Court File No. C62054

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 THE INTERVENORS, 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 FRONTIÈRES, ABORIGINAL PEOPLES TELEVISION NETWORK, CENTRE FOR FREE EXPRESSION

STOCKWOODS LLP
Barristers
Toronto-Dominion Centre
TD North Tower
77 King Street West
Suite 4130, P.O. Box 140
Toronto ON M5K 1H1

Philip Tunley (26402J)
Andrea Gonsalves (52532E)
Justin Safayeni (58427U)
Tel: 416-593-3494
justins@stockwoods.ca

Tel: 416-593-7200
Fax: 416-593-9345

Lawyers for the Intervenors

TO: **LINDEN & ASSOCIATES PC**
Royal Bank Plaza
200 Bay Street, North Tower
Suite 2010, P.O. Box 10
Toronto, ON M5J 2J1

Iain A.C. MacKinnon (39167A)
Tel: 416-861-9338, ext. 231
Fax: 416-861-9973
Email: imackinnon@lindenlex.com

Lawyers for the Appellants

AND TO: **PUBLIC PROSECUTION SERVICE OF CANADA**
130 King Street West, Suite 3400
Box 36
Toronto, ON M5X 1K6

Sara Shaikh
Brian Puddington
Tel: 416-973-3744
Fax: 416-973-8253
Email: sarah.shaikh@ppsc-sppc.gc.ca
brian.puddington@ppsc-sppc.gc.ca

Lawyers for the Respondent

AND TO: **LERNERS**
Lawyers
130 Adelaide Street West, Suite 2400
Toronto, ON M5H 3P5

Brian N. Radnoff
Tel: 416-601-2387
Fax: 416-867-2412
Email: bradnoff@lerners.ca

Lawyers for the Intervenor,
the Canadian Civil Liberties Association

AND TO: **BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP**

Barristers and Solicitors
33 Yonge Street, Suite 201
Toronto, ON M5E 1G4

Tae Mee Park
Andrew W. MacDonald
Tel: 416-982-3800
Fax: 416-982-3801
Email: amacdonald@lexcanada.com

Lawyers for the Intervenor,
the British Columbia Civil Liberties Association

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PART I - OVERVIEW

1. This Coalition of media and journalist organizations[1] has been granted leave to intervene in this appeal to make legal argument on issues relating to the production order.[2] These submissions are informed by the collective experience and expertise of the members of the Coalition in the importance of the media's ability to operate within a zone of privacy, free from state interference, when gathering and reporting the news in a democratic society.

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1 Comprising the Canadian Journalists for Free Expression, the Canadian Broadcasting Corporation, Ad Idem/Canadian Media Lawyers Association, Canadian Association of Journalists, Canadian Media Guild/Communications Workers of America (Canada), Reporters Without Borders/Reporters Sans Frontières, Aboriginal Peoples Television Network and the Centre for Free Expression.

2 A copy of Chief Justice Strathy's reasons on the leave motion can be found at Schedule "**C**" of these submissions.

2. The Coalition seeks to build on the general factors set out by the Supreme Court of Canada in *Lessard* and *New Brunswick*, in order to provide courts with some practical guidance when authorizing and reviewing production orders, in a manner that is both consistent with the Supreme Court's jurisprudence and sensitive to the realities of modern news gathering.

3. More specifically, through its intervention the Coalition seeks to make four points.

4. First, there is no room for deference by an issuing justice in holding the state to its burden to satisfy the statutory conditions for a production order. The Supreme Court's direction to give such requests "careful consideration" requires a serious and sober assessment of the record, not a deferential or generous one, particularly given the *ex parte* nature of most hearings.

5. Second, as part of the balancing exercise, an issuing justice must always take into account the chilling effect. Whenever the police are authorized to seize records of a journalist's communications with a source for the purpose of investigating or prosecuting that source, the chilling effect will be serious – regardless of whether some or all of the information in those records has previously been published. Read carefully, contextually and in light of the Supreme Court's more recent jurisprudence on the chilling effect, this conclusion is not undermined by the articulation of the 'publication factor' in *Lessard* and *New Brunswick.*

6. Third, an issuing justice must examine the purpose and value of the production order being sought. If the order is meant to collect evidence for a criminal prosecution – rather than for the purpose of identifying the alleged offenders or protecting the public from further criminal activity – then the likelihood of a trial actually occurring is a critical consideration.

