perhaps that is because the value of identifying the alleged offenders was fairly obvious in *Lessard*, *New Brunswick* and *National Post.* But just as the strength of the chilling effect varies according to certain factors, so too does the strength of law enforcement's interests in the production orders and search warrants sought. For the *Lessard* balancing to work as this Court intended, lower courts must be directed to carefully and critically examine, consider and weigh all of the variables that have an impact on the strength of the state's interests in the investigation and prosecution of crimes.

The order should serve an urgent purpose, in terms of protecting the public

64. To avoid some of the confusion plaguing lower court decisions, a clear line ought to be drawn between orders that seek information in order to investigate crimes on an urgent basis and protect the public, and orders that seek to gather evidence solely for prosecution.

65. Cases involving violent demonstrations typically fall into the first category. In *New Brunswick*, for example, this Court held that the throwing of Molotov cocktails at a building "not only damaged the property but constituted a potential threat to the lives and safety of others."[55] Depending on the gravity of the offence and the risk of further criminal activity in Canada, an order may have significant benefits in these circumstances, in terms of quickly investigating the identity of offenders and apprehending them in order to protect the public.

66. It must be recognized however that other cases, including this one, fall into a different category. Such cases demand a more careful and nuanced examination of law enforcement's interests. In particular, this Court should address whether the probative value of the evidence

54 See footnote 31, *supra*.

55 ***New Brunswick*** at para. 34

(including the possibility of a trial) is a relevant consideration and, if so, how that inquiry should be undertaken. The courts below refused to even engage in this assessment.

If the material sought is for a criminal investigation or prosecution, the probative value of the material should be examined

67. Appellate courts have split on the proper approach to this issue, and lower courts generally fail to conduct a thorough examination – a result that benefits law enforcement in the balancing exercise.

68. The issue is an important one. By refusing to examine the probative value of the material sought, the Court of Appeal essentially determined, *a priori*, that the law enforcement interests favouring disclosure cannot be second-guessed.[56] This is a dangerous and non-contextual approach. It is anathema to type of delicate balancing required by this Court in *Lessard*. It is also irreconcilable with the approach of the Manitoba Court of Appeal in *CBC (MBCA)*, which involved a robust analysis of whether the material sought would have value to the police.[57]

69. Whatever the proper approach, issuing courts, reviewing courts and appellate courts across the country would benefit from clarity on this question. If this Court concludes that a probative value inquiry is a necessary part of the balancing analysis, then further guidance is necessary as to how that inquiry should be carried out. In cases where law enforcement seeks the material to identify alleged offenders – as in *Lessard, New Brunswick* and *National Post* – the value of the material may be obvious. In others, such as the present case, a more rigorous analysis may be required to assess this side of the balancing equation.

70. On the facts of this case, three key points stand out.

71. First, when a search warrant or production order seeks material or information for use in a criminal prosecution, this Court should address the need to take account of *whether there will be a trial at all.* Here, the chances of that trial are remote at best. Shirdon's whereabouts are unknown and he may not even be alive. He has been charged *in absentia*, but he cannot be tried *in absentia*

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[56] The Court of Appeal in the case at bar rejected outright the Appellants' suggestion that the Court should assess the probative value and a demonstrated need for the evidence sought by the production order, by stating at para, 41 of the decision, "To suggest that a judge can foreclose police access to relevant evidence otherwise producible in law, because the judge thinks the prosecution does not need the evidence to prove its case, is to seriously confuse the role of those who investigate and prosecute crime with the role of those who adjudicate the cases brought by the prosecution against individuals."

[57] ***CBC (MBCA)*** at paras. 63-64, 75. See also ***Dunphy***, at paras. 49-52

absent some degree of cooperation on his part,[58] and there is nothing to suggest that will be forthcoming.

72. Second, the value of the material sought should be considered against the backdrop of other material that is, or could reasonably be expected to be, available at an eventual trial. In this case, as discussed above, the ITO makes plain that Shirdon has been public and explicit about expressing his involvement with ISIS on multiple social media platforms over many months. The material sought from VICE and Mr. Makuch is, at best, simply more of the same. Moreover, the fact that Shirdon was using a pseudonym during the Kik chats (and never directly identified himself to Makuch) makes it highly unlikely that those chats could be proven, beyond a reasonable doubt, to be communications from Shirdon.

