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December 22, 2016

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Attention: Philip Tunley
Andrea Gonsalves
Justin Safayeni

Dear Counsel:

**RE: R. v. Vice Media, C.A. No. C62054**

Please find enclosed the Attorney General of Ontario's Intervener factum filed today at the Court of Appeal.

Yours truly,

Catherine for

Susan Magotiaux
Counsel, Crown Law Office Criminal

SM/clc

Encls.

Court File No. C62054

**COURT OF APPEAL FOR ONTARIO**

**B E T W E E N:**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**

*Respondent*

- and -

**VICE MEDIA CANADA INC. and BEN MAKUCH**

*Appellants*

- and –

**THE ATTORNEY GENERAL OF ONTARIO, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, THE CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN JOURNALISTS FOR FREE EXPRESSION, CANADIAN BROADCASTING CORPORATION, AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, CANADIAN ASSOCIATION OF JOURNALISTS, CANADIAN MEDIA GUILD/COMMUNICATION WORKERS OF AMERICA (CANADA), REPORTERS WITHOUT BORDERS/REPORTERS SANS FRONTIERES, ABORIGINAL PEOPLES TELEVISION NETWORK, CENTRE FOR FREE EXPRESSION**

*Interveners*

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# FACTUM OF THE INTEREVENER THE ATTORNEY GENERAL OF ONTARIO

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## OVERVIEW

1. There is a common thread among the facta of the appellant and interveners. They think justices should carefully consider freedom of expression and media interests when issuing warrants. They say that law enforcement cannot have "easy access"[1] to journalist work product. They say that sources will dry up if their identities will be "easily"[2] or "routinely"[3] provided to police. The Attorney General of Ontario agrees. The *Lessard* test was designed specifically to address those concerns.[4]

2. When police seek a judicial order authorizing a search or seizure that affects media premises or journalists, the justice must consider all of the circumstances at play. In particular, under the direction of the Supreme Court of Canada in *Lessard*, justices weigh the vital public importance of news gathering and dissemination activities, the impact of a proposed search on those interests, the availability of information sought from other sources, the specific nature of the law enforcement interests engaged, the degree to which information is already in the public domain, and any conditions that could minimize media impact.

3. Sometimes the balance will fall on the side of law enforcement and evidence in the hands of media entities will have to be produced. The Attorney General of Ontario takes no position on whether the justices below got the balance right in this case. This intervention is a response to the suggestion that it is the test itself, and not the result, that is problematic here. The *Lessard* test is

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[1] *BCCLA Factum*, para 37.
[2] *Appellant's Factum*, para 39, *Media Coalition Factum*, at para. 39, *BCCLA Factum*, para. 4
[3] *Media Coalition Factum*, para. 29. The "*Lessard*" test is a set of guidelines formulated by Cory J., for the majority, in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459 at 481 and adopted in *Canadian Broadcasting Corp. v. Lessard,* [1991] 3 S.C.R. 421 at 445. In *Lessard*, at p. 445, Cory J. indicated that the factors were first summarized in *New Brunswick*. However, in *R. v. National Post*, [2010] 1 S.C.R. 477, the Supreme Court refers to the framework as "the *Lessard* conditions" (at para. 87), so that is the label is used here.
[4] *Lessard*, at para. 4.

principled, comprehensive, flexible and duly protective of media interests. It is working. It needs no amendment. To the extent that there may be societal change, it argues against, not for, a categorical approach to legal standards that require complex balancing of competing *Charter* rights. This Court should resist the urging to assign pre-weighted value to any factor in the discretionary evaluation of media searches.

## PART I:
## STATEMENT OF THE FACTS

4. The Intervener Attorney General for Ontario makes no submissions on the facts of the instant case.

## PART II:
## ISSUES AND ARGUMENT

1. Context – The Role of Production Orders in Criminal Investigations

5. Production orders like the one in the instant case are routine tools used in criminal investigations in Canada. It is important to recall that search warrants and production orders can be sought in all kinds of circumstances for all kinds of reasons. The test that governs their issuance must remain flexible, allowing for the exercise of wide judicial discretion in order to safely and effectively balance the vast potential field of interests at stake, for the state, the public, suspected parties, and the media. There can be no pre-determined weight of one factor or assumption about the effect of orders that will apply to all authorizations involving media.

6. The proposals for a changed test reflect a misunderstanding of the nature of search warrants and production orders. In *CanadianOxy*, a unanimous Supreme Court of Canada emphasized that the public interest demands prompt and thorough investigation of criminal offences.[5] Major J., for the Court, stated:[6]

> The purpose of s. 487(1) is to allow the investigators to unearth and preserve as much relevant evidence as possible. To ensure that the authorities are able to perform their appointed functions properly they should be able to locate, examine and preserve all the evidence relevant to events which may have given rise to criminal liability. It is not the role of the police to investigate and decide whether the essential elements of an offence are made out - that decision is the role of the courts. The function of the police, and other peace officers, is to investigate incidents which might be criminal, make a conscientious and informed decision as to whether charges should be laid, and then present the full and unadulterated facts to the prosecutorial authorities.

7. The Intervener BCCLA suggests a test which would include a justice considering the necessity and likely probative value of evidence sought. The Media Coalition asserts that the likelihood of a trial progressing or the sufficiency of evidence for the purpose of charging or trial are key considerations for the justice assessing an application. But there may not be a prosecution at the stage of a production order. There may not be a suspect. The evidence sought may go to a potential defence, and may thus have value for an accused person or suspect instead of strengthening a prosecution.[7] The relative weight or importance of evidence cannot be established before the Crown has marshalled evidence for a prosecution, and cannot therefore provide a meaningful criterion for exercise of discretion in considering an application for an investigative tool such as a production order or warrant.

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[5] *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1998] 1 S.C.R. 743, at para. 19.
[6] *CanadianOxy*, at para. 22.
[7] *CanadianOxy*, at paras. 23-27.

2. The Current Test is Effectively Protecting Media Interests

**A) The Test**

8. The appropriate framework for consideration of judicial authorization to search or seize information is the s. 8 balancing test informed by the special position of the media and structured in accordance with the principles set out by the Supreme Court of Canada in *New Brunswick* and reiterated in *Lessard*.[8] Section 2(b) of the *Charter* finds appropriate and sufficient expression in those guiding principles. The test applies equally to all manner of search warrants and production orders such as the one in the case at bar.[9]

9. The *Lessard* test was formulated in recognition of the vitally important role of the media in Canadian society. It affirms that media are entitled to special consideration in search warrant decisions and that s.2(b) interests form a necessary backdrop to any exercise of discretion in deciding whether to issue an authorization affecting media premises.[10] However, the guidelines do not import constitutional requirements for the issuance of warrants or orders.[11] The constitutional standard of search and seizure is reasonableness under s. 8 of the Charter. It is unquestionably informed by other *Charter* rights and values and rights that may be engaged. [12]

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[8] *Lessard*, at p. 445; *New Brunswick*, at p. 481.
[9] *Tele-Mobile Co. v. Ontario*, [2008] 1 S.C.R. 305; *Canadian Broadcasting Corp. v. Manitoba (Attorney General) et al*, 2009 MBCA 122, 250 C.C.C. (3d) 61, at para. 31.
[10] *Lessard*, at p. 444.
[11] *New Brunswick*, at pp. 475-476; *R. v. Vice*, 2016 ONSC 1961, [2016] O.J. No. 1597, at para. 53. In *National Post*, at para. 38, Cory J. specifically noted that not all news gathering techniques are constitutionally entrenched. This point was again emphasized by LeBel J., for a unanimous court, in *Globe and Mail v. Canada (Attorney General)*, [2010] 2 S.C.R. 592, at para. 20.
[12] For example, a search of religious property would require consideration of s. 2(a) of the *Charter*.

10. *Lessard* and *New Brunswick* were companion cases heard and released together. Cory J., for the majority in both decisions, formulated a set of guidelines for consideration of judicial authorizations on media targets. The guidelines are included at Appendix A in their entirety.

11. The *Lessard* conditions require that the justice apply the statutory pre-requisites of the order requested, and remind that the justice must go on to consider whether or not to issue the order even where statutory criteria are made out. The issuance of any order is a discretionary exercise. As noted in *Lessard*, "[e]ven after the statutory conditions have been met it may still be a difficult and complex process to determine whether a search warrant should be issued."[13] The materials (usually an affidavit or information to obtain) must contain enough information to permit the justice to make a fair assessment of the interests at stake and potential impact of the order sought.[14]

12. Assuming that statutory criteria are met, justices must engage in a complex balancing exercise to determine whether it is appropriate to issue the order requested, with or without amendments or conditions. The analysis cannot possibly look the same in each case. However, *Lessard* sets out particularized factors to be considered by a justice considering a request for authorization targeting media sources:

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[13] *Lessard*, at p. 444 (per Cory J., for the majority).
[14] *Lessard*, at 445 (Factor #4). The Media Coalition asserts that statutory criteria should be "strictly applied" and that justices should not make inferences without "direct evidence" or read materials from a perspective that "favours the state" (*Factum*, paras. 18-20). These are general comments about judicial functions in search warrant review that do not bear on the relevance of the *Lessard* test. Any test should, of course, be applied objectively and conscientiously.

a. Identifying Interests [*Lessard* #3]

The exercise of discretion requires balancing the interests at stake. The justice must consider the particular state interests in investigating and prosecuting crime, as well as the important *Charter* protected rights to privacy and to gather and disseminate news that may be engaged to various degrees. The vital role of the media in protecting democratic society must be borne in mind. If the media is an innocent third party, this fact will also weigh in the analysis.

b. Reasonable Alternative Sources [*Lessard* #5]

The application should ordinarily address potential alternative sources of the evidence or information and whether efforts have been undertaken to obtain the alternatively placed evidence or information.

c. Prior Publication [*Lessard* #6]

The justice should consider the degree to which information sought has already been published or disseminated. Prior publication will normally weigh in favour of granting the order.

d. Minimizing Conditions [*Lessard* #7]

A justice should consider whether particular conditions have been or can be attached to an authorization to reduce any potential negative impact on news gathering and publishing activities of the media target.

**B) A Strong Track Record**

13. The *Lessard* framework has withstood the test of time. It is a flexible test, allowing for the myriad nuanced circumstances that can arise in a given case. It has not gone unchallenged by the media. In 2010, in *R. v. National Post*, the Supreme Court faced an argument much like the one raised before this Court now, similarly advanced by the BCCLA, CCLA, a media coalition and a particular media outlet and journalist.[15] Binnie J., for the majority, reviewed the *Lessard*

[15] The authorization in *National Post* was a general warrant with an assistance order attached that required the *Post* to produce an identified record. That investigation predated the production order provisions but the warrant and assistance order effectively operated as a production order: *National Post*, paras. 21-23, 89-90.

test and then summarized the argument as follows:[16]

> The appellants and their media supporters argue that these principles are too general. The media interest, they say, is not just one of many factors to be taken into account in "all of the circumstances". The *Charter*, they contend, entitles them to greater protection than *Lessard* and *New Brunswick* provide. Thus, armed with ss. 2(*b*) and 8 of the *Charter*, the appellants seek a re-examination of the existing law.

14. The majority of the Court in *National Post* rejected the argument that s. 2(b) required a re-structuring or enhancement of the *Lessard* factors. The *Lessard* test, which required mandatory consideration of the s. 2(b) rights and the importance of privacy for the media in their news gathering and dissemination activity, was found to appropriately embody concern for the vital role of journalists to democratic Canadian society. Suppression of crime is also a fundamental objective of civil society, and one that can conflict with media interests in search applications. *National Post* confirmed that the principles in *Lessard* provide solid guidance and ensure that the public rights and interests in both free press and crime suppression will be weighted heavily in the judicial lens.[17] The mandatory reflection on all of the circumstances in a given case, including the specific impact on news gathering and dissemination activities of the target media premise, guarantees full and rigorous analysis of the important press interests engaged.[18]

15. On a practical level, the test is working. The Intervener BCCLA, who advances the claim that a restructuring is needed, contradicts its own claim that the framework is insufficient to

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[16] *National Post*, at para. 32.
[17] *National Post*, at paras. 28-32.
[18] *National Post*, at para. 31.

protect journalists. The cases of *Dunphy*,[19] *CBC v. Manitoba*, and *R v. CBC*[20] relied on by the BCCLA, demonstrate that the test as currently framed is providing a meaningful standard that works to prevent overbroad or unnecessary searches of media premises.

3. Beyond this Case: Confidential Sources

16. This appeal is not about access to confidential source identification. However, several parties have raised the issue of the enhanced protections required in cases involving confidential sources and claims of journalist/source privilege. *National Post* dealt with such a claim. Even in those circumstances, where privilege claims were engaged (though ultimately unsubstantiated), the *Lessard* test was found to be the proper guiding framework for consideration of judicial authorization. Potential privilege claims are dealt with in a separate analytical framework. Anticipated privilege issues will be considered by an issuing justice and can be addressed through conditions for sealing and subsequent court determination of privilege claims, or made the subject of applications pursuant to s.487.0193(4)(b) where the authorization sought is a general production order.[21] Case-by-case privilege arguments arise in many search contexts but do not import additional constitutional standards into the warrant regime.[22] The potential for privilege claims in no way undermines the continuing efficacy of the *Lessard* test.