7. Finally, in circumstances such as this appeal, productions orders against the media should be reviewed *de novo,* rather than on the highly deferential *Garofoli* standard. A principled commitment to a free press requires nothing less.

PART II - FACTS

8. The Coalition accepts the facts as set out in the factum of the Appellants.

PART III - ISSUES

9. The Coalition intervenes in this appeal to make submissions on the legal principles that ought to govern when, and the circumstances under which, production orders are granted to seize material in the hands of the media, and the judicial review of those orders.

PART IV - ARGUMENT

A. Building on *Lessard* and *New Brunswick* to provide guidance in the digital age

10. Nearly a quarter century ago, the Supreme Court of Canada decided a pair of cases – *Lessard* and *New Brunswick* – that laid out a number of general principles for how courts should deal with requests by law enforcement to search for and/or seize material in the hands of the media.[3] Although *Lessard* and *New Brunswick* dealt with search warrants, the Coalition accepts that under the current state of the law, those same general principles also inform cases where the state seeks to compel production of material in the hands of the media by way of other judicially authorized search or seizure orders, including the production order at issue in this appeal.

11. In *Lessard* and *New Brunswick,* the Court concluded that attempts by law enforcement to obtain material in the hands of the media raise unique considerations. This is not because the media are inherently special or deserving of protection, but because of their role as gatherers and disseminators of news, and the vital importance of that role in a democratic society.[4]

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3 ***Lessard v Canadian Broadcasting Corporation***, [1991] 3 SCR 421, Appellants' Book of Authorities (APP BOA) ["*Lessard*"]; ***Canadian Broadcasting Corporation v Attorney General for New Brunswick,*** [1991] 3 SCR 459, APP BOA ["*New Brunswick*"]

4 ***Lessard*** at para 14 (*per* Cory J); ***New Brunswick*** at paras 29-30 (*per* Cory J). Or, as Justice Douglas of the US Supreme Court put it in *Branzburg,* "The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favoured class, but to bring fulfillment to the public's right to know",

12. Accordingly, the Supreme Court wrote that "special concerns" arise where the state seeks an order targeting material in the possession of the media, and called on courts to exercise "careful consideration" before making such orders.[5] Although the Court wrote that there is no different legal test *per se* when it comes to orders targeting the media, *Lessard* and *New Brunswick* are equally clear that in exercising the discretion of whether to grant an order, an issuing justice must consider certain key factors.[6]

13. The factors are instructive, but they are also articulated at a generalized and high level. For example, they include:

(a) "it is essential that all the [statutory] requirements… for the issuance of the search warrant be met";

(b) the justice of the peace "should consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant";

(c) 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"; and

(d) "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]

14. These factors may be a useful starting point, but they do not provide sufficient guidance to issuing justices (and reviewing judges) in deciding these difficult cases. If anything, they raise additional questions: How closely should the record be examined to ensure the statutory requirements are met? What circumstances are relevant to the balancing exercise? How does

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as cited in B. Oliphant, "Freedom of the Press as a Discrete Constitutional Guarantee", *McGill Law Journal,* vol 59, no 2, 2013, APP BOA at p 296

5 ***New Brunswick*** at paras 30-31 (*per* Cory J)

6 ***New Brunswick*** at paras 31, 44 (*per* Cory J); ***Lessard*** at para 15 (*per* Cory J)

7 ***New Brunswick*** at para 44 (*per* Cory J); ***Lessard*** at para 15 (*per* Cory J)

one strike the proper balance between the interests of the media and those of law enforcement? And just what role does prior dissemination of the information play in any given case?

15. The majority's analysis in *Lessard* and *New Brunswick* sheds little light on these questions. In those cases, the majority was focused mainly on comparing the factual context before them – a warrant requiring media outlets to produce videotape and photos of protestors in order to identify those individuals involved in causing property damage[8] – to a hypothetical scenario where police try to obtain the identity of a confidential source. Many other scenarios fall between these two extremes, including the facts in this appeal, which involve an attempt to seize a journalist's records of his communications with a (non-confidential) source.

