SCC Court File No. 37574

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

VICE MEDIA CANADA INC. and BEN MAKUCH

Appellants

- and -

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

Respondent

- and -

ABORIGINAL PEOPLES TELEVISION NETWORK, AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, 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 / RADIO CANADA, THE CANADIAN MUSLIM LAWYERS ASSOCIATION, ATTORNEY GENERAL OF ONTARIO, CANADIAN CIVIL LIBERTIES ASSOCIATION, THE MEDIAL LEGAL DEFENCE INITIATIVE, REPORTERS WITHOUT BORDERS, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE MEDIA LAW RESOURCE CENTRE, THE INTERNATIONAL PRESS INSTITUTE, ARTICLE 19, PEN INTERNATIONAL, PEN CANADA, INDEX ON CENSORSHIP, THE COMMITTEE TO PROTECT JOURNALISTS, THE WORLD ASSOCIATION OF NEWSPAPERS AND NEWS PUBLISHERS, THE INTERNATIONAL HUMAN RIGHTS PROGRAM, UNIVERSITY OF TORONTO FACULTY OF LAW, AND THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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(Pursuant to Rules 47, 55 and 56 of the *Rules of the Supreme Court of Canada)*

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PART I - OVERVIEW

1. The Aboriginal Peoples Television Network, the Canadian Association of Journalists, Canadian Journalists for Free Expression, the Centre for Free Expression, the Canadian Media Lawyers' Association, the Communications Workers of America Canada, Global News, a Division of Corus Television Limited Partnership and Postmedia Network Inc. (together, the "**Coalition**") intervenes in this appeal to argue that the common law test for granting orders compelling the media to produce documents or information ("**Media Orders**") must be clarified and, if necessary, recalibrated in a manner that offers robust protection for the news-gathering rights recognized under section 2(b) of the *Charter of Rights and Freedoms* ("***Charter***").

2. More than 25 years ago, in *Lessard*, this Court recognized that "special concerns" arise where the state seeks to compel production of material in the hands of the media, and called on courts to exercise "careful consideration" before authorizing such conduct.[1] In particular, this Court directed authorizing justices to "ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination" (emphasis added).[2]

3. Like the Appellants, the Coalition submits that the "balance" envisioned by this Court has not been borne out in practice, with lower court decisions tilting almost exclusively in favour of the state and against the media.

4. Unlike the Appellants, however, the Coalition does not seek to restore the balance by directing courts to focus on the so-called "chilling effect" that Media Orders may have on sources who might otherwise have offered news. Instead, returning to the original formulation of the balancing test in *Lessard*, the Coalition submits that a more practical and principled approach may be to consider whether, and to what extent, a Media Order intrudes upon the protected zone of privacy journalists and media organizations must enjoy in order to effectively gather and report the news – including records of communications between those journalists and sources who are not confidential ("**journalist-source communications"**).

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1 *CBC v New Brunswick*, [1991] 3 SCR 459 at p. 476 (*per* Cory J) [*New Brunswick*].
2 *CBC v Lessard*, [1991] 3 SCR 421 at 445 (*per* Cory J) [*Lessard*].

5. At a practical level, a privacy-based approach is a more workable analytical framework for recognizing and weighing the media's interests under the *Lessard* balancing test, and avoids the difficulties courts often face when attempting to evaluate the often invisible impact of the chilling effect on sources. At a principled level, a focus on the media's privacy interests properly recognizes that intruding on those interests causes harm beyond a chilling effect on sources, stifling the news-gathering process and undermining the perceived impartiality of media organizations in a number of different ways that are not easily susceptible to empirical proof.

6. The media's right to privacy extends, at a minimum, to a journalist's work product. In assessing the intrusion on that right to privacy, two points bear special mention. First, the intrusion is highest for material that may reveal a journalist's confidential sources, but remains strong with respect to records of <u>any</u> journalist-source communications. Second, the fact that a journalist may elect to publish some or all of his/her communications with a source does not diminish the media's right to privacy in the underlying records vis-à-vis the state for use in an investigation or prosecution.

7. Finally, when evaluating the requesting party's basis for seeking a Media Order, the urgency and timing of any such request must be carefully scrutinized, particularly where material is being sought to assist in a prosecution, rather than to address an ongoing or imminent threat.

PART II - QUESTIONS IN ISSUE

8. The Coalition intervenes to provide this Court with submissions on how the *Lessard* balancing test should be carried out in order to afford proper protection to the interests of the media. The Coalition takes no position on the outcome of this appeal.

PART III - STATEMENT OF ARGUMENT

A. Media's right to privacy should be the focus of the balancing analysis

9. In the jurisprudence to date dealing with Media Orders targeting journalist-source communications, most of the focus by lower courts has been on whether granting such an order would create a "chilling effect" by discouraging future sources of news and information from co-

operating with the media. Overwhelmingly, lower courts have concluded that such a chilling effect does not exist, often with little or no analysis.[3]

10. The Coalition agrees with the Appellants that the chilling effect on sources exists, and that it is an important consideration militating against Media Orders.[4]

11. But a near-singular focus on the chilling effect when evaluating the negative implications of Media Orders on the freedom of expression is not the proper approach. Instead, consistent with the original language of the *Lessard* balancing test, the main focus of the analysis carried out by lower courts should be on weighing law enforcement's interests against "the right to privacy of the media in the course of their news gathering and news dissemination".[5]

12. This approach will provide greater analytical clarity for judges and other decision-makers grappling with whether to grant Media Orders, and reflect a more principled approach to the *Lessard* balancing analysis.

i. Focus on privacy provides analytical clarity

13. At a practical level, the question of whether a Media Order intrudes on the media's right to privacy is one that is discrete, specific and can typically be addressed by means of conventional evidence (*i.e.* what type of records are involved, who has possession of those records, how are they stored, etc.). Indeed, evaluating the impact of warrants or production orders on protected privacy interests is a staple of lower court diets across the country.

14. By contrast, requiring courts to evaluate the extent of any chilling effect of a Media Order on future news sources can present a challenging exercise. It is not an inquiry that is easily susceptible to scientific proof or empirical measurement.

15. Of course, the fact that a chilling effect is often intangible does not make it any less real. Nor does it reduce the harmful impact of the chilling effect to the media's ability to perform its role in a free and democratic society. However, perhaps in part due to the difficulty of measuring the chilling effect on news sources, many lower courts have been unwilling or unable to weigh this

3 See Appendix 1 of the Appellants' factum.
4 Appellants' factum at para. 69.
5 *Lessard* at 445 (*per* Cory J).

consideration adequately, or at all, in the *Lessard* balancing analysis when it comes to journalist-source communications. The pernicious impact of a chilling effect on sources consistently gets the short shrift – and, as a result, so too do the media's interests in the balancing analysis.

16. Giving decision-makers a clear analytical framework for how to recognize and weigh the media's interests under the *Lessard* balancing test will contribute to better protecting those interests. In most cases, it will be far easier for lower courts to examine the issue of whether, and to what extent, Media Orders intrude on the privacy interests of a media organization or a journalist, rather than to evaluate whether a Media Order will have a chilling effect on news sources.

17. Considering the media's interests in the *Lessard* balancing test through the lens of privacy interests is not only more consistent with this Court's original formulation of that test, but it also brings the common law approach in line with the statutory analysis under the recently enacted *Journalistic Sources Protection Act* ("*JSPA*").[6]

18. Pursuant to the *JSPA*, section 488.01(1) of the *Criminal Code* now provides that if a search warrant or production order request under one of certain specific provisions of the *Code* "relates to a journalist's communications or an object, document or data relating to or in the possession of a journalist", then such an order may be issued only if, *inter alia*, "the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information" (emphasis added). The relevant provisions of the statute make no explicit reference to the chilling effect, or the impact of the order sought on sources of news.

ii. Focus on privacy is a more principled approach

19. Refocusing the *Lessard* balancing analysis on the media's right to privacy is also the more principled approach, as compared to one concerned primarily with whether and to what extent a Media Order will have a chilling effect on sources.

20. A privacy-based approach is more principled because it better reflects – and is justified by – the fact that the harmful impacts of Media Orders extend beyond a chilling effect on news sources

6 S.C. 2017, c. 22.

alone. The state's ability to obtain material from a journalist's zone of privacy triggers a myriad of consequences that hinder the media's news-gathering activities, and risk compromising the role of the media in a free and democratic society.

21. Indeed, this Court has recognized that quite apart from a chilling effect on sources, the harmful impacts of Media Orders on journalists include:

> (a) losing opportunities to cover events because of fears on the part of participants that press files will be readily available to authorities;
>
> (b) being deterred from recording and preserving their recollections for future use, or otherwise creating records of their communications with sources; and
>
> (c) resorting to self-censorship to conceal the fact that they possess information that may be of interest to the police in an effort to protect their sources and their ability to gather news in the future.[7]

While these concerns were originally articulated by this Court in the context of search warrants under the *Criminal Code*, their logic extends to all manner of Media Orders. Similar concerns have been voiced by American appellate courts.[8]

22. In addition to harmful impacts on news-gathering, Media Orders also erode public trust in the media by creating the perception that journalists are "an investigative arm of the police". As the Manitoba Court of Appeal explained:

> …Production orders against the media casually given can have a chilling effect on the appearance of independence and on future actions of members of the public and the press. There may be a resulting loss of credibility and appearance of impartiality... The media should be the last rather than the first place that authorities look for evidence. There should be a clear, compelling, "demonstrated necessity to obtain the information" to avoid the impression that the media has become an investigative arm of the police.[9]

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7 *Lessard* at 452 (*per* McLachlin J, dissenting); *R v National Post*, [2010] 1 SCR 477 at para 78 (adopting McLachlin J's description in *Lessard* of the disruptive effects of search warrants).

8 See, for example, the cases cited at para 51 (fn 47) of the Appellants' factum.

9 *Canadian Broadcasting Corp v Manitoba (Attorney General)*, 2009 MBCA 122 at para 74.

These concerns have particular resonance in the current social and political climate, where forces aiming to undermine public confidence in journalism are operating at full tilt.

23. An inquiry centered on the media's right to privacy is a principled approach to the *Lessard* balancing analysis because it properly recognizes that all Media Orders are likely to have *some* degree of negative impact on the ability of journalists and media organizations to gather and report the news by the means identified above, and on the public's perception of the media as an independent and impartial institution. Examining the media's privacy interests properly moves the analytical focus of the *Lessard* balancing analysis past the question of *whether* such negative impacts exist to the more pertinent question of the *extent* of such impacts.

24. In this way, the degree of intrusion on the media's right to privacy becomes a useful, workable and principled proxy for measuring all of the inchoate, invisible and insidious harms caused by Media Orders on the news-gathering role and perceived independence of the media – including, but not limited to, a chilling effect on news sources – rather than forcing courts to grapple with the often impossible task of measuring those harms in and of themselves.

B. Assessing the intrusion on the media's privacy interests

25. The precise boundaries of the media's right to privacy need not be exhaustively defined by this Court at this juncture.

26. At a minimum, however, the Coalition submits that the media's right to privacy would cover what Justice La Forest described in his concurring opinion in *Lessard* as a "reporter's work product", including "a reporter's personal notes, recordings of interviews and source contact lists".[10] Drafts of stories and communications with editors (or other journalists) regarding news stories should also be included in the protected sphere of privacy, as such material forms an important part of the process of gathering and disseminating news. And Justice La Forest's conception of a reporter's work product should be updated to reflect 21st century technology, including text messages and online chats with sources.

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

27. