Court File No. C-62054

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)

FACTUM OF APPELLANTS VICE MEDIA CANADA INC. and BEN MAKUCH

Iain A.C. MacKinnon
Linden & Associates PC
Royal Bank Plaza
200 Bay St., North Tower
Suite 2010, P.O Box 10
Toronto, ON M5J 2J1

Tel: 416-861-9338 x231
Fax: 416-861-9973
Email: imackinnon@lindenlex.com
LSUC NO.: 39167A

Lawyers for the Applicants (Appellants)

TO: Public Prosecution Service of Canada
130 King Street West, Suite 3400, Box 36
Toronto, Ontario
M5X 1K6

Sarah Shaikh
Tel.: 416-973-3744
Fax: 416-973-8253
Email: sarah.shaikh@ppsc-sppc.gc.ca

Counsel for Her Majesty the Queen in Right of Canada

PART I – NATURE OF APPEAL

1. The Appellants, Vice Media Canada Inc. and Ben Makuch ("VICE"), appeal from the decision of Justice MacDonnell (the "Application Judge"), which denied VICE's applications to quash, vary, or revoke the Production Order (as defined below) served on VICE. The Application Judge's decision also upheld a sealing order over small portions of the Information to Obtain that was relied on for the issuance of the Production Order, and ordered a publication ban over significant portions of the Information to Obtain.

2. VICE appeals the Application Judge's decisions on upholding the validity of the Production Order, maintaining portions of the sealing order, and ordering the publication ban.

3. This appeal concerns the circumstances in which a production order should be issued to compel a media organization and journalist to produce documents to police for purposes of a criminal investigation and whether an Information to Obtain should be subject to a publication ban.

PART II – OVERVIEW

4. This appeal raises issues concerning one of the hallmarks of a democratic society – a free and independent press. Journalists' ability to pursue the truth without fear of reprisal or interference is essential to every facet of Canadian life: to the workings of justice, national security, individual freedoms, and government itself. Freedom of the press is protected under the *Charter of Rights and Freedoms* as a "fundamental freedom." It is a recognition that government infringement in the practice of journalism is harmful not just to journalists and their sources, but ultimately to society as well—no matter how acutely the state may wish to interfere.

5. If the Production Order is upheld as valid, it will have a detrimental chilling effect on the practice of journalism in Canada. The production of proprietary and confidential communications between a VICE news reporter and Islamic State militant Farah Shirdon ("Shirdon") will violate the compact that allows investigative reporters to do their jobs. Similarly placed sources will have serious reservations about speaking with the press, regardless of the reporter's affiliation, and in the end, the public will know less about the crucial and evolving public threat of ISIS, as well as other important stories. Furthermore, the idea that reporters cannot shield their sources from police and government inquiry could invite violence against journalists thought to be in possession of sensitive or incriminating material.

6. This Application raises issues of fundamental importance to the news media and all Canadians. The issues involved go to the heart of a journalist's role in a democratic society, which is to provide Canadians with independent and objective information on issues of public importance. The press plays a vitally important role in our society, as the Supreme Court of Canada has stated on a number of occasions. If media outlets are permitted to become investigative arms of the police through the use of production orders, the media's important role and credibility will be undermined, as well as its ability to gather information.

7. VICE submits that the Application Judge erred in failing to quash the Production Order, and failing to place sufficient weight on the constitutionally-protected and vital role the media play in a democratic society, as recognized by the Supreme Court of Canada and section 2(b) of the *Charter of Rights and Freedoms*. The Application Judge also erred by failing to take into

account the probative value and relevance of the evidence requested pursuant to the Production Order in question.

8. VICE further submits that the Application Judge erred in maintaining a sealing order over portions of the Information to Obtain and ordering a publication ban over approximately half of the Information to Obtain.

PART III – FACTS

9. VICE is an online Canadian media publisher and Ben Makuch ("Makuch") is a journalist employed by VICE. On June 23, 2014, August 15, 2014, and October 7, 2014, VICE published articles by Makuch on its website at Vice.com, based on conversations Makuch had with Shirdon via an online messaging application called "KIK Messenger." The articles reported that Shirdon, who was a Canadian citizen and resident, left Canada to join and fight for the cause of ISIS in Syria or elsewhere. Other media outlets published similar stories about Shirdon.[1]

10. On February 13, 2015, on an *ex parte* basis, Justice J. Nadelle of the Ontario Court of Justice, issued a Production Order (the "Production Order"), based on an Information to Obtain, sworn by Constable Harinder Grewal of the RCMP and dated February, 2015 (the "ITO"). The Production Order was to compel Vice Media, Makuch, and Vice Studio Canada Inc., located at 159 Dufferin St., Toronto, Ontario, to produce the following documents:

a) any notes and all records of Makuch or anyone at Vice Media or Vice Studio Canada Inc. regarding the means of effecting communications with Shirdon or respecting communications with him using certain internet user names;

[1] Affidavit of Ben Makuch, Appellants' Appeal Book & Compendium ("Appeal Book"), Tab 4

b) unedited copies of all electronic records, paper printouts, screen captures, and other computer records of all communications between Makuch or any employee of Vice Media or Vice Studio Canada Inc., and Shirdon over Kik Messenger; (the "Requested Documents")[2]

11. On the same date – February 13, 2015 – Justice Nadelle also issued a sealing Order prohibiting access to and disclosure of any information related to the Production Order, including the ITO (the "Sealing Order").[3]

12. The Production Order alleges that there are reasonable grounds to believe that Shirdon has committed terrorism-related offences and uttering threats, contrary to the *Criminal Code.*

13. After receiving the Production Order, VICE's counsel advised the Crown that the only materials in VICE's or Makuch's possession that fall under the Requested Documents are the instant messenger chats between Makuch and Shirdon over the course of a few months via the Kik Messenger platform, which would be preserved on Makuch's old smart phone (the "Kik Messenger Chats"), as well as screen shots of the Kik Messenger Chats. VICE and Makuch do not possess any other documents or materials listed under the Requested Documents in the Production Order.

14. On or about September 24, 2015, the RCMP announced the following terrorism charges were laid against Shirdon in *abstentia:*[4]

a) Leave Canada to participate in the activity of a terrorist group. (Sec 83.181);

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[2] Production Order and Sealing Order and ITO, Appeal Book, Tabs 5 and 6, Reasons of Application Judge, para. 1, Appeal Book, Tab 2
[3] Production Order and Sealing Order, Appeal Book, Tab 5
[4] RCMP news release, Appeal Book, Tab 4G

b) Participation in the activity of a terrorist group. (Sec 83.18(1)– Enhancing the ability of ISIS to facilitate or commit terrorist activity.);

c) Instructing a person to carrying out terrorist activity for the benefit of ISIS.(Section 83.21(1) – relating to his encouragement of others to travel to Syria/Iraq and to send money to ISIS);

d) Instructing a person to carrying out terrorist activity for the benefit of ISIS.(Section 83.21(1) – relating to his encouragement of others to commit violence in support of ISIS);

e) Commission of an indictable offence for a terrorist group. (Sec 83.2) – Relating to the utterance of threats towards Canada and the United States made on or about April 13, 2014 on an ISIS released video.);

f) Commission of an indictable offence for a terrorist group. (Sec 83.2) – Relating to the utterance of threats made on or about September 23, 2014 during an interview with Vice Media.)

PART IV – STATEMENT OF ISSUES AND LAW

15. This appeal gives rise to the following issues:

(i) Whether the Application Judge erred in failing to place sufficient weight on the constitutionally-protected and vital role the media play in a democratic society, as recognized by the Supreme Court of Canada;

(ii) Whether the Application Judge erred in failing to consider the affidavit evidence of Ben Makuch, and potential chilling and disruptive effects the Production Order could have on the ability of Makuch, and journalists generally, to report in important stories of public interest;

(iii) Whether the Application Judge erred in failing to properly assess the probative value and relevance of the evidence sought by the Production Order, and failing to take into account the wealth of evidence the police have already gathered against Shirdon, as factors to consider when balancing the interests of the state in prosecuting crimes and the interests of the media in gathering and disseminating important news stories;

(iv) Whether the Application Judge erred in failing to take into account that the Kik Messenger screenshots between Makuch and Shirdon constitute Makuch's work product;

(v) Whether the Application Judge erred in finding that no explanation was required in the ITO for how the communications over Kik Messenger between Shirdon and Makuch, would provide "important" and "highly reliable" evidence regarding the commission of the offences under investigation;

(vi) Whether the Application Judge erred in maintaining a partial sealing order over parts of the ITO and ordering a publication ban over a significant portion of the ITO

Standard of Review of Productions Orders

16. The Production Order was issued pursuant to section 487.012 of the *Criminal Code,* which was amended in or about July, 2015. Section 487.012(3) (now section 487.014) stated that a court may issue a production order if the following conditions were met:

> (3) 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.

17. The wording of the conditions precedent to issue a production order closely mirrors the wording of the conditions precedent for issuing a search warrant. For both situations, there must

be reasonable grounds for the issuing justice or judge to be satisfied that the requested materials *will afford evidence* with respect to the commission of an offence.

18. Given the similarity between the search warrant provisions and the production order provisions, courts have consistently held that the standard for judicial review of production orders is the same as that for search warrants.[5]

19. When faced with a review of a production order, the reviewing judge should apply a modified *Garofoli* test and take into account certain factors first outlined by the Supreme Court of Canada in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* and *Canadian Broadcasting Corp. v. Lessard* (outlined below more fully). The standard of review of on appeal in reviewing Superior Court's decision regarding the validity of a production order is correctness because the issuing justice or Application Judge's application of a legal standard involves a question of law.[6]

20. In *R. v. Dunphy,* the police served a production order on a newspaper to obtain copies of all notes of interviews a reporter had with Paul Gravelle, who was suspected of being the head of a criminal organization and having some connection with the murder of a lawyer and his wife.

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[5] *Tele-Mobile Co. v. Ontario*, [2008] 1 SCR 305, 2008 SCC 12 (CanLII), online at: http://canlii.ca/t/1w75h, Appellants' Book of Authorities ("BOA"), Tab 1; *Canadian Broadcasting Corp. v. Manitoba (Attorney General) et al.*, 2009 MBCA 122 (CanLII), at paras. 30-32, online at: http://canlii.ca/t/26zx1, BOA Tab 2; *R. v. Dunphy*, 2006 CarswellOnt 1234, [2006] O.J. No. 850, BOA Tab 3; *Thomson Reuters Canada Ltd v. The Queen*, 2013 ONCJ 568 (CanLII), online at: http://canlii.ca/t/g1np0, BOA Tab 4 ; *R. v. Canadian Broadcasting Corporation*, 2010 CanLII 86186 (NL PC), online at: http://canlii.ca/t/fkd7z, BOA Tab 5

[6] *CBC v. Manitoba*, *supra* at paras. 20-23, http://canlii.ca/t/26zx1**,** BOA Tab 2

The Ontario Superior Court of Justice made the following comments about the applicable test when a superior court reviews a production order:

> In respect of this relatively new order to produce section, it is appropriate to apply the test developed in respect of search warrants and, accordingly, "the standard is one of credibly based probability": *R. v. Sanchez* (1994), 20 O.R. (3d) 468 at p. 9. Further, "mere suspicion, conjecture, hypothesis or 'fishing expeditions' fall short of the minimally acceptable standard from both a common law and constitutional perspective. On the other hand, in addressing the requisite degree of certitude, it must be recognized that reasonable grounds is not to be equated with proof beyond a reasonable doubt or a prima facie case" and, "the appropriate standard of reasonable or credibly-based probability envisions a practical, non-technical and common sense probability as to the existence of the facts and inferences asserted.": *Sanchez*, *supra*, page 9.[7]

Application Judge Failed to Consider All Relevant Factors For Production Orders On Media Outlets

21. When the target of a search warrant or production order is a media outlet or journalist, the Supreme Court of Canada and other courts across Canada have held that, in addition to the statutory factors, the issuing justice or judge must also consider other factors. The Supreme Court has recognized that the media play an important role in a democratic society by gathering and disseminating information to the public, and this role must be impaired as minimally as possible:[8]

> The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being. The special significance of the work of the media was recognized by this Court in *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, at pp. 1339-40. The importance of that role and the manner in which it must be fulfilled give rise to special concerns when a warrant is sought to search media premises.