73. Third, the urgency and timing of the production order must be considered. Even if one assumes that Shirdon will eventually stand trial, that will not happen for many years. The RCMP have not explained why they require the material from VICE and Mr. Makuch *now*. The Crown could subpoena Mr. Makuch and copies of the Kik screenshots at trial, or request a production order once a trial date is actually set. Although such a subpoena or order may still be contested as having a chilling effect, at least the interests of the state in advancing a prosecution would have crystallized.[59] At this stage, they remain contingent, if not speculative.

74. The facts of this case lay plain the problem with the prevailing approach taken by lower courts in assessing the law enforcement side of the balancing equation. In this case, it was (and remains) premature to assign *any* value to the law enforcement interest given the remote possibility of Shirdon actually standing trial, the other available evidence, and the lack of urgency. Yet without applying the necessary degree of scrutiny, law enforcement interests were uncritically accepted as weighing heavily in the balance. The result is a Production Order for unnecessary evidence in support of a prosecution that will, in all likelihood, never proceed.

B. No Deference for *Ex Parte* Orders Targeting Journalist-Source Communications

75. The failure to recognize and weigh the chilling effects of search warrants and production orders targeting the media, and the uncritical acceptance of law enforcement's interests in the

58 Sections 650 and 650.01 of the *Criminal Code*.

59 This was the approach taken by the Crown in ***Toronto Star***, where a production order was sought in late December 2016 for a trial slated to occur in March 2017. In his majority opinion in *Lessard*, Justice Cory also noted that the "degree of urgency of the search" and whether there is an "urgent need to obtain evidence" are factors to consider when determining if a search warrant against a media outlet is justified.

material sought, are compounded by the deferential standard of review applied by many reviewing courts and endorsed by the court below. That standard was developed in the context of applications involving nothing more than the satisfaction of statutory preconditions. It is wholly unsuited to the fact-sensitive and value-laden balancing, as mandated by this Court in *Lessard*. It is far too deferential to law enforcement interests.

76. This Court has never addressed the issue of whether *Garofoli*, or a modified standard of review, should apply in the context of an order targeting journalist-source communications.[60]

77. The Court of Appeal below refused to deviate from the *Garofoli* standard. Writing for the panel, Doherty JA explained: "While no doubt additional considerations come into play with a media target, I do not see how they make a reasonableness assessment more difficult, or less appropriate."[61] But the reasonableness assessment ***is*** more difficult and less appropriate, precisely because of the delicate and often complicated nature of the *Lessard* balancing exercise.

78. Without an opportunity to hear evidence and argument from the media, issuing courts are not conducting any balancing using the *Lessard* factors, which this Court has stated is a requirement. Only one side of the story is heard. Only one set of interests is weighed. Against this backdrop, it is not surprising that such *ex parte* orders are almost always granted.[62] Thus for the balancing mandated by this Court to occur at all, it must occur on review.

79. On such review, given the constitutionally protected interests at stake when the state seeks journalist-source communications, it is inappropriate and artificial to engage in a hypothetical debate about whether an *ex parte* production order "could have" been made. The only question a reviewing court should ask in such cases is whether the production order *should* have been made, on a proper application of the *Lessard* factors, including the balancing analysis. Anything less is an affront to the interests protected in sections 2(b) and 8 of the *Charter*.

80. Even if this Court takes a different view of the appropriate standard for reviewing courts to adopt where an *ex parte* order seeks to compel productions of journalist-source communications, it should consider and decide the issue. As things stand, confusion reigns as to how the standard of review should be articulated and applied. Most courts have applied *Garofoli* and adopted a

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60 In ***National Post***, this Court simply noted that "the reviewing judge is generally bound, in deciding this issue, to afford a measure of deference to the determination of the issuing justice": see para. 80.