16. Moreover, when it wrote *Lessard* and *New Brunswick,* the Court could not have predicted how technology would change both the world of policing and the world of journalism in the decades to come. We have moved from a world of VHS tapes to Kik Messenger chats. The implications of these technological advances require a fresh legal analysis, similar to how the Supreme Court has approached the privacy implications of new technology in other s. 8 cases.[9]

17. Against this backdrop, this Court's decision in this appeal is likely to have a significant influence on how the general principles set out in *Lessard* and *New Brunswick* are adapted and applied in the digital age. The Supreme Court has not revisited the issues addressed in *Lessard* and *New Brunswick* in any detail[10], and few appellate courts across Canada have done so.[11] But

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8 ***New Brunswick*** at paras 2-6; ***Lessard*** at paras 2-5

9 See, for example, ***R v Cole***, [2012] 3 SCR 24 (privacy interests in a computer); ***R v Spencer***, [2014] 2 SCR 212 (privacy interest in IP address and associated subscriber information)

10 Apart from the confidential source issue, the Supreme Court's treatment of these factors in *National Post* was brief and cursory: see ***R v National Post***, [2010] 1 SCR 477, Coalition Book of Authorities ("CBOA") ["*National Post*"], Tab 1 at paras 87-88

11 This Court last considered these issues in detail in ***R v Canadian Broadcasting Corporation*** (2001), 52 OR (3d) 757 (CA), CBOA, Tab 2 ["*R v CBC*"]. As far as the Coalition is aware, only one appellate court has considered the

these issues are not going away. In fact, one can expect more frequent requests for such production orders as data and digital records in the hands of the media become an increasingly abundant and potentially convenient source of information for law enforcement.

B. Statutory prerequisites to authorization should be strictly scrutinized

18. As outlined above, the Supreme Court has already declared it "essential" that the statutory preconditions for an order targeting material in the hands of the media be fulfilled[12], and has directed lower courts to give "careful consideration" before making such orders.[13]

19. Taking the Supreme Court's words seriously, there can be no room for deference by the issuing justice in requiring the state to satisfy the statutory conditions for a production order. An issuing justice should not fill in evidentiary gaps in the information to obtain ("ITO"), draw inferences without direct evidence, or adopt a generous reading of the ITO that favours the state. Instead, where an innocent media party is the target of the order being sought, the issuing justice should strictly scrutinize whether the ITO meets the statutory preconditions for an order. If it does not – or if it is unclear or ambiguous – then the order should not be granted.

20. This strict approach to statutory preconditions is especially appropriate because of the *ex parte* nature of most hearings before an issuing justice. Without opposing counsel present to test, review or scrutinize the material put forward in support of law enforcement's requests, or to advance arguments on behalf of the media, an issuing justice is the only bulwark against an intrusive production order. In these circumstances, giving "careful consideration" requires a sober, cautious and restricted assessment of the record, not a deferential or generous one.

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type of production order at issue in this appeal: see ***Canadian Broadcasting Corp v Manitoba (Attorney General)***, 2009 MBCA 122, APP BOA.

12 ***New Brunswick*** at para 44 (*per* Cory J); ***Lessard*** at para 15 (*per* Cory J) (Factor #1)

13 ***New Brunswick*** at para 31 (*per* Cory J)

C. Exercise of discretion requires proportionality assessment

21. Even where the statutory prerequisites for production order are met, an issuing justice retains the discretion not to issue the order. In exercising this discretion, the Supreme Court has directed issuing justices to "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."[14]

22. The Supreme Court's "balancing" direction may be reframed as follows: it is only constitutionally acceptable to issue an order targeting records in the hands of the media (as an innocent third party) where that order's salutary effects in terms of furthering a criminal investigation or prosecution outweigh its deleterious effects on the ability of the media to effectively gather, report and disseminate the news. Otherwise, any such order will have a disproportionately severe impact on the activities and values protected under section 2(b) of the *Charter,* will not be "reasonable" under s. 8 of the *Charter*, and must be set aside.

23. Carrying out this analysis requires an issuing justice to take account of the relevant factors on both sides of the scale. In other words, an issuing justice must assess both (a) the purpose of the order being sought and its value to law enforcement, and (b) its negative impacts on activities of the media – including its chilling effects on news gathering. The following subsections provide some proposed guidance on how these elements should be analyzed.

