



SUPREME COURT OF CANADA

CITATION: R. v. Vice Media Canada Inc.,
2018 SCC 53

APPEAL HEARD: May 23, 2018
JUDGMENT RENDERED: November 30, 2018
DOCKET: 37574

BETWEEN:

Vice Media Canada Inc. and Ben Makuch
Appellants

and

Her Majesty The Queen
Respondent

- and -

**Attorney General of Ontario, Aboriginal Peoples Television Network, Advocates
in Defence of Expression in Media, Canadian Association of Journalists,
Canadian Journalists for Free Expression, Canadian Media
Guild/Communications Workers of America Canada, Centre for Free
Expression, Global News, a Division of Corus Television Limited Partnership,
Postmedia Network Inc., Canadian Broadcasting Corporation, Canadian
Muslim Lawyers Association, Media Legal Defence Initiative, Reporters
Without Borders, Reporters Committee for Freedom of the Press, Media Law
Resource Centre, International Press Institute, Article 19, Pen International,
Pen Canada the Canadian Centre of Pen International, Index on Censorship,
Committee to Protect Journalists, World Association of Newspapers and News
Publishers, International Human Rights Program, British Columbia Civil
Liberties Association and Canadian Civil Liberties Association**
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,
Rowe and Martin JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 108)

Moldaver J. (Gascon, Côté, Brown and Rowe JJ.
concurring)

CONCURRING REASONS:
(paras. 109 to 171)

Abella J. (Wagner C.J. and Karakatsanis and Martin JJ.
concurring)

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R. v. VICE MEDIA CANADA INC.

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Ben Makuch**

Appellants

v.

Her Majesty The Queen

Respondent

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**Attorney General of Ontario,
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Advocates in Defence of Expression in Media,
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Canadian Media Guild/Communications
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Canadian Muslim Lawyers Association,
Media Legal Defence Initiative, Reporters Without Borders,
Reporters Committee for Freedom of the Press,
Media Law Resource Centre, International Press Institute,
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British Columbia Civil Liberties Association and
Canadian Civil Liberties Association**

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2018 SCC 53

File No.: 37574.

2018: May 23; 2018: November 30.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of expression — Media — Framework governing applications by police for search warrants and production orders — Police obtaining ex parte production order compelling media organization and journalist to hand over instant messages exchanged with suspected terrorist — Whether current framework provides adequate protection to media in view of special role it plays in free and democratic society — Whether production order validly issued — Canadian Charter of Rights and Freedoms, s. 2(b).

Criminal law — Production orders — Standard of review — Notice — Police obtaining ex parte production order compelling media organization and journalist to hand over instant messages exchanged with suspected terrorist — Standard of review applicable to production and other investigative orders relating to media — Whether presumptive notice requirement should be imposed when police

seeking production order or search warrant in relation to media — Criminal Code, R.S.C. 1985, c. C-46, s. 487.014.

A media organization and one of its journalists (together, “Vice Media”) wrote and published three news stories in 2014 based on exchanges between the journalist and a source, a Canadian man suspected of having joined a terrorist organization in Syria. The articles contained statements by the source that, if true, could provide strong evidence implicating him in multiple terrorism offences. The RCMP successfully applied *ex parte* to the Ontario Court of Justice, under s. 487.014 of the *Criminal Code*, for an order directing Vice Media to produce the screen captures of the messages exchanged with the source. Rather than producing that material, Vice Media brought an application in the Superior Court to quash the order. The reviewing judge dismissed Vice Media’s challenge to the production order, holding that it was open to the authorizing judge to conclude that the media’s interest was outweighed by the public interest in obtaining reliable evidence of very serious terrorism offences. The Court of Appeal dismissed Vice Media’s appeal.

Held: The appeal should be dismissed. The production order was properly issued and should be upheld.

Per Moldaver, Gascon, Côté, Brown and Rowe JJ.: The framework set out in *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421, and its companion case, *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, continues to provide a suitable model for considering

applications for search warrants and production orders relating to the media and provides adequate protection to the media and the special role it plays in Canadian society. However, certain aspects of that framework should be refined: its factors should be reorganized; the effect of prior partial publication of the materials sought should be assessed on a case-by-case basis; and a modified standard of review should be adopted when reviewing an order related to the media that was made *ex parte*.

The *Lessard* framework, which seeks to balance the state's interest in the investigation and prosecution of crime and the media's right to privacy in gathering and disseminating the news, sets out nine factors for judges to consider when determining whether to issue a search warrant relating to the media. These factors should be reorganized to make them easier to apply in practice. On an application for a production order against the media, a four-part analysis should be applied: 1) the authorizing judge must consider whether to exercise his or her discretion to require notice to the media; 2) all statutory preconditions must be met; 3) the authorizing judge must balance the state's interest in the investigation and prosecution of crimes and the media's right to privacy in gathering and disseminating the news; and 4) if the authorizing judge decides to exercise his or her discretion to issue the order, he or she should consider imposing conditions to ensure that the media will not be unduly impeded in the publishing and dissemination of the news.

With respect to the first stage of the analysis, a presumptive notice requirement should not be imposed in situations where the police are seeking a

production order in relation to the media. The traditional model of *ex parte* applications gives effect to the language of the *Criminal Code* and to this Court's decision in *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477. The *Criminal Code* permits *ex parte* applications for production orders, subject to the authorizing judge's overriding discretion to require notice where he or she deems appropriate. Absent urgency or other circumstances that justify proceeding *ex parte*, the authorizing judge may find it desirable to require that notice be given to the media, especially if he or she considers that more information is necessary to properly balance the rights and interests at stake. However, that conclusion is not mandatory. The police should show some evidentiary basis for why there is urgency or other circumstances that justify proceeding *ex parte*; bare assertions will not provide a basis for doing so. A broad and unsupported claim that the media is unlikely to cooperate with police or that the media could theoretically put the materials beyond the reach of authorities if notice were to be given should not suffice.

In performing the balancing exercise at the third stage of the analysis, the authorizing judge should consider all of the circumstances, including, but not limited to, the likelihood and extent of any potential chilling effects; the scope of the materials sought by the police and whether the order sought is narrowly tailored; the likely probative value of the materials; whether there are alternative sources from which the information may reasonably be obtained and, if so, whether the police have made all reasonable efforts to obtain the information from those sources; the effect of prior partial publication of the materials sought; and more broadly, the vital role that

the media plays in the functioning of a democratic society and the fact that the media will generally be an innocent third party. The decision as to whether to grant the order sought is discretionary, and the relative importance of the various factors guiding that discretion will vary from case to case. Although chilling effects cannot be overlooked, they should not be presumed in all cases regardless of the circumstances; rather, the existence and extent of any potential chilling effects should be assessed on a case-by-case basis. Further, the distinction between confidential and non-confidential sources should not be erased. Additionally, a strict necessity test for production orders should not be imposed. While probative value may be a relevant consideration, requiring the police to demonstrate that a production order is necessary to secure a conviction would effectively transform the production order application into a trial of the alleged offence on the merits and would seriously undermine the ability of the police to investigate and gather evidence of potential criminality.

Rather than being assessed as an independent factor to be considered on its own, prior partial publication of the information sought should now be treated as part of the overall *Lessard* balancing exercise. While prior partial publication was considered in *Lessard* as a factor that always militates in favour of granting an order, the effect of prior partial publication should now be assessed on a case-by-case basis. Prior partial publication should not necessarily lessen the degree of protection afforded to the unpublished materials, since permitting state access to these materials still interferes with the media's right to privacy in gathering and disseminating the news and compelled production of these materials may still cause chilling effects. In

determining the effect of prior partial publication, the authorizing judge should consider all the circumstances, including the nature of the materials (both published and unpublished) and how much of the full body of materials has already been published. This more nuanced approach adds greater flexibility to the *Lessard* framework and permits a more contextual inquiry.

The standard of review to be applied to *ex parte* production orders targeting the media should be a modified version of the standard set out in *R. v. Garofoli*, [1990] 2 S.C.R. 1421. The traditional *Garofoli* approach, namely, whether in light of the record before the authorizing judge, as amplified on review, the latter could have granted the authorization, is highly deferential and, in some cases, works unfairness due to absence of the media at the authorization stage. In such circumstances, the authorizing judge would have performed the *Lessard* analysis without having fully weighed both sides of the scale. A decision made without having considered all of the relevant information that could reasonably have affected the outcome cannot rightly be shown deference, and therefore a fresh weighing by the reviewing judge is justified. Thus, the following test should be applied: if the media points to information not before the authorizing judge that, in the reviewing judge's opinion, could reasonably have affected the authorizing judge's decision to issue the order, then the media will be entitled to a *de novo* review. If, on the other hand, the media fails to meet this threshold requirement, then the traditional *Garofoli* standard will apply. Where the media was given notice and appeared before the authorizing judge, there is generally good reason to apply the traditional *Garofoli* standard on

review, since permitting a *de novo* review may do little more than add unnecessary time and expense.

Applying the refined *Lessard* framework to the facts of this case, the production order should not be set aside. First, it was open to the authorizing judge to proceed *ex parte* and decline to exercise his discretion to require notice. The authorizing judge was justified in relying on the police's explanation for seeking the order *ex parte*, which included the risk that Vice Media could move the materials beyond the reach of Canadian courts if alerted to the police's interest in the material. Vice Media did not point to any information not before the authorizing judge that could reasonably have affected the decision to issue the order. Accordingly, the traditional *Garofoli* standard of review applies. Second, the statutory preconditions for the issuance of a production order were satisfied. Notably, the evidence of the police provided reasonable grounds to believe that 1) the source had committed certain offences; 2) Vice Media had in its possession the materials sought; and 3) those materials would afford evidence respecting the commission of the alleged offences. Third, based on the record, it was open to the authorizing judge in conducting the *Lessard* balancing exercise to conclude that the state's interest in the investigation and prosecution of crime outweighed the media's right to privacy in gathering and disseminating the news. Even on a *de novo* review, the order was properly granted. Disclosure of the materials sought would not reveal a confidential source; no "off the record" or "not for attribution" communications would be disclosed; there is no alternative source through which the materials sought may be

obtained; the source used the media to publicize his activities with a terrorist organization as a sort of spokesperson on its behalf; and the state's interest in investigating and prosecuting allegations of serious terrorism offences weighs heavily in the balance. Fourth, the authorizing judge imposed adequate terms in the production order, providing Vice Media with ample time to comply with the order. Vice Media thus had sufficient opportunity to move to have the production order set aside, as it did.

It is neither necessary nor appropriate in this case to formally recognize that freedom of the press enjoys distinct and independent constitutional protection under s. 2(b) of the *Charter*. The appeal can readily be disposed of without rethinking s. 2(b), and the matter was not fully argued by the parties or considered by the courts below.

Finally, this case does not engage the new *Journalistic Sources Protection Act* because the facts arose before the legislation came into force.

Per Wagner C.J. and **Abella**, Karakatsanis and Martin JJ.: A strong, independent and responsible press ensures that the public's opinions about its democratic choices are based on accurate and reliable information. This is not a democratic luxury — there can be no democracy without it. Section 2(b) of the *Charter* contains a distinct constitutional press right which protects the media's core expressive functions — its right to gather and disseminate information for the public benefit without undue interference. The press enjoys this constitutional protection, not

only because “freedom of the press and other media” is specifically mentioned in the text of s. 2(b), but also because of its distinct and independent role.

Strong constitutional safeguards against state intrusion are a necessary precondition for the press to perform its essential democratic role effectively. A vigorous, rigorous, and independent press holds people and institutions to account, uncovers the truth, and informs the public. It further provides the public with the information it needs to engage in informed debate.

Given the media’s unique role, the purpose underlying protection for the press in s. 2(b) is related to, but separate from, the broader guarantee of freedom of expression. When the state seeks access to information in the hands of the media through a production order, both the press’ s. 2(b) rights and s. 8 *Charter* privacy rights are engaged. A rigorously protective harmonized analysis is therefore required.

The press’ s. 2(b) right includes not only the right to transmit news and other information, but also the right to gather this information without undue interference from government. Section 2(b)’s press and media guarantee includes protection for journalistic work product, such as a reporter’s personal notes, recordings of interviews, or source contact lists. It also includes protecting communications with confidential sources as well as those whose comments are “off the record” or “not for attribution”. And it includes protecting the journalist’s documentation of his or her investigative work. These are the indispensable tools which help the press gather, assess and disseminate information.

This Court previously set out the approach for how s. 8 applies to production orders when the target is the press in *Lessard* and its companion case, *New Brunswick*. In these cases, the Court held that there must be a balancing of the constitutional s. 8 privacy rights of the press with the interests of the state in investigating crime. Both cases were decided on the assumption that although the press had enhanced privacy interests under s. 8, there was no distinct role for the press' s. 2(b) rights.

An approach based solely on s. 8 privacy rights is no longer sustainable. Recognizing a distinct press guarantee in s. 2(b) of the *Charter* means that the press is no longer just the “backdrop” referred to in *New Brunswick*. An independent, distinct protection for the press in s. 2(b) requires an approach that explicitly addresses those rights, as well as the s. 8 privacy rights. The fact that *both* constitutional rights for the press are engaged suggests a new harmonized analysis, in which the press' right to be secure against unreasonable search and seizure *as well* as its right to be protected from undue interference with legitimate newsgathering activities, are explicitly taken into account.

What is now required is a proportionality inquiry showing that the benefit of the state's interests in obtaining the information outweighs the harmful impact on the press' constitutionally protected s. 8 *and* s. 2(b) rights. Among the considerations to be weighed by authorizing judges are: the media's reasonable expectation of privacy; whether there is a need to target the press at all; whether the evidence is

available from any other source, and if so, whether reasonable steps were taken to obtain it; and whether the proposed order is narrowly tailored to interfere with the press' rights no more than necessary. Generally, the more intrusive the proposed order is on the s. 8 privacy and s. 2(b) rights of the media, the greater the impact on the press' ability to gather and publish the news. And, in turn, the greater the harmful impact on the public's right to know the fruits of the press' activities. An obvious collateral impact on the press of being required to comply with a production order is a chilling effect not only on the particular press being targeted, but on the press generally.

On the other side of the balance, the more serious the crime under investigation, the more cogent the evidence sought and the more urgent the investigative need, the stronger the state's interest will be. While the cogency of the evidence is a relevant consideration, an assessment of whether it is necessary for the Crown to obtain a conviction is not required in evaluating the strength of the state's interest.

Recognizing that s. 2(b) requires a more rigorous approach to authorizations against the press compels clarification of some aspects of the jurisprudence, the first being the relevance of prior publication. One of the media's core functions is the exercise of discretion over what is and is not published, and there is often an expanse of unpublished material behind each published story. State access to the unpublished portion clearly interferes with both privacy and newsgathering.

Where part or all of a communication with a journalist was intended or understood to be “off the record”, it too is entitled to protection from disclosure requirements. This aligns with the need to protect journalists’ source materials even where the identification of a confidential source is not at issue.

Finally, this Court has interpreted provisions similar to s. 487.014(1) of the *Criminal Code* to permit, but not require, *ex parte* proceedings. There are strong rationales for requiring notice to the press in cases like this. If the authorizing judge lacks evidence and submissions from the party exclusively in possession of the information needed for the balancing — the innocent media third party whose s. 2(b) rights are engaged — there is nothing to balance. While the issue of notice is ultimately a matter within the discretion of the authorizing judge, it is highly preferable in most cases to proceed on notice to the media. Where there are exigent circumstances or a real risk of the destruction of evidence, notice may not be feasible, but these cases will be rare.

The orthodox approach for reviewing production orders set out in *Garofoli* was not designed to scrutinize whether s. 2(b) *Charter* rights were sufficiently protected. In proceedings where the press is involved, and there has been no notice before the authorizing judge, the press will not have had the opportunity to explain how the order would interfere with its work until after the authorization is made. In such cases, the press is entitled to a *de novo* balancing on the review. If, on the other hand,

the press was present and able to make its case before the authorizing judge, the more deferential *Garofoli* approach would be justified.

In this case, the production order strikes a proportionate balance between the rights and interests at stake. The order is narrowly tailored, targeting only the journalist's communications with the source, and those communications are not available from any other source. The suggestion that the production order would interfere with Vice Media's newsgathering and publication functions shrivels in a context where the source was not a confidential one and wanted everything he said to be made public. Crucially, there is no suggestion that anything the source said was intended or understood to be "off the record". The journalist's own conduct shows that the relationship was not confidential in any way. Accordingly, the benefit of the state's interest in obtaining the messages outweighs any harm to Vice Media's rights.

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By Moldaver J.

Modified: *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459; **applied:** *R. v. Garofoli*, [1990] 2 S.C.R. 1421; **referred to:** *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *British Steel Corp. v. Granada Television Ltd.*, [1981] A.C. 1096; *Canadian Broadcasting Corp. v. Manitoba (Attorney General)*, 2009 MBCA 122, 250 C.C.C. (3d) 61; *Moysa v. Alberta (Labour*

Relations Board), [1989] 1 S.C.R. 1572; *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *R. v. Canadian Broadcasting Corp.* (2001), 52 O.R. (3d) 757; *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Nero*, 2016 ONCA 160, 334 C.C.C. (3d) 148; *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609.

By Abella J.

Referred to: *R. v. Garofoli*, [1990] 2 S.C.R. 1421; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Goodwin v. United Kingdom* (1996), 22 E.H.R.R. 123; *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Vancouver Sun (Re)*, 2004 SCC 43,

[2004] 2 S.C.R. 332; *R. v. Sinclair*, 2010 SCC 35, [2010] 2 S.C.R. 310; *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41, [2010] 2 S.C.R. 592; *Nagla v. Latvia*, No. 73469/10, July 16, 2013; *R. (Miranda) v. Secretary of State for the Home Department*, [2016] EWCA Civ 6, [2016] 1 W.L.R. 1505; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Canadian Broadcasting Corp. v. Manitoba (Attorney General)*, 2009 MBCA 122, 250 C.C.C. (3d) 61; *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743; *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *R. v. Nero*, 2016 ONCA 160, 334 C.C.C. (3d) 148; *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992; *World Bank Group v. Wallace*, 2016 SCC 15, [2016] 1 S.C.R. 207; *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343.

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Canada Evidence Act, R.S.C. 1985, c. C-5, s. 39.1(1) “journalistic source”, “journalist”.

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Criminal Code, R.S.C. 1985, c. C-46, ss. 83.18, 83.2, 487.014 [ad. 2014, c. 31, s. 20; formerly s. 487.012], 487.0193(1), (4), 488.02(3).

Journalistic Sources Protection Act, S.C. 2017, c. 22.

Treaties and Other International Instruments

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 [the *European Convention on Human Rights*], art. 10.

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APPEAL from a judgment of the Ontario Court of Appeal (Hoy A.C.J.O. and Doherty and Miller J.J.A.), 2017 ONCA 231, 137 O.R. (3d) 263, 412 D.L.R. (4th) 531, 352 C.C.C. (3d) 355, 23 Admin. L.R. (6th) 66, [2017] O.J. No. 1431 (QL), 2017 CarswellOnt 3901 (WL Can.), affirming in part a decision of MacDonnell J., 2016 ONSC 1961, 352 C.R.R. (2d) 60, [2016] O.J. No. 1597 (QL), 2016 CarswellOnt 4901 (WL Can.), dismissing applications to quash, vary or revoke a production order and allowing in part an application to set aside a sealing order. Appeal dismissed.

M. Philip Tunley, Iain A.C. MacKinnon and Jennifer P. Saville, for the appellants.

Croft Michaelson, Q.C., and *Sarah Shaikh*, for the respondent.

John Patton and Deborah Krick, for the intervener the Attorney General of Ontario.

Justin Safayeni, for the interveners the Aboriginal Peoples Television Network, the Advocates in Defence of Expression in Media, the Canadian Association of Journalists, the Canadian Journalists for Free Expression, the Canadian Media Guild/Communications Workers of America Canada, the Centre for Free Expression, Global News, a Division of Corus Television Limited Partnership and Postmedia Network Inc.

Sean A. Moreman and Katarina Germani, for the intervener the Canadian Broadcasting Corporation.

Faisal Mirza and Yavar Hameed, for the intervener the Canadian Muslim Lawyers Association.

Paul Schabas and Kaley Pulfer, for the interveners the Media Legal Defence Initiative, Reporters Without Borders, the Reporters Committee for Freedom of the Press, the Media Law Resource Centre, the International Press Institute, Article

19, Pen International, Pen Canada the Canadian Centre of Pen International, the Index on Censorship, the Committee to Protect Journalists, the World Association of Newspapers and News Publishers and the International Human Rights Program.

Tae Mee Park, for the intervener the British Columbia Civil Liberties Association.

Brian N. Radnoff and *Rebecca Shoom*, for the intervener the Canadian Civil Liberties Association.

The judgment of Moldaver, Gascon, Côté, Brown and Rowe JJ. was delivered by

MOLDAVER J. —

I. Overview

[1] Over 25 years ago, in *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421, and its companion case *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, this Court established a general framework governing applications by the police for search warrants — and, as recognized in subsequent cases, production orders — relating to the media. This framework, reaffirmed just eight years ago in *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, seeks to balance two competing concepts: the state’s interest in the investigation

and prosecution of crime, and the media's right to privacy in gathering and disseminating the news.

[2] The appellants, a media organization and one of its journalists, say that this framework is not working. They claim that, in practice, it serves as nothing more than a “rubber stamp” permitting the police to access materials in the hands of the media. They submit that it must therefore be reformed — perhaps even abandoned entirely — to provide stronger protection for the media and the special role it plays in a free and democratic society. Applying this stronger protection, they maintain that the production order challenged in this case (“Production Order”), which requires them to produce records of communications they had with a suspected terrorist, should be set aside.

[3] The respondent, the Crown, sees things differently. It submits that the existing framework adequately protects the media and the special role it plays. Further, it maintains that the Production Order was properly issued in accordance with that framework and should not be set aside.

[4] For reasons that follow, I am of the view that the *Lessard* framework continues to provide a suitable model for considering applications for search warrants and production orders relating to the media. I would, however, refine certain aspects of that framework:

- First, rather than treating prior partial publication as a factor that *always* militates in favour of granting an order, I would assess the effect of prior partial publication on a case-by-case basis.
- Second, with respect to the standard of review to be applied when reviewing an order relating to the media that was made *ex parte*, I would adopt a modified *Garofoli* standard (see *R. v. Garofoli*, [1990] 2 S.C.R. 1421): if the media points to information not before the authorizing judge that, in the reviewing judge’s opinion, could reasonably have affected the authorizing judge’s decision to issue the order, then the media will be entitled to a *de novo* review. Otherwise, the traditional *Garofoli* standard will apply, meaning that the order may be set aside only if the media can establish that — in light of the record before the authorizing judge, as amplified on review — there was no reasonable basis on which the authorizing judge could have granted the order.
- Third, I would reorganize the *Lessard* factors to make them easier to apply in practice.

[5] Turning to the case at hand, and applying the refined *Lessard* framework, I would not set aside the Production Order. Here, the state’s interest in investigating and prosecuting the alleged crimes outweighs the appellants’ right to privacy in gathering and disseminating the news. Importantly, disclosure of the materials sought would not reveal a confidential source; no “off the record” or “not for attribution”

communications would be disclosed; there is no alternative source through which the materials sought may be obtained; the source used the media to publicize his activities with a terrorist organization and broadcast its extremist views as a sort of spokesperson on its behalf; and the state's interest in investigating and prosecuting the alleged crimes — which include serious terrorism offences — weighs heavily in the balance. Accordingly, I would dismiss the appeal.

[6] Before setting out my reasons, I wish to clarify at the outset that this case does not engage the new *Journalistic Sources Protection Act*, S.C. 2017, c. 22 (“*JSPA*”), brought into force in October 2017. Among other things, the *JSPA* provides enhanced protections for maintaining the confidentiality of “journalistic sources”¹ and sets out a new framework governing applications for search warrants, production orders, and other orders relating to a “journalist”.² Although, going forward, this new regime will govern production orders relating to “journalists”, even where no confidential source is involved, the facts in this case arose before the *JSPA* was brought into force, and therefore it does not apply. Accordingly, these reasons deal with the statutory and common law framework standing separate and apart from the *JSPA*. Given that the legal landscape in this area has changed and now has a new and untested statutory component, and bearing in mind the lack of any real merit to the argument that, on the facts of this case, the Production Order should be set aside, I

¹ “Journalistic source” is defined in s. 39.1(1) of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, as “a source that confidentially transmits information to a journalist on the journalist’s undertaking not to divulge the identity of the source, whose anonymity is essential to the relationship between the journalist and the source”.

² “Journalist” is defined in s. 39.1(1) of the *Canada Evidence Act* as “a person whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person”.

am of the view that we should adopt a narrow approach that is restricted to the issues raised by the parties both here and in the courts below.

II. Facts

[7] My colleague has summarized the relevant facts and judicial history in her reasons, and I see no need to duplicate her efforts. I will refer to the facts only as necessary to develop a particular issue. However, to briefly summarize, Vice Media Canada Inc. (“Vice Media”) is a company that produces stories and content on a number of multimedia platforms. In 2014, one of its reporters, Ben Makuch (together with Vice Media, the “appellants”), began exchanging with a Canadian man suspected of having joined the Islamic State of Iraq and Syria (“ISIS”), Farah Mohamed Shirdon, through an instant text messaging application, Kik messenger. Based on these exchanges, Mr. Makuch wrote three new stories and Vice Media published the articles. The RCMP sought and obtained the Production Order, which directed the appellants to hand over screen captures of Mr. Makuch’s exchanges with Mr. Shirdon. The appellants unsuccessfully challenged the Production Order in the courts below and now appeal to this Court.

III. Issues

[8] This appeal raises four main issues:

- (1) Should the *Lessard* framework be reformed?

(2) Where the police are seeking a production order relating to the media, should a presumptive notice requirement be imposed?

(3) What is the standard of review to be applied on review of a production order relating to the media?

(4) Should the Production Order be set aside?

IV. Analysis

A. *Should the Lessard Framework Be Reformed?*

[9] The main jurisprudential question on appeal can be stated simply: does the *Lessard* framework provide adequate protection to the media and the special role it plays in Canadian society, or does it need to be reformed or perhaps even abandoned? To answer this question, I consider it necessary to first review the three key precedents that have shaped this area of the law: *Lessard*, *New Brunswick* and *National Post*.

(1) *Lessard*, *New Brunswick* and *National Post*

[10] In both *Lessard* and *New Brunswick*, Canadian Broadcasting Corporation (“CBC”) reporters captured video footage of individuals engaging in what appeared to be criminal activity: in *Lessard*, occupying and damaging a post office building in

Pointe-Claire, Quebec; in *New Brunswick*, throwing Molotov cocktails at a guardhouse in St-Quentin, New Brunswick, setting it aflame. Parts of the footage were broadcast on television. The police subsequently applied for search warrants permitting them to search CBC's premises and seize the tapes in their entirety — both aired and unaired footage.

[11] In *Lessard*, the information to obtain submitted in support of the application contained nothing from which the authorizing justice of the peace could determine whether there was an alternative source of information, and if so, whether the police had taken reasonable steps to obtain the information from that source. In the information in *New Brunswick*, the police explained that while alternative sources existed, they either provided insufficient evidence or were unavailable or unwilling to testify.

[12] In both cases, the search warrants were granted and the tapes seized. CBC then applied to have the warrants set aside. In *Lessard*, CBC failed initially but succeeded on appeal. In *New Brunswick*, it was the opposite. The parties then appealed to this Court.

[13] This Court undertook the delicate task of fashioning a framework for determining whether an application for a search warrant relating to the media should be granted, having regard to both the right to be free from unreasonable search or seizure under s. 8 of the *Canadian Charter of Rights and Freedoms* and the guarantee of freedom of expression under s. 2(b) — that is, a framework for “assess[ing] s.

8 reasonableness in a s. 2(b) context” (*National Post*, at para. 79). Underlying this framework is the recognition that the media plays a special role in a free and democratic society and as such, investigative orders relating to the media raise unique concerns.

[14] In both *Lessard* and *New Brunswick*, the special status accorded to the media was front and centre in Cory J.’s majority reasons. In *Lessard*, he stated that “the media are entitled to particularly careful consideration, both as to the issuance of a search warrant and as to the conditions that may be attached to a warrant to ensure that any disruption of the gathering and dissemination of news is limited as much as possible” and that “[t]he media are entitled to this special consideration because of the importance of their role in a democratic society” (p. 444). Similarly, in *New Brunswick*, he wrote:

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 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. [p. 475]

[15] But while he stressed the vital importance of the media and acknowledged the special concerns that arise when a warrant to search media premises is sought, Cory J. clarified that rather than “import[ing] any new or additional requirements for the issuance of search warrants”, the constitutional protection of freedom of expression afforded by s. 2(b) serves as “a backdrop against

which the reasonableness of the search may be evaluated” (*New Brunswick*, at pp. 475-76). He nonetheless emphasized that the constitutional protection afforded to freedom of expression “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” (*ibid.*, at p. 476).

[16] Justice Cory went on to articulate a list of nine factors for judges to consider when determining whether to issue a search warrant relating to the media:

- (1) All statutory requirements for the issuance of the search warrant must be met.
- (2) If all statutory requirements have been met, then the authorizing judge “should consider all of the circumstances in determining whether to exercise his or her discretion to issue [the] warrant.”
- (3) The authorizing judge “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”, bearing in mind that “the media play a vital role in the functioning of a democratic society” and that the media will generally be an innocent third party.

- (4) The affidavit supporting the application must contain “sufficient detail” to enable the authorizing judge to properly exercise his or her discretion as to whether to issue the warrant.
- (5) Although it is not a constitutional requirement, the affidavit should “ordinarily” disclose whether there are alternative sources from which the information may reasonably be obtained and, if so, that those sources have been investigated and all reasonable efforts to obtain the information from those sources have been exhausted.
- (6) If the information sought has been disseminated by the media in whole or in part, then this “will be” a factor favouring the issuance of the warrant.
- (7) If the authorizing judge determines that a warrant should be issued, then he or she should consider imposing conditions on its implementation so that the media “will not be unduly impeded in the publishing or dissemination of the news.”
- (8) If it comes to light after the warrant is issued that the police “failed to disclose pertinent information that could well have affected the decision to issue the warrant”, then this may result in a finding that the warrant was invalid.

(9) If the search was unreasonably conducted, then this may render the search invalid.

(*Lessard*, at p. 445; *New Brunswick*, at pp. 481-82)

[17] Justice Cory added that “all factors should be evaluated in light of the particular factual situation presented” and “[t]he factors which may be vital in assessing the reasonableness of one search may be irrelevant in another” (*New Brunswick*, at p. 478). He framed the “essential question” as follows: “taking into account all the circumstances and viewing them fairly and objectively can it be said that the search was a reasonable one?” (*ibid.*).

[18] Applying this framework, the majority upheld the validity of the search warrants in both cases.

[19] Nearly two decades later, in *National Post*, this Court had further occasion to consider the principles to be applied when the state’s interest in investigating and prosecuting crime collides with the media’s s. 8 rights in a s. 2(b) context. There, in exchange for a blanket, unconditional promise of confidentiality, a secret source supplied a journalist at the *National Post* with a plain brown envelope containing a document said to implicate a former Canadian prime minister in a financial conflict of interest. Having received a complaint that the document was forged, the RCMP applied for a search warrant and an assistance order permitting them to search the premises of the *National Post* and seize the document and the

envelope in which it was contained. Although the search warrant and assistance order were initially granted, they were later quashed by the reviewing judge, only to be reinstated by the Ontario Court of Appeal.

[20] On further appeal to this Court, Binnie J., writing for a seven-justice majority, set out the “general rule” when it comes to search and seizure: “[t]he public has the right to every person’s evidence” (para. 1). That rule, of course, has its exceptions. In particular, the issue before the Court was to determine the circumstances in which the courts will respect a promise of confidentiality given by a journalist to a source.

[21] In approaching this issue, Binnie J. reaffirmed and applied the principles set out in *Lessard* and *New Brunswick* (see paras. 31-33, 79, 82 and 87). In doing so, he repeatedly emphasized the vital importance of the media and its special role in society. He described the public interest in freedom of expression as being “of immense importance” (para. 5); stated that “freedom of the press and other media of communication” is “vital in a society based on the rule of law” (para. 26); and recognized the “special position of the media” (para. 64). He also confirmed that “freedom to publish the news necessarily involves a freedom to gather the news” (para. 33). In making these observations, he confirmed and underscored s. 2(b)’s role in safeguarding the media’s freedom to gather and publish the news.

[22] Justice Binnie acknowledged that “the law should and does accept that in some situations the public interest in protecting [a] secret source from disclosure

outweighs other competing public interests — including criminal investigations” (para. 34). However, he rejected the argument that a judicial order compelling disclosure of a confidential source would generally violate s. 2(b) (para. 41). He also declined to recognize a class privilege protecting the journalist-confidential source relationship. Instead, he held that journalist-confidential source privilege should be assessed on a case-by-case basis, applying the Wigmore criteria (see paras. 53-64).

[23] Considering these criteria, he concluded that no such privilege could be established on the facts. In the result, the majority upheld the validity of the search warrant and assistance order.

[24] Having reviewed the key precedents, I will now turn to the appellants’ proposed reforms to the *Lessard* framework.

(2) Appellants’ Proposed Reforms to *Lessard* Framework

(a) *Presumed Chilling Effect*

[25] The appellants submit that whenever the state seeks a production order relating to the media, a “chilling effect” should be presumed. They argue that the media should not be put to the task of proving, in each individual case, that the order would have a chilling effect, for such an effect is, they say, inevitable.

[26] In this context, I would define the term “chilling effect” fairly broadly: it refers to the stifling or discouragement of the media’s legitimate activities in gathering and disseminating the news for fear of legal repercussions such as compelled disclosure. These effects may manifest themselves in a number of ways — for example:

- Confidential sources may “dry up”. As Lord Denning wrote in *British Steel Corp. v. Granada Television Ltd.*, [1981] A.C. 1096, “if they [newspapers] were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed” (p. 1129). If sources who are willing to speak out only on a confidential basis come to fear that their identity may be disclosed at the whim of the state, then they will remain in the shadows. Consequently, the media will lose opportunities to receive and disseminate important information to the public.
- Journalists may consciously avoid recording and preserving their notes, contact lists, internal deliberations, and other work product out of a concern that any such recordings may find their way into the hands of the police (see *National Post*, at para. 78, adopting the dissenting reasons of McLachlin J. (as she then was) on this point in *Lessard*, at p. 452).

- The media may self-censor in order to conceal the fact that it possesses information of interest to the police, with a view to protecting its sources and preserving its ability to gather information in the future (see *ibid.*).
- The public may come to view the media as an arm of the state such that the public loses faith in the media's ability to execute its functions independently and impartially (see *Canadian Broadcasting Corp. v. Manitoba (Attorney General)*, 2009 MBCA 122, 250 C.C.C. (3d) 61, at para. 74, citing *New Brunswick*, p. 474; *Lessard*, at p. 432, per La Forest J., concurring). This lack of faith in the media may in turn undermine its ability to gather and disseminate the news.

[27] Proving the existence and extent of such effects is, of course, no easy feat. Chilling effects do not lend themselves to scientific or empirical proof. Rather, they are intangible in nature and difficult — if not impossible — to measure with exactitude. But that does not mean they are insignificant or unimportant. To the contrary, to the extent that chilling effects *do* arise, their consequences can be considerable: a weak and fearful press, alongside a diminishing pool of sources, translates into a less informed, less open, and less vibrant society in which discussion, debate, and the flow of information are stymied. Thus, concerns over potential chilling effects cannot be overlooked.

[28] However, with respect, I struggle to see why a chilling effect should be presumed *in all cases*, regardless of the circumstances. The law is not quick to make assumptions without a basis in the evidence in the particular case. And while the evidence may often support a concern over potential chilling effects, in my view, the existence and extent of any potential chilling effects should be assessed on a case-by-case basis, not simply presumed in the abstract.

[29] The conclusion that chilling effects should not be simply presumed without regard to the particular circumstances finds ample support in this Court's jurisprudence. In none of *Lessard*, *New Brunswick* or *National Post* did this Court see reason to recognize a presumed chilling effect. Moreover, even before those cases were decided, this Court declined to assume, in the absence of evidence, that compelling journalists to testify before tribunals will necessarily cause sources to "dry up" (see *British Steel Corp.*) or otherwise "detrimentally affect journalists' ability to gather information" (*Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572, at p. 1581). Further, while this Court has held that "[i]n some situations, a chilling effect can be inferred from known facts and experience" (*R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at para. 79), this statement does not support the imposition of a presumed chilling effect. Rather, it merely confirms the more modest proposition that, in some situations, a chilling effect *can* — not *must* — be inferred. In sum, I see no reason why this Court should depart from its established jurisprudence and recognize a presumed chilling effect in all cases.

[30] I would add that in cases where the police are seeking information that the media did not procure through a promise of confidentiality and has already published in large measure, as was the case in *Lessard* and *New Brunswick*, the order may cause little to no chilling effect. And to the extent there is a risk that some potential chilling effects may arise, those potential effects may be neutralized through the imposition of conditions on the order. In her dissent in *Lessard*, McLachlin J. described chilling effects as being the result of “the prospect of seizure of press material in future cases without the imposition of conditions to protect press freedom and the identity of informants” (p. 453 (emphasis added)). Thus, where appropriate conditions are imposed, the concern over potential chilling effects may be sufficiently mitigated.

[31] For these reasons, in my view, there is no basis for recognizing a presumed chilling effect whenever the state seeks a production order relating to the media. Instead, the existence and extent of any potential chilling effect should be assessed on a case-by-case basis. As is often said, context is crucial.

[32] With this in mind, if the authorizing judge concludes, based on the record, that the order sought would likely have a chilling effect, then that finding should be considered in determining whether, in light of all the circumstances, the order should be refused, or if granted, what conditions should be included. In some cases, the existence and extent of potential chilling effects may be a significant factor

in the analysis. In other cases, it may not. Again, each case turns on its own unique facts.

(b) Removal of Distinction Between Confidential and Non-Confidential Sources

[33] The appellants argue that confidential sources and non-confidential sources should be treated the same under the *Lessard* framework. They maintain that if sources must insist on confidentiality to have their communications shielded from access at will by the state, then the ability of the media to carry out its function will be seriously undermined.

[34] The simple answer to the appellants' argument is that there are good reasons to draw a distinction between confidential and non-confidential sources, as the privacy and other concerns they raise may differ substantially.

[35] This Court's jurisprudence demonstrates that confidential sources raise unique considerations. Most notably, in *National Post*, the potential negative effects of permitting state-compelled disclosure of confidential sources were found to be so compelling as to justify opening the door to journalist-confidential source privilege on a case-by-case basis. No such privilege exists between journalists and non-confidential sources (see *National Post*, at para. 56). Moreover, as noted above, the potential chilling effects that may result from permitting state-compelled disclosure of information may differ considerably depending on whether the source of the information is confidential or non-confidential.

[36] The enactment of the *JSPA*, to which I have previously referred, serves as a further illustration of the important distinction between confidential and non-confidential sources. Through that legislation, among other things, Parliament amended the *Criminal Code*, R.S.C. 1985, c. C-46, and the *Canada Evidence Act*, R.S.C. 1985, c. C-5, to provide enhanced protections for maintaining the confidentiality of “journalistic sources”, a term restrictively defined as a source who transmits information in confidence and whose anonymity is essential to the relationship with the journalist. For example, under s. 488.02(3) of the *Criminal Code*, a “journalist” may bring an application objecting to the disclosure of documents seized under a search warrant or production order on the basis that they identify or are likely to identify a “journalistic source”. Hence, Parliament too has acknowledged that there is a meaningful difference between confidential and non-confidential sources.

[37] Accordingly, I would not erase the distinction between confidential and non-confidential sources.

[38] To be clear, however, the absence of a confidentiality agreement does not give the state free rein to compel production of materials in the hands of the media. Even where the source of the information sought is non-confidential, compelled production may cause chilling effects, and the impact on the media and the privacy interests at stake may nonetheless be significant. But once again, context is crucial,

and it should not be assumed that the existence or absence of a confidentiality agreement makes no difference in the analysis.

(c) Recharacterization of Effect of Prior Partial Publication

[39] As indicated, the sixth *Lessard* factor provides that if the information sought has been disseminated by the media in whole or in part, then “this will be a factor which will favour the issuing of the search warrant” (*Lessard*, at p. 445; *New Brunswick*, at p. 481 (emphasis added)). Indeed, in *Lessard*, Cory J. treated prior partial publication as a decisive factor:

. . . once the news media have published the gathered information, that information then passes into the public domain. The publication of that information is a very important factor for the justice of the peace to consider. This is something that favours the issuing of a search warrant. When a crime has been committed and evidence of that crime has been published, society has every right to expect that it will be investigated and, if appropriate, prosecuted. Here, the publication or broadcasting of the information was a factor of sufficient importance to enable the justice of the peace to exercise his discretion and issue the search warrant notwithstanding the failure of the police to explain that there was no alternative source available that would give them the information contained in the videotape. [pp. 446-47]

[40] The appellants take issue with the state of the law on prior partial publication. They maintain that prior partial publication does nothing to reduce the chilling effects caused by compelling disclosure of the unpublished materials, nor does it attenuate the media’s interests in the unpublished materials, particularly when those materials are journalist-source communications.

[41] I accept that “[w]hen a crime has been committed and evidence of that crime has been published, society has every right to expect that it will be investigated and, if appropriate, prosecuted” (*Lessard*, at p. 447). In my view, the publication of materials that raise serious and credible concerns over potential criminality, particularly where there is an ongoing or imminent threat to safety and security, cannot be ignored in weighing the state and the media’s respective interests. Neither the police nor Canadian society should turn a blind eye to such materials. Nor should the courts.

[42] Moreover, not only may prior partial publication heighten the state’s interests in the unpublished materials, but in some circumstances it may also attenuate the media’s interests in those materials. For example, where “[t]he media ha[s] already completed their basic function of news gathering and news dissemination” (*Lessard*, at p. 447) — i.e., the news cycle is over — this may be a factor suggesting that the media’s interests in the unpublished materials have been diminished.

[43] However, I cannot accept that prior partial publication will *always* militate in favour of granting the order. Prior partial publication should not necessarily lessen the degree of protection afforded to the *unpublished* materials, since permitting state access to the unpublished materials still interferes with the media’s right to privacy in gathering and disseminating the news (see *Lessard*, at p. 453, per McLachlin J., dissenting), and compelled production of the unpublished materials may still cause chilling effects. In fact, in some cases, the media may well

have decided not to disseminate the unpublished materials precisely because they are particularly sensitive. Relatedly, the unpublished materials will sometimes be of a different nature as compared to the published materials, thereby raising different privacy concerns. For example, the state may seek disclosure of the raw communications between journalist and source (potentially including related metadata) or a journalist's personal notes or contact lists. The important privacy interests attaching to those types of materials are not necessarily diminished through publication of a news article based on or otherwise related to those materials.

[44] Accordingly, I am of the view that the effect of prior partial publication should be assessed on a case-by-case basis. In determining the effect of prior partial publication in any particular case, the authorizing judge should consider all the circumstances, including the nature of the materials (both published and unpublished) and how much of the full body of materials has already been published. Where, for example, the published materials raise serious and credible concerns over potential criminality, the disclosure of the unpublished materials would not reveal a confidential source or disclose "off the record" or "not for attribution" communications, and much of the materials have already been published, prior partial publication may militate in favour of granting the order. All of these conditions were present in *Lessard* and *New Brunswick*. By contrast, where only some or none of these conditions are present, the effect of prior partial publication may be more neutral. In my view, this more nuanced approach to prior partial publication adds greater flexibility to the *Lessard* framework and permits a more contextual inquiry.

[45] Finally, I am of the view that although it is listed as an independent factor under the *Lessard* framework, prior partial publication is best viewed as an aspect of the *Lessard* balancing test, at least in the sense that prior partial publication may enhance the state's interest in investigating and prosecuting alleged crime and may diminish the media's interests in the unpublished materials. For the sake of clarity, therefore, I would simply treat prior partial publication as part of the overall balancing exercise, rather than an independent factor to be considered on its own.

(d) *State's Interests — Prospect of Trial and Probative Value of Evidence*

[46] The appellants argue that in assessing the state's interests under the third factor of the *Lessard* framework, the authorizing judge should consider (1) the prospect of a trial actually taking place; and (2) the probative value of the evidence sought.

(i) Prospect of Trial

[47] First, with respect to the prospect of a trial actually taking place, it is important to understand that what we are concerned with here is the *investigation and evidence-gathering* stage. Searches performed at this stage are aimed at investigating and gathering evidence of potential criminality, not at proving allegations and securing a conviction in court. At this early stage, “the public interest requires prompt and thorough investigation of potential offences”, and as such “all relevant information and evidence should be located and preserved as soon as possible”

(*CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 19 (emphasis in original)). The function of the police at this juncture is “to investigate incidents which might be criminal, make a conscientious and informed decision as to whether charges should be laid, and then present the full and unadulterated facts to the prosecutorial authorities” (para. 22). This function does not include “investigat[ing] and decid[ing] whether the essential elements of an offence are made out”; that role belongs to the courts (*ibid.*).

[48] Once the nature and purpose of the investigation and evidence-gathering stage is properly understood, it becomes clear that the prospect of a trial actually taking place is not relevant at this stage of the inquiry. Put simply, the prospect of a trial is a concern left for another day and for a different set of actors.

[49] Further, and more practically, it may be difficult — if not impossible — to gauge at this early stage the prospect of a trial actually taking place. Much can change in the course of investigating and prosecuting alleged crime. To ask judges at such an early stage to attempt to assess the prospect of a trial actually taking place down the road would be impracticable and would require authorizing judges to engage in speculation. And in any event, even where it appears uncertain — or even unlikely — that a trial will actually take place, society still has an interest in seeing crime investigated, particularly where it is ongoing or poses a future threat.

[50] Finally, from a policy perspective, the consequences of accepting the appellants’ proposal would be perverse. It would enable a suspected criminal to delay

or even prevent the police from securing crucial authorizations permitting them to carry out their investigation by, for example, fleeing the country and thereby decreasing the likelihood of a trial ever taking place. It goes without saying that this type of conduct must not be encouraged.

[51] Therefore, I am of the view that the prospect of a trial actually taking place is not a relevant factor in determining whether to grant a production order in relation to the media.

(ii) Probative Value of Materials Sought

[52] Second, the appellants maintain that in determining whether to grant a production order relating to the media, authorizing judges should consider the probative value of the materials sought. They then go further and suggest that this probative value should be considered incrementally against the materials that are, or could reasonably be expected to be, available and admissible at trial. They submit that a court should grant a production order relating to the media only where the materials sought are “necessary . . . in the sense of making the difference between acquittal and conviction” (A.F., at para. 117 (emphasis deleted)).

[53] For the sake of clarity, I note that s. 487.014 (formerly s. 487.012) of the *Criminal Code*, the provision permitting peace officers and public officers to apply for an order requiring a person who is not under investigation to produce a document, requires that the court be satisfied that there are reasonable grounds to believe that,

among other things, the document or data sought “will afford evidence respecting the commission of the offence” (s. 487.014(2)). It says nothing of probative value. Therefore, the question is whether, in addition to this statutory requirement, there is — or should be — a common law rule requiring authorizing judges to consider the probative value of the materials sought in deciding whether to exercise their discretion to grant the order requested.

[54] In *National Post*, this Court stated that in weighing the public interest in protecting the journalist-confidential source relationship in question against countervailing public interests such as the investigation of a particular crime, courts should consider, among other things, “the probative value of the evidence sought to be obtained” (para. 61). In light of this clear recognition, I see no reason why the probative value of the materials sought would not similarly be considered by authorizing judges in determining whether to exercise their discretion to make a production order in relation to the media.

[55] Accordingly, where the materials sought can reasonably be expected to have a higher degree of probative value, the case in favour of granting the order is strengthened. Our jurisprudence supports this proposition. For example, in *Lessard* and *New Brunswick*, the footage was believed to show the actual commission of criminal offences, thereby having obvious probative value. In *National Post*, the materials sought had even higher potential probative value: they were alleged to form the very *actus reus* of a criminal offence (para. 77). In these circumstances, the state’s

interests in the materials are heightened, and the probity of the materials sought weighs more heavily in the balance. By contrast, where the materials sought can reasonably be expected to be of lesser probative value, the state's interests in the materials may be attenuated.

[56] That said, the assessment of probative value has its limits. This Court has cautioned that “[i]t will often be difficult to determine definitively the probative value of a particular thing before the police investigation has been completed” (*Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 889). It is therefore important not to place undue weight on the assessment of likely probative value, as it may be an imprecise and uncertain exercise.

[57] In the end, while probative value may be a relevant consideration in applying the *Lessard* framework, I would not go so far as to impose the appellants' proposed “necessity” test. The notion that the police should be denied a production order unless they can demonstrate that the order is necessary to secure a conviction cannot be sustained for several reasons, including the following:

- First, it misapprehends the role of authorizing judges. On this point, I would endorse Doherty J.A.'s observation in the court below that the appellants' submission “improperly blurs the line between judge and prosecutor by assigning judges the job of deciding whether the prosecution has sufficient

evidence to prove its case without access to the information in the hands of the media” (2017 ONCA 231, 137 O.R. (3d) 263, at para. 41).

- Second, in a different sense, it would effectively transform the production order application into a trial of the alleged offence on the merits. In my view, it would be both inappropriate and impracticable to require the authorizing judge to speculate about whether the police have amassed sufficient evidence to prove beyond a reasonable doubt that an offence has been committed.
- Third, the mere fact that *other* evidence — even *similar* evidence — is available should not preclude the police from gathering *further* evidence. Again, the objective at the investigation and evidence-gathering stage is to conduct a “prompt and thorough investigation of potential offences” and to locate and preserve “all relevant information and evidence . . . as soon as possible” (*CanadianOxy*, at para. 19 (emphasis in original)). Indeed, at this stage, “[i]t is important that an investigation unearth as much evidence as possible” (para. 24 (emphasis added)).
- Fourth, imposing a test of strict necessity would seriously undermine the ability of the police to investigate and gather evidence of potential criminality.

[58] Thus, while the probative value of the materials sought may be considered in weighing the state's interest in the investigation and prosecution of crime against the media's right to privacy in gathering and disseminating the news, I would not accede to the appellants' submission that a strict necessity test should be imposed.

B. *Where the Police Are Seeking a Production Order Relating to the Media, Should a Presumptive Notice Requirement Be Imposed?*

[59] The appellants ask that this Court impose a rule to the effect that, absent exigent circumstances, the media must be given notice of an application for a production order relating to it.

[60] I respectfully disagree that we should impose such a requirement. As I will explain, the proposed requirement cannot be sustained in light of (1) the clear language of the *Criminal Code*; and (2) this Court's decision in *National Post*.

(1) *Criminal Code*

[61] First, the *Criminal Code* provision authorizing the type of production order issued in this case, s. 487.014(1), grants peace officers and public officers the ability to bring an “*ex parte* application” for a production order. Parliament presumably used these words for a reason, and they ought to be given effect. With respect, imposing a presumptive notice requirement absent exigent circumstances

would effectively rewrite the legislation. One of the consequences of this rewriting would be to transform production order applications relating to the media into full-blown adversarial hearings. Whatever the merits of that approach, it is not the one envisioned by Parliament.

[62] I would add, as Doherty J.A. did in the court below (see para. 23), that the negative impact on the media resulting from the *ex parte* proceeding model is countered, at least to some degree, by the media's right under s. 487.0193(1) of the *Criminal Code* to apply to court to have the production order varied or revoked before the materials are turned over to the police.

(2) *National Post*

[63] Second, in *National Post*, a majority of this Court rejected the argument that where the police are seeking a search warrant relating to the media, the media must be given notice. Justice Binnie observed that a majority of the Court in *New Brunswick* held that the special position of the media did not “import any new or additional [procedural] requirements” (para. 82, citing *New Brunswick*, at p. 475 (text in brackets added by Binnie J.)). He stated that although the media should be given the opportunity to present its case against the warrant at the earliest opportunity, it enjoys no entitlement to notice. Rather, the authorizing judge retains discretion as to the timing of when the media will be permitted to present its case, and it may be appropriate to proceed *ex parte* in “cases of urgency or other circumstances” (para. 83 (emphasis added)). These “other circumstances” may include instances where, for

example, proceeding *ex parte* would help ensure the evidence does not disappear while the merits of the warrant are debated (see *ibid.*). Justice Binnie cautioned, however, that where the authorizing judge does proceed *ex parte*, “adequate terms must be inserted in any warrant to protect the special position of the media, and to permit the media ample time and opportunity to point out why, on the facts, the warrant should be set aside” (para. 84).

[64] I am of the view that we should adhere to our previous decision in *National Post*. It is consistent with the *ex parte* model provided for in the *Criminal Code*, and I see no compelling reason to depart from a decision of the Court issued only eight years ago.

(3) Conclusion

[65] I would not impose a presumptive notice requirement in situations where the police are seeking a production order in relation to the media. In my view, the traditional model of *ex parte* applications for production orders “provides adequate protection to ensure a strong, vibrant and independent media, free to carry out its important role in our society without unwarranted state intrusion” (*R. v. Canadian Broadcasting Corp.* (2001), 52 O.R. (3d) 757 (C.A.), at para. 6 (“CBC (ONCA)”). I would therefore give effect to the language of the *Criminal Code* and to this Court’s decision in *National Post*: as a starting proposition, there is no notice requirement where the police are seeking a production order relating to the media. Instead, the *Criminal Code* permits peace officers and public officers to bring an *ex parte*

application for a production order (s. 487.014(1)), subject to the authorizing judge's overriding discretion to require notice where he or she deems appropriate (see *National Post*, at para. 83; *CBC (ONCA)*, at para. 50).

[66] Absent urgency or other circumstances justifying an *ex parte* proceeding, the authorizing judge may well find it desirable to require that notice be given to the media (see *National Post*, at para. 83), especially if he or she considers that more information is necessary to properly balance the rights and interests at stake. That conclusion, however, is not mandatory.

[67] It is worth emphasizing that bare assertions in the affidavit submitted in support of the application for a production order will not provide a basis for proceeding *ex parte*. Instead, the police should show some evidentiary basis for why there is “urgency or other circumstances”. In my view, this is essential to ensure the media is not denied the opportunity to make its case before the authorizing judge without good reason. To illustrate, a broad and unsupported claim that the media is unlikely to cooperate with police or that the media could theoretically put the materials beyond the reach of authorities if notice were to be given — which is *always* a risk to at least some degree — should not suffice.

C. *What Is the Standard of Review to Be Applied on Review of a Production Order Relating to the Media?*

[68] Setting aside the *JSPA* for the moment, there are two main avenues through which a person subject to a production order may challenge the order:

- First, the person may pursue a statutory right of review. A person required to produce a document under s. 487.014 of the *Criminal Code* may bring an application under s. 487.0193(1) to the justice or judge who made the order, or to a judge in the judicial district where the order was made, to revoke or vary the order. Such an application may succeed only if the reviewing judge is satisfied that (a) it would be unreasonable in the circumstances to require the applicant to prepare or produce the document or (b) production of the document would disclose information that is privileged or otherwise protected from disclosure by law (s. 487.0193(4)).
- Second, provided the order was not made by a justice of a superior court (see D.J.M. Brown and J.M. Evans, with the assistance of D. Farley, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 1, at §1:2210), the person may file an application for *certiorari* in a superior court.

[69] With respect to this second avenue, *Garofoli* is the leading authority on the standard of review. Put succinctly, the standard to be applied is whether — in light of the record before the authorizing judge, as amplified on review — the authorizing judge “could have” granted the authorization (p. 1452). The reviewing

judge is not entitled to substitute his or her view for that of the authorizing judge (*ibid.*). Instead, the reviewing judge is restricted to determining whether “there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued” (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 54 (emphasis deleted); see also *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 40-43; *R. v. Nero*, 2016 ONCA 160, 334 C.C.C. (3d) 148, at paras. 68-72).

[70] Although this Court has never explicitly indicated that the *Garofoli* standard applies on an application to set aside a production or other investigative order relating to the media, Binnie J. in *National Post* stated that the standard is whether “there was no reasonable basis” for the order, and the reviewing judge “is generally bound . . . to afford a measure of deference to the determination of the issuing justice” (para. 80). In my view, the “no reasonable basis” standard is functionally equivalent to the *Garofoli* standard described above.

[71] The appellants submit that although the *Garofoli* standard may be an appropriate one to apply when reviewing production orders generally, it is far too deferential when applied to production orders relating to the media. This is the case, they say, because the production order will generally have been made *ex parte*, and therefore the authorizing judge would not have had the benefit of hearing the media’s case when balancing the rights and interests at stake as required by *Lessard*. Consequently, unless the media is entitled to a *de novo* review, it will have been denied the opportunity to have its interests pitted against those of the state in

determining whether the order *should* be made, not merely whether it *could have* been made.

[72] I agree that where the production order was made against the media *ex parte*, the highly deferential *Garofoli* standard may, in some cases, work unfairness. In fact, though I need not rely on this concession, the Crown accepted that in the context of production orders made against the media *ex parte*, “you cannot just take the *Garofoli* framework as it was laid down in *Garofoli* and apply it” (transcript, at p.105).

[73] However, it may be going too far to create a general rule entitling the media to a *de novo* review of *any* production order that was made *ex parte*. In my view, where the production order was made *ex parte*, the following test should be applied: if the media points to information not before the authorizing judge that, in the reviewing judge’s opinion, could reasonably have affected the authorizing judge’s decision to issue the order, then the media will be entitled to a *de novo* review. If, on the other hand, the media fails to meet this threshold requirement, then the traditional *Garofoli* standard will apply, meaning that the production order may be set aside only if the media can establish that — in light of the record before the authorizing judge, as amplified on review — there was no reasonable basis on which the authorizing judge could have granted the order. In applying the *Garofoli* standard in this context, reviewing judges should bear in mind that authorizing judges are required to give special consideration to the vital role of the media in a free and democratic society

and to balance the state's interest in investigating and prosecuting crimes and the media's right to privacy in gathering and disseminating the news.

[74] The threshold requirement of pointing to information not before the authorizing judge that could reasonably have affected the decision, which should be assessed on a case-by-case basis, is not unduly burdensome. For example, without purporting to supply an exhaustive list, the requisite threshold may be satisfied by pointing to:

- a confidentiality agreement protecting the source's identity, or an agreement to keep certain communications "off the record" or to treat them as "not for attribution", that the authorizing judge was not aware of;
- unique features in the nature of the journalist-source relationship that the authorizing judge was not aware of;
- evidence that the production order affected, affects, or will affect the media — such as by preventing or delaying publication or compromising a journalistic investigation — in a way that could not have been foreseen by the authorizing judge;
- specific evidence — rather than general concerns — concerning chilling effects that the authorizing judge was not aware of; or

- alternative sources of the information that the authorizing judge was not aware of.

[75] The requisite threshold would not, however, be satisfied by relying on the fact that the materials sought were provided on a confidential basis if that fact was known to the authorizing judge, as was the case in *National Post*. Nor would it be satisfied by a general assertion that the authorizing judge did not give sufficient weight to concerns over chilling effects or simply did not strike the right balance.

[76] This modified *Garofoli* standard recognizes that a strict application of the *Garofoli* standard may work significant unfairness where, due to absence of the media at the authorization stage, information that could reasonably have affected the decision was not before the authorizing judge. In such circumstances, the authorizing judge would have performed the *Lessard* analysis — which requires a “careful weighing” of the rights and interests at stake and that the media be given “particularly careful consideration” (*Lessard*, at p. 444) — without having fully weighed both sides of the scale. A decision that was made without having considered all of the relevant information that could reasonably have affected the outcome cannot rightly be shown deference, and therefore a fresh weighing is justified.

[77] However, this modified *Garofoli* standard also recognizes that there is no principled reason to undertake a *de novo* review where the media cannot point to

information not before the authorizing judge that could reasonably have affected the authorizing judge's decision to issue the order. In some circumstances, even where the media was absent at the authorization hearing, the authorizing judge may have had all the information that could reasonably have affected the decision before him or her. If there is no information offered on review that could reasonably have affected the authorization decision but was not before the authorizing judge, then the justification for permitting a *de novo* review — namely, that relevant considerations were not taken into account — falls away.

[78] There are, of course, good reasons for showing deference to the authorizing judge's decision where he or she had all of the relevant information bearing on the decision before him or her. For example, a production order is presumptively a valid court order and *de novo* review would be inconsistent with the existence of a valid court order. Additionally, the discretionary nature of a decision to issue a production order invites a deferential standard of review. More broadly, while the media carries with it unique considerations given its special role in society, that does not necessarily make the *Garofoli* standard any less appropriate.

[79] This modified *Garofoli* standard is not inconsistent with *National Post*. As indicated, Binnie J. stated in that case that the reviewing judge “is generally bound . . . to afford a measure of deference to the determination of the issuing justice” (para. 80 (emphasis added)). His use of the word “generally” clearly contemplated that deference would not be an absolute rule. For the reasons I have identified, I consider

it appropriate to recognize an exception where the production order relating to the media was made *ex parte* in circumstances where the authorizing judge did not have before him or her all the information that could reasonably have affected the decision. While the *Garofoli* standard applies as a general rule, “[t]he media are entitled to this special consideration because of the importance of their role in a democratic society” (*Lessard*, at p. 444).

[80] I wish to re-emphasize that it remains open to the authorizing judge to exercise his or her discretion to require that the media be given notice, and judges should not hesitate to exercise this discretion where the police have failed to provide some evidentiary basis for why there is “urgency or other circumstances”. In addition, where the affidavit in support of the application appears to leave important gaps in information (e.g., regarding the nature of the journalist-source relationship), or where the authorizing judge is uncertain as to the effect the order may have on the specific media outlet or the media more broadly, the authorizing judge may well decide that it would be unwise to proceed *ex parte*. While *ex parte* proceedings remain the statutory *status quo*, authorizing judges are not bound to proceed in this manner. Requiring notice will generally obviate the need for a *de novo* review, with consequential savings to the administration of justice.

[81] Finally, for the sake of clarity, I wish to add that where the media was given notice and appeared before the authorizing judge, there is generally good

reason to apply the traditional *Garofoli* standard on review. In that context, permitting a *de novo* review may do little more than add unnecessary time and expense.

D. *Reorganization of Lessard Factors*

[82] Having settled the main jurisprudential issues on appeal, I wish to take this opportunity to reorganize the *Lessard* factors to make them easier to apply in practice. On an application for a production order against the media, the authorizing judge should apply a four-part analysis:

(1) **Notice.** First, the authorizing judge must consider whether to exercise his or her discretion to require notice to the media. While the statutory *status quo* is an *ex parte* proceeding (see *Criminal Code*, s. 487.014(1)), the authorizing judge has discretion to require notice where he or she deems appropriate (see *National Post*, at para. 83; *CBC (ONCA)*, at para. 50). Proceeding *ex parte* may be appropriate in “cases of urgency or other circumstances” (*National Post*, at para. 83). However, where, for example, the authorizing judge considers that he or she may not have all the information necessary to properly engage in the analysis described below, this may be an appropriate circumstance in which to require notice.

(2) **Statutory Preconditions.** Second, all statutory preconditions *must* be met (*Lessard* factor 1).

(3) **Balancing.** Third, the authorizing judge must balance the state's interest in the investigation and prosecution of crimes and the media's right to privacy in gathering and disseminating the news (*Lessard* factor 3). In performing this balancing exercise, which can be accomplished only if the affidavit supporting the application contains sufficient detail (*Lessard* factor 4), the authorizing judge should consider all of the circumstances (*Lessard* factor 2). These circumstances may include (but are not limited to):

- (a) the likelihood and extent of any potential chilling effects;
- (b) the scope of the materials sought and whether the order sought is narrowly tailored;
- (c) the likely probative value of the materials;
- (d) whether there are alternative sources from which the information may reasonably be obtained and, if so, whether the police have made all reasonable efforts to obtain the information from those sources (*Lessard* factor 5);
- (e) the effect of prior partial publication, now assessed on a case-by-case basis (*Lessard* factor 6); and

(f) more broadly, the vital role that the media plays in the functioning of a democratic society and the fact that the media will generally be an innocent third party (*Lessard* factor 3).

At the end of the day, the decision as to whether to grant the order sought is discretionary (*Lessard* factor 2), and the relative importance of the various factors guiding that discretion will vary from case to case (see *New Brunswick*, at p. 478).

(4) **Conditions.** Fourth, if the authorizing judge decides to exercise his or her discretion to issue the order, he or she should consider imposing conditions on the order to ensure that the media will not be unduly impeded in the publishing and dissemination of the news (*Lessard* factor 7). The authorizing judge may also see fit to order that the materials be sealed for a period pending review.

[83] As explained above at para. 73, if the order is granted *ex parte* and is later challenged by the media, the standard of review is determined by applying the following test: if the media points to information not before the authorizing judge that, in the reviewing judge's opinion, could reasonably have affected the authorizing judge's decision to issue the order, then the media will be entitled to a *de novo* review. If, on the other hand, the media fails to meet this threshold requirement, then the traditional *Garofoli* standard will apply, meaning that the production order may be

set aside only if the media can establish that — in light of the record before the authorizing judge, as amplified on review — there was no reasonable basis on which the authorizing judge could have granted the order.

[84] With this analytical framework in mind, I will now apply the law to the facts of this case.

E. *Should the Production Order Be Set Aside?*

(1) Notice and Standard of Review

[85] As a procedural matter, the Production Order cannot be successfully challenged on the basis that it should not have been made *ex parte*. The Information to Obtain (“ITO”) sworn by Constable Grewal explains the police’s rationale for seeking the order *ex parte*. It describes Vice Media and its operations and sets out key information regarding Mr. Makuch, his interactions with Mr. Shirdon, and the articles he wrote based on those interactions. In light of this discussion, it identifies a risk that once alerted to the police’s interest in the material, the appellants could move the materials beyond the reach of Canadian courts. It explains that before bringing the application, investigators weighed the potential risks associated with alerting the appellants of the investigative importance of the information against the benefits of obtaining the information more swiftly. It also states that there was no basis on which to be assured that the appellants would cooperate with the police, adding that the police drew “a reasonable inference that this news organization would not be able to

stage this kind of interview with a purported member of a terrorist group if they had a reputation for immediately handing original evidence to the police” (A.R., at pp. 242-43). Although the police’s explanation for seeking the Production Order *ex parte* could have been stronger and better supported, I am of the view that when that explanation is read in the context of the ITO as a whole, it was open to the authorizing judge to rely on this explanation and to proceed *ex parte*, declining to exercise his discretion to require notice.

[86] On the issue of standard of review, the appellants have not pointed to any information not before the authorizing judge that could reasonably have affected the decision to issue the Production Order. I note, for instance, that Mr. Makuch’s evidence regarding chilling effects on his ability to cultivate journalist-source relationships consisted primarily of a mere assertion that “it is critical for [his] work that individuals do not view [him] as an agent of the police or that the information they provide [him] will be used for purposes of a police investigation”, as well as his stated belief that if individuals that he interviews “are aware that everything they tell [him] could be provided to police”, then “they will be much less inclined to answer [his] questions and provide [him] with information” (A.R., at p. 87). In my view, such assertions are too general to qualify as information not before the authorizing judge that could reasonably have affected the authorizing judge’s decision, especially given that the ITO does indicate that Vice Media would have difficulty staging interviews of this nature if it had a reputation for immediately handing original evidence to the police. Accordingly, the traditional *Garofoli* standard applies, and the authorizing

judge's decision may be overturned only if the appellants can establish that — in light of the record before the authorizing judge, as amplified on review — there was no reasonable basis on which the authorizing judge could have granted the Production Order.

[87] The remaining question, then, is whether the Production Order can withstand scrutiny under the *Lessard* framework, as restated above. In my view, applying that framework, there was a reasonable basis on which to grant the Production Order. The statutory preconditions were met, and based on the record it was open to the authorizing judge to conclude that the compelling state interest in the investigation and prosecution of the alleged terrorism offences at issue outweighed the media's right to privacy in the circumstances of this case. Indeed, as I will discuss, even on a *de novo* review, the Production Order was properly granted.

(2) Statutory Preconditions

[88] Subsection 487.014(2) of the *Criminal Code* permits a judge or justice to issue a production order where he or she is satisfied by information on oath that there are reasonable grounds to believe that (1) “an offence has been or will be committed”; (2) “the document or data is in the person's possession or control”; and (3) the document or data “will afford evidence respecting the commission of the offence”.

[89] Here, these baseline statutory requirements were met:

- First, the ITO provided reasonable grounds to believe that Mr. Shirdon had committed certain offences — including participating in the activities of a terrorist group contrary to s. 83.18 of the *Criminal Code* and committing indictable offences (namely, uttering threats of death) for a terrorist group contrary to s. 83.2 — in relation to his alleged participation in, and facilitation of, the activities of ISIS.
- Second, the ITO provided reasonable grounds for believing that the appellants had in their possession the materials sought — including records of communications between Mr. Shirdon and Mr. Makuch over Kik messenger — based on the police’s belief that Mr. Makuch, as a journalist, would have saved the communications.
- Third, the ITO provided reasonable grounds for believing that those materials would afford evidence respecting the commission of the alleged offences. As MacDonnell J. observed, the ITO provided an overview of the results of the investigation, set out the basis for the police’s belief that Mr. Shirdon had made statements to Mr. Makuch with respect to his involvement in ISIS (statements which, on their face, were evidence of the offences under investigation), and affirmed that the affiant believed that the documents sought ‘will afford evidence of the . . . offences’ (2016 ONSC 1961, 352 C.R.R. (2d) 60, at para. 21, citing ITO, at para. 17, as reproduced in A.R., at p. 148).

Thus, the statutory preconditions for the issuance of a production order were satisfied in the circumstances.

(3) Balancing

[90] This case turns on the *Lessard* balancing exercise — an exercise which this Court has recognized can be a “difficult and complex process” (p. 444).

(a) *Media’s Right to Privacy in Gathering and Disseminating News*

[91] Beginning with the media’s right to privacy in gathering and disseminating the news, there are two main factors that, in my view, demonstrate that the impact of the Production Order on this right is attenuated: (1) the nature of the materials sought; and (2) the narrow scope of the order and the fact that it is minimally disruptive of the appellants’ legitimate activities.

[92] First, unlike in *National Post*, this is not a case in which compliance with the order would result in a confidential source’s identity being revealed. Mr. Shirton never insisted on confidentiality. Although he used a pseudonym when he first connected with Mr. Makuch, he openly identified himself as the Canadian who had burned his passport in the online propaganda video, and his name was used repeatedly throughout the articles in question. Clearly, he did not regard himself as a confidential source, nor did Mr. Makuch. Nor is there any indication in the record that any of the information Mr. Shirton provided to Mr. Makuch was “off the record” or “not for

attribution”. Moreover, without insisting on confidentiality, Mr. Shirdon used the appellants as a means through which to publicize his activities with ISIS and broadcast its extremist views as a sort of spokesperson on behalf of the organization. As MacDonnell J. put it, Mr. Shirdon regarded the appellants as “the channels through which he would speak to the whole world” (para. 43). Clearly, therefore, this is no ordinary case. While the Production Order could arguably raise some concerns over potential chilling effects — for example, it may convey a sense that the media is being conscripted as an arm of the state, discourage journalists from keeping notes and records regarding their communications with suspected criminals, or lead those involved in criminal activities to have second thoughts about speaking to the media — the factors described above largely mitigate any potential chilling effect that might otherwise be associated with the Production Order.

[93] Second, in my view, a carefully tailored order, targeting only a limited scope of materials that are closely related to the offence(s) under investigation, has a lesser impact on the media’s right to privacy in gathering and disseminating the news, as compared to a more sweeping order. Here, the Production Order is carefully tailored, targeting a relatively discrete set of records and communications. The scope of materials sought does not overreach or result in undue interference. Relatedly, the order is only minimally disruptive of the appellants’ legitimate activities. No search is involved, and compliance would not be unduly burdensome. Accordingly, this factor militates in favour of the Production Order.

(b) *State's Interest in Investigating and Prosecuting Crime*

[94] Turning to the other side of the scale, there are four main factors that, in my view, demonstrate that the state's interest in investigating and prosecuting crime is high in this case: (1) the seriousness of the crimes alleged and the need to respond swiftly; (2) the importance of the materials sought to the investigation and prosecution of the alleged offences; (3) the absence of alternative sources from which the information may be reasonably obtained; and (4) the fact of prior partial publication.

[95] First, as Cory J. stated in *New Brunswick*, "investigation of a serious and violent crime [is] of importance to the state", and this importance will be further enhanced where there is some urgency to the investigation (p. 476). The offences with which Mr. Shirdon has been charged include participating in the activities of a terrorist group and committing indictable offences (namely, uttering threats of death) for a terrorist group. Such conduct is incompatible with a safe, peaceful, and democratic society. And according to one of Mr. Makuch's articles, Mr. Shirdon communicated to Mr. Makuch a specific threat that if Canada joins the crusade against Muslims, then blood will flow in the streets of Canada and Canadians will be attacked in their homes. Suffice it to say that a threat of this nature cannot be taken lightly, nor can a response be put off until later. To the contrary, the offences alleged demand a swift and committed response.

[96] Second, the records sought — including screenshots of the unedited communications between Mr. Makuch and Mr. Shirdon (rather than simply Mr. Makuch's interpretation and relaying of those communications) — would provide reliable, direct, and probative evidence that would not require second-hand interpretation. Such evidence would significantly advance the investigation and prosecution of the offences alleged. Therefore, the state's interest in the materials is heightened.

[97] Third, the materials sought are not available from any other source. The ITO stated that the efforts of the police to obtain the materials from the text-messaging service provider, Kik Interactive, or from any other individual or company, were unsuccessful. There is nothing suggesting the materials sought may be available through some other alternative source.

[98] Fourth, in this case, prior partial publication also militates in favour of granting the Production Order. Justice MacDonnell stated that “[t]he authorizing justice was also entitled to consider that the bulk of the information that Shirdon communicated to Mr. Makuch had been published by Mr. Makuch” (para. 44). Mr. Makuch went even further, stating in his affidavit that “[a]ll relevant information and comments that Shirdon made during our K[i]k Messenger exchanges were included in my articles” (A.R., at p. 86), though of course those articles did not include the full record of the original communications themselves. Further, the publication of the articles put into the public sphere information relating to the

commission of serious terrorism offences. As Cory J. stated in *Lessard*, “when a crime has been committed and evidence of that crime has been published, society has every right to expect that it will be investigated and, if appropriate, prosecuted” (p. 447).

[99] In light of the considerations outlined above, the state’s interest in the materials is high in this case. This militates in favour of the Production Order.

(c) *Conclusion*

[100] I therefore conclude that the balancing exercise favours the issuance of the Production Order.

(4) Conditions

[101] Finally, following this Court’s guidance in *National Post* (see para. 84), the authorizing judge imposed adequate terms in the Production Order providing ample time — a full 60 days — to comply with the order, thereby giving the appellants sufficient opportunity to move to have the Production Order set aside, as they did. This factor further supports the conclusion that the authorizing judge was justified in proceeding *ex parte* and in issuing the order.

V. My Colleague’s Proposed Approach

[102] Finally, I briefly comment on my colleague's approach, which treats this case as an opportunity to formally recognize that freedom of the press enjoys "distinct and independent constitutional protection under s. 2(b) of the *Charter*" (Abella J. reasons, at para. 123).

[103] In my respectful view, it is neither necessary nor appropriate in this case to do so. Neither the proper contours of this proposed understanding of s. 2(b) nor its implications — whether in this case or beyond the scope of the appeal — was fully argued by the parties or considered by the courts below. This proposed recognition may have unforeseen consequences, for example, on the law relating to freedom of information requests, publication bans, and other areas implicating freedom of the press. In these circumstances, I consider it prudent to rely on the precedents established by this Court in *Lessard*, *New Brunswick* and *National Post*.

[104] Here, I consider that the *Lessard* framework has not been shown to be unworkable, its validity has not been undermined by subsequent jurisprudence, and none of the considerations on which it is based can be said to be no longer relevant (*Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 19). Accordingly, I am not convinced that it is necessary to open up s. 2(b) on this appeal and abandon the *Lessard* framework in favour of another test. In my view, it is preferable to retain the essential framework from *Lessard* and refine that framework in the ways I have outlined above.

[105] In declining to recognize freedom of the press as enjoying distinct and independent constitutional protection under s. 2(b), I do not suggest that freedom of the press is anything less than essential in a free and democratic society. Nor do I deny that freedom of the press is entitled to constitutional protection — the text of s. 2(b) confirms that it clearly is. Rather, I simply take the view that because this appeal can readily be disposed of without going so far as to rethink s. 2(b), and because the matter was not fully argued by the parties or considered by the courts below, I do not view this appeal as an appropriate venue in which to formally recognize a distinct and independent constitutional protection for freedom of the press under s. 2(b). I would leave that question for another day.

VI. Conclusion

[106] In sum, considering all of the circumstances, not only was there a reasonable basis on which the authorizing judge could have issued the Production Order, but a *de novo* consideration of the *Lessard* framework favours the issuance of the Production Order. Accordingly, I would uphold its validity.

[107] As for the sealing order and the publication ban, the appellants have failed to demonstrate why this Court should depart from Doherty J.A.'s conclusion on these matters. As such, I would decline to set them aside.

[108] Accordingly, I would dismiss the appeal.

The reasons of Wagner C.J., Abella, Karakatsanis and Martin JJ. were delivered by

ABELLA J. —

[109] For twenty-five years, this Court has flirted with acknowledging that s. 2(b) of the *Charter* protects *independent* rights for the media. Unlike the majority, I see no reason to continue to avoid giving distinct constitutional content to the words “freedom of the press” in s. 2(b). The words are clear, the concerns are real, and the issue is ripe.

[110] A strong, independent and responsible press ensures that the public’s opinions about its democratic choices are based on accurate and reliable information. This is not a democratic luxury — there can be no democracy without it.

[111] This case explores the border between vigorous protection for the press and the state’s ability to investigate crime by seeking information from the press. There are, as a result, two provisions of the *Canadian Charter of Rights and Freedoms* at issue in this appeal. One is s. 8, which protects a reasonable expectation of privacy. The other is s. 2(b), which protects “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”.

[112] Strong constitutional safeguards against state intrusion are a necessary precondition for the press to perform its essential democratic role effectively. As

these reasons seek to demonstrate, s. 2(b) contains a distinct constitutional press right which protects the press' core expressive functions — its right to gather and disseminate information for the public benefit without undue interference. When the state seeks access to information in the hands of the media through a production order, both the media's s. 2(b) rights and s. 8 privacy rights are engaged. A rigorously protective harmonized analysis is therefore required.

Background

[113] In 2014, Vice Media Canada Inc. published three stories about Farah Mohamed Shirdon, a Canadian man believed to have left Canada to join ISIS in Syria. Those stories were based on messages between Mr. Shirdon and Ben Makuch, a Vice Media journalist, in which Mr. Shirdon talked openly about his involvement with ISIS, using Mr. Makuch to make his message public. Seeking evidence of Mr. Shirdon's alleged terrorist activities, police obtained an *ex parte* production order directing Vice Media and Mr. Makuch to hand over screenshots of the messages. Vice Media unsuccessfully challenged the order in the Ontario courts and now appeals to this Court.

[114] Mr. Makuch was a full-time reporter, editor and video producer in Canada for Vice Media, an organization that publishes in both traditional media and multimedia platforms. His specialty was reporting on cyber security, terrorism, intelligence and ISIS. To that end, he began following social media accounts of ISIS jihadists and other militants. In April 2014, a video was posted on YouTube showing

jihadists ripping up their passports, pledging allegiance to ISIS, and making specific threats of violence and destruction against Canada. Soon after, a journalist colleague gave Mr. Makuch the Twitter contact information of a person who claimed to be one of the people in that video, and who was willing to speak with someone from Vice Media.

[115] In May 2014, Mr. Makuch initiated contact with this individual, who at first identified himself as “Abu Usamah”. They communicated through Kik Messenger, an instant messaging platform. Kik does not store the content of messages, so the only records of the communications are those on the devices of the parties to the conversation. “Abu Usamah” responded freely to questions Mr. Makuch posed to him about his activities and his involvement in ISIS. He confirmed that he was a Canadian, had left Canada, and was in the YouTube video.

[116] A CBC news story on June 18, 2014 identified Farah Shirdon, originally from Calgary, as one of the men in the YouTube video. Subsequently, Mr. Makuch published articles in June and August of 2014 based on his initial exchanges with “Abu Usamah”, now revealed to be Mr. Shirdon. Independently, someone from Vice Media in New York contacted Mr. Shirdon to arrange a Skype video interview with him that was published online in September 2014. The Kik message exchanges between Mr. Shirdon and Mr. Makuch continued, resulting in a third article in October 2014. Mr. Makuch’s articles contain statements by Mr. Shirdon that, if true, could provide strong evidence implicating Mr. Shirdon in multiple terrorism offences.

[117] In February 2015, the RCMP applied *ex parte* for a production order from the Ontario Court of Justice under s. 487.014 of the *Criminal Code*, R.S.C. 1985 c. C-46, directing Vice Media and Mr. Makuch to produce documents relating to their communications with Mr. Shirdon. The order was granted but was sealed, along with the Information To Obtain (ITO) sworn by an RCMP officer.

[118] When it received the order, Vice Media determined that the only documents in its possession that responded to the order were screen captures of the Kik messages. Rather than producing that material, Vice Media brought an application in the Superior Court to quash the order and unseal the records the RCMP relied on to obtain it. It argued that the order was an overbroad “fishing expedition” and that the ITO did not assert sufficient grounds to justify it under the existing legal framework. It also contended that the sealing order was an unjustified interference with open access to court documents.

[119] The reviewing judge dismissed Vice Media’s challenge to the production order but allowed, in part, its application in respect of the sealing order.³ He rejected its argument that the information sought was available from other sources, including similar information from media reports, which were not substitutes for the messages themselves. Further, no promise of confidentiality was sought by or given to Mr. Shirdon since Mr. Shirdon had come to Mr. Makuch as a “channe[l] through which he would speak to the whole world”, and Vice Media had already published much of this

³ (2016), 352 C.R.R. (2d) 60 (Ont. S.C.J.).

information. Accordingly, the reviewing judge held that it was open to the authorizing judge to conclude that the media's interest was outweighed by the public interest in obtaining reliable evidence of very serious terrorism offences. He concluded, however, that most of the material in the ITO should be unsealed.

[120] The Court of Appeal dismissed Vice Media's appeal of the production order.⁴ It rejected Vice Media's argument that the context of media searches required a more robust form of review, concluding instead that the ordinary standard for warrant review set out in *R. v. Garofoli*, [1990] 2 S.C.R. 1421 should apply. It also lifted part of the sealing order that the reviewing judge had left in place over the ITO, releasing more of the material relied on by the police to obtain the production order.

Analysis

[121] At the centre of the analysis in this appeal is s. 2(b) of the *Charter*, which states:

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, *including freedom of the press and other media of communication*;

...

⁴ (2017), 137 O.R. (3d) 263 (C.A.).

Specifically, the focus is on “freedom of the press and other media”.

