Court File No. C-62054

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

– and –

VICE MEDIA CANADA INC. and BEN MAKUCH

Appellants

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

Interveners

RESPONDENT'S FACTUM

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PART I – RESPONDENT'S STATEMENT AS TO FACTS

Overview

1. The RCMP swore an affidavit in support of a production order ("ITO"), alleging that Farah Shirdon ("Shirdon") committed acts of terrorism, left Canada to participate in terrorist activity, and made efforts to recruit on behalf of a brutal terrorist organization, ISIS. The production order requires the appellants, a media organization and a

reporter who works for them, to hand over documents found to be directly admissible evidence of the commission of the alleged offences. The documents are screenshots of a social media exchange the appellants had with Shirdon, where Shirdon admitted his involvement with ISIS.

2. The appellants are appealing the decision of MacDonnell J. that dismissed their application to quash the production order. They are also appealing His Honour's ruling with respect to the unsealing of the ITO and his decision to ban portions of the ITO from publication. The CCLA, the BCCLA, and the "Coalition"[1] were granted intervenor status in this Court, as was the Attorney General of Ontario.

3. There is no basis to interfere with MacDonnell J.'s decision to uphold the production order. In a 133 paragraph decision, he took great care to discuss and apply the well settled legal principles relevant to this case. Rather than point to any specific errors in MacDonnell J.'s ruling, the appellants simply reiterate the importance of their section 2(b) *Charter* rights. At no point has the respondent disputed the importance of section 2(b) of the *Charter*, or negated the special considerations that section of the *Charter* entails. MacDonnell J.'s ruling also demonstrates a strong understanding of the important role the media plays in a free and democratic society. He committed no legal error in his analysis, and absent palpable and overriding error, his factual findings should remain.

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[1] The "Coalition" includes a number of applicants, including the Canadian Journalists for Free Expression, Canadian Broadcasting Corporation, Ad Idem/Canadian Media Lawyers Association, Canadian Association of Journalists, Canadian Media Guild/Communication Workers of America, Reporters Without Borders Sans Frontieres, Aboriginal Peoples Television Network, and the Centre for Free Expression.

4. To the extent that the interveners argue for new or additional factors to be considered in a "more specific or rigorous framework"[2] than the current Supreme Court authority provides, this contention should be rejected. The current framework, known as the *Lessard* factors, allows an authorizing justice, faced with an application for a production order aimed at the media, to engage in a weighing and balancing of particular factors which may be different in each case. As the intervener the Attorney General of Ontario submits, it is a flexible test that already addresses the concerns raised by the appellants and the interveners. A restructuring of the test was rejected by the Supreme Court of Canada in 2010, and there is no reason to restructure it now.

5. The appellants and interveners also take issue with the decision of MacDonnell J. to order a publication ban on a portion of the affidavit, and seal limited information that would identify a single innocent third party. Neither of these complaints have any merit. In ordering the publication ban, MacDonnell J. balanced the *Charter* rights of the accused with the media's s. 2(b) *Charter* rights. In the end, he found the accused's rights tipped the scale in favour of a limited and temporary publication ban. There is no basis to interfere with that decision. This was the least restrictive means to protect Shirdon's *Charter* rights while also recognizing the need for public access.

6. The order to seal information that would identify a single innocent third party was equally measured. MacDonnell J. rejected the Crown's request to protect three innocent third parties. He carefully considered the evidence of each of the individuals and assessed the reasonableness of their fears. He accepted that one of those people

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[2] *Factum of the Intervener BCCLA*, at para 5.

had a legitimate concern for their safety and would not have spoken to the police had he/she known that their identity would be published. Given his factual findings, his order was necessary, reasonable, and without error. This appeal should be dismissed.

Facts in Detail

7. The respondent sets out below the background facts which are important to the resolution of this appeal. In particular, the respondent emphasizes and relies upon the reasons of the reviewing judge, MacDonnell, J.

i) Vice Media and the RCMP investigation of Farah Shirdon

8. Between June and October 2014, the appellants published three articles about Shirdon's involvement with the terrorist organization ISIS. Those articles were based in large part on conversations between the appellant and Shirdon, through a social media platform known as "Kik" text messaging service.[3]

9. The RCMP were also investigating Shirdon for various terrorism-related offences, and believed Shirdon left Canada in March 2014 to join ISIS in Iraq or Syria. After the articles were published, the RCMP sought a production order for documents and data in the possession of the appellants related to their communications with Shirdon. That production order was granted by Justice Nadelle on February 13, 2015 in Ottawa, Ontario pursuant to ss. 487.012(1) and (3) of the *Criminal Code*. The ITO was sworn

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[3] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 3.

by Constable Grewal of the RCMP and is 102 pages in length. A sealing order was also made on the entire ITO at the time it was issued.[4]

10. On September 24, 2014, the RCMP charged Shirdon *in absentia* for various terrorism-related offences, including leaving Canada to participate in the activities of a terrorist group, contrary to section 83.181 of the *Criminal Code*[5]. Shirdon has not yet been arrested and remains at large.[6]

ii) Overview of the certiorari application in the Superior Court

11. The appellants brought the following three simultaneous applications in the Superior Court of Justice to set aside the production order and sealing order:

(i) an application for *certiorari* to quash the production order;
(ii) in the alternative, an application under s. 487.0193 of the *Criminal Code* for an order revoking or varying the production order; and
(iii) an application for an order setting aside the sealing order.

12. On March 1, 2016, MacDonnell J. dismissed the applications to quash, revoke or vary the production order, but did vary the sealing order. It was common ground, and MacDonnell J. accepted, that the only documents in the possession of the appellants that were covered by the production order were the screenshots of the actual "Kik" text exchanges between Vice Media and Shirdon.[7] The ITO set out the fact that the respondent was unable to obtain the content of the text exchanges through "Kik"

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[4] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras. 1-2.
[5] It is important to note that the elements of this offence require both the *actus reus* of "leaving or attempting to leave" Canada, and the *mens rea* of doing so for the purpose of participating in a terrorist group. The screen captures sought through the production order would be strong evidence, and in fact MacDonnell J. found them to be the best evidence of this offence.
[6] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 2.
[7] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 23.

because "Kik" does not store the content of the conversations made through their platform.[8]

13. The appellants' articles were published on June 23, 2014, August 15, 2014, and October 7, 2014, and formed part of the record at the certiorari application.[9] The articles reported that Shirdon made certain admissions during the text exchanges with the appellant Makuch. Shirdon's comments, as reported by the appellants, were characterized by MacDonnell J. as, on their face, "evidence of the commission of the offences under investigation."[10] He also concluded that the evidence contained within the messages was "directly admissible against him [Shirdon] in the proposed prosecution."[11]

14. The articles state that Shirdon is the same man who appeared in a video where he burned his Canadian passport, and announced that he emigrated to Syria. A few examples of Shirdon's comments, as reported by the appellants, are as follows:

- "I have anger against my government for entering Muslim countries on false pretenses."[12]
- "..fighting is prescribed upon Muslims both offensive and defensive...."[13]
- Statements supporting the re-establishment of the "Islamic Caliphate"[14]

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[8] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 28.
[9] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 3. *Appeal Book & Compendium*, Tabs 4 c-e.
[10] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 21.
[11] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 35.
[12] *A Chat with the Canadian ISIS Member Who Burned His Passport on YouTube,* June 23, 2014, *Appeal Book & Compendium*, Tab 4 c, page 72.
[13] *A Chat with the Canadian ISIS Member Who Burned His Passport on YouTube,* June 23, 2014, *Appeal Book & Compendium*, Tab 4 c, page 72.
[14] *A Chat with the Canadian ISIS Member Who Burned His Passport on YouTube,* June 23, 2014, *Appeal Book & Compendium*, Tab 4 c, page 72.