1. Chilling effects must always be taken into account

24. In exercising discretion, an issuing justice must recognize and weigh the expected chilling effects of production orders on the media's news-gathering activities, which are implicit

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14 ***New Brunswick*** at para 44 (*per* Cory J); ***Lessard*** at para 15 (*per* Cory J) (Factor #3)

in the right to news publication protected under s. 2(b) of the *Charter*[15] and are of vital importance in a democratic society.[16]

25. Production orders targeting the media will almost always have some form of chilling effect, though the degree and nature of such effects will vary. An issuing justice does not require empirical or other evidence of the chilling effect implications of production orders. Such inferences may be drawn as a matter of common sense judgment about human behaviour.[17]

26. Given that authorization proceedings are typically *ex parte*, it is impossible for media targets to present an issuing justice with evidence of chilling effects. Of course, if specific evidence of specific chilling effects is before the issuing justice or reviewing judge, it must be considered and weighed more heavily in the proportionality analysis. A failure to do so constitutes reversible error.

27. The chilling effect of certain types of production orders – such as those that risk identifying a journalist's confidential source – will be obvious and severe. At the other end of the spectrum are the facts in *Lessard* and *New Brunswick*, where the majority found little reason to believe a chill would result from the seizure of the media's tapes and photos of protestors in a public space.

28. In between lie a range of different scenarios, including situations like this appeal, where police seek to seize material related to a journalist's communications with a source (even if not confidential), for the purpose of investigating or prosecuting that source.

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15 ***New Brunswick*** at para 32 (*per* Cory J) ("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 fulfill its role as a news gatherer and news disseminator…"). See also para. 39.

16 ***National Post*** at paras 33, 38; ***New Brunswick*** at para 30 (*per* Cory J); ***Edmonton Journal v Alberta (Attorney General)***, [1989] 2 SCR 1326, APP BOA at para 3

17 ***St. Elizabeth Home Society v Hamilton (City)***, 2008 ONCA 182, CBOA, Tab 3 at para 32; ***R v Khawaja***, [2012] 3 SCR 555, CBOA, Tab 4 at para 79

29. Courts must recognize the serious chilling effect of a production order in these circumstances. Just as confidential sources will be more reluctant to come forward if their identities are revealed, any source – and particularly those already in an adversarial relationship with the state – will be more reluctant to come forward if journalists are routinely compelled to turn over records to the state for use against that source. The chilling effect may be heightened if the information has never been published, but the chill does not vanish if some or all of the information has been previously published. Prior publication is not determinative: the chill stems from the records themselves (*i.e.* the source's own communications with a journalist) being used to assist the state in investigating or prosecuting that source.

30. In other words, a real risk of a chilling effect will persist whenever the state seeks to compel information or records from the media for use against their own sources. Potential sources who perceive that the state can readily seize communication records – potentially including meta-data and other information beyond what is published in print or broadcast over television – will hesitate to come forward and share their stories with the public, particularly if their relationship with the state is adversarial. The end result is that more stories of public importance will go unreported. This is precisely the danger with journalists or media organizations serving as the *de facto* "investigative arm of the police"[18].

31. Some may argue that this view of the chilling effect is inconsistent with the 'publication factor' from *Lessard* and *New Brunswick*, which states that "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 warrant."[19] This argument is flawed, for several reasons.

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18 ***Lessard*** at para 29 (*per* La Forest J)

19 ***New Brunswick*** at para 44 (*per* Cory J); ***Lessard*** at para 15 (*per* Cory J) (Factor #6). This argument was accepted by the Applications Judge: see para. 42.

32. **First**, the Supreme Court's treatment of prior publication as a "crucial factor" in *Lessard* must be considered on the specific facts of that case.[20] Police were seeking a warrant for videotape and photographs of protestors in a public sphere who had no relationship with the media – and thus (arguably) no expectation that media footage would not be shared with law enforcement. *Lessard* and *New Brunswick* did not involve a request for records of private communications between a journalist and a source who was in an openly adversarial relationship with the state. There is a world of difference between these two types of records: one has nothing to do with news sources, while the other directly engages the ability of a journalist to build a relationship of trust with potential sources in order to gather news.

33. The majority opinions in *Lessard* and *New Brunswick* did not examine whether forcing a journalist to turn over records of his/her communications with a non-confidential source would have a chilling effect. That scenario simply was not before them. Care must be taken not to extend *Lessard* and *New Brunswick* beyond their factual context to support propositions that the Court did not even consider, let alone endorse.

34. **Second**, even as articulated in *Lessard* and *New Brunswick*, the publication factor does not say that publishing information eliminates any chilling effect, nor that it should necessarily result in a warrant (or production order) being granted. Perhaps anticipating the broad range of possible circumstances where an order targeting material in the hands of the media could be sought, the Court explicitly rejected this kind of bright line approach to how the publication factor should be applied or the weight it should be given: in *New Brunswick,* Justice Cory stated

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20 ***Lessard*** at para 16. See also para 20.

that "[t]he factors which may be vital in assessing the reasonableness of one search may be irrelevant in another."[21]

35. When it comes to journalistic sources who are in an adversarial relationship with the state, the fact that some or all of the information in the records being sought has been published may not always be irrelevant, but it certainly is not conclusive.