61 Court of Appeal Reasons at para. 22, A.L.A., Tab 2G, p.70

62 Recent statistics from the Service de Police de la Ville de Montreal suggests that such orders are granted routinely by justices of the peace on an *ex parte* basis: see p. 41

"narrow" scope of judicial review.[63] Some courts have suggested that without the issuing court having information before it that relates to the media's interests, balancing is impossible and deference is inappropriate.[64] Others have applied a "modified *Garofoli* test" amounting to something more searching than the "could have" standard, but less than *de novo* review.[65]

81. Even the court below has sent mixed messages. In *CBC (ONCA),* Moldaver JA (as he then was) did not reference *Garofoli* and explained intervention was appropriate if the issuing judge "failed to give adequate or any consideration to a pertinent factor".[66] In this case, the same Court– without referencing *CBC (ONCA)* – explicitly endorsed *Garofoli*, but then confusingly added: "Practically speaking, the more significant the material placed before the reviewing judge, the more the review will take on the appearance of a *de novo* assessment of the merits."[67]

82. What these conflicting statements from appellate and reviewing courts suggest is that there is a genuine struggle in how to reconcile the standard approach to reviewing *ex parte* orders with the difficult, complex and delicate balancing exercise required by *Lessard.* This Court should address this vexing issue once and for all, so that reviewing courts across the country can approach these important questions with a degree of consistency and predictability.

PART IV and V – ORDERS SOUGHT

The Applicants respectfully request:

A. leave to appeal the decision of the Ontario Court of Appeal; or

B. in the alternative, an oral hearing to address whether leave should be granted; and

C. that no costs be ordered in the present application.

May 19, 2017 ALL OF WHICH IS RESPECTFULLY SUBMITTED

For:

M. Philip Tunley / Iain A.C. Mackinnon / Justin Safayeni
Counsel to the Applicants

63 ***Vancouver Sun*** at paras. 6, 52; ***Toronto Star*** at paras. 35-36; ***Meigs*** at paras. 58, 62; ***R. v. CBC*** (1992), 77 C.C.C. (3d) 341 (S.C.J.) at para. 28

64 ***CBC (NL)*** at paras. 72, 74, aff'd 2007 NLCA 62 at paras 29, 35-40; ***Barbès, supra***, at para. 28

65 ***CBC (MBCA)*** at para. 34

66 ***R. v. Canadian Broadcasting Corp.*** (2001), 52 O.R. (3d) 757 (C.A.) at para. 54. At footnote 2, Moldaver JA added: "I leave for another day whether an enlarged standard of review might be warranted in circumstances involving different facts and/or different *Charter* considerations."

67 Court of Appeal Reasons at para. 23, A.L.A Tab 2G, p.70

Appendix 1

Cases where production orders or search warrants have been upheld against the media

CASE	BRIEF DESCRIPTION OF ORDER
R. v. Canadian Broadcasting Corporation (1992), 77 C.C.C. (3d) 341 (S.C.J.)	Search warrant of media premises to obtain unpublished videos and photographs of riot
R. v. Canadian Broadcasting Corporation (2001), 52 O.R. (3d) 757 (C.A.)	Search warrant of media premises to obtain film or photographs of demonstration
Groupe TVA inc. c. Réjean Lavoie (Cour Supérieure REJB 2003-50466)	Search warrant of media premises to obtain video of a demonstration
HMTQ v. Meigs et al., 2003 BCSC 1816	Search warrant of media premises for a video tape recording of man in custody, awaiting trial on criminal charges
R. v. National Post, [2010] 1 S.C.R. 477	Search warrant compelling production of document alleged to be forged and envelope
The Vancouver Sun v. British Columbia, 2011 BCSC 1736[68]	Production order for digital photographs or video files of Stanley Cup riots
Global TV v. Alberta, 2013 ABPC 342	Production order for all video and audio recordings and electronic material that resulted from various communications between journalist and persons of interest in a murder investigation
CTV v. IIO 2013 BCPC 252	Production order for all video footage relating to an incident where a police officer shot and killed an armed man
Thomson Reuters Canada Ltd. v. The Queen 2013 ONCJ 568	Production order for all email communications between journalist and source, for use in a Competition Bureau investigation
CTV v. Attorney General of Canada 2015 BCPC 0065	Production order for video and audio recordings and notes created during media interviews with a source charged with failure to stop at the scene of an accident causing bodily harm or death
CTV v. Her Majesty the Queen,	Production order for media interviews with a source

[68] The orders were technically quashed because of a failure to identify geographic limits, but in all other respects were upheld (see para. 94). Presumably, new orders were sought with more clearly defined geographic limits.