[122] This Court has decided many cases involving the rights of the press. Time and again it has emphasized the media’s importance. But it has, to date, stopped short of openly and unambiguously giving distinct and independent meaning to the guarantee of “freedom of the press and other media” in s. 2(b). It is difficult to justify, in my respectful view, why the express inclusion of “freedom of the press” in the text of s. 2(b) should be denied distinct constitutional meaning. Recognizing *Charter* protection for the press under s. 2(b) is merely recognizing explicitly something this Court has repeatedly gestured towards (see, for example, *R. v. National Post*, [2010] 1 S.C.R. 477, at para. 78; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459,⁵ at pp. 464 and 475).

[123] Why not openly acknowledge that freedom of the press is not a derivative right? It enjoys distinct and independent constitutional protection under s. 2(b) of the *Charter*, not only because it is specifically mentioned in the text of s. 2(b), but also because of its distinct and independent role. Prior judicial hesitancy to recognize such a right has attracted considerable academic criticism (see, for example, Jamie Cameron, *Section 2(b)’s Other Fundamental Freedom: The Press Guarantee, 1982-2012*, (2013) (online); Benjamin Oliphant, “Freedom of the Press as a Discrete Constitutional Guarantee” (2013), 59 *McGill L. J.* 283; Gerald Chan, “Transparency Confined to the Courthouse: A Critical Analysis of *Criminal Lawyers’ Assn., C.B.C.*

⁵ Any references in these reasons to *New Brunswick* refer to the 1991 decision unless specific reference is made to this Court’s 1996 decision in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480.

and *National Post*” (2011), 54 *S.C.L.R.* (2d) 169). Based on the clear text and purpose of s. 2(b), even Crown counsel graciously conceded in oral argument before this Court that “freedom of the press” is a distinct constitutionally protected right.

[124] This Court has long recognized that among the core purposes animating s. 2(b) are the pursuit of truth and the ability to participate in democratic decision making (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976). In upholding these objectives, s. 2(b) protects “listeners as well as speakers” (*Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 767). It has already also observed that “[t]he full and fair discussion of public institutions, which is vital to any democracy, is the *raison d’être* of the s. 2(b) guarantees” and that democratic debate is “predicated on an informed public, which is in turn reliant upon a free and vigorous press” (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23, per La Forest J.). And it has noted that the role of the media in providing a vehicle for the free flow of information and debate is “explicitly recognized in the text of s. 2(b) itself” (*Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640, at para. 52, per McLachlin C.J.).

[125] The purpose underlying protection for the press is related to, but distinct from, the broader guarantee of freedom of expression. The dichotomy in s. 2(b) between freedom of expression generally and freedom of the press specifically is a logical one, since the press plays a distinct expressive role, with both institutional and historic differences from how and why others are entitled to “freedom of expression”.

Section 2(b) sets out generous protections designed to facilitate the healthy functioning of our democracy. But they are incomplete if s. 2(b) is viewed only as an individual right to freedom of expression, reading out protection of “freedom of the press”. A vigorous, rigorous, and independent press holds people and institutions to account, uncovers the truth, and informs the public. It provides the public with the information it needs to engage in informed debate. In other words, it is the public’s “right to know” that explains and animates the distinct constitutional protection for freedom of the press (*Branzburg v. Hayes*, 408 U.S. 665 (1972), at p. 721, per Douglas J. (dissenting); see also *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), at p. 17, per Stewart J. (concurring)).

[126] The singular purpose of press protection has, in fact, resulted in the European Court of Human Rights concluding that the freedom of expression guarantee in Article 10 of the *European Convention on Human Rights*, 213 U.N.T.S. 221,⁶ which does not expressly mention any right for the press, nonetheless includes a distinct press right. A separate right was held to be necessary to protect the “vital public watchdog role of the press . . . and the ability of the press to provide accurate

⁶ Article 10

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

and reliable information” (*Goodwin v. United Kingdom* (1996), 22 E.H.R.R. 123, at para. 39).

[127] The question, then, is what does this s. 2(b) right include? As Crown counsel also conceded in oral argument, for a start it includes not only the right to transmit news and other information, but also the right to *gather* this information without “undue governmental interference” (*New Brunswick* (1996), at para. 24, citing *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421, pp. 429-30, per La Forest J.). The right to convey information to the public is fragile unless the press is free to pursue leads, communicate with sources, and assess the information acquired. Newsgathering activities form an “integral part of freedom of the press” because they are an indispensable part of the right and the ability to tell the public the facts and ideas that make up the story (*Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 19, at para. 46; see also *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1339-40; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442). Without protection from undue interference in newsgathering, public access to the fruits of the media’s work is diminished, as is the public’s ability to understand, debate and form opinions on the issues of the day, thereby impairing its ability to participate meaningfully in the democratic process.

[128] Explicit constitutional protection for newsgathering underlies the protections for the press which we have already recognized. The Court held that open

access to court proceedings by the press is protected under s. 2(b) (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Edmonton Journal*; *Dagenais*; *Mentuck*; *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332). Similarly, constitutional protection was extended to “filming, taking photographs and conducting interviews” outside courtrooms (*Canadian Broadcasting Corp. v. Canada (Attorney General)*, at para. 46). In this way, broader protection of the press’ newsgathering activities represents a logical and incremental development of the jurisprudence.

[129] There is no doubt that defining precisely who is the “press” or “media” and what activities are entitled to protection is, in light of the proliferation of new forms and sources of media, sometimes challenging. It has obvious implications for the questions of who has standing to assert a s. 2(b) violation and what is sufficient to establish a violation. But although the definitions of “media” and “press” have gone from linear to kaleidoscopic, there is no reason to avoid protecting what is at the core of the right. And what is at the core is the right to gather and disseminate information for the public’s benefit without undue interference from government. As Binnie J. observed in his dissent in *R. v. Sinclair*, [2010] 2 S.C.R. 310, at para. 107, a *Charter* right “should be given a broad interpretation consistent with its purpose. If it takes time to work out its proper amplitude, so be it.” In any event, at this stage, there is no need to be preoccupied over who is covered by the s. 2(b) press protection (see *Oliphant*, at p. 299).

[130] Not every activity should or will be protected under s. 2(b), but the more the activity accords with standards of professional journalistic ethics, such as those referred to in the Chamberland Commission Report, the more likely it will be found to attract constitutional protection (Quebec, *Commission d'enquête sur la protection de la confidentialité des sources journalistiques — Rapport* (2017), at p. 38). That is why this Court has recognized the need to protect confidential journalistic source relationships to ensure the free flow of information necessary to the media's newsgathering function (*National Post; Globe and Mail v. Canada (Attorney General)*, [2010] 2 S.C.R. 592). On the other hand, as Binnie J. cautioned in *National Post*, vigorous protection for freedom of the press does not require unwavering support for tabloid espionage or "[c]hequebook journalism" (para. 38).

[131] Does s. 2(b)'s press and media guarantee include protection for journalistic "work product", such as a reporter's personal notes, recordings of interviews, or source contact lists? It seems inescapable that it usually does. The European Court of Human Rights has held that protecting the press includes protection for material in the journalist's possession that might identify a confidential source (*Goodwin*, at para. 39; see also *Nagla v. Latvia*, No. 73469/10, July 16, 2013 (HUDOC)). And in *R. (Miranda) v. Secretary of State for the Home Department*, [2016] EWCA Civ 6, Dyson M.R. held that the protection of sources is "no more than one aspect" of the Article 10 press protection, which protects "journalistic material" even where "the source is known" (paras. 102 and 107). Similarly, in his concurring opinion in *Lessard*, La Forest J. stated that "work product" must be protected because

“[t]he fear that the police can easily gain access” to this material “could well hamper the ability of the press to gather information” (pp. 431-32).

[132] It also necessarily includes, in my respectful view, protecting communications not only with sources that are truly confidential, as in *National Post*, but also those whose comments are “off the record” or “not for attribution”. And it includes protecting the journalist’s documentation of his or her investigative work (Chamberland Commission Report, at pp. 175-80). These are the indispensable tools which help the press gather, assess and disseminate information.

[133] The question then is under what circumstances should the state be able to get access to the background relied on by the press in preparing the information the public will see. In the context of search warrants and production orders, what are the implications of letting s. 2(b) come out of the shadows and explicitly acknowledging the media’s entitlement to constitutional protection? Is the current legal framework, developed before a distinct *Charter* right for the press was recognized, sufficiently respectful of the media’s enhanced status? That brings us to the issue in this case.

[134] Binnie J.’s phrase in *National Post* that the public has the “right to every person’s evidence” was used in the context of a case exploring the relationship between the law of privilege and disclosure. What is at issue here, however, is not the state’s “right” to everyone’s evidence, it is everyone’s right to be secure against unreasonable search and seizure *and* the media’s right to freedom of the press. The

state has an *interest* in investigating and prosecuting crime, but it does not have a *right* to do so in violation of the *Charter*.

[135] Judicial involvement with search warrants and production orders occurs at two stages: at the authorization stage, when police seek an order from a judicial officer permitting a search or directing production of information, usually without notice to the person or organization targeted; and at judicial review, when the targeted party can challenge the initial authorization. The relevant *Charter* provision is s. 8, which states:

8. Everyone has the right to be secure against unreasonable search or seizure.

[136] The provision setting out the conditions for authorizing a production order in this case was s. 487.014 of the *Criminal Code*, which states, in part:

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.

...

[137] In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court held that if the state seeks to intrude on a reasonable expectation of privacy, the constitutional baseline to ensure compliance with s. 8 of the *Charter* is prior judicial authorization based on “reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search” (at p. 168). The *Hunter* standard has been incorporated into many of the statutory provisions — including s. 487.014 — under which police seek authorizations for searches and seizures. These are referred to as the “statutory preconditions for issuance”. But even where those preconditions are met, the judicial officer from whom the authorization is sought retains discretion not to issue the order.

[138] This Court set out the approach for how s. 8 applies to production orders when the target is the press in *Lessard* and its companion case, *New Brunswick*, where the Crown sought video footage the CBC had shot and then aired of demonstrations said to show criminal activity.

[139] The Court held that there must be a balancing of the constitutional s. 8 privacy rights of the press against whom an order is sought with the interests of the state in investigating crime. Of particular relevance to this case, it also held that s.

2(b)'s guarantee of freedom of expression "does *not* . . . import any new or additional requirements for the issuance of search warrants" when the press is involved (*New Brunswick*, at p. 475 (emphasis added)). While noting that "the media play a vital role in the functioning of a democratic society" and "will not be implicated in the crime under investigation" since it is "truly an innocent third party" (*New Brunswick*, at p. 481), the Court observed that s. 2(b) merely provides the "backdrop" for evaluating whether it is reasonable to issue the order (*New Brunswick*, at p. 475). Twenty years later, in *National Post*, this Court expanded on the *Lessard* framework in the context of confidential journalistic sources.

[140] While both *Lessard* and *National Post* were decided on the assumption that although the press had enhanced privacy interests under s. 8, there was no distinct role for the constitutionally protected right under s. 2(b). Rather, the framework acknowledged that s. 2(b) was an important aspect of the analysis for judicial authorizations that target the media. As noted in *National Post*, such orders "constitute a head-to-head clash between the government and the media, and the media's ss. 2(b) and 8 interests are clearly implicated" (para. 78). That is why *New Brunswick* and *Lessard* added a number of considerations to the s. 8 analysis over and above the statutory requirements for warrants so that "any disruption of the gathering and dissemination of news is limited as much as possible" (*Lessard*, at p. 444). Chief among these were: (a) recognition that the press' interests should be interfered with no more than is reasonably necessary (factors 5 and 7); and (b) a balancing test that weighed the state's interest against "the right to privacy of the media in the course of

their news gathering and news dissemination” (factor 3) (*New Brunswick*, at p. 481; *Lessard*, at p. 445).

[141] In my view, an independent, distinct protection in s. 2(b) requires an approach that explicitly addresses those rights, as well as the s. 8 privacy rights. An approach based solely on s. 8 privacy rights is, in my respectful view, no longer sustainable. Recognizing a distinct press guarantee in s. 2(b) of the *Charter* means that the press is no longer just the “backdrop” referred to in *New Brunswick*. Rather than being simply a balance between the constitutional *privacy* rights of the press and the state’s interest in investigating crime, it is now a balance between the state’s investigatory interest and both the media’s s. 8 privacy rights *and* its s. 2(b) media rights.

[142] The fact that *both* constitutional rights for the press are engaged suggests a new harmonized analysis, in which the media’s right to be secure against unreasonable search and seizure *as well* as its right to be protected from undue interference with legitimate newsgathering activities, are explicitly taken into account. I agree with counsel for the intervener, The International Coalition, that what this requires, in addition to the important baseline standards established under s. 8, is a proportionality inquiry showing essentially that the salutary effects of the production order outweigh the deleterious effects.

[143] Once the statutory preconditions for authorizing the order are met, in other words, the authorizing judge should be satisfied that the benefit of the state’s

interests in obtaining the information outweighs the harmful impact on the media's constitutionally protected s. 8 and s. 2(b) rights, including being satisfied that the production order interferes with the media's rights no more than is necessary.

[144] Balancing the benefit against the harm, authorizing judges would consider what the impact of the production order is on the media's s. 8 and s. 2(b) rights. A harmonized approach means that among the considerations authorizing judges would weigh are: the media's reasonable expectation of privacy; whether there is a need to target the press at all, since "[t]he media should be the last rather than the first place that authorities look for evidence" (*Canadian Broadcasting Corp. v. Manitoba (Attorney General)* (2009), 250 C.C.C. (3d) 61 (Man. C.A.), at para. 74); whether the evidence is available from any other source, and if so, whether reasonable steps were taken to obtain it (*Lessard*, factor 5, at p. 445); and whether the proposed order is narrowly tailored to interfere with the media's rights no more than necessary (*Lessard*, factor 7, at p. 445).

[145] The authorizing judge must balance the state's investigatory interest with the press' s. 8 and s. 2(b) rights. The authorizing judge should be satisfied that the interests of the state in investigating and prosecuting crimes outweigh the press' s. 8 privacy rights. Those rights, in turn, cannot be assessed without also considering the distinct constitutional protection for the press under s. 2(b). Only where the authorizing judge is satisfied that the state's beneficial interest outweighs the harmful impact on the press should a production order be made.