36. **Third**, the publication factor came about in an era where the information that could be gleaned from records was limited. Photographs and videotapes captured a record of what happened – nothing more, nothing less. There was little practical difference between what was published and what was seized. Today, electronic records may include all manner of additional (and often private) information beyond the image or the words published, including the physical locations of the parties involved, the time and date the records were produced, and other forms of meta-data. Courts must be sensitive to these modern realities when considering the intrusiveness of the search in question, as well as how closely the records sought align with the information that has been published.

37. **Finally**, the Supreme Court's understanding of the chilling effect has evolved since *Lessard* and *New Brunswick*, and the weight afforded to the publication factor should be tempered accordingly.

38. In her dissenting opinion in *Lessard*, Justice McLachlin (as she then was) listed various ways chilling effects may result from police orders targeting material in the hands of the media:

> (a) confidential sources may be fearful of speaking to the press, and the press may lose opportunities to cover events because participants exclude the press due to fear that press files will be readily available to authorities;

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21 ***New Brunswick*** at para 38

(b) reporters may be deterred from recording and preserving their recollections for future use; and

(c) the press may resort to self-censorship to conceal the fact that it possesses information that may be of interest to the police in an effort to protect its sources from police, and to preserve its ability to gather news in the future.[22]

Justice McLachlin's analysis was the minority view in *Lessard,* but it was later adopted by the majority in *National Post*.[23] It is now the latest word from the Supreme Court on how court orders targeting material in the hands of the media can create a chilling effect.

39. This shift towards Chief Justice McLachlin's more sensitive, nuanced and realistic conception of the chilling effect recognizes that the chilling effect does not turn on whether the records sought by law enforcement in a specific case contain previously published information, or might identify a confidential source.[24] Instead, the effect emanates from the perception by potential sources that police can too easily gain access to the media's records.

40. The new approach also recognizes that the chilling effect does not affect only sources. Journalists may be less inclined to cover important stories if there is a significant risk they will be required to share information or records with law enforcement. Similar observations were made by Justice La Forest in his concurring opinion in *Lessard*, where he accepted that a chilling effect would result if the police sought to seize aspects of a "reporter's work product" such as "a reporter's personal notes, recordings of interviews and source contact lists" (emphasis added).[25]

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22 ***Lessard*** at para 76 (*per* McLachlin J, dissenting). Technically, these observations were made in the context of a search warrant case, but (like the rest of the factors articulated in *Lessard*) many of them apply with equal force to production orders.

23 ***National Post*** at para 78 (adopting McLachlin J's description in *Lessard* of the disruptive effects of search warrants)

24 Justice McLachlin found a chilling effect in *Lessard,* despite the fact that it involved previously published information and no confidential sources.

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

This zone of privacy for a reporter's work product and notes should extend to their 21st century equivalents, including text messages and online chats with sources.

41. For all of these reasons, the publication factor does little, if anything, to cure the chilling effects that will likely flow whenever the state compels the media to provide records for use against a source – especially one who is in an adversarial relationship with the state. Issuing justices must take this chilling effect seriously, and weigh it heavily in the balance when determining whether to grant the requested order. A failure to do so constitutes reversible error.

2. Purpose and value of production orders must be considered

42. Against the chilling effect (and any other deleterious consequences) of the proposed production order, an issuing justice must carefully and critically weigh the order's purpose and expected benefit to law enforcement (if any).[26]

43. Not all production orders are created equal. Some may serve an urgent investigative or public safety objective, such as identifying perpetrators in order to charge them or prevent them from engaging in imminent or ongoing criminal activity. Such was the case in *Lessard* and *New Brunswick*. Depending on the gravity of the offence and the risk of further criminal activity, a production order may have significant benefits in these circumstances.

44. But this appeal raises very different facts. Here, the identity of the alleged offender (Farah Shirdon) is known. The production order will have no discernable impact on his criminal activity. Law enforcement already has enough information and evidence to charge and convict him *in absentia*. This is not an 'identify' or 'prevent harm' case. The production order is simply being used to facilitate conviction of a journalist's source at trial.