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[19] 2006 CarswellOnt 1234 (S.C.J.).
[20] *R. v. Canadian Broadcasting Corporation*, 2007 NLCA 62, 270 Nfld. P.E.I.R. 117.
[21] See *R. v. Thomson Reuters Canada Ltd.*, 2013 ONCJ 568, [2013] O.J. No. 4937 and *CTV v. Canada*, 2015 BCPC 65, [2015] B.C.J. No. 616.
[22] *R. v. Gruenke*, [1991] 3 S.C.R. 263 (religious communications); *R. v. Serendip Physiotherapy Clinic* (2004), 73 O.R. (3d) 241 (C.A.) (health records); *R. v. Dickson*, 2013 ONSC 6250, [2013] O.J. No. 6418 (medical records); *R. v. J.O.*, [1996] O.J. No. 4799 (Gen. Div) (psychiatric records). These cases are to be distinguished from solicitor-client privilege, a class privilege which is presumed to apply to the group and may therefore be treated differently: *Serendip*, at para. 17

4. The "Changing Times" Argument

17. The Media Coalition suggests that after nearly 25 years, the *Lessard* test needs updating to accommodate technological development in Canadian society. There are several problems with the assertion. First, the Supreme Court re-examined and applied the test in 2010. So it is 6 years, not 25, since the top court evaluated the continuing effectiveness of the framework.[23] Second, there is nothing about the *Lessard* test that is focused on or limited by the *form* of the evidence sought. Where it is the form of evidence that is the concern, for example a computer search or some kind of new technological tool, the common law appropriately develops to address any new s. 8 concerns.[24] Third, where the issue is that police may have other sources of information through technological surveillance or search techniques, that too is well accommodated in the existing framework. The *Lessard* test directs justices to consider other reasonably available means of accessing the sought evidence. For electronic communications, the other source may sometimes prove to be a telecommunications provider. The existing framework comfortably accommodates advances in both law enforcement capability and media practice.[25]

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[23] The material sought in *National Post* was a brown envelope. The police wanted the envelope to forensically analyze it to determine the identity of the sender, including extracting DNA from saliva potentially left on the envelope's seal. That kind of investigative purpose is not qualitatively different from seeking to examine the screen shots in the current case in order to investigate the message-sender who is charged with criminal offences.

[24] *R. v. Tessling*, [2004] 3 S.C.R. 432 (considering infrared technology), *R. v. Fearon*, [2014] 3 S.C.R. 621 (search incident to arrest doctrine modified for electronic devices), *R. v. Vu*, [2013] 3 S.C.R. 657 (re: search and seizure of computers), and *R. v. Jones* (2011), 107 O.R. (3d) 241 (C.A.)(re: appropriate limitations on computer search).

[25] In fact, the Supreme Court of Canada made specific mention of the media's enhanced use of technology in *National Post*, stating that "[j]ournalists are quick to use long-range microphones, telephoto lenses or electronic means to hear and see what is intended to be kept private" (at para 38). The march of technology does not place advantage or burden on only one side of a media/law enforcement conflict.

18. The landscape of technological change does not support a shift in the constitutional protections required for media entities in judicially authorized search or seizure. Both sides of the scale (or all sides of the multi-faceted analysis) are affected by technological and social change. Police do have recourse to more technological tools. But times have changed for the media too. Journalists use digital tools for communication, news gathering and dissemination of their work. A test that focuses on principles, interests and broad consideration of impact is best adaptive to changing contexts.

19. A new test such as that proposed by the Intervener BCCLA which makes a categorical line and mandatory high threshold for searches on "a journalist or news media organization"[26] would have to go hand-in-hand with a definition of media that enables justices to properly define when the proposed test applies. The appellant says the journalist's "role" is to provide Canadians with independent and objective information on issues of public importance"[27]. But of course, not every person gathering or spreading "news" will share that objective, nor need they. Journalists can write, or blog, or speak, on any subject from the trivial to the nationally pressing, and can do so for individual, partisan, financial or altruistic reasons. As noted in *National Post*, modern media is a loose, large and unregulated group. Binnie J., explained:[28]

> …the protection attaching to freedom of expression is not limited to 'traditional media', but is enjoyed by "everyone" (in the words of s. 2(*b*) of the *Charter*) who chooses to exercise his or her freedom of expression on matters of public interest whether by blogging, tweeting, standing on a street corner and shouting the "news" at passing pedestrians or publishing in a national newspaper.