- "We need to incite the believers, it's my duty as a Muslim to do this."[15]
- "What's the benefit of using social media if I'm not using it to recruit?"[16]
- "Blood has to flow.... Attack us in our homes, we shall do the same."[17]

iii) Justice MacDonnell's Reasons

A. Application to quash/vary the production order

15. In dismissing the application to quash, revoke or vary the production order, MacDonnell J. considered and applied the governing section 8 *Charter* principles. He also reviewed the Supreme Court of Canada jurisprudence regarding warrants directed to the media, in particular, *Canadian Broadcasting Corporation* v. *Lessard.*[18] Over approximately 29 paragraphs, MacDonnell J. set out the applicable law. He then outlined his reasons for concluding that the ITO set forth a basis upon which the authorization judge could have issued the production order after balancing the "special position" of the media with the interests of law enforcement, and the public.[19]

16. In the course of his entire reasons, MacDonnell J. made several findings in the context of his consideration of the *Lessard* factors. Some of those findings are as follows:

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[15] *A Chat with the Canadian ISIS Member Who Burned His Passport on YouTube,* June 23, 2014, *Appeal Book & Compendium*, Tab 4 c, page 73.
[16] *A Chat with the Canadian ISIS Member Who Burned His Passport on YouTube,* June 23, 2014, *Appeal Book & Compendium*, Tab 4 c, page 73.
[17] *The Canadian Jihadist Told Us Canada Isn't Immune to Isis Attacks,* October 7, 2014, *Appeal Book & Compendium*, Tab 4 e, page 91.
[18] *Canadian Broadcasting Corporation v. Lessard,* [1991] 3 S.C.R. 421.
[19] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras. 6-13, and 27-48.

- The ITO revealed sufficient grounds to believe the material sought "will afford" evidence of the offence.[20]
- The "Kik" screenshots were the "best and most reliable evidence" that would be admissible at trial. In making this conclusion, he rejected the appellant's suggestion that Makuch could be subpoenaed as an alternative to handing over the screenshots of the text exchange.[21]
- There were no alternative sources to obtain copies of the actual text exchanges.[22]
- Shirdon was not a confidential source.[23]
- The authorizing justice was entitled to consider that the information was publically disseminated in whole or in part and that this would favour issuance of the production order.[24]
- The production order was calculated to not disrupt or interfere with Vice's news-gathering functions.[25]
- The screenshots did not constitute work product or private notes.[26]

B. Application to set aside or vary the sealing order

17. MacDonnell J. varied the sealing order imposed by Justice Nadelle. In doing so, he started with the presumption that full public access should be permitted.[27] He took into account the relevant *Criminal Code* provisions that outline the basis upon which access or publication can be denied. He also recognized and applied the well-known *Dagenais/Mentuck* test that applies to all discretionary court orders that involve freedom of expression and freedom of the press.[28]

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[20] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras. 15-21.
[21] Justice MacDonnell found that the screen captures were essential because they were "actual electronic communications made by an accused." *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras 29, 33, 35-37.
[22] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras. 42-43.
[23] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 43.
[24] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 44.
[25] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 45.
[26] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras. 51-53.
[27] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 55.
[28] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras. 56-57, 59.

18. Ultimately, MacDonnell J.'s varied order accomplished the following:

- It unsealed approximately 76 paragraphs and 231 subparagraphs of the ITO, allowing that information to be fully accessed and published by the media.[29]
- It imposed a *temporary* publication ban[30] on information that would compromise Shirdon's right to a fair trial.[31] Access to this information was permitted.
- It only sealed information where the Crown made a national security claim[32], information that would reveal the identity of one innocent third party[33]; and information contained in two sub-paragraphs (paragraphs 63b and 63c) of the ITO, to protect an ongoing investigation.

19. With respect to the sealing order, the appellants on appeal only complain about the decision to seal information that would identify a single innocent third party, and do not to take issue with the national security claim, nor the order to protect an ongoing investigation. The intervener CCLA, however, takes issue with the other portions of the ITO that were ordered sealed.

PART II – RESPONSE TO THE APPELLANT'S ISSUES

1) Overview of the Crown's position

20. The appellants are trying to engage in a *de novo* review of Justice Nadelle's decision to issue the production order. However, this is an appeal of MacDonnell J.'s

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[29] Any portion of the ITO that does not contain yellow highlighting was completely unsealed. See *Appeal Book & Compendium*, Tab 7, pages 218 – 319.
[30] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 132.
[31] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961, Schedule A. This information is highlighted in yellow on the ITO found in the *Appeal Book & Compendium*, Tab 7, pages 218 – 319.
[32] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 130. None of the national security redactions were challenged by the appellant before MacDonnell J. Those redactions are similarly not challenged on appeal. In any event, only the Federal Court has jurisdiction to assess the viability of national security claims.
[33] The Crown sought to protect the identity of three innocent third parties. However, MacDonnell J. found that only the disclosure of one of those people would constitute a serious risk to the administration of justice. *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras 68-74.

decision to dismiss the appellants' certiorari application. The appellants have failed to point out any errors in his analysis.

21. The respondent's position is as follows:

a. MacDonnell J. properly considered and applied the relevant *Lessard* factors in upholding the issuance of the Order;

b. There was ample evidence to support MacDonnell J.'s finding that the "will afford evidence" criteria was met; and

c. The publication ban and sealing orders are necessary, and do not offend the appellants' *Charter* rights.

2) The standard and scope of review

22. MacDonnell J. used the correct standard of review when he dismissed the application to set aside the production order. He recognized that a review of a production order begins with a presumption of validity. The correct question that MacDonnell J. considered was whether the appellants demonstrated that there was no reasonable basis for the issuance of the order.[34] The familiar *Garofoli* principles[35] govern the standard of review, and those principles are the same when the media is the focus of the judicial authorization.[36] This was articulated by the Supreme Court of Canada in *R* v. *National Post*[37] as follows:

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[34] *R* v *Sadikov* 2014 ONCA 72 at paras 83-84.
[35] The scope of judicial review is narrow. A reviewing justice does not engage in a *de novo* analysis nor is he or she permitted to substitute his or her own opinion in place of the opinion of the issuing justice. The test is whether there is any evidence upon which the issuing justice *could* determine that a production order should be issued. It is not for the reviewing justice to weigh the evidence or decide whether the issuing justice *should* have been satisfied by the affidavit in support of the order. *R v Garofoli* [1990] 2 S.C.R. 1421 at para 56.
[36] As MacDonnell J. said: "Those principles [referring to the *Garofoli* principles, reiterated in *R. v. Nero*, 2016 ONCA 160 at para. 71] remain fully applicable where the target of the production order is a media outlet." *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 13.
[37] *R. v. National Post*, 2010 SCC 16.

> On the warrant application, the burden is on the police to show reasonable and probable grounds. Once the warrant has been issued, however, the burden shifts to the media applicant on the motion to quash to establish that there was **no reasonable basis for its issuance**. Moreover, **the reviewing judge is generally bound, in deciding this issue, to afford a measure of deference to the determination of the issuing justice**."[38] [Emphasis Added]

23. On an appeal of a reviewing judge's decision, deference is owed to the findings of fact, and of course any inferences made from those findings of fact. Therefore, any of those findings made by MacDonnell J. must be reviewed on a standard of palpable and overriding error.[39] In the absence of an error of law, a misapprehension of material evidence or a failure to consider relevant evidence, this Court should decline to interfere.[40]

A. Justice MacDonnell considered the relevant *Lessard* factors

24. Nobody disputes the important role the media play in society. The Supreme Court of Canada has consistently acknowledged this important role, and developed a test to ensure that role is properly recognized and protected. That test was first set out in *Canadian Broadcasting Corporation v. Lessard*,[41] and *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*.[42]

25. In short, a reviewing court's assessment as to whether a production order was properly issued engages questions of statutory compliance[43] and the reasonable

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[38] *R. v. National Post*, 2010 SCC 16 at para. 80.
[39] *Canadian Broadcasting Corporation v. Manitoba (Attorney General) et al.*, 2009 MBCA 122 at para 22.
[40] *R. v. Nero*, 2016 ONCA 160 at para. 74. See also paras 65-73.
[41] *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 421.
[42] *Canadian Broadcasting Corporation* v. *New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459.
[43] Section 487.012 of the *Criminal Code* (at the time) stated that a production order requires a justice to be satisfied that there are reasonable grounds to believe that (a) an offence has been or is suspected to have been committed; (b) the documents or data will afford evidence respecting the commission of the offence; and (c) the person who is

exercise of the issuing justice's discretion. The *reasonableness* of the decision to issue the production order is evaluated while keeping in mind the special role the media play in a democratic society. The constitutional protection afforded by s. 2(b) does not import any new or additional requirements for judicial authorizations that are aimed at the media.[44] Instead, the Supreme Court of Canada developed what is known as the "*Lessard* factors" to help determine the reasonableness of the overall decision.

26. MacDonnell J. recognized the importance of these principles and applied them in reviewing Justice Nadelle's decision to issue the production order.[45] The reasonableness of MacDonnell J.'s decision is apparent given the following findings, which directly accord with the relevant *Lessard* principles[46]:

- The statutory requirements for the issuance of a production order were met (*Lessard* factor #1)
- The justice of the peace considered all of the circumstances in determining whether to exercise his discretion to issue the production order (*Lessard* factor #2)
- A balance was struck between the competing interests of the state in the investigation, the prosecution of crimes and the rights to privacy of the media.[47] (*Lessard* factor #3)
- The ITO contained sufficient detail to enable the justice of the peace to properly exercise his discretion.[48] (*Lessard* factor #4)

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subject to the order has possession or control of the documents or data. The conditions for making a production order remain the same and are now found at *Criminal Code,* R.S.C., 1985, c. C-46, s. 487.014(2).

[44] *Canadian Broadcasting Corporation* v. *New Brunswick (Attorney General),* [1991] 3 S.C.R. 459 at paras 31-32.

[45] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras 6-13.

[46] The *Lessard* factors are helpfully re-produced in the *Factum of the Intervener The Attorney General of Ontario*, at Appendix A.

[47] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 47.

[48] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 21.

- The ITO set out that there were no alternate sources for the information sought.[49] Importantly, MacDonnell J. found that the evidence sought was the best, and most reliable evidence for the prosecution. It was also found that the screen shots of the "Kik" conversation would be important evidence in relation to serious allegations that are highly reliable and do not require a second-hand interpretation.[50] (*Lessard* factor #5)

- The bulk of the information that Shirdon communicated was already published[51] and Shirdon was not a confidential source. The communications were made with the understanding that they would be shared with the world and directly attributed to Shirdon.[52] (*Lessard* factor #6)

- The production order was calculated to not disrupt or interfere with the work of either Mr. Makuch or Vice Media.[53] (*Lessard* factor #7)

- There was no allegation that the affiant failed to disclose pertinent information that would have affected the issuance of the production order. (*Lessard* factor #8)

- There was no allegation that the production order was executed in an unreasonable manner. (*Lessard* factor #9)

27. Contrary to the submissions of the appellant and the interveners, the section 2(b) *Charter* protection does not give rise to any absolute rules. For example, there is no constitutional requirement for the police to demonstrate that there are no other sources for the information.[54] Furthermore, journalistic sources are not protected by a class privilege (such as solicitor-client privilege, or confidential informant privilege), which means that journalists cannot give a source a total assurance of confidentiality.[55] Instead, when an application for a search warrant or production order is made, the freedom afforded by section 2(b) of the *Charter* provides a "backdrop"

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[49] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras. 28-29.
[50] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras 45-46.
[51] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 44.
[52] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 43.
[53] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 45.
[54] *Canadian Broadcasting Corporation v. Lessard,* [1991] 3 S.C.R. 421 at para. 49-50.
[55] *R. v. National Post*, 2010 SCC 16 at para. 69.

against which the reasonableness of any search conducted may be evaluated.[56] This evaluation is based on the totality of the circumstances and considered on a case-by-case basis.[57] That is exactly how MacDonnell J. considered and applied this constitutional protection.

(i) The additional considerations requested by the appellant's are unnecessary

28. The Supreme Court of Canada has consistently conveyed the message that, as a general principle, "the public has a right to every person's evidence".[58]

29. The appellants asked MacDonnell J., and now they ask this Court to consider three additional factors in assessing the overall reasonableness to issue a production order when the media is involved:

(1) the probative value of the evidence sought given that the police already have sufficient evidence[59];
(2) the fact that charges have already been laid; and
(3) the availability of the evidence elsewhere.[60]

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[56] *Canadian Broadcasting Corporation* v. *New Brunswick (Attorney General),* [1991] 3 S.C.R. 459 at paras 31-32.
[57] In *Canadian Broadcasting Corporation v. Lessard,* [1991] 3 S.C.R. 421, the police sought videotapes from the C.B.C. The videos captured a group of people damaging a post office building. The Court said at para 51: "It must be remembered that all members of the community have an interest in seeing that crimes are investigated and prosecuted. In a situation as this, the media might even consider voluntarily delivering their videotapes to the police. For example, if the tapes depicted a murder being committed and means of identifying the killer, would the media seek to withhold the tapes on the grounds that to release them would have a chilling effect on their sources and thus interfere with freedom of the press? I trust that such a position would not be taken."
[58] *R. v. National Post*, 2010 SCC 16 at para. 1. This is Justice Binnie's opening sentence. See also Justice Cory's remarks in *Canadian Broadcasting Corporation v. Lessard,* [1991] 3 S.C.R. 421 at para. 51 where he said: "It must be remembered that all members of the community have an interest in seeing that crimes are investigated and prosecuted."
[59] The appellants state: "the RCMP and Crown believe they already have sufficient evidence and a reasonable prospect to obtain convictions against Shirdon without the requested documents, otherwise they would not have laid charges against him." *Factum of the Appellants Vice Media Canada Inc. and Ben Makuch* at para. 31.
[60] *Factum of the Appellants Vice Media Canada Inc. and Ben Makuch* at para. 30.

30. First, it is not clear how the appellants can suggest that MacDonnell J. erred in his assessment of the value of the evidence sought. His Honour not only found that the "Kik" screenshots "will afford" evidence of the offences, but he went further and found that they are in fact evidence of the commission of the very offences under investigation:

> **The fact that the screen captures of Shirdon's electronic communications would be the best and most reliable evidence of what he said** is not determinative of where the balance should be struck on an application for a production order directed to a media outlet. However, it is a relevant consideration.[61] [Emphasis added.]

31. The screenshots are clearly probative, both on a common sense analysis and given MacDonnell J.'s factual findings. The probative value of the evidence is not lessened by the fact that other evidence, or "enough" evidence, might exist. The appellants cannot dictate how the police are to conduct their investigations or how the Crown is to ultimately prove their case.

32. A similar "probative value" argument was rejected by the Supreme Court of Canada in *National Post*. In that case, the reviewing judge quashed a warrant for an alleged forged bank document because she considered it unlikely that the outcome of any forensic analysis would be successful. In reversing that ruling, the Court said:

> With respect, **I do not think the possibility of failure is a reason to prevent the police from undertaking forensic inquiry by well-established techniques such as DNA analysis of documents which the appellants concede are reasonably linked to the alleged criminal offences.** A search to retrieve the physical instrumentality by which the offence was allegedly committed would

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[61] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 37.

> likely satisfy the test in s. 487 of the *Criminal Code*, even if the documents did not shed light on the identity of the offender. Moreover, if Benotto J. is correct, and the envelope is unlikely to identify the confidential source, then there is little public interest in refusing its production to the police.[62] [Emphasis added.]

33. Second, the fact that charges have been laid is similarly irrelevant to the validity of the production order. The contention that "a production order should only be issued when Shirdon is in custody, scheduled to go to trial, and the evidence is truly necessary to obtain a conviction"[63] equally fails to consider the realities of the criminal trial.[64] It is also contrary to the appellants' own position. If the argument is that production orders should only issue when the evidence sought is highly probative and not available elsewhere, then presumably those conditions should not disappear simply because the accused has been arrested, and has scheduled a trial. This argument also ignores the possibility that the evidence sought may contain exculpatory evidence, or otherwise assist the accused in his defence. If the evidence is relevant, it should be obtained and disclosed as soon as possible in the process.

34. Third, the suggestion that MacDonnell J. failed to properly consider that similar evidence is available elsewhere is in direct conflict with his factual findings and ruling. As already outlined above, in considering the fifth factor under *Lessard,* His Honour found that the evidence is **not** available elsewhere, and is in fact necessary to prove the charges. The only argument the appellants raised before MacDonnell J. was that Mr. Makuch could be subpoenaed for the evidence. This suggestion was rejected as

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[62] *R. v. National Post*, 2010 SCC 16 at para. 6.
[63] *Factum of the Appellants Vice Media Canada Inc. and Ben Makuch* at para. 34.
[64] If the police were prevented from obtaining valid orders that are aimed at the media until it is "truly necessary" this would also likely delay proceedings and infringe on an accused's section 11(b) *Charter* rights.

an unreasonable alternative because the actual text exchanges exist and would in fact be the best evidence, not Mr. Makuch's recollection of the conversation:

> It must also be said that **it is hard to understand how the suggestion that Mr. Makuch be subpoenaed to testify to the communications would ameliorate the concern that the applicants have raised with respect to participating in a police investigation.** From the source's perspective, whether the material is provided pursuant to a production order or under subpoena would seem to be six of one or a half-dozen of the other.[65] [Emphasis added.]

35. The appellants' reliance on *R.* v *Dunphy*[66] is misplaced. In *Dunphy*, the police sought the personal notes of Dunphy (a newspaper reporter) that he took when interviewing an individual by the name of Paul Gravelle. Gravelle was not an accused but a witness. The production order was denied because there was *no evidence* of anything relevant in Dunphy's notes beyond what was reported. Furthermore, the court found that there *were* alternate sources to the information sought. Gravelle was a willing and available witness who could be approached by the police for a statement.[67] These facts are clearly distinguishable from the case at bar. The evidence sought is not available elsewhere. The "Kik" screenshots are not Ben Makuch's notes. They are the evidence of the conversation that forms the basis of the terrorism charges.

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[65] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para 37.
[66] *R. v. Dunphy,* [2006] O.J. No 850 (Sup Ct)
[67] MacDonnell J. distinguished *Dunphy* in his reasons at *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 paras. 30-36.

(ii) The Potential "Chilling Effect" of the Order was Properly Considered

36. The respondent adopts the submissions of the intervener, the Attorney General of Ontario. The *Lessard* factors were specifically developed by Justice Cory to address the media's section 2(b) *Charter* rights, including the chilling effect any judicial authorization may have on the media's function of gathering and disseminating the news. MacDonnell J. was aware of this concern, and specifically addressed it in his reasons as well.

37. As already discussed above, MacDonnell J. found that the production order was not calculated to disrupt or interfere with the work of Mr. Makuch or Vice Media.[68] He also found that the issuing justice was entitled to consider that Shirdon was not a confidential source and that the conversation took place with the understanding that it would be shared with the public:

> "[T]he only reasonable inference appears to be that Shirdon regarded Mr. Makuch and Vice Media as the channels through which he would speak to the whole world.[69]

38. Justice MacDonnell also noted, in accordance with *Lessard*, that the media's decision to publish the contents of the communications in whole or in part favoured the issuance of the order. In essence, in the circumstances of this particular case, Shirdon wanted his identity to be known and the notoriety his interviews with the media would bring. In the facts of this case, there can be little argument that the production order would cause a "chilling effect".

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[68] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 45.
[69] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 43.

(iii) The Lessard factors are working

39. Contrary to what is submitted by the interveners the BCCLA and the Coalition in this case, the *Lessard* factors do not need to be revised or built upon. Their submissions are akin to those presented to the Supreme Court of Canada in *National Post* in 2010. In that case, Binnie J. summarized the position of the media as follows:

> The appellants and their media supporters argue that these principles are too general. The media interest, they say, is not just one of many factors to be taken into account in "all of the circumstances". The *Charter*, they contend, entitles them to greater protection than *Lessard* and *New Brunswick* provide. Thus, armed with ss. 2(*b*) and 8 of the *Charter*, the appellants seek a re-examination of the existing law.[70]

40. The Supreme Court of Canada reviewed the arguments of the appellant and interveners in *National Post* and found that the current factors strike the appropriate balance. They declined to "re-examine" the existing law.