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26 ***New Brunswick*** at para 32 (*per* Cory J)

45. In these circumstances, the likelihood of a trial actually occurring is a critical consideration. If an accused may be dead, has not been apprehended, or has been charged *in absentia*, the state's interest in obtaining evidence is significantly lessened, and the balancing equation will normally weigh against making the order.[27]

D. Production orders with media targets should be reviewed *de novo*

46. Reviewing judges should review production orders that target media records afresh, rather than on the highly deferential *Garofoli* standard (which simply asks whether the authorizing judge "could have" made the order, based on the record as amplified on review). This is particularly true for production orders targeting communication records between a journalist and a source, since these situations will almost invariably bring about a chilling effect.

47. The *Garofoli* test is not appropriate when dealing with production orders targeting the media. Given the fundamental importance of the media in a democratic society, the recognized chilling effect of production orders on news gathering, the limited nature of the *ex parte* proceedings at first instance, and the delicate and potentially complex nature of the balancing inquiry[28], the *Garofoli* test does not adequately protect the special position and role of the media.

48. Without the benefit of evidence or submissions from the media at first instance, an issuing justice may well not appreciate the full range and impact of the special factors to be considered in determining whether the order should be made. Rather than speculating as to what the issuing justice "could have" decided on a fuller record, the focus of the reviewing justice

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27 Of course, if the order is refused, the application can be reconsidered when a trial becomes a reasonable probability and the Crown's disclosure obligations arise.

28 ***New Brunswick*** at para 33 (*per* Cory J) ("The balancing of interests is always a difficult and delicate task"); ***Lessard*** at para 14 (*per* Cory J) ("[I]t may still be a difficult and complex process to determine whether a search warrant should be issued").

should be to ensure any order made strictly complies with the statutory prerequisites and is proportionate in terms of benefits and harm. If not, the order should be quashed.

49. In *R v CBC,* this Court briefly considered the standard of review issue, in the context of an appeal with facts similar to *Lessard* and *New Brunswick.* Writing for this Court, Justice Moldaver observed that the *Garofoli* standard "may not provide perfect protection to members of the media", but was able to conclude that "it provides adequate protection in circumstances such as those in the present case" (emphasis added).[29] In a footnote, Justice Moldaver confirmed that he was "leav[ing] for another day whether an enlarged standard of review might be warranted in circumstances involving different facts and/or different *Charter* considerations."[30]

50. That day has come. As discussed above, production orders targeting records of communications between a journalist and a source are entirely different than orders targeting images of protestors who had no relationship with the media. Generally speaking, the latter scenario engages chilling effect more intensely and directly than the former – and calls for greater protection in the authorization process. At a minimum, this would require *de novo* review by the reviewing judge. A principled commitment to a free press requires this Court to develop the law in this manner, and precedent does not preclude this Court from doing so.

PART V - RELIEF REQUESTED

51. The Coalition requests that its submissions be taken into account in deciding this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of November 2016.

M. Philip Tunley / Andrea Gonsalves / Justin Safayeni
Stockwoods LLP
Lawyers for the Coalition

29 ***R v CBC*** at para 55. Emphasis added.
30 *Ibid.* at footnote 2

SCHEDULE "A"
LIST OF AUTHORITIES

TAB	CASE
1.	*Lessard v Canadian Broadcasting Corporation,* [1991] 3 SCR 421
2.	*Canadian Broadcasting Corporation v Attorney General for New Brunswick,* [1991] 3 SCR 459
3.	*R v Cole,* [2012] 3 SCR 24
4.	*R v Spencer,* [2014] 2 SCR 212
5.	*R v National Post,* [2010] 1 SCR 477
6.	*R v Canadian Broadcasting Corporation* (2001), 52 OR (3d) 757 (CA)
7.	*Canadian Broadcasting Corp v Manitoba (Attorney General),* 2009 MBCA 122
8.	*Edmonton Journal v Alberta (Attorney General),* [1989] 2 SCR 1326
9.	*St. Elizabeth Home Society v Hamilton (City),* 2008 ONCA 182
10.	*R v Khawaja,* [2012] 3 SCR 555
	TEXT
11.	B. Oliphant "Freedom of the Press as a Discrete Constitutional Guarantee", *McGill Law Journal,* vol. 59, no. 2, 2013, p. 296

SCHEDULE "B"
RELEVANT STATUTES

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.

SCHEDULE "C"

COURT OF APPEAL FOR ONTARIO

DATE: 20161108
DOCKET: M46964 (C62054)

Strathy C.J.O. (In Chambers)

BETWEEN

Vice Media Canada Inc. and Ben Makuch

Applicants (Appellants)

and

Her Majesty the Queen in the Right of Canada

Respondent (Respondent)

Iain A.C. MacKinnon, for the appellants

Brian Puddington and Sarah Shaikh, for the respondent

Brian Radnoff, for the Canadian Civil Liberties Association, moving party

Justin Safayeni, for the Canadian Journalists for Free Expression, Canadian Broadcasting Corporation, AdIdem/Canadian Media Lawyers Association, Canadian Association of Journalists, Canadian Media Guild/Communications Workers of America (Canada), Reporters Without Borders/Reporters Sans Frontières, Aboriginal Peoples Television Network, and Centre for Free Expression, moving parties

Andrew W. MacDonald, for the British Columbia Civil Liberties Association, moving party

Heard: October 27, 2016

Motions to intervene

ENDORSEMENT

[1] The moving parties seek leave to intervene in this appeal pursuant to rr. 2 and 23 of the *Criminal Appeal Rules*, S.I./93-169, and rr. 13.01 and 13.02 of the

Rules of Civil Procedure, R.R.O. 1990, Reg. 194. The appellants consent to the motions and the Crown opposes them.

[2] The appellants appeal an order of the Superior Court of Justice, dismissing an application for *certiorari* to quash a production order granted by a judge of the Ontario Court of Justice pursuant to ss. 487.012(1) and (3) of the *Criminal Code*. The judge also granted a sealing order over the Information to Obtain the production order ("ITO"). The *certiorari* judge varied this order by unsealing parts of the ITO and imposing a publication ban on others. The appellant also challenges this decision.

[3] At the conclusion of oral argument, I granted the motions, subject to certain conditions, with reasons to follow. These are my reasons.

Facts

[4] Between June and October 2014, the appellant Vice Media published three articles, written by the appellant Makuch, about the alleged involvement of Farah Shirdon in the terrorist organization ISIS. The articles were largely based on communications between Makuch and Shirdon through a text messaging service called "Kik".

[5] Shirdon had emigrated from Canada to Syria. The RCMP had been investigating him for terrorism-related offences. On September 24, 2014, the RCMP charged him *in absentia* with various offences, including leaving Canada

to participate in the activities of a terrorist group, contrary to s. 83.181 of the *Criminal Code*. Shirdon remains at large.

Procedural History

[6] The RCMP applied to the Ontario Court of Justice for a production order for documents and data in the possession of Vice and Makuch pertaining to communications with or about Shirdon.

[7] The application judge granted the order, and the order sealing the ITO, on February 13, 2015.

[8] The *certiorari* judge refused to quash the production order, but varied the sealing order to cover only: information where the Crown made a national security claim; information that would reveal the identity of one innocent party; and information related to an ongoing investigation. The *certiorari* judge imposed a publication ban on other information in the ITO that would compromise Shirdon's right to a fair trial, but he unsealed and allowed the remaining portions to be published.

[9] On appeal to this court, the appellant submits that the *certiorari* judge erred in failing to place sufficient weight on the role of the media in a democratic society, as recognized by the Supreme Court of Canada's interpretations of s. 2(*b*) of the *Charter*, when balancing the state's interests in prosecuting crimes,

against the media's interests in gathering and disseminating news under s. 487.012 of the *Criminal Code*.

Applicable Legal Principles

[10] The overarching requirement for intervention under the *Rules* is that the proposed intervener will make a useful contribution to the appeal without causing injustice to the immediate parties: *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.), p. 167; *P.S. v. Ontario*, 2014 ONCA 160, 317 O.A.C. 219, at para. 5.

[11] To make a useful contribution to the proceeding, the intervener must do more than simply echo the positions of the parties: *Jones v. Tsige*, 106 O.R. (3d) 721 (C.A.), at para. 29. The usefulness of an intervener is partly a function of its experience and expertise: *Jones*, at para. 25.