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[7] *R v. Dunphy, supra,* at para. 41, BOA Tab 3

[8] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 SCR 459, 1991 CanLII 50 (SCC) at para. 31, online at: http://canlii.ca/t/1fsh3, BOA Tab 6; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326, 1989 CanLII 20 (SCC), online at: http://canlii.ca/t/1fszp; BOA Tab 7

> The constitutional protection of freedom of expression afforded by s. 2(*b*) of the *Charter* does not, however, import any new or additional requirements for the issuance of search warrants. What it does is provide a backdrop against which the reasonableness of the search may be evaluated. It requires that careful consideration be given not only to whether a warrant should issue but also to the conditions which might properly be imposed upon any search of media premises.

22. The leading cases on the factors a court needs to consider when exercising its discretion to issue a search warrant or production order on a media outlet or journalist are the companion decisions of *CBC v. New Brunswick* and *CBC v. Lessard.* Both cases involved the execution of search warrants on the CBC after CBC journalists recorded footage of people damaging property, which constituted possible crimes.[9]

23. In those two decisions, the Supreme Court set out nine factors that a judge or justice of the peace must consider before issuing a search warrant, which have subsequently been applied by courts in the context of reviewing production orders:

> 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.
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> 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

[9] *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 SCR 421, 1991 CanLII 49 (SCC), online at: http://canlii.ca/t/1fsh1, BOA Tab 8; *CBC v. New Brunswick, supra*, online at: http://canlii.ca/t/1fsh3

> considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant.
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> 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.
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> 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.
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> 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.
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> (the "*Lessard* Factors")

24. Justice McLachlan (as she then was) made the following comments about the special position of the media in her dissenting judgment in *CBC v. Lessard*:[10]

> By specifically referring to freedom of the press, s. 2(*b*) affirms the special position of the press and other media in our society. It affirms that the press and the media have the constitutional right to pursue their legitimate functions in our society. Freedom of the press under the *Charter* must be interpreted in a generous and liberal fashion having regard to the history of the guarantee and focusing on the purpose of the guarantee: see *Edmonton Journal v.*

[10] *CBC v. Lessard, supra* at para. 61, http://canlii.ca/t/1fsh1

> *Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326 (*per* Cory J.); *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295 (*per* Dickson J.); *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145 (*per* Dickson J.) at pp. 156 *et seq*.
>
> The history of freedom of the press in Canada belies the notion the press can be treated like other citizens or legal entities when its activities come into conflict with the state. Long before the enactment of the *Charter*, the courts recognized the special place of the press in a free and democratic society. In England the matter was succinctly summarized by Denning M.R. in *Senior v. Holdsworth, Ex parte Independent Television News Ltd*., [1976] 1 Q.B. 23 (C.A.), at p. 34 :
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> > . . .there is the special position of the journalist or reporter who gathers news of public concern. The courts respect his work and will not hamper it more than is necessary.

25. The Application Judge failed to give proper consideration to the full scope of factors outlined in the *New Brunswick* and *Lessard* cases when balancing the interests of the police against the interests of VICE in the context of sections 2(b) and 8 of the *Charter.*

26. The Appellants submit that since news gathering and investigative reporting are core functions of section 2(b)'s purposes and vitally linked to democratic values, Courts should go further in protecting freedom of the press under the *Charter* and section 2(b), including a broader consideration of the important relationship between journalists and their sources.[11] Rather than simply relying on the reasonableness of a search under section 8 of the *Charter* when considering an *ex parte* production order or search warrant of a media outlet, Courts should give broader protection to journalists under section 2(b).

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[11] See Oliphant, Benjamin "Freedom of the Press as a Discrete Constitutional Guarantee,", *McGill Law Journal*, vol. 59, no. 2, 2013, p. 283-336, BOA Tab 9; Cameron, Jamie, "Of Scandals, Sources and Secrets: Investigative Reporting, National Post and Globe and Mail," *Supreme Court Law Review* (2011), 54 S.C.L.R. (2d), p. 233, BOA Tab 10

27. There are only a handful of decisions in Canada that have dealt specifically with applications to quash production orders served on media outlets and only one appellate court decision – *CBC v. Manitoba*.[12] In that case, the Manitoba Court of Appeal noted the special role of the media and the *Lessard* factors:[13]

> The media are entitled to particularly careful consideration because of the importance of their role in a democratic society, whether production orders or search warrants are issued. See *Lessard*, at p. 444. In *Dunphy*, in addition to accepting that the existing law regarding search warrants should apply to production orders generally, Glithero J. also found that the specific rules regarding media searches should be applied when production orders were sought for media outlets (see para. 49).

The Probative Value of the Information Sought is a Relevant Factor

28. The Application Judge failed to take into account an important factor when assessing the validity of the Production Order – the necessity and probative value of the Requested Documents. The Application Judge erred in finding that there was no alternative source for evidence of the same quality and reliability as the Kik Messenger Chats. As outlined in paragraphs 35-39 of the ITO, the RCMP has gathered substantial evidence of Shirdon's alleged crimes through Shirdon's own social media accounts. As the ITO makes clear, Shirdon was very active and vocal on social media and discussed his involvement with ISIS at length.[14] The information contained in the Kik Messenger Chats is simply more of the same type of evidence the RCMP has already obtained.

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[12] *Canadian Broadcasting Corp. v. Manitoba (Attorney General) et al.*, supra; *R. v. Dunphy*, *supra; Thomson Reuters Canada Ltd v. The Queen*, *supra; The Vancouver Sun v. British Columbia*, 2011 BCSC 1736 (CanLII), online at: http://canlii.ca/t/fpd09. BOA Tab 11

[13] *CBC v. Manitoba*, *supra*, at para. 34, online at: http://canlii.ca/t/1fszp

[14] ITO, paras. 35-39, Appeal Book, Tab 6

29. Based on the ITO, it is clear that the RCMP has gathered numerous inculpatory statements by Shirdon that will be used as evidence to support the terrorism charges he is facing. The fact that the RCMP already has adequate alternative evidence is a relevant factor in reviewing the Production Order. This is not a situation where the KIK Messenger chats are evidence of the actual criminal acts alleged against Shirdon.

30. When the information or evidence sought from a reporter is duplicative of the evidence already available and not reasonably necessary for providing proof of the offences, a production order against a media outlet should not be issued.[15]

31. The Application judge erred in finding that the Kik Messenger screenshots are "important" and "highly reliable evidence that do not require a second hand interpretation" without any analysis or explanation of the reliability or importance of the Kik messages. The ITO fails to demonstrate reasonable grounds for believing that the Requested Documents will afford evidence regarding the commission of any criminal offences by Shirdon. More importantly, Shirdon has already been charged with various terrorism offences, without any of the Requested Documents. Clearly, the RCMP and Crown believe they already have sufficient evidence and a reasonable prospect to obtain convictions against Shirdon without the Requested Documents, otherwise they would not have laid the charges against him.