(iv) The affidavit of Ben Makuch

41. The appellants argue that MacDonnell J. failed to consider the affidavit evidence of Mr. Makuch. However, a Judge is not required to specifically refer to each and every piece of evidence in his or her ruling. In this case, after a review of MacDonnell J.'s entire ruling, it is clear that he did consider Mr. Makuch's affidavit. Mr. Makuch's affidavit summarized the facts of the case, the RCMP investigation, and his concerns with respect to the "chilling effect" the production order may have on his sources and

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[70] *R. v. National Post*, 2010 SCC 16 at para. 32.

the media at large. All of these points played a part in MacDonnell J.'s balancing of the competing interests, as required by *Lessard,* and more recently, in *National Post*.

42. In *National Post,* the Supreme Court of Canada re-affirmed the *Lessard* principles and balanced the interests of a *confidential* journalistic source against the state's interest in investigating crime. The Supreme Court found it appropriate to order the National Post to produce the requested material:

> The public interest in freedom of expression is of immense importance but it is not absolute and in circumstances such as the present it **must be balanced against other important public interests, including the investigation and suppression of crime.** The courts understand the need in appropriate circumstances to protect from disclosure the identity of secret sources who provide the media, on condition of confidentiality, with information of public interest, but even the journalist Andrew McIntosh recognized that if his source had provided the document "to deliberately mislead me" the source would no longer be worthy of protection.[71] [Emphasis added].

And then later in the decision:

> The bottom line is that **no journalist can give a source a total assurance of confidentiality. All such arrangements necessarily carry an element of risk that the source's identity will eventually be revealed.** In the end, the extent of the risk will only become apparent when all the circumstances in existence at the time the claim for privilege is asserted are known and can be weighed up in the balance. What this means, amongst other things, is that a source who uses anonymity to put information into the public domain maliciously may not in the end avoid a measure of accountability.[72] [Emphasis added.]

43. In this case, no "secret sources" are at risk of being divulged. The source of the information is Shirdon. We know this because Mr. Makuch went on the internet and

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[71] *R. v. National Post*, 2010 SCC 16 at para.5.
[72] *R. v. National Post*, 2010 SCC 16 at para.69.

said that the source of the information is Shirdon. In these circumstances, it is understandable why MacDonnell J. did not specifically address Mr. Makuch's claims. As the Supreme Court of Canada said in *Canadian Broadcasting Corporation* v. *New Brunswick (Attorney General),* once the information has been made public, it becomes difficult to contend there would be a "chilling effect" on the media sources if that information were also disclosed to the police:

> The media argue that the issuance of a search warrant would have the effect of 'drying up' their sources of information. In my view, that argument is seriously weakened once the media have placed the information in the public domain. **They can then no longer say, in effect, "I know that a crime was committed; I have relevant information that could assist in its investigation and prosecution, but I'm not going to assist you towards that end.**[73] [Emphasis added.]

(v) The "Kik" chats are not work product

44. The appellants claim that the "Kik" text exchanges are equivalent to a reporter's notes, but provide no legal or factual basis for this assertion. At any rate, MacDonnell J. rejected this argument in its entirety and noted that "the submissions were not pressed with any vigor in oral argument".[74] This is also clear in His Honour's rejection of the appellant's reliance on *Dunphy*:

> And what they were seeking, at least insofar as subparagraph 64c was concerned, **was not Makuch's notes but rather the screenshots, printouts or other *computer* records of Shirdon's statements.** That is, they wanted copies of **Shirdon's actual electronic communications** as they appeared on the computer screen of the person to whom those communications were made. In essence, the

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[73] *Canadian Broadcasting Corporation* v. *New Brunswick (Attorney General),* [1991] 3 S.C.R. 459 at para 37.
[74] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 52.

police were seeking **recordings** of the communications.[75] [Emphasis added]

B. The "will-afford" evidence standard was met

45. In his reasons, MacDonnell J. specifically addressed the appellants' claim that the ITO failed to set out that the evidence sought "will-afford" evidence with respect to the commission of the named offences.[76] He concluded that Shirdon's reported statements were "on their face" statements of the commission of the offence(s) under investigation.[77] There is no reason to interfere with these findings.

46. The Supreme Court of Canada in *CanadianOxy Chemicals Ltd.*, v. *Canada (Attorney General)*,[78] defined "evidence with respect to the commission of an offence" as a "broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence."[79] Therefore, anything relevant or logically connected to an incident under investigation, the parties involved, and their potential culpability, falls within the scope of the provision.[80]

47. In this case, the named offences outlined in the ITO include the following:

i. Knowingly participating in or contributing to the activities of a terrorist group, contrary to s. 83.18 of the *Criminal Code*;

ii. Leaving Canada to participate in the activities of a terrorist group, contrary to s. 83.181 of the *Criminal Code*;

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[75] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 36.
[76] See *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras 15-21.
[77] For example, it is clear in the ITO that the RCMP believed that Shirdon made comments to Mr. Makuch about his involvement with ISIS.
[78] *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 SCR 743.
[79] *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 SCR 743 at paras. 15.
[80] *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 SCR 743 at paras. 15-16.

iii. Commission of an indictable offence (uttering threats, contrary to s. 264.1 and murder, contrary to s.235), for the benefit of, at the direction of, or in association with a terrorist group, contrary to s. 83.2 of the *Criminal Code*.

48. Justice MacDonnell found that Shirdon's statements, as reported by the appellants, are highly relevant to the offences noted above. Evidence of intention and motive are required elements of terrorism offences. Clearly, there is a connection between the documents requested and the named offences. The actual words made by Shirdon are evidence of the commission of the offences under investigation.[81] This is the furthest from a "fishing expedition"[82] as one can imagine.

C. The publication ban and sealing order do not offend the appellants' *Charter* rights

49. The appellants argue that MacDonnell J. erred when he varied the sealing order made by Justice Nadelle. Specifically, they complain about his decision to seal information concerning a single innocent third party, and his decision to impose a temporary publication ban on certain aspects of the investigation. Both of these complaints are without merit. MacDonnell J. considered the evidence carefully, used the appropriate legal principles, and made the least intrusive order he could make, keeping in mind the interests at stake: freedom of the press, protecting an innocent third party, and the fair trial rights of Shirdon.

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[81] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 21.
[82] At paragraph 33 of the appellants' factum, they allege that any suggestion that the text exchanges between Makuch and Shirdon will afford evidence of the offences is a "fishing expedition".

