SCC 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

Applicants (Applicants)

- and -

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

Respondent (Respondent)

REPLY MEMORANDUM OF THE APPLICANTS

(Rule 28 of the *Rules of the Supreme Court of Canada*)

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A. Overview

1. Stripped to its core, the Respondent's position on this application rests on the following propositions:

a) the *Lessard* balancing test is working just fine and has produced even-handed results in practice. Therefore, there is no need for further guidance on any aspect of the *Lessard* test;

b) the production order in this case caused no chilling effect, because it involved a non-confidential source whose words were already published;

c) it is both impossible and inappropriate for courts to assess the probative value of the materials sought by law enforcement in these types of cases; and

d) any issues pertaining to the standard of review can be addressed through the discretion to provide the media with notice.

2. All of these propositions are flawed. When the Respondent's arguments are examined in detail, they reaffirm the need for this Court's intervention to provide clarity, consistency and a long-overdue recalibration of the *Lessard* balancing analysis.

B. *Lessard* balancing consistently favours law enforcement

3. The Respondent points to the cases cited in Chart 1 of Appendix A of its Response to suggest that the *Lessard* balancing test is being applied in an even-handed manner by reviewing courts, and does not operate as a "rubber stamp" for the Crown.[1]

4. A closer review of these cases, however, reveals that they offer no support for the Respondent's position. Of the 11 cases in Chart 1, only the *CBC v. Manitoba (Attorney General)*[2] decisions (at both the Queen's Bench and Court of Appeal) turned on a *Lessard* balancing analysis that favoured the media.

5. The remaining nine cases cited by the Respondent involved quashing a warrant or production order for reasons quite apart from the *Lessard* balancing test — such as a failure to provide full and frank disclosure[3]; a failure to meet statutory preconditions for the order sought[4];

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[1] Respondent Memorandum at para. 23.

[2] 2008 MBQB 229, aff'd 2009 MBCA 122.

[3] ***CBC v. Newfoundland & Labrador***, 2007 NLCA 62 at paras. 44-45 (and lower court decision at [1994] N.J. No. 131 (NLTD)).

or a failure to identify the geographic limits of the order sought or properly name the media defendants.[5] Some of the cases cited by the Respondent are even farther afield, involving the distinct legal test for issuing a subpoena under s. 698 of the *Criminal Code* (i.e. that the journalist was likely to give material evidence at trial)[6], or the production of documents under civil rules of procedure.[7]

6. What every case shares in common (apart from *CBC v. Manitoba (Attorney General*)) is that it did not turn on the *Lessard* balancing test This confirms the Applicants' submission that *CBC v. Manitoba (Attorney General)* is the only reviewing court to find that the media's interests in gathering and reporting news outweighed those of law enforcement.

C. *National Post* and this case address fundamentally different issues

7. The Respondent argues that in *R. v. National Post*, this Court endorsed the *Lessard* test and "essentially… found that this test is working."[8] On this basis, the Respondent urges this Court to deny leave. This position misunderstands both *National Post* and the case at bar.

8. *National Post* focused on whether there should be a constitutional privilege for journalists with respect to confidential sources. The case was framed, argued and largely decided in terms of constitutional questions[9] — not a *Lessard* analysis. After concluding that no such constitutional privilege exists, this Court held that Wigmore's common law, case-by-case privilege analysis should be applied in deciding whether journalist-source privilege is made out on a given set of facts.

9. In the course of its 92 paragraph majority judgment in *National Post*, this Court refers to "other *Lessard* conditions" only briefly, in passing.[10] The decision never addresses how the

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[4] ***R. v. Dunphy***, [2006] O.J. No. 850 (Sup. Ct.) at para. 56; ***CBC v. B.C.*** [1994] B.C.J. No. 1543.

[5] ***Vancouver Sun v. British Columbia***, 2011 BCSC 1736 at paras. 80-85.

[6] ***R v. Finkle***, [2007] O.J. No. 3506 (ONSC) at paras. 92-95; ***Ehman v. Saskatchewan (Attorney General)***, [1994] S.J. No. 202.

[7] ***Fullowka v. Royal Oak Mines***, 2001 NWTSC 4 (Sup. Ct.) and ***Wasylyshen v. CBC***, 2005 ABQB 902 (Sup Ct.). In *Fullowka*, the Court expressly distinguished the situation from *Lessard* and other cases involving state-requested material from the media: "These cases, of course, do not address the balancing of factors in a civil context" (see para. 43)

[8] Respondent's Memorandum at paras. 24-25.

[9] ***R. v. National Post***, [2010] 1 S.C.R. 477 at para. 92 ["*National Post*"].

[10] *Ibid.* at paras. 87-88.

Lessard balancing test applies in the context of communications between journalists and non-confidential sources – including whether a chilling effect should be presumed (as it is with confidential sources), whether evidence of a chilling effect is required, whether a chill arises from intruding on a journalist's private work product (apart from its impact on any sources), and whether and to what extent prior publication of a source's words attenuates the chilling effect.

10. There are no clear answers to these questions, either in the case law or anywhere in the Respondent's submissions. For example, the Respondent states: "No guidance is needed to determine whether evidence needs to be called to establish a chilling effect."[11] Tellingly, however, the Respondent fails to provide any further insight into what the answer might be.