32. In *CTV Inc. v. Barbes and SPVM,* the Superior Court of Quebec quashed search warrants on a media outlet because the issuing judge and ITO failed to take into account the *Lessard*

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[15] *Canadian Broadcasting Corporation v. Newfoundland*, 1994 CanLII 4430 (NL SCTD), online at: http://canlii.ca/t/1nm5n; BOA Tab 12*; Canadian Broadcasting Corporation v. R. et al*., 1987 CanLII 5185 (NL SCTD) at para. 26, online at: http://canlii.ca/t/g8wlx, BOA Tab 13

factors and the ITO failed to provide any information to assist the issuing judge in deciding whether to issue search warrants on the media outlet:[16]

> The tensions between the notion of media freedom on one hand and the exigencies of the administration of justice on the other stand ultimately to be considered and decided at the level of the hearing of the certiorari proceedings. This clearly does not absolve the "justice" of the duty, at the ***ex parte*** stage, of satisfying himself with regard to the first seven points enunciated by Cory J. which I have reproduced above.

33. Any suggestion by the RCMP or Crown that the Requested Documents will afford additional evidence relevant to the charges against Shirdon is "mere suspicion, conjecture, or hypothesis" and in that sense, is a fishing expedition. In quashing the production order in *R. v. Dunphy*, Justice Glithero noted:[17]

> The Information before me indicates that Mr. Dunphy has said that anything relevant to the murders is already reported in his newspaper articles. The prosecution believes otherwise or, at least, argues that Mr. Dunphy may not be in a position to accurately assess what is relevant as he may not be privy to all the information available to the police. Nevertheless, is the police belief "one of credibly based probability" or is it "mere suspicion, conjecture, hypothesis or a 'fishing expedition'." The only evidence before me on this application as to what is contained in the notes is Mr. Dunphy's assertion to the police that anything relevant to the murders is already contained in the published articles. There is no actual evidence from the affiant that Mr. Dunphy's notes contain any information that is not already the subject of the published articles. In my opinion, the applicant's suggestion that the notes will afford additional information relevant to the murders falls into the category of suspicion, conjecture or hypothesis and is in that sense a "fishing expedition".

34. The Application Judge failed to weigh the materiality, relevancy, and probative value of the Requested Documents against the impairment of the ability of the media to gather and report news, including whether there is any infringement of freedom of the press under section 2(b). The Production Order was premature and should not have been issued while Shirdon is still at

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[16] *CTV Inc. v. Barbès*, 2008 QCCS 3992 (CanLII), at para. 29, online at: http://canlii.ca/t/20mmb, BOA Tab 14

[17] *R v. Dunphy, supra*, at para. 48

large, in light of the important constitutional rights at stake and the abundance of similar evidence the police have already gathered. In these circumstances, a production order should only be issued when Shirdon is in custody, scheduled to go to trial, and the evidence is truly necessary to obtain a conviction.

The Application Judge Erred in Failing to Consider the Potential Chilling and Disruptive Effects of the Production Order

35. The Application Judge erred in failing to consider the potential chilling and negative effects of the Production Order on VICE, Makuch, and journalists generally. As the Supreme Court noted in *CBC v. New Brunswick,*

> It is of particular importance that the justice of the peace consider the effects of the search and seizure on the ability of the particular media organization in question to fulfil its function as a news gatherer and news disseminator. If a search will impede the media from fulfilling these functions and the impediments cannot reasonably be controlled through the imposition of conditions on the execution of the search warrant, then a warrant should only be issued where a compelling state interest is demonstrated.[18]

36. The Application Judge failed to even refer to Makuch's affidavit that was filed on the Application and Makuch's evidence was not challenged by the Crown. In his affidavit, Makuch notes the following:

> Even for non-confidential sources, it is critical for my work that individuals do not view me as an agent of the police or that the information they provide me will be used for purposes of a police investigation. Some people are prepared to talk to me and tell me things, but are not prepared to talk to police. If individuals that I interview for my stories are aware that everything they tell me could be provided to police, I believe that they will be much less inclined to answer my questions and provide me with information, particularly sensitive information that may not be intended for publication. Sometimes, sources tell me information that is off the record and not meant for publication.
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> Before I published any stories about them, I spent more than a year monitoring and researching the social media networks and accounts of militants and jihadists in order to understand how they operate and who they are. It took a significant amount of time and

[18] *CBC v. New Brunswick, supra* at para. 33

> effort for me to build trust and relationships with many of my sources in these networks before they would speak with me. I do not believe that they would have spoken to me if they knew that my notes or interviews would be provided to police for purposes of a criminal investigation, including Shirdon. Other individuals that I contacted did not agree to be interviewed for purposes of my stories.[19]

37. In *CBC v. New Brunswick*, the Court found that the search warrant for video footage was reasonable in the circumstances, but Justice La Forest noted that an effective independent press must be unfettered in its ability to gather information without undue government influence. He found that unrestrained searches of some journalistic material is a real threat to freedom of the press and drew a distinction between video or photos of an event that had been broadcast and recordings of interviews:[20]

> There can be no doubt, of course, that it comprises the right to disseminate news, information and beliefs. This was the manner in which the right was originally expressed, in the first draft of s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* before its expansion to its present form. However, the freedom to disseminate information would be of little value if the freedom under s. 2(*b*) did not also encompass the right to gather news and other information without undue governmental interference.
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> I have little doubt, too, that the gathering of information could in many circumstances be seriously inhibited if government had too ready access to information in the hands of the media. That someone might be deterred from providing information to a journalist because his or her identity could be revealed seems to me to be self-evident. . As Stewart J. (dissenting) stated in Zurcher v. Stanford Daily, 436 U.S. 547 (1978), at p. 572:
>
> > It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows that, despite the journalist's assurance, his identity may in fact be disclosed.
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> . . .

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[19] Affidavit of Ben Makuch, Appeal Book, Tab 4, para. 17-18

[20] *CBC v. New Brunswick, supra* at paras. 3-5, http://canlii.ca/t/1fsh3; See also *Goodwin v. United Kingdom*, (1996) 22 EHRR 123. Court European Court of Human Rights, BOA Tab 15

> In my view, the threat to the freedom of the press that would result from unrestrained searches of certain journalistic material goes beyond the merely speculative. I would draw a line, however, between films and photographs of an event and items such as a reporter's personal notes, recordings of interviews and source "contact lists". In both this case and the companion New Brunswick case, *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 000, the only materials seized were videotapes and photographs of the demonstration.

38. The Kik Messenger chats are effectively an electronic print recording of an interview of Shirdon by Makuch. In that sense, they deserve a higher level of protection from police because, as Justice La Forest noted:[21]

> The press should not be turned into an investigative arm of the police. The fear that the police can easily gain access to a reporter's notes could well hamper the ability of the press to gather information. I would think that, barring exigent circumstances, the seizure of items of this nature should only be permitted when it is clear that all reasonable alternative sources have been exhausted.

39. If journalists are viewed as "deputies" or agents of the police when conducting interviews, gathering information, and publishing stories, interview subjects, confidential informants, whistleblowers, and others may be less willing to speak to journalists, creating a chilling effect on freedom of speech. Sometimes interview subjects would rather speak to a journalist and use the media as a conduit for disclosing information, including incidents of corruption or wrongdoing by governments, corporations, or individuals. If interview subjects believe that information or comments they provide to journalists will be easily provided to the police through the execution of a production order or search warrant, sources may dry up for journalists. In her dissent in *CBC v. Lessard,* Justice McLachlan recognized this risk:[22]

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[21] *CBC v. New Brunswick, supra* at para. 7
[22] *CBC v. Lessard, supra* at para. 67

> I cannot accept that the fact that a portion of the material seized may have been published negates the chilling effect seizure might have on informants and the press itself. The fact that a portion of the material has been published does not negate the fact that other portions adversely affecting the privacy of press informants may be disclosed as a consequence of the search. But more fundamentally, it is the prospect of seizure of press material in future cases without the imposition of conditions to protect press freedom and the identity of informants which creates the chilling effect. The fact that some of the material may have been published in no way diminishes such fears.

40. The public's ability to be informed about important legal issues will be threatened if people involved in the criminal justice system are unwilling to talk to members of the media, knowing their comments may be later used against them in court. The result may be that society will be denied access to relevant points of view in a timely manner. In other words, when societal interest is at its greatest, society will not be privy to all relevant information. The public will be less informed, and accordingly the possible debates will be stymied. Ultimately, the conclusions reached by the public regarding the functioning of its social and legal systems may be different from what they would have been, had all the information been available at the time when the issues were most relevant.

41. Accordingly, the public's ability to hear important stories will be adversely affected, and the media's ability to gather information, and, therefore, to disseminate information in a relevant manner, will be undermined as well. This will mean a continuing erosion of the information available to the public.

42. Makuch has written a number of stories for Vice.com about Shirdon and terrorism issues generally, and he intends to continue writing such stories. If Shirdon or any other person interested in discussing issues with Makuch or answering his questions, knows that

copies of their discussions and communications with Makuch will be provided to police and potentially used as evidence in a criminal trial, they will be less likely to talk to Makuch. That would have a serious and detrimental impact on Makuch's ability to report on matters of public interest and perform his job.

43. In a democracy, a free press is essential. A free press is the best guarantee that information flowing to the public is credible and present without fear or favour. It is the role and duty of the journalist to find and report the news in as comprehensive and truthful a manner as possible and to remain independent of forces that would distort or pollute the channels of communication. As result, a free press is both reflected in the institutional separation that marks the media from agencies of the state and in the attitude of mind that a journalist brings to his or her task.

44. When members of the media are called upon to provide evidence in a criminal matter, the court must balance the media's unique position and role in society with the necessity of having the evidence in question provided to the police, by providing heightened protection under section 2(b) of the *Charter*.[23]

THE ITO SHOULD BE UNSEALED WITHOUT ANY PUBLICATION BAN

45. The Supreme Court of Canada has repeatedly emphasized the importance of the "openness principle". In *Toronto Star v. Ontario*, the Supreme Court summarized the applicable

[23] McNeill, Christie A., "Search and Seizure of the Press." Osgoode Hall Law Journal 34.1 (1996) : 175-211, BOA Tab 16

legal principles of open courts as follows: "(I)n any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy."[24]

46. In 2004, the Supreme Court of Canada further summarized the openness values as follows:[25]

> [para 24] The open court principle has long been recognized as a cornerstone of the common law: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at para. 21. The right of public access to the courts is "one of principle ... turning, not on convenience, but on necessity": *Scott v. Scott*, [1913] A.C. 417 (H.L.), *per* Viscount Haldane L.C., at p. 438. "Justice is not a cloistered virtue": *Ambard v. Attorney-General for Trinidad and Tobago*, [1936] A.C. 322 (P.C.), *per* Lord Atkin, at p. 335. "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity": J. H. Burton, ed., *Benthamiana: Or, Select Extracts from the Works of Jeremy Bentham* (1843), p. 115.
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> [para 25] Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.
>
> [para 26] The open court principle is inextricably linked to the freedom of expression protected by s. 2(*b*) of the *Charter* and advances the core values therein: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at para. 17. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression: *Ford [page347] v. Quebec (Attorney General)*, [1988] 2
> S.C.R. 712; *Edmonton Journal, supra*, at pp. 1339-40. The press plays

[24] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 (CanLII), at para. 1, online at: http://canlii.ca/t/1l27q , BOA Tab 17; *Attorney General of Nova Scotia v. MacIntyre*, 1982 CanLII 14 (SCC), online at: http://canlii.ca/t/1lpbn, BOA Tab 18

[25] *Vancouver Sun (Re)*, 2004 SCC 43 (CanLII), at paras. 24-26, online at: http://canlii.ca/t/1hbl8, BOA Tab 19

> a vital role in being the conduit through which the public receives that information regarding the operation of public institutions: *Edmonton Journal*, at pp. 1339-40. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.