(i) The law

50. The *Dagenais/Mentuck* test applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. A sealing order or ban on publication should only be made where:

> (1) the order is necessary to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and
>
> (2) the salutary effects of the order outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of an accused to a fair and public trial, and the efficacy of the administration of justice.[83]

51. The *Criminal Code* also permits orders that deny access and publication in certain circumstances. Pursuant to s.487.3, the court may grant an order denying access to information used to obtain a warrant or production order, including a provision to protect ongoing investigations and the privacy rights of innocent third parties.[84]

(ii) The sealing order on the identity of an innocent third party

52. The appellants complain that MacDonnell J. erred in sealing information that would identify one of the three persons the Crown sought to protect. There is no dispute as to the extent of these redactions, only the fact that the identity of one innocent party is

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[83] *Dagenais* v. *Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835; *R.* v. *Mentuck*, [2001] 3 S.C.R. 442; *Toronto Star Newspapers Ltd.* v. *Ontario*, [2005] 2 S.C.R. 188. The first branch of the test essentially requires a demonstration of necessity by the party seeking the order and secondly, a balancing of the positive and negative effects which may result from the granting of the requested order. The test must be applied in a flexible and contextual manner rather than mechanically. Regard must be given to the circumstances in which a sealing order is sought and whether there is a real and demonstrated interest in delaying public disclosure.

[84] *Criminal Code,* R.S.C., 1985, c. C-46, s. 487.3 (2).

sealed.[85] The appellants argue that the facts MacDonnell J. relied upon to issue the sealing order amounted to a "generalized assertion"[86].

53. In this case, the sealing order was made for two reasons:

- the innocent party feared negative publicity; and
- that person stated that if they had known that their identity would be made public at this stage of the process, they would not have talked to the police.[87]

This was a sufficient basis to issue the sealing order and does not amount to a "generalized assertion".

54. In *R.* v. *Twitchell*,[88] the Court ordered redacted from the materials in question the names, phone numbers, addresses, careers and occupations of any innocent third parties. The information was therefore sealed. The Court reasoned that there was no public need for the privacy interest of third parties to be invaded in any way. The same reasoning applies here.

55. Similar concerns were identified in *Dagenais*. Lamer C.J.C. recognized the need to protect interests other than the fair trial rights of an accused. For example:

- Maximizing the chances of witnesses testifying because they will not fear the consequences of publicity.
- Preserving the privacy of individuals involved in the criminal process (for instance the accused family or potential witnesses and their families)[89]

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[85] MacDonnell J. made clear that redactions made in relation to this person would be made outside of court and that if there was any dispute, the matter would be referred back to him. Neither party brought the matter back before Justice MacDonnell. *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 131.
[86] *Factum of the Appellants Vice Media Canada Inc. and Ben Makuch* at para. 48.
[87] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras. 68-74.
[88] *R. v. Twitchell*, [2009] A.J. No. 1558 at paras 41-45.
[89] *Dagenais* v. *Canadian Broadcasting Corp.* [1994] 3 S.CR. 835 (SCC) at para 83.

56. The information that is sealed in this case is extremely limited. The vast majority of the contents of the innocent party's statement is not sealed. Furthermore, MacDonnell J. recognized that, in all the circumstances, revealing the identity of the one individual in this case would constitute a serious risk to the proper administration of justice:

> The context of this investigation has to be kept in mind: this is a case that concerns a brutal terrorist organization that has amply demonstrated a willingness to inflict horrific and barbaric violence. In such a case, there are legitimate concerns about the willingness of witnesses to co-operate with the authorities: cf. R. v. Esseghaier, supra, at paragraph 165. This person's implicit concern for his/her safety is a reasonable concern. In all the circumstances I am satisfied that revealing the identity of this person would constitute a serious risk to the proper administration of justice. In my view, there is no reasonable alternative to denying access to any information that could reveal his/her identity.[90]

57. In circumstances such as this, it is conceivable that this individual, who explicitly requested that their identity not be made public, is akin to a confidential informant. As the Supreme Court of Canada noted in *R. v. Named Person B:*

> *An implicit promise of informer privilege may arise even if the police did not intend to confer that status or consider the person an informer, so long as the police conduct in all the circumstances could have created reasonable expectations of confidentiality."*[91] *[Emphasis added].*

58. The innocent third party clearly had an expectation of confidentiality, given that they specifically requested that their name not be made public. Whether that raises this individual to the level of a "confidential informant" may still need to be determined. It

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[90] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para 74.
[91] *R. v. Named Person B,* 2013 SCC 9, at para. 18.

cannot be said, however, that MacDonnell J.'s decision to protect this individual's safety at this stage was in any way unreasonable.

59. In any event, the appellants are fully aware of the negative attention disclosure may have. For example, the appellant Mr. Makuch requested (and the Crown agreed) to redact his home address and license plate number from the public version of the ITO.[92] It was not unreasonable of him to request such a redaction.

(iii) The other two areas of the ITO were properly sealed

60. The intervener, CCLA, complain about two aspects of MacDonnell J.'s order that the appellants do not appeal: (1) the national security claims;[93] and (2) the two sub-paragraphs that were sealed based on a public interest privilege - ongoing police investigation. With respect to the national security claim, not only was that claim not contested before MacDonnell J., but it was acknowledged by the appellants that only the Federal Court has jurisdiction to hear national security claims.[94]

61. The argument that the ongoing status of the investigation is a "bald allegation" is unsubstantiated. MacDonnell J. rejected the Crown's request to seal information surrounding the ongoing police monitoring of Shirdon's social media accounts. He did so on the basis that Shirdon knew he was being monitored by authorities.[95] However, he sealed different information that is contained in two sub-paragraphs of the ITO in order to preserve ongoing investigative efforts. He found that disclosure of that limited

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[92] *Appeal Book & Compendium*, Tab 7, at page 292, para 43.
[93] See paragraph 51 of the *Factum of the Intervener CCLA*.
[94] See section 38 of the *Canada Evidence Act*, R.S.C. 1985, Chap. C-5.
[95] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 65.

information would result in a substantial risk to the administration of justice. His order was narrowly tailored and supported by his factual findings.[96]

62. The status of the investigation was confirmed by Corporal Ian Ross in his affidavit, which was before MacDonnell J.[97] Corporal Ross confirmed that the integrity of the investigation would be compromised if the details of the nature and manner in which the R.C.M.P. have been conducting their investigation were disclosed or made accessible to the public.[98] MacDonnell J. accepted this evidence and also acknowledged that the test requires more than a mere general assertion to amount to a serious risk to the proper administration of justice.[99] It is on that basis that he ultimately rejected the entirety of what the Crown sought to seal and limited the sealing order to two sub-paragraphs in the ITO.

(iv) The publication ban was justified

63. The appellants and the CCLA argue that there is no evidence to conclude that a publication ban was required. Much of their argument incorrectly relies upon the proposition that MacDonnell J. ordered a permanent ban.

64. As previously stated, MacDonnell J. issued a *temporary* ban on some (but not all) of the information gathered by the investigators in support of the allegations. He did

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[96] Only 63b and 63c are sealed. Clearly, Justice MacDonnell found that future investigative efforts that were not already public should be sealed to prevent a serious risk to the administration of justice. He was able to make this assessment because he had access to the un-redacted ITO. See Winnipeg Free Press (Re) [2006] M.J. No. 93, at paras 71-72.

[97] Affidavit of Corporal Ian Ross, *Appeal Book & Compendium*, Tab 8, pages 320 – 323.