[146] Generally, the more intrusive the proposed order is on the s. 8 privacy and s. 2(b) rights of the media, that is, the more it seeks to get access to confidential or “off the record” communications with sources, or to journalistic work products like private notes and contact lists, the greater the impact on the media’s ability to gather and publish the news. And, in turn, the greater the harmful impact on the public’s right to know the fruits of the press’ activities. In *National Post*, Binnie J. expanded on this impact, citing with approval the dissent of McLachlin J. in *Lessard*:

The ways in which police search and seizure may impinge on the values underlying freedom of the press are manifest. First, searches may be physically disruptive and impede efficient and timely publication. Second, retention of seized material by the police may delay or forestall completing the dissemination of the news. Third, confidential sources of information may be fearful of speaking to the press, and the press may lose opportunities to cover various events because of fears on the part of participants that press files will be readily available to the authorities. Fourth, reporters may be deterred from recording and preserving their recollections for future use. Fifth, the processing of news and its dissemination may be chilled by the prospect that searches will disclose internal editorial deliberations. Finally, 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 and its ability to gather news in the future. All this may adversely impact on the role of the media in furthering the search for truth, community participation and self-fulfillment.

(*National Post*, at para. 78, citing *Lessard*, at p. 452)

[147] As this quote demonstrates, an obvious collateral impact on the press of being required to comply with a production order is a chilling effect not only on the particular press being targeted, but on the press generally. The extent of the chill may vary from case to case, but its existence can hardly be questioned.

[148] On the other side of the balance is the strength of the state's interest in obtaining the order. As Cory J. held in *Lessard*, "all members of the community have an interest in seeing that crimes are investigated and prosecuted" (p. 446). In particular, the "investigation of a serious and violent crime [is] of importance to the state", and in circumstances where a crime is ongoing or where there is a risk that further crimes will be committed, "some urgency in conducting the search must be recognized" (*New Brunswick*, at p. 476). In other words, the more serious the crime under investigation, the more cogent the evidence sought and the more urgent the investigative need, the stronger the state's interest will be.

[149] While the cogency of the evidence is a relevant consideration, I agree with the Crown that in assessing the strength of the state's interest it would not be appropriate to require an assessment of whether the evidence is *necessary* for the Crown to obtain a conviction. Production orders are often a preliminary part of the Crown's efforts to marshal a case. What will ultimately be necessary to prove the Crown's case at trial is unknowable at the early stages of an investigation, where the police's role is "to locate, examine and preserve all the evidence relevant to events which may have given rise to criminal liability", not to "decide whether the essential elements of an offence are made out" (*CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 22).

[150] Recognizing that s. 2(b) requires a more rigorous approach to authorizations against the press, also compels clarification of some aspects of the

impact on the media's rights that have emerged in the jurisprudence. One is the relevance of "prior publication". In *Lessard* and *New Brunswick*, the material sought was video footage of events said to constitute criminal activity, which had already been broadcast by the press. The Court held that the fact that the information sought had been published in whole or in part attenuated the media's claim to s. 8 privacy protection in the footage (*Lessard*, at pp. 446-47; *New Brunswick*, at p. 477).

[151] But one of the media's core functions is the exercise of discretion over what is and is not published, and there is often an expanse of unpublished material behind each published story. It seems to me that prior publication is a factor to be addressed on a case-by-case basis. If a journalist obtains a number of documents and decides to publish only some or part of them, the publication in "part" should not undermine protection for the *unpublished* portion, since state access to it clearly interferes with both privacy and newsgathering.

[152] There is also the issue of how to deal with sources, some of whom ask for full confidentiality, while others say certain things "off the record" despite being otherwise unconcerned about being identified as a source. For this latter group, the desire to remain anonymous *with respect to those particular communications* may be no less significant to their willingness to communicate with the journalist than a desire for blanket confidentiality such as was at issue in *National Post*. Where part or all of a communication with a journalist was intended or understood to be "off the record", it too is entitled to protection from disclosure requirements. This aligns with

the approach taken by the Chamberland Commission, which noted the need to protect journalists' source materials even where the identification of a confidential source is not at issue (Chamberland Commission Report, at pp. 175-80).

[153] And the final aspect warranting discussion is whether a production order should be made against the press without the press at the hearing. This Court, in applying *Criminal Code* provisions similar to s. 487.014(1), has interpreted them to permit, but not require, *ex parte* proceedings in order to ensure that a judge is not deprived of the option of having a hearing on notice “to ensure reasonableness and fairness in the circumstances” (*R. v. S.A.B.*, [2003] 2 S.C.R. 678, at para. 56; *R. v. Rodgers*, [2006] 1 S.C.R. 554, at para. 16). There are strong rationales for providing notice to the press in cases like this. If the authorizing judge lacks evidence and submissions from the party exclusively in possession of the information needed for the balancing — the innocent media third party whose s. 2(b) rights are engaged — then there is nothing to balance. And the authorizing judge would have no way of knowing some highly relevant facts, such as the nature of the relationship between a source and a journalist. For this reason, the Court in *National Post* held that “the media should have the opportunity to put their case against the warrant at the earliest reasonable opportunity”, and that absent urgent circumstances, the issuing judge “may well conclude that it is desirable to proceed on notice” (para. 83). While the issue of notice is ultimately a matter within the discretion of the authorizing judge, it is, obviously, highly preferable in most cases to proceed on notice to the media rather than *ex parte*.

[154] In rare cases where the Crown can show that there are exigent circumstances or that there is a real risk of the destruction of evidence, notice may not be feasible. A real risk, for example, that the press would act to move evidence “beyond the reach of [the] Canadian court process”, as the ITO in this case asserted, might also militate against giving notice. In those circumstances, an order should be made for sealing and preserving the evidence that is obtained pending notice to the press and an opportunity to contest the order before a reviewing judge. The possibility that the press may not “cooperate with police”, which was also suggested in the ITO, does not raise the same concerns. In those cases, it remains preferable to proceed on notice so that the media can oppose the order at the earliest possible opportunity.

[155] That brings us to the approach for reviewing production orders. Once an authorization has been granted, the person targeted by the order can challenge it. A challenge to an ordinary search warrant or production order by a third party typically occurs by way of *certiorari* in the Superior Court (Scott C. Hutchison et al., *Search and Seizure Law in Canada* (loose-leaf), at pp. 16-53 to 16-55). The target can argue that the record before the authorizing judge was insufficient to establish the requisite statutory grounds for issuance. Alternatively, he or she can argue that the record did not accurately reflect what the affiant knew or ought to have known and that, if it had, the authorization would not have been granted (Robert W. Hubbard, Peter M. Brauti and Scott K. Fenton, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (loose-leaf), at section 8.5.2).

[156] This Court set out the orthodox approach for reviewing authorizations in *Garofoli*. Under that approach, the reviewing judge “does not substitute his or her view for that of the authorizing judge” (p. 1452). Instead, he or she is confined to determining whether, in light of the record as amplified on review, “there continues to be any basis for the decision of the authorizing judge” (p. 1452). Even where the record reveals “the existence of fraud, non-disclosure, misleading evidence and new evidence”, if the authorizing judge “*could* have granted the authorization”, the reviewing judge should *not* interfere (*Garofoli*, at p. 1452 (emphasis added); see also *R. v. Nero*, (2016) 334 C.C.C. (3d) 148 (Ont. C.A.); *R. v. Araujo*, [2000] 2 S.C.R. 992).

[157] The combination of the *Garofoli* approach with *ex parte* authorization proceedings may make sense in the ordinary search warrant context, where the amplification of the record on review does not generally change the interests at stake. Any new evidence on review still typically relates to whether the statutory preconditions for issuance have been satisfied, namely, whether there were reasonable and probable grounds to believe that an offence had been committed and evidence of it would be obtained. As this Court has said, “[w]hat matters is what the affiant knew or ought to have known at the time the affidavit in support of the . . . authorization was sworn” (*World Bank Group v. Wallace*, [2016] 1 S.C.R. 207, at para. 119). As a result, this Court has held that the scope for cross-examination of an affiant is usually narrow, and “[e]ven if it is established that information contained within the affidavit is inaccurate, or that a material fact was not disclosed, this will not necessarily detract

from the existence of the statutory pre-conditions” (*R. v. Pires*, [2005] 3 S.C.R. 343, at para. 30). New facts are not relevant if the affiant could not reasonably have known of them (*World Bank Group*, at para. 122).

[158] But this highly deferential approach was not designed to scrutinize whether s. 2(b) *Charter* rights were sufficiently protected. In fact, this Court has never directly analysed what approach should be applied for reviewing a production order against the press. In proceedings where the press is involved, and there has been no notice before the authorizing judge, the press will not have had the opportunity to explain how the order would interfere with its work until after the authorization is made. At that stage, irrespective of the new evidence, under the *Garofoli* approach the court would not be entitled to conduct a fresh balancing. Instead, it could only set aside the order if it felt the authorizing judge could not have come to any other conclusion than to deny the order.

[159] Although all production orders involve infringements of constitutional privacy rights, those infringements are usually knowable in advance and require little additional elaboration. The nature and extent of the impacts on the press are, by contrast, fact-dependent and contextual. A challenge to an *ex parte* authorization against a journalist may, and necessarily does, involve the introduction of facts on review that the police affiant had little to no way of knowing. And, unlike in an ordinary *Garofoli* review, those facts are *highly* relevant, because the inquiry is not

about the sincerity or reasonableness of the affiant's beliefs, it is about whether the order reflects a proportionate balancing.

[160] Most significantly, if the authorizing judge's decision has been made without the benefit of any submissions or evidence from the press, it is hard to see why it would be entitled to deference. In my view, where the press has not had a chance to appear before the authorizing judge, it is entitled to a *de novo* balancing on the review. It would be an artificial exercise to defer to the conclusions of a decision maker who does not possess some or all of the most relevant facts in order to balance the interests at play. As well, a *de novo* hearing provides a more straightforward process for all parties, minimizing the number of steps and interim decisions, and enabling the judge to zero in on the substantive issues. If, on the other hand, the press was present and able to make its case before the authorizing judge, the more deferential *Garofoli* approach would be justified.

[161] A final note about the analysis. Some of the parties referred to the new *Journalistic Sources Protection Act*, S.C. 2017, c. 22, for the general purpose of showing that Parliament intended to strengthen press protection. None of its provisions, however, was at issue before us. As a result, these reasons have intentionally avoided addressing or applying any of them.

Application

[162] In this case, Vice Media has put forward all of the evidence and argument that would have been weighed in the balance. Based on that record, in my view, the production order strikes a proportionate balance between the rights and interests at stake.

[163] The order is narrowly tailored and targets only Mr. Makuch's communications with Mr. Shirdon, and, apart from Vice Media's claim that the Crown could somehow use published media accounts as a substitute for the evidence it seeks, there is no suggestion that those communications are available from any other source. Balancing the harms and benefits of the order, although any production order against a journalist is serious, the harmful impact of this order is, in my view, minimal. In saying so I do not rely on the Crown's submission that Vice Media's privacy interest in these documents was undermined by "prior publication". Rather, it is because the specific facts of this case undermine the strength of Vice Media's suggestion that the production order would interfere with its newsgathering and publication functions.

[164] The unusual lens through which this appeal must be viewed is that we are dealing with information from a source in circumstances where the source wanted everything he said to be made public. I do not deny the seriousness of journalists being seen to be participating in or conscripted into the investigation of crime. That perception could most decidedly undermine the media's perceived independence,

resulting in a “loss of credibility and appearance of impartiality” (*Manitoba*, at para. 74). But the concern shrivels in the context of this case.

[165] It bears repeating that Mr. Shiridon was not a confidential source, or even one who so much as intimated that he wished Mr. Makuch to conceal his identity. On the contrary, he went to Mr. Makuch with the express purpose of broadcasting his extremist views to the public. Crucially, Mr. Makuch’s lengthy, detailed affidavit contains no suggestion whatsoever that anything Mr. Shiridon said was intended or understood to be “off the record”, and Vice Media has never argued otherwise.

[166] Vice Media points out that Mr. Shiridon did not initially identify himself to Mr. Makuch and used a pseudonym. But this does not amount to a confidentiality agreement. More pertinently, Mr. Makuch’s own conduct shows that the relationship was not confidential in any way. It was Mr. Makuch, not the police, who identified Mr. Shiridon to the public, by publishing the articles that linked Abu Usamah to Farah Shiridon and the YouTube video. It cannot be said, therefore, that this case involved *state* interference with a journalist-source relationship. No one, in fact, interfered with Mr. Shiridon’s anonymity or privacy since he himself was the person who willingly gave up both in order to have a public platform for his views — a fact confirmed by Mr. Makuch’s apparent lack of concern about identifying Mr. Shiridon in his articles.

[167] Vice Media argues that being required to comply with *any* production order, regardless of whether it covers confidential or quasi-confidential communications, and regardless of whether there is any appearance of connection

between the journalist and the police, will chill sources. With respect, accepting that submission would amount to a universal, automatic immunity from production orders for the press. While the risk of a chilling effect can be presumed in such cases, the particular factual context of each case may amplify, diminish, or displace that presumption. In this case, the deliberately non-confidential nature of the source and the communications at issue diminish the risk of a chill.

[168] As for the strength of the state's interest, Vice Media does not dispute that Mr. Shirdon's alleged offences are extremely serious. Nor does Vice Media dispute that the communications between Mr. Makuch and Mr. Shirdon are likely to reveal strong evidence of Mr. Shirdon's alleged terrorist conduct. What it says instead is that the Crown does not really need these communications to succeed in its prosecution of Mr. Shirdon — a prosecution, moreover, that Vice Media says is unlikely to occur soon, if ever. But, as previously noted, whether the evidence sought is *necessary* for the Crown to obtain a conviction is not part of assessing the strength of the state's interests.

[169] Nor can I accept Vice Media's argument that the production order should not be issued unless and until Mr. Shirdon returns to Canada and a prosecution here becomes imminent. Fleeing from Canada to join ISIS is part of the very conduct for which Mr. Shirdon is charged. It would be incongruous to use his flight from Canada as a basis for delaying an investigation of his conduct.

[170] This leads to the conclusion that the benefit of the state's interest in obtaining the messages outweighs any harm to Vice Media's rights.

[171] I would therefore dismiss the appeal.

Appeal dismissed.

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