47. The presumption of openness naturally and necessarily applies to production order and search warrant materials. As Justice Cory noted in Edmonton Journal:[26]

> It is equally important for the press to be able to report upon and for the citizen to receive information pertaining to court records. It was put in this way by Anne Elizabeth Cohn in her article "Access to Pre-Trial Documents Under the First Amendment" (1984), 84 Colum. L. Rev. 1813, at p. 1827:
>
> > Access to pretrial documents furthers the same societal needs served by open trials and pretrial civil and criminal proceedings. Court officials can be better evaluated when their actions are seen by informed, rather than merely curious spectators

48. The Application Judge erred in finding that there was sufficient evidence to meet the *Dagenais/Mentuck* test (as outlined below) to justify a sealing order over one of the individuals referred to in the ITO. The individual did not file any affidavit evidence and the Application Judge based his decision to issue a sealing order simply on the basis that, "he did not wish the details of his/her involvement in the investigation to be made public 'due to fear of negative publicity'. The person has told Corporal Ross that if they had known that their identity would be made public at this stage of the process, they would not have talked to the police." Such a

[26] *Edmonton Journal v. Alta (A.G.), supra,* at para. 11

rationale does not meet the *Dageanis/Mentuck* test because a generalized assertion of harm is not sufficient.[27]

Dagenais/Mentuck Test

49. The Application Judge erred in finding that "stigmatization" of an accused and risk to jury impartiality were grounds for ordering a publication ban over approximately half of the ITO.[28] There was no evidence filed by the Crown that could justify such a publication ban under the *Dagenais/Mentuck* test.

50. In *Toronto Star*, the Supreme Court of Canada established indisputably that in order to justify a denial of access to court records – in effect a sealing order -- the party seeking a sealing order or publication ban bears a heavy onus to satisfy the stringent *Dagenais/Mentuck* test. The first component (the "Dagenais" component) of the test is that a sealing order or publication ban should only be ordered when:[29]

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy to the administration of justice.

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[27] *Canadian Broadcasting Corporation and Others v. HMQ*, 2013 ONSC 6983 (CanLII), at para. 24 online at: http://canlii.ca/t/g1vsp, BOA Tab 20; see also *Canadian Broadcasting Corporation and Others v. HMQ*, 2013 CanLII 75897 (ON SC), online at: http://canlii.ca/t/g22qf, BOA Tab 21

[28] The portions of the ITO subject to a publication ban can be found in the highlighted parts of the ITO found at Tab 7 of the Appeal Book.

[29] *Toronto Star, supra* at para. 7; *R v. Mentuck*, [2001] S.C.J. No. 104 at para. 32, BOA Tab 22; cited in Toronto Star, *supra*, at para. 26 http://canlii.ca/t/51x5

51. The second component (the "Mentuck" component) of the test clarifies that in order to show "necessity", the applicant must lead specific evidence of risk to the proper administration of justice. As Justice Iacobucci stated in Mentuck:[30]

> I would add some general comments that should be kept in mind in applying the test. The first branch of the test contains several important elements that can be collapsed in the concept of "necessity", but that are worth pausing to enumerate. One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in Dagenais, a "real and substantial" risk. *That is, it must be a risk the reality of which is well-grounded in the evidence*. [emphasis added]

52. And further:

> It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society that *the judge must have a convincing evidentiary basis for issuing the ban*. [emphasis added][31]

53. Justice Doherty noted in the Ontario Court of Appeal decision of *Toronto Star*;[32]

> The necessity standard described in Mentuck is a high one. The Crown must demonstrate, based on evidence, viewed through the lens of judicial experience, that absent a sealing order there is a serious risk to the proper administration of justice.

54. In *Dagenais* and subsequent cases, the Supreme Court has repeatedly emphasized (after considering whether alternative measures such as change of venue or challenge for cause will be satisfactory to meet the risk of harm sought to be avoided), that even if a ban or a limit on

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[30] *R v. Mentuck, supra* at para. 34

[31] *R v. Mentuck*, supra, at para. 39

[32] *Toronto Star Newspapers Ltd. v. Ontario*, [2003] O.J. No. 4006 (C.A.) at para. 26, http://canlii.ca/t/4qq7, BOA Tab 23

openness is justified, it must still be narrowly tailored to impair the right of the public to know no more than is necessary. As Chief Justice Lamer concluded:[33]

> Therefore, the party seeking the ban bears the burden of proving that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure, that the proposed ban is as limited (in scope, time, content, etc.) as possible, and that there is a proportionality between the salutary and deleterious effects of the ban.

55. For a sealing order or publication ban to be issued consistent with the *Dagenais/Mentuck* test, it is not enough for an applicant to lead evidence to demonstrate that such an order is necessary to prevent a serious risk to the administration of justice and that the order being sought is as narrow as reasonably possible. The applicant must also demonstrate that the salutary effects of the sealing order or publication ban outweigh the deleterious effects of the order on freedom of expression.

Application of Dagenais/Mentuck Principles to Production Orders and Search Warrants

56. In *Toronto Star*, the Attorney-General for Ontario argued that the Ontario Court of Appeal erred in requiring the Crown to meet the "stringent" *Dagenais/Mentuck* test in order to justify sealing search warrant documents. The Supreme Court rejected that argument, stating:[34]

> The Crown now argues that the open court principle embodied in the Dagenais/Mentuck test ought not to be applied when the Crown seeks to seal search warrant application materials. This argument is doomed to failure by more than two decades of unwavering decisions in this Court: the Dagenais/Mentuck test has repeatedly and consistently been applied to all discretionary judicial orders limiting the openness of judicial proceedings.

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[33] *Dagenais v. Canadian Broadcasting Corp.,* [1994] 3 SCR 835, 1994 CanLII 39 (SCC). 835 at p. 891, http://canlii.ca/t/1frnq BOA Tab 24

[34] *Toronto Star, supra* at para. 30

57. The Ontario Superior Court of Justice applied the above-noted principles in considering the validity of a sealing order. In *R. v. Toronto Star Newspapers Ltd.*, everything was initially sealed, including the sealing order itself. Various media outlets brought an application to challenge the sealing order shortly after the warrants were executed and the Crown consented to the immediate release of the sealing order and offered to release much of the Information, after appropriate editing. Although the Crown subsequently released a significant portion of the Information to Obtain, much remained redacted and the media pursued its application to challenge the redactions.[35]

58. Justice Nordheimer rejected virtually all of the arguments that the Crown advanced in its attempt to justify the continued redactions. In summarizing the legal principles, Nordheimer J. stated at paragraph 10:[36]

> It is also clear that the justification for any continued suppression of information used in a court proceeding must be clearly made out. In particular, any asserted risk to the proper administration of justice that is used to justify a further restraint on public access must be based on a firm evidentiary foundation. As Mr. Justice Doherty said in *Toronto Star Newspapers Ltd. v. Ontario* (2003), 178 C.C.C. (3d) 349 (Ont.C.A.) at para. 20:
>
> > "That is, it must be a risk the reality of which is well-grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained."