11. The case at bar is about addressing these jurisprudential gaps left in the wake of *National Post.* That case provided important guidance and clarification for the protection of a journalist's communications with confidential sources. Here, the Applicants ask this Court to do the same for two much larger (and often overlapping) categories of material essential to the news-gathering function: journalist-source communications and a journalist's private work product.

D. This Court should clarify how to approach the chilling effect

12. The Respondent asserts that there was no chilling effect in this case because Shirdon was not a confidential source and much of the information sought has already been published in Makuch's stories.[12] The Respondent further asserts that both the reviewing judge and the Court of Appeal found "there is no chilling effect" in this case.[13]

13. It is not clear that either level of court below concluded that there was no chilling effect. The reviewing judge made no reference to a chilling effect, to Makuch's evidence of a chilling effect, or to the broader concern that a chill would arise from this type of production order. The Court of Appeal for Ontario dealt with the chilling effect only briefly, and never accepted (or denied) the proposition that the seizure of materials from the Applicants would create a chill.

14. More fundamentally, one of the key reasons that this Court should grant leave in this case is precisely because many reviewing courts (to the extent they address the issue at all) echo the

[11] Respondent's Memorandum at para. 35.

[12] *Ibid.* at paras. 29-32.

[13] *Ibid.* at para. 31.

Respondent's position, and misconstrue how the chilling effect operates on the news-gathering activities of journalists and the media. For these courts, the fact that a source is not confidential, or that a source's statements have been published, effectively ends the chilling effect inquiry and the *Lessard* balancing analysis. Others — notably the Manitoba Court of Appeal in *CBC v. Manitoba (Attorney General)*[14] and McLachlin J.'s dissenting opinion in *Lessard* itself[15] — have taken a more nuanced view of how the chilling effect operates.

15. Indeed, an important part of what causes a chilling effect is the notion that records or information a source provides to a journalist, including off-the-record statements, can be handed over to assist police in a criminal investigation or prosecution. This remains true for confidential and non-confidential sources alike. A chill also arises from journalists being forced to turn over their private work product. Makuch's uncontradicted evidence is that any order requiring him to provide his work product would inhibit his ability to gather and report important news stories — especially where that work product contains records of communications with sources in an adversarial relationship with the state, with whom he had built a relationship of trust.[16]

16. Whatever the proper approach, there is a need for clarity in this area of the law. These questions are matters of first impression for this Court, which has never considered the issue of whether or how a chilling effect operates in the context of journalist-source communications.

E. This Court should clarify how to weigh the interests of law enforcement

17. On the other side of the balancing equation, the Respondent states that it is "impossible" to assess the probative value of evidence at the investigative stage, and that it should play "no part" in the *Lessard* analysis.[17] The Respondent cites *National Post* in support of this position.

18. The Respondent's position reflects the view expressed by the Court of Appeal for Ontario in this case and the approach taken by reviewing courts in other cases (even if implicitly). But it does not reflect the view expressed by this Court in *National Post.* Under the fourth Wigmore criteria, a majority of this Court expressly endorsed examining "the nature and seriousness of the offence under investigation, the probative value of the evidence sought to be obtained… [and]

[14] ***Canadian Broadcasting Corp. v. Manitoba (Attorney General)***, 2009 MBCA 122 at para. 74.

[15] ***Canadian Broadcasting Corp. v. Lessard***, [1991] 3 S.C.R. 421 at para. 67.

[16] Makuch Affidavit at paras. 17-19, A.L.A., Tab 6 at pp. 324-325.

[17] Respondent's memorandum at paras. 36-37.

the underlying purpose of the investigation".[18]

19. The Respondent's position is also inconsistent with its own argument (accepted by the reviewing judge and the Court of Appeal) that the Kik text messages are the "best possible evidence". If it is really impossible to assess the value of evidence at the investigative stage, then how can it be determined that the records sought are the best possible evidence?

20. The reality is that the *Lessard* test necessarily *requires* analyzing law enforcement's interests, at least to some degree, before placing them on the balancing scale. For example, in the case at bar, if a trial does not occur (*e.g.* because Shirdon is dead or never returns to Canada), then the records sought will have no value at all. Surely this is relevant to the balancing analysis.

21. The Court of Appeal for Ontario's approach is an invitation for law enforcement to go on a fishing expedition at the expense of the media's protected news-gathering function. Reviewing courts would have to blindly stack that side of the balancing test, without inquiring into the purpose, necessity or value of the evidence sought. This makes the threshold for obtaining information from a media outlet unreasonably low, contravening the text and spirit of *Lessard*. Guidance by this Court is required so that such an absurd result can be avoided in future cases.

F. The possibility of notice does not cure problems with *Garofoli* standard

22. In response to the Applicants' position that reviewing courts should apply a less deferential standard of review, the Respondent relies on the issuing judge's discretion to provide notice to the media before a production order or search warrant is issued.[19]

23. Such reliance is misplaced. The Respondent has not provided any cases or situations when such notice has been provided. The Applicants are not aware of any case since *National Post* where police, the Crown, or an issuing court provided advance notice to a media outlet to allow it to make submissions on whether an order should issue. The fact that such discretion is technically possible cannot cure the problems with the deferential *Garofoli* standard. In practice, that is the standard applied when the media finally do have an opportunity to present their side of the case.

[18] ***National Post*** at paras. 61-62.

[19] Respondent's memorandum at para. 43.

August 3, 2017

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

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