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[26] *BCCLA Factum*, para. 6
[27] *Appellant's Factum*, para 6.
[28] *Supra*, at para. 40. See also *Globe and Mail*, at paras. 20-22, 33, 36.

20. The vast range of persons or entities who may qualify as journalists only underscores the need for a flexible test that can accommodate the varied interests and effects that may be engaged in a proposed search or seizure. The *Lessard* framework is just such a test. It needs no modification to incorporate the wide-ranging presentation of media interests and law enforcement objectives at play in the digital age.

5. Managing the Chill

21. There is no demonstrated basis to suggest that there will be a chill on media engagement as a result of the issuance of production orders against media entities where the *Lessard* framework is applied.[29] No freeze has descended since 2010 when *National Post* endorsed the continued application of the *Lessard* tes.[30] *National Post* dealt with a promise of confidentiality, where the suggestion of potential chill would arguably hold greater sway. Media outlets and individual journalists have always had only conditional protection to afford sources. Yet the media in modern society has been widely accomplished in bringing to light many public scandals and items of extreme public interest for Canadians. They will no doubt continue to do so.

22. Unfettered access to media-held material, or too ready access to journalist work product or source identifiers could cause chill or reluctance to participate in news gathering.[31] No one is

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[29] See *BCCLA Factum*, at para 25, claiming that chill should be presumed without evidence in all media cases.

[30] It is of note that *National Post* involved circumstances of arguably heightened journalistic interests over the current case in that the police there sought the identity of a confidential source. Even in the face of a privilege claim, the majority of the Supreme Court of Canada found that the *Lessard* test for balancing rights in the media warrant context was sufficiently protective of press interests under s. 2(b) of the *Charter*.

[31] See *CBC v. Manitoba* at para. 74 where the Court notes that "[p]roduction orders against the media casually **given can** have a chilling effect" [emphasis added].

advocating for that. There has been and should be no inhibition in the public airing of important issues because people are aware that a justice may issue authorization for gathering of defined categories of evidence in criminal investigations where the s. 2(b) guarantee has been considered and balanced in all of the circumstances of the case. Each case will depend on its facts.[32] The *Lessard* guidelines ensure that access will be duly restrained. The existing framework appropriately considers potential "chill" and allows justices to recognize and address potential negative impact in any given case thorough conditions or denial of the application. No more is needed.

6. The Media/Law Enforcement Relationship

23. The "media as investigative arm of the state" argument was considered and rejected in *National Post*.[33] It finds no more traction here. The (mandatory) infusion of *Charter* values in the balancing tests ensures that the special position of the media will be given due weight in the constitutional analysis of law enforcement objectives and proposals. Complying with a judicial order does not make any citizen an agent of the state. The law is entitled to every person's evidence;[34] even when it costs in time, money and personal stress to deliver evidence.[35] That is the social cost of a robust truth-seeking justice system. If police deliberately use journalists in place of conducting their own investigations, that factor may well be fatal in the balancing of the *Lessard* test. It was in *CBC v. Manitoba*. But the mere issuance of an order directed at a third

[32] In *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572, at p. 1580, for example, the Supreme Court of Canada found no chill had been established when a journalist was compelled to testify about her source before the Labour Relations Board and that judicial notice would not be taken of that effect in every case. There had been no s. 2(b) infringement established and one would not be presumed.
[33] *Supra*, at para. 89-90. Argument in *Appellant's Factum*, at paras. 6,39.
[34] *National Post*, at para. 1.
[35] *CBC v. Manitoba*, at para. 71.

party who holds evidence relevant to a criminal investigation cannot be said to cast that party in a conspiratorial role with authorities.

24. Law Enforcement and journalists are not always adversarial. Police are frequently the source of detailed early information provided to media of all types in press conferences, news releases, and individual interviews or comments. Sometimes, media entities may be the repository of evidence sought in a particular investigation. It could be real evidence, as in *National Post*, that has been delivered without invitation. It could be an audio file that captures a crime, or a video that provides an alibi for someone who was otherwise suspected.[36] It could be information about the whereabouts of a person, like the instant target, who has been charged with serious criminal offences and is at large and potentially putting others at risk. The public, suspect/accused, media and law enforcement interests in any given case cannot be assumed to fall always in the same lines.[37] That is why a balancing test, not a pre-weighted categorical approach, is the best mechanism to safely protect all *Charter* rights and values.

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[36] See discussion in *CanadianOxy* at paras. 23-27. Authorities are bound to avoid tunnel vision and pursue "as much evidence as possible", including evidence that could exculpate a suspect.

[37] This point is illustrated in *New Brunswick*, at pp. 476-478, where Cory J. explains that the media may not be opposed to providing evidence of a crime which they have already disseminated in the public arena and further that police may "very well be interested in protecting the identity of a media informant in many cases". In *Lessard*, at p. 447, Cory J. similarly suggested that the media may consider voluntarily providing video to police where video captures a crime or identifies a perpetrator.

## PART III:
## ORDER REQUESTED

25. The Attorney General for Ontario respectfully requests permission to make submissions at oral argument for a period of not more than 15 minutes, subject to the direction of the panel, but takes no position on the proper outcome of the instant appeal.

ALL OF WHICH is respectfully submitted this 22nd day of December, 2016.

Susan Magotiaux
Counsel for the Attorney General of Ontario

## SCHEDULE A:
## AUTHORITIES CITED

*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459

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

*R. v. National Post*, [2010] 1 S.C.R. 477

*CanadianOxy Chemicals Ltd. v. Canada (Attorney General),* [1998] 1 S.C.R. 743

*Tele-Mobile Co. v. Ontario*, [2008] 1 S.C.R. 305

*Canadian Broadcasting Corp. v. Manitoba (Attorney General) et al*, 2009 MBCA 122, 250 C.C.C. (3d) 61

*R. v. Vice*, 2016 ONSC 1961, [2016] O.J. No. 1597

*Globe and Mail v. Canada (Attorney General)*, [2010] 2 S.C.R. 592

*R. v. Dunphy*. 2006 CarswellOnt 1234 (S.C.J.)

*R. v. Canadian Broadcasting Corporation*, 2007 NLCA 62, 270 Nfld. P.E.I.R. 117.

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*CTV v. Canada*, 2015 BCPC 65, [2015] B.C.J. No. 616

*R. v. Gruenke*, [1991] 3 S.C.R. 263

*R. v. Serendip Physiotherapy Clinic* (2004), 73 O.R. (3d) 241 (C.A.)

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*R. v. J.O.*, [1996] O.J. No. 4799 (Gen. Div)

*R. v. Tessling*, [2004] 3 S.C.R. 432

*R. v. Fearon*, [2014] 3 S.C.R. 621

*R. v. Vu*, [2013] 3 S.C.R. 657

*R. v. Jones* (2011), 107 O.R. (3d) 241 (C.A.)

*Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572

## SCHEDULE B:
## RELEVANT LEGISLATIVE PROVISIONS

*None cited*

## APPENDIX A:

## THE *LESSARD* TEST

*Canadian Broadcasting Corp. v. Lessard,* [1991] 3 S.C.R. 421, at p. 445
*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459 at p. 481

1) It is essential that all the requirements set out in s. 487(1)(b) of the Criminal Code for the issuance of a search warrant be met.
2) Once the statutory conditions have been met, the justice of the peace should consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant.
3) The justice of the peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination. It must be borne in mind that the media play a vital role in the functioning of a democratic society. 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.
4) The affidavit in support of the application must contain sufficient detail to enable the justice of the peace to properly exercise his or her discretion as to the issuance of a search warrant.
5) Although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted.
6) If 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.
7) If a justice of the peace determines that a warrant should be issued for the search of media premises, consideration should then be given to the imposition of some conditions on its implementation, so that the media organization will not be unduly impeded in the publishing or dissemination of the news.
8) If, subsequent to the issuing of a search warrant, it comes to light the authorities failed to disclose pertinent information that could well have affected the decision to issue the warrant, this may result in a finding that the warrant was invalid.
9) Similarly, if the search itself is unreasonably conducted, this may render the search invalid.

Court File No. C62054

# COURT OF APPEAL FOR ONTARIO

**B E T W E E N:**

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**CANADIAN MEDIA GUILD/COMMUNICATION WORKERS OF AMERICA (CANADA),**
**REPORTERS WITHOUT BORDERS/REPORTERS SAN FRONTIÈRES,**
**ABORIGINAL PEOPLES TELEVISION NETWORK,**
**CENTRE FOR FREE EXPRESSION**
Interveners

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# FACTUM OF THE INTERVENER, THE ATTORNEY GENERAL OF ONTARIO

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