CASE	**BRIEF DESCRIPTION OF ORDER**
2015 ONSC 4842	charged with failing to provide the necessaries of life
Toronto Star v. The Queen 2017 ONSC 1190	Production order for recordings of a media interview with a source facing a number of charges
CBC v. SPPC (03/17/2017; SCQ No 500-36-008128-160)	Production order for recordings of a journalist's telephone conversations with two sources, later charged with fraud and corruption

PART VI – TABLE OF AUTHORITIES

CASE LAW	**Referring Paragraph(s)**
Canadian Broadcasting Corp. v. Lessard, [1991] 3 S.C.R. 421	2, 4, 6, 7, 8, 10, 11, 12, 22, 25, 29, 30, 31, 32, 33, 34, 35, 36, 42, 43, 45, 47, 52, 53, 54, 55, 58, 60, 63, 68, 69, 75, 82
Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1991] 3 S.C.R. 459	2, 4, 30, 31, 43, 45, 54, 55, 58, 60, 63, 65, 69
R. v. National Post [2010] 1 S.C.R. 477	3, 4, 34, 35, 42, 44, 45, 47, 53, 55, 63, 69, 76
Toronto Star v. The Queen, 2017 ONSC 1190	32, 73, 80
CBC v. SPPC et al., Superior Court of Quebec File No. 500-36-008128-160 (March 17, 2017)	32, 42, 57
CTV v. Attorney General of Canada, 2015 BCPC 65	32, 42, 43, 57
CTV v. Her Majesty the Queen, 2015 ONSC 4842	32, 42, 43, 57
HMTQ v. Meigs et al., 2003 BCSC 1816	32, 42, 57, 80
The Vancouver Sun v. British Columbia, 2011 BCSC 1736	32, 80
R. v. CBC, 2009 MBCA 122	33, 48, 49, 62, 68, 80
R. v. Canadian Broadcasting Corporation, 2005 NLTD 218, aff'd 2007 NLCA 62	33, 62
R. v. Dunphy, 2006 CanLII 6575 (ON S.C	33, 62, 68
Corporation Sun Média c. Barbès, 2008 QCCS 3996	33, 62, 80
R. v. Araujo, [2000] 2 SCR 992, 2000 SCC 65	39
R. v. Erickson, [2002] O.J. No. 3341 (S.C.J.)	43
R. v. Khawaja, [2012] 3 S.C.R. 555	47

St. Elizabeth Home Society v Hamilton (City), 2008 ONCA 182	47
Moysa v. Alberta (Labour Relations Board), [1989] 1 S.C.R. 1572	49
R. v. TELUS Communications Co., [2013] 2 S.C.R. 3	56
R. v. Cole, [2012] 3 S.C.R. 34	56
R. v. CBC (1992), 77 C.C.C. (3d) 342 (S.C.J.)	80
CBC (NL), aff'd 2007 NLCA 62	80
R. v. Canadian Broadcasting Corp. (2001), 52 O.R. (3d) 757 (C.A.)	81
Commission d'enquête sur la protection de la confidentialité des sources journalistiques	38
Bill S-231 (*Journalistic Sources Protection Act*), as passed by the Senate	38

PART VII – STATUTES AND REGULATIONS

Criminal Code, R.S.C. 1985, c. C-46 (current)

General production order
487.014 (1) Subject to sections 487.015 to 487.018, on ex parte application made by a peace officer or public officer, a justice or judge may order a person to produce a document that is a copy of a document that is in their possession or control when they receive the order, or to prepare and produce a document containing data that is in their possession or control at that time.

Conditions for making order
(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that

(a) an offence has been or will be committed under this or any other Act of Parliament; and

(b) the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence.