[98] Affidavit of Corporal Ian Ross, *Appeal Book & Compendium*, Tab 8, page 322, para. 7. In support of that claim, Corporal Ross said that there is a risk that the subjects of the investigation would be alerted, and would potentially alter their behaviour which would hamper ongoing efforts.

[99] "..[T]he ground must not just be asserted in the abstract; it must be supported by particularized grounds related to the investigation that is said to be imperilled." See *Toronto Star Newspapers Ltd.* v. *Ontario* [2005] 2 S.C.R. 188 at para 23.

so for two reasons: (1) to protect the fair trial rights of Shirdon, and (2) to minimize the risk of stigmatization.

65. The ultimate goal of the procedural and substantive protections in the criminal justice system are to ensure that trials are scrupulously fair. To that end, there are procedures that have been developed to ensure that jurors are impartial and try an accused solely based on the evidence admitted in court in accordance with the trial judge's instructions. Publication bans serve that important right by providing an accused with an effective means to prevent jurors from being exposed to prejudicial information that may be inadmissible at trial. This safeguard is particularly important in the age of the internet and the significant media attention the present case has garnered.

66. These are the rights and interests that MacDonnell J. considered when he balanced them against the impact on section 2(b) of the *Charter*. He recognized that it is not uncommon to issue publication bans to protect the fair trial rights of an accused, and considered the following factors in support of his conclusion that publication would result in a serious risk to the administration of justice:

- Shirdon's fair trial rights are protected by s.7 and 11(d) of the Charter.[100]
- Media coverage and the availability of information on the internet strengthens the likelihood of jury tainting.[101]

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[100] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras. 75-76.

[101] MacDonnell J. carefully went through cases that decided both ways. In the end, the media attention that this case has garnered was a significant, if not *the* factor, in deciding to issue the ban. *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras. 86-88. See *Dagenais* where Lamer C.J. concluded that where there is significant pre-trial publicity concerning matters that will be the subject of trial, the effect of a trial judge's instructions will be "considerably lessened" since a jury may not be able to separate the evidence in court from information that they received from the pre-trial publicity. *Dagenais* v. *Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 at paras. 88-89.

- There is a danger of stigmatization with untested and one-sided information.[102]

67. Importantly, MacDonnell J., in applying the *Dagenais/Mentuck* test, considered the availability of reasonable alternative measures to publication. He found that permitting access, but not publication, is a less restrictive measure versus a full sealing order. He relied upon a weight of authority in arriving at this conclusion.[103] This conclusion makes sense. A publication ban restricts the right of the press to report on what happens in court or the contents of an ITO. However, it does not infringe on the more general right to the open court principle because the press and the public have *access* to the proceedings or the information.

68. MacDonnell J. rejected the notion that as a matter of principle, he could not consider that a publication ban was a meaningful alternative to a sealing order. Rather, he rightly concluded that it is a case-specific determination that will require consideration of the *Dagenais/Mentuck* test. In this case, the publication ban was supported by the evidence before him and the factual findings he made.

69. The distinction between a permanent ban and a temporary one is also an important consideration in assessing the extent the ban would impact section 2(b) of the *Charter*.[104] Once again, MacDonnell J.'s order is temporary.[105] In March of 2018 the

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[102] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras. 89-98.
[103] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at paras. 99-120. See also *R. v. Flahiff* (1998) 123 C.C.C. (3d) 79; *R. v. Esseghaier*, 2013 ONSC 5779; *R. v. National Post*, 2010 SCC 16; *Ottawa Citizen Group Inc. v. Canada*, [2005] O.J. No. 2209. In particular, see the section of the Supreme Court of Canada's decision in *Named Person v. Vancouver Sun*, [2007] S.C.R. 253 entitled: Distinction Between the Right of Access to the Courts and the Right to Inform the Public on Matters Before Them at paras. 96-98.
[104] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para.125.
[105] It is difficult to argue that MacDonnell J. failed to consider that Shirdon has not been arrested. It is clear from his reasons that he knew Shirdon was still at large. That is why he issued a temporary order. In any event, it is speculation to conclude Shirdon will never be arrested.

continued need for the publication ban can be reviewed. This is recognition by MacDonnell J. of the ultimate need for public access to the ITO.[106] There are also ample portions of the ITO that are not subject to a publication ban and can be freely published by the media. Over 76 paragraphs (and numerous sub-paragraphs) can be published, including some of the evidence the RCMP relies upon to support the production order. In addition, MacDonnell, J described other information that can be published:

> Second, what is contemplated is not an absolute ban on the publication of the search warrant materials. The media can still publish the identity of the target of the investigation, the nature of the materials sought by the production order, the date on which the application was made and the order was issued, the nature of the materials sought, and some portions of the ITO. Again, this was a consideration that the Supreme Court regarded as important in *Toronto Star Newspapers Ltd.* Justice Deschamps observed that this kind of partial publication ban "may make journalists' work more difficult, but it does not prevent them from conveying and commenting on basic, relevant information."[107]

70. It is important to consider what specifically is covered by the publication ban in this case. All of the banned information includes either "untested and one-sided prejudicial allegations"[108] of the police, hearsay, personal beliefs of the affiant or information that is otherwise prohibited by law from publication.[109]

71. What is even more pressing in the case at bar is that Shirdon is not present to tell his side of the story. There are several "Investigator's Comments" throughout the ITO that, while based on the reasonable belief of the officer, are admittedly one-sided at

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[106] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 132.
[107] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para.126.
[108] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para. 96.
[109] For example, MacDonnell J. ordered that paragraph 32c of the ITO be banned from publication. This paragraph is arguably also banned from publication pursuant to section 110 of the *Youth Criminal Justice Act* (S.C. 2002, c.1).

the moment. MacDonnell J., therefore, temporarily banned those opinions of the affiant from publication.

72. Orders banning publication are routinely made through sections 517 and 539(1) of the *Criminal Code* with respect to bail hearings and preliminary hearings. In the case at bar, the danger of stigmatizing the accused and affecting his fair rights is even greater than is the case at the bail hearing or preliminary inquiry. This was expressed by Justice MacDonnell in his ruling:

> What is in issue in this case is not the impact of the publication of information presented at a bail hearing or at a preliminary inquiry but the impact of permitting access to information that was presented to a court in a proceeding even further removed from a trial, one at which an accused or a potential accused had no right to be heard. In light of the *ex parte* nature of the process for obtaining search warrants or similar authorizations, the concerns that the Supreme Court had with respect to stigmatizing an accused with untested and one-sided prejudicial allegations apply with even greater force.[110]

73. Finally, the appellants raise several cases in which courts have declined to issue publication bans. None of these cases, however, call for interfering with MacDonnell J.'s decision. On the other hand, there are several cases where courts have issued publication bans on evidence that, if released, would interfere with the fair trial rights of an accused. Justice MacDonnell relied upon these cases, and they support his ultimate findings:

- In *Hennessey*, the Court ordered a publication ban on the contents of certain Informations because publication would pose a serious risk to the fair trial rights of the accused. The contents of the Informations contained incriminating evidence, the admissibility and/or reliability of which had not