[12] The criteria for intervention are somewhat relaxed in *Charter* cases. This ensures that the court will have the benefit of various perspectives of the historical and sociological context, as well as policy and other considerations that bear on the constitutional validity of state action: *Authorson (Litigation guardian of) v. Canada (Attorney General)* (2001), 147 O.A.C. 355 (C.A.), at para. 7. In *Bedford v. Canada (Attorney General)*, 98 O.R. (3d) 792 (C.A.) this court stated at para. 2 that in a *Charter* case a proposed intervener usually must demonstrate that it:

(a) has a real substantial and identifiable interest in the subject matter of the proceedings;

(b) has an important perspective distinct from the immediate parties; or

(c) is a well-recognized group with special expertise and a broadly identifiable membership base.

[13] This is also a criminal appeal. Leave to intervene should be granted sparingly where an accused's liberty is at stake: *R. v. Roks*, 2010 ONCA 182, 275 O.A.C. 146, at para. 11. Courts are reluctant to allow interveners in criminal cases where the proposed intervener supports the Crown's position. A criminal proceeding in which the accused person is obliged to respond to the submissions of more than one prosecutor lacks the appearance of fairness: *Roks*, at para. 14.

[14] However, although this is a criminal appeal, it is not a prosecution. Shirdon is only under investigation at this stage and is not in Canada. His liberty is not at stake. Moreover, the proposed interveners all contest the Crown's position. Therefore, these principles of restraint for interventions in criminal appeals do not apply.

Applying the Principles

[15] This appeal raises issues of public importance. There is little appellate case law on the application of *Canadian Broadcasting Corp. v. Lessard*, [1990] 3

S.C.R. 421, dealing with search warrants of media property, to the statutory criteria in s. 487.012 of the *Criminal Code*.

[16] In my view, the court will benefit from the broader perspectives, experience, and expertise of the interveners on the constitutional rights of Canadian citizens beyond Vice and Makuch who are affected by the decision.

[17] The moving parties are well-recognized groups with demonstrated experience and expertise. They bring unique perspectives – those of news gatherers and news consumers – that are distinct from those of the immediate parties. They have a real interest in the issues raised in this appeal. They do not assert new grounds of appeal. They simply assert different perspectives on the issues informed by their experience.

[18] The moving parties will provide a useful contribution on the balancing of media rights and state interests as it pertains to applying the statutory criteria in s. 487.012 of the *Criminal Code*. The will illuminate the potential effect of a production order on the ability of journalists to obtain sensitive information from sources. They will also provide a useful perspective on whether the publication ban ordered by the *certiorari* judge was a reasonable alternative to a sealing order.

[19] I do not agree with the Crown's submission that the British Columbia Civil Liberties Association's proposal to explain how the *Lessard* criteria should be

modified given the advances in technology since 1991 will require the introduction of evidence that was not before the *certiorari* judge. In my view, the advances of communications technology and journalistic techniques in the past twenty five years are, in the broadest sense, matters of which the court may take judicial notice.

Order

[20] For these reasons I am satisfied that the interveners will assist the court and that the conditions imposed will prevent injustice to the respondent. Leave to intervene is granted to the CCLA, the BCCLA, and the Coalition, subject to the following conditions:

(a) the submissions of the CCLA shall be confined to the issue of the sealing order and the publication ban;

(b) the submissions of the BCCLA and the Coalition shall be confined to the issue of the production order;

(c) the interveners will make reasonable efforts not to duplicate their written or oral submissions or the written or oral submissions of the appellant;

(d) the interveners shall take the factual record as they find it and shall not supplement or expand the record;

(e) each intervener may file a factum of up to 15 pages by November 28, 2016 and, subject to the discretion of the panel, may make oral submissions of up to 15 minutes;

(f) the interveners shall not seek costs and shall not be liable for costs; and

(g) the respondent may file a factum of up to 40 pages and, subject to the discretion of the panel, may have an additional 15 minutes of oral argument.

C.J.O.

VICE MEDIA CANADA INC. and BEN MAKUCH
Applicants (Appellants)

and

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA
Respondent (Respondent)

Court File No. C62054

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

FACTUM OF THE INTERVENORS, 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 FRONTIÈRES, ABORIGINAL PEOPLES TELEVISION NETWORK, CENTRE FOR FREE EXPRESSION

STOCKWOODS LLP
Barristers
Toronto-Dominion Centre
TD North Tower
77 King Street West
Suite 4130, P.O. Box 140
Toronto ON M5K 1H1

Philip Tunley (26402J)
Andrea Gonsalves (52532E)
Justin Safayeni (58427U)
Tel: 416-593-3494
justins@stockwoods.ca

Tel: 416-593-7200
Fax: 416-593-9345

Lawyers for the Coalition