Ordonnance générale de communication
487.014 (1) Sous réserve des articles 487.015 à 487.018, le juge de paix ou le juge peut, sur demande *ex parte* présentée par un agent de la paix ou un fonctionnaire public, ordonner à toute personne de communiquer un document qui est la copie d'un document qui est en sa possession ou à sa disposition au moment où elle reçoit l'ordonnance ou d'établir et de communiquer un document comportant des données qui sont en sa possession ou à sa disposition à ce moment.

Conditions préalables
(2) Il ne rend l'ordonnance que s'il est convaincu, par une dénonciation sous serment faite selon la formule 5.004, qu'il existe des motifs raisonnables de croire, à la fois :

(a) qu'une infraction à la présente loi ou à toute autre loi fédérale a été ou sera commise;

(b) que le document ou les données sont en la possession de la personne ou à sa disposition et fourniront une preuve concernant la perpétration de l'infraction.

Criminal Code, R.S.C. 1985, c. C-46 (at the time Production Order was issued)

487.012 (1) A justice or judge may order a person, other than a person under investigation for an offence referred to in paragraph (3)(*a*),

(*a*) to produce documents, or copies of them certified by affidavit to be true copies, or to produce data; or

(*b*) to prepare a document based on documents or data already in existence and produce it.

Production to peace officer
(2) The order shall require the documents or data to be produced within the time, at the place and in the form specified and given

487.012 (1) Sauf si elle fait l'objet d'une enquête relative à l'infraction visée à l'alinéa (3)a), un juge de paix ou un juge peut ordonner à une personne :

(a) de communiquer des documents — originaux ou copies certifiées conformes par affidavit — ou des données;

(b) de préparer un document à partir de documents ou données existants et de le communiquer.

Commmunication à un agent de la paix
(2) L'ordonnance précise le moment, le lieu et la forme de la communication ainsi que la

(*a*) to a peace officer named in the order; or

(*b*) to a public officer named in the order, who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament.

Conditions for issuance of order
(3) Before making an order, the justice or judge must be satisfied, on the basis of an ex parte application containing information on oath in writing, that there are reasonable grounds to believe that

(*a*) an offence against this Act or any other Act of Parliament has been or is suspected to have been committed;

(*b*) the documents or data will afford evidence respecting the commission of the offence; and

(*c*) the person who is subject to the order has possession or control of the documents or data.

Terms and conditions
(4) The order may contain any terms and conditions that the justice or judge considers advisable in the circumstances, including terms and conditions to protect a privileged communication between a lawyer and their client or, in the province of Quebec, between a lawyer or a notary and their client.

Power to revoke, renew or vary order
(5) The justice or judge who made the order, or a judge of the same territorial division, may revoke, renew or vary the order on an *ex parte* application made by the peace officer or public officer named in the order.

personne à qui elle est faite — agent de la paix ou fonctionnaire public nommé ou désigné pour l'application ou l'exécution d'une loi fédérale ou provinciale et chargé notamment de faire observer la présente loi ou toute autre loi fédérale.

Conditions à remplir
(3) Le juge de paix ou le juge ne rend l'ordonnance que s'il est convaincu, à la suite d'une dénonciation par écrit faite sous serment et présentée *ex parte*, qu'il existe des motifs raisonnables de croire que les conditions suivantes sont réunies :

(a) une infraction à la présente loi ou à toute autre loi fédérale a été ou est présumée avoir été commise;

(b) les documents ou données fourniront une preuve touchant la perpétration de l'infraction;

(c) les documents ou données sont en la possession de la personne en cause ou à sa disposition.

Conditions
(4) L'ordonnance peut être assortie des conditions que le juge de paix ou le juge estime indiquées, notamment pour protéger les communications privilégiées entre l'avocat — et, dans la province de Québec, le notaire — et son client.

Modification, renouvellement et révocation
(5) Le juge de paix ou le juge qui a rendu l'ordonnance — ou un juge de la même circonscription territoriale — peut, sur demande présentée *ex parte* par l'agent de la paix ou le fonctionnaire public nommé dans l'ordonnance, la modifier, la renouveler ou la révoquer.