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[110] *R. v. Vice Media Inc. and Ben Makuch*, 2016 ONSC 1961 at para 96. MacDonnell J. found authority for this proposition in the Supreme Court of Canada's decision in *Toronto Star Newspapers Ltd. V. Canada*, 2010 SCC 21.

yet been tested. The Court concluded that the negative effects of the ban were minimized in two ways: (1) the documents were no longer sealed; and (2) the publication ban was temporary.[111]

- In *R.* v. *N.Y.*, Justice Sproat issued a publication ban on certain portions of evidence led at the trial of one person in order to protect the fair trial rights of several others that were being tried separately. The Court held that given the risk of sustained and prejudicial pre-trial publicity (this was the so-called "Toronto 18" case) the ban was necessary to prevent a real and substantial risk to the fairness of the subsequent trial.[112]

- In *R. v. Flahiff*[113], the Quebec Court of Appeal issued a publication ban on information contained in various warrants to avoid a "real and substantial risk" to the fairness of the trial. The Court stated:

  The "fairness" of a trial is not limited to a fair outcome or verdict, although that, of course, is critically important. A fair trial also involves the fairness of the process in which it is to be conducted. No accused should have to face his trial in an ongoing torrent of unfair publicity. No judge or jury should have to strain to banish unfair and unsupported publicity from their minds so that they can reach an impartial verdict based on the evidence. Fairness in a trial involves, in some measure, the impartiality and serenity of the atmosphere in which the trial is conducted. [Emphasis added.]

  The Court noted that it would be a contradiction to allow the media to publish untested evidence contained in an affidavit when they would be prevented from publishing that very same evidence tested by cross examination at a preliminary inquiry.

- In *R.* v. *CTV* (Referred to by Justice MacDonnell as *R.* v. *Esseghaier*), Justice Durno imposed a publication ban on the police-gathered evidence set out in ITO to protect the fair trial rights of the accused. Justice Durno held, in part, that a publication ban had less of an impact on the media's 2(b) Charter rights than a full sealing order for two reasons. One, the ban was time-limited, and:

  Second, in order to make the impact of the ban as narrowly focused as possible, the media and members of the public will have access to the material. While the PPSC and Mr. Jaser questioned what public interest would be served by providing access with a publication ban, counsels for the media and a review of the authorities have persuaded me that there is a benefit from access. As the Quebec Court of Appeal held in Flahiff, access will permit the media to have "full knowledge of the contents of the search warrant as

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[111] *R. v. Hennessey*, [2008] A.J. No. 1563 (ABQB) at paras 54, 70-71, 74, 80, 91-92.
[112] *R. v. N.Y.*, [2008] O.J. No. 1217 (SCJ) at paras 24-58 and 74-79.
[113] *R. v. Flahiff* (1998), 123 C.C.C. (3d) 79 at paras 30, 40-43.

well as the affidavit or information on which it is based. This would allow the press full scrutiny." Flahiff, at para. 51."[114]

74. Shirdon is charged with straight indictable offences, and he faces a lengthy term of imprisonment if convicted. Pursuant to section 11(f) of the *Charter,* he has a right to a jury trial on these offences. Given the need to protect the fair trial interests of accused and to limit the stigmatization that could occur in a case with such serious allegations, the balancing of interests and limited ban on publication in this case was appropriate in the circumstances.

PART III – ADDITIONAL ISSUES

75. The respondent raises no additional issues.

PART IV – ORDER REQUESTED

76. It is requested that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto, this 20th day of January, 2017.

Brian G. Puddington
Counsel for the Respondent

FOR Sarah Shaikh
Counsel for the Respondent

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[114] *R. v. Esseghaier,* 2013 ONSC 5779, at paras. 130-132.

SCHEDULE "A" – AUTHORITIES TO BE CITED

R. v. Vice Media Inc. and Ben Makuch, 2016 ONSC 1961.

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

R. v. *Sadikov*, 2014 ONCA 72.

R. v. Garofoli, [1990] 2 S.C.R. 1421.

R. v. Nero, 2016 ONCA 160.

R. v. National Post, 2010 SCC 16.

Canadian Broadcasting Corporation v. Manitoba (Attorney General) et al., 2009 MBCA 122.

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

R. v. Dunphy, [2006] O.J. No 850 (Sup Ct).

CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 SCR 743.

Dagenais v. *Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835.

R. v. *Mentuck*, [2001] 3 S.C.R. 442.

Toronto Star Newspapers Ltd. v. *Ontario*, [2005] 2 S.C.R. 188.

R. v. Twitchell, 2010 ABQB 692.

R. v. Named Person B, 2013 SCC 9.

Named Person v. Vancouver Sun, [2007] S.C.R. 253.

R. v. Hennessey, [2008] A.J. No. 1563 (ABQB)

R. v. N.Y., [2008] O.J. No. 1217 (SCJ)

R. v. Flahiff (1998), 123 C.C.C. (3d) 79.

R. v. Esseghaier, 2013 ONSC 5779.

Ottawa Citizen Group Inc. v. Canada, [2005] O.J. No. 2209 (Ont. C.A.)

Toronto Star Newspapers Ltd. v. Canada, 2010 SCC 21.

SCHEDULE "B"

RELEVANT LEGISLATIVE PROVISIONS

***Canada Evidence Act,* R.S.C. 1985, Chap. C-5, s. 38.**

Notice to Attorney General of Canada

38.01 (1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

During a proceeding

(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a proceeding shall raise the matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Notice of disclosure from official

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

During a proceeding

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Application to Federal Court — Attorney General of Canada

s. 38.04 (1) The Attorney General of Canada may, at any time and in any circumstances, apply to the Federal Court for an order with respect to the disclosure of information about which notice was given under any of subsections 38.01(1) to (4).

Application to Federal Court — general

(2) If, with respect to information about which notice was given under any of subsections 38.01(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with subsection 38.03(3) or, other than by an agreement under section 38.031, does not authorize the disclosure of the information or authorizes the disclosure of only part of the information or authorizes the disclosure subject to any conditions,

(a) the Attorney General of Canada shall apply to the Federal Court for an order with respect to disclosure of the information if a person who gave notice under subsection 38.01(1) or (2) is a witness;

(b) a person, other than a witness, who is required to disclose information in connection with a proceeding shall apply to the Federal Court for an order with respect to disclosure of the information; and

(c) a person who is not required to disclose information in connection with a proceeding but who wishes to disclose it or to cause its disclosure may apply to the Federal Court for an order with respect to disclosure of the information.

***Criminal Code,* R.S.C. 1985, Chap. C-46, s. 487.3**

(1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or an authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that

(a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and

(b) the reason referred to in paragraph (a) outweighs in importance the access to the information.

(2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure

(a) if disclosure of the information would

(i) compromise the identity of a confidential informant,

(ii) compromise the nature and extent of an ongoing investigation,

(iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or

(iv) prejudice the interests of an innocent person; and

(b) for any other sufficient reason.

Court File No. C-62054

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HER MAJESTY THE QUEEN
Respondent

– and –

VICE MEDIA CANADA INC. and BEN MAKUCH
Appellants

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

Interveners

RESPONDENT'S FACTUM

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