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[35] *R v. Toronto Star Newspapers Ltd.,* 2005 CanLII 47737 (ONSC), online at: http://canlii.ca/t/1m820 , BOA Tab 25

[36] *R. v. Toronto Star Newspapers Ltd.* , *supra* at para 10

59. The Application Judge erred in finding that there was a risk to jury impartiality that justified a publication ban. In *R. v. J.S.R.*, known in the media as the "Jane Creba Murder case," Justice Nordheimer was faced with requests for a publication ban in the context of staggered trials. In that case, there were three separate trials scheduled for the various co-accused at staggered intervals. Much of the evidence at the three trials was going to be overlapping. As a result, the Crown and Accused sought publication bans on character evidence introduced at the first trials that referred to the accused at the later trial. Justice Nordheimer refused to grant any publication ban and made the following comments about the ability to find an impartial and fair jury:[37]

> Additionally, courts have accepted that the simple fact that people are made aware of an event, and may even form initial impressions of it, does not preclude them from acting as jurors and undertaking their duties as such in an impartial and objective manner. In this day and age, when there are so many sources of information and persons are subjected to so much publicity regarding events deemed by the media to be 'newsworthy', it would be facile to reject persons as jurors unless they could claim no knowledge of the events relating to any subsequent trial might arise from such events.
>
> . . .
>
> First and foremost, there is a very different effect, it seems to me, in twelve persons, having been selected as jurors and knowing that they are tasked with deciding the issue of the guilt of the accused, learning of problematic material in the midst of the trial contrasted with the effect on persons learning of such material when they have no idea that they will be a juror in the case to which the material relates. In the former situation there is not only the immediacy of the impact of such material on the jurors given their role, there are compelling reasons for the jurors to remember the information in the trial context that do not exist in the pre-trial context. Second, there are many instances where, despite the best efforts of all involved, jurors hear things that they should not. The instances where this occurs and the trial proceeds nonetheless because the judge concludes that the fair trial rights of the accused have not been impaired are numerous and the instances where the opposite result is

[37] *R. v. J. S-R.*, 2008 CanLII 54303 (ON SC) at paras. 38 and 40 (S.C.J.), online at: http://canlii.ca/t/2197z BOA Tab 26

> reached are rare. Third, there are also many instances where evidence has permissible uses along with impermissible uses and, even so, we permit jurors to receive the evidence because we are confident that jurors will use the evidence only in the permitted fashion as directed by the trial judge.

60. In *R v. Kossyrine*, the Ontario Superior Court of Justice rejected the argument that high profile criminal cases with significant media attention should be a basis for a publication ban, in the context of staggered trials and a guilty plea by a co-accused. Justice Nordheimer reiterated the importance and strength of the jury system, as well as the importance of measures that can be taken to avoid prejudice to a fair trial:[38]

> It is contended that if Mr. Ross' plea of guilty is published, along with the surrounding facts that he acknowledged, it will be impossible for the applicants to get a fair trial. I do not agree. To accede to that contention, is to accept the proposition that the jurors selected to decide this case will not honour their duties and obligations as jurors. That proposition has been consistently rejected by all levels of court, most especially by the Supreme Court of Canada. *Dagenais* is one such case. Another is *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, 1995 CanLII 86 (SCC), [1995] 2 S.C.R. 97, where Cory J. remarked, at para. 133:
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> > I cannot accept the contention that increasing mass media attention to a particular case has made this vital institution either obsolete or unworkable. There is no doubt that extensive publicity can prompt discussion, speculation, and the formation of preliminary opinions in the minds of potential jurors. However, the strength of the jury has always been the faith accorded to the good will and good sense of the individual jurors in any given case.
>
> In addition, the contention that there needs to be a publication ban in order to protect the fair trial rights of the applicants ignores, or at least gives little effect to, the challenge for cause process. The fundamental rationale for that challenge process is to identify persons who have been exposed to publicity about the case, and who have formed opinions as a consequence, that they are not prepared to put aside in deciding the case. The situation

[38] *R. v. Kossyrine & Vorobiov*, 2011 ONSC 6081 (CanLII) at paras. 10-11, online at: http://canlii.ca/t/fnf5g BOA Tab 27; See also *R. v. Larue*, 2012 YKSC 15 (CanLII), online at: http://canlii.ca/t/fqdw9 BOA Tab 28

> here would appear to be the preeminent example of why we permit challenges for cause based on publicity. If we do not believe in the efficacy of the challenge process, then we should cease to engage in it. Until such a result is decreed, however, I consider the effectiveness of that process coupled with the recognized effectiveness of jury instructions as sufficient to ensure that a fair and impartial jury can be empanelled in this case. As Dickson, C.J.C. said in *R. v. Corbett*, 1988 CanLII 80 (SCC), [1988] 1 S.C.R. 670 at p. 693:
>
> > Moreover, the fundamental right to a jury trial has recently been underscored by s. 11(f) of the *Charter*. If that right is so important, it is logically incoherent to hold that juries are incapable of following the explicit instructions of a judge.

61. In another decision of the Ontario SCJ, the Court rejected a publication ban on the grounds that such a ban was necessary, "to preserve trial fairness, ensure that there is no improper witness tainting and to prevent unwarranted stigmatization." The Court noted that,

> Any salutary effect of a complete publication ban on the applicants' trial fairness rights is outweighed by the deleterious effects such a restriction would have on the media's right to publish the contents of the Public ITO, and on the public's right to know the contents of it. As Justice Fish remarked in Toronto Star, supra at para. 1, "the administration of justice thrives on exposure to light - and withers under a cloud of secrecy."[39]

62. Shirdon's location and whereabouts are unknown to police and he may never be apprehended or arrested. It is an unjustified restriction on VICE's *Charter* rights to order a publication ban in effect for two years, as the Application Judge did. There is no evidence to suggest he will be arrested at any point in the near future. As the Court noted in *CBC v. HMQ,* "the impact of a publication ban of that length on the immediacy that naturally arises from the public's right to have information, especially when it relates to current affairs, is so significant that it may well be, in practical terms, the equivalent of a permanent ban".[40]

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[39] *R v. Cabero*, [2016] O.J. No. 3096, at para. 57, BOA Tab 29
[40] *CBC v. HMQ, supra* at para. 55

63. Furthermore, the vast majority of information subject to the Application Judge's publication ban has already been published to the world by Shirdon himself, through his social media accounts, which are detailed in the ITO. When information in an ITO has already been published and is not particularly sensational, a publication ban should not be ordered.[41]

CONCLUSION

64. This Court,must consider the rights enshrined in s. 2(b) of the *Charter* and, in particular, the important role of the press in our society, as is recognized by the wealth of jurisprudence in this area.

65. The media play a fundamental role in ensuring the public has access to relevant stories and information, which is protected by the constitutionally guaranteed right of freedom of the press. The media are not the investigative arm of the state and cannot be viewed as such by the public. Courts must be wary of supporting the development of precedents where individual reporters are prevented from doing their jobs effectively and where the public perception of the independence of the media is threatened by permitting production orders to issue against reporters, but for in exceptional circumstances.

66. The police have extensive powers and resources to solve crime. That is their role. It is the separate and distinct role of an independent media to report on the state of our society. The media's role would be rendered impossible if its members are not seen as objective observers by the public. The role is constitutionally enshrined in the *Charter* guarantee in section 2(b). The infringement of the constitutional rights of the media generally, and VICE in particular, must be

[41] *R v. Ben Aissa,* (2016), Unreported Decision of Court of Quebec, January 14, 2016, at para. 44, BOA Tab 30, affirmed SCQ unreported decision, July 20, 2016, BOA Tab 31

weighed carefully before the VICE and its reporter are compelled to provide their work product and private records in a criminal matter in which they are only involvement occurred by virtue of their role as members of the media.

PART IV – ORDER REQUESTED

67. The Appellants respectfully request:

(i) that the Appellants' application in the Court below for *certiorari* to quash the Production Order be granted;

(ii) that the Appellants' application in the Court below to set aside the sealing order over the Information to Obtain be granted, without any publication ban over the Information to Obtain; and

(iii) its costs of this Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
at Toronto on this 11th day of August, 2016

Iain A.C. MacKinnon

LINDEN & ASSOCIATES
Royal Bank Plaza
200 Bay St., North Tower
Suite 2010, P.O Box 10
Toronto, ON M5J 2J1

Tel: 416-861-9338 x231
Fax: 416-861-9973
Email: imackinnon@lindenlex.com

Lawyers for the Applicants (Appellants)

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Tele-Mobile Co. v. Ontario,* [2008] 1 SCR 305, 2008 SCC 12 (CanLII)
2. *Canadian Broadcasting Corp. v. Manitoba (Attorney General) et al.*, 2009 MBCA 122 (CanLII)
3. *R. v. Dunphy*, 2006 CarswellOnt 1234, [2006] O.J. No. 850,
4. *Thomson Reuters Canada Ltd v. The Queen*, 2013 ONCJ 568 (CanLII)
5. *R. v. Canadian Broadcasting Corporation*, 2010 CanLII 86186 (NL PC)
6. *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 SCR 459, 1991 CanLII 50 (SCC)
7. *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 SCR 1326, 1989 CanLII 20 (SCC)
8. *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 SCR 421, 1991 CanLII 49 (SCC)
9. Oliphant, Benjamin "Freedom of the Press as a Discrete Constitutional Guarantee,", *McGill Law Journal*, vol. 59, no. 2, 2013, p. 283-336
10. Cameron, Jamie, "Of Scandals, Sources and Secrets: Investigative Reporting, National Post and Globe and Mail," Supreme Court Law Review (2011), 54 S.C.L.R. (2d), p. 233
11. *The Vancouver Sun v. British Columbia*, 2011 BCSC 1736 (CanLII)
12. *Canadian Broadcasting Corporation v. Newfoundland*, 1994 CanLII 4430 (NL SCTD)
13. *Canadian Broadcasting Corporation v. R. et al*., 1987 CanLII 5185 (NL SCTD)
14. *CTV Inc. v. Barbès,* 2008 QCCS 3992 (CanLII)
15. *Goodwin v. United Kingdom*, (1996) 22 EHRR 123. Court European Court of Human Rights
16. McNeill, Christie A., "Search and Seizure of the Press." Osgoode Hall Law Journal 34.1 (1996) : 175-211
17. *Toronto Star Newspapers Ltd. v. Ontario,* 2005 SCC 41 (CanLII)
18. *Attorney General of Nova Scotia v. MacIntyre,* 1982 CanLII 14 (SCC)
19. *Vancouver Sun (Re),* 2004 SCC 43 (CanLII)
20. *Canadian Broadcasting Corporation and Others v. HMQ*, 2013 ONSC 6983 (CanLII)

21. *Canadian Broadcasting Corporation and Others v. HMQ*, 2013 CanLII 75897 (ON SC)

22. *R. v. Mentuck*, [2001] 3 SCR 442, 2001 SCC 76 (CanLII)

23. *Toronto Star Newspapers Ltd. v. Ontario*, [2003] O.J. No. 4006 (C.A.)

24. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835, 1994 CanLII 39 (SCC)

25. *R v. Toronto Star Newspapers Ltd.*, 2005 CanLII 47737 (ONSC)

26. *R. v. J. S-R.*, 2008 CanLII 54303 (ON SC)

27. *R. v. Kossyrine & Vorobiov*, 2011 ONSC 6081 (CanLII)

28. *R. v. Larue*, 2012 YKSC 15 (CanLII)

29. *R v. Cabero*, [2016] O.J. No. 3096

30. *R v. Ben Aissa*, (2016), Unreported Decision of Court of Quebec, January 14, 2016,

31. *R v. Ben Aissa*, (2016), Unreported Decision of Superior Court of Quebec, July 20, 2016

SCHEDULE "B"

Criminal Code Provisions

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.

Former Criminal Code Provision In Effect at Time Production Order was Issued

Production order

- **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

  - (*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.

VICE MEDIA CANADA INC., et. al
Applicants (Appellants)

and

HER MAJESTY THE QUEEN
Respondent (Respondent)

Court File No: C-62054

COURT OF APPEAL FOR ONTARIO

FACTUM OF VICE MEDIA CANADA INC. AND BEN MAKUCH

LINDEN & ASSOCIATES
PROFESSIONAL CORPORATION
Royal Bank Plaza
200 Bay St., North Tower
Suite 2010, P.O Box 10
Toronto, ON M5J 2J1

Tel: 416-861-9338 x231
Fax: 416-861-9973
Email: imackinnon@lindenlex.com

Lawyers for the Applicants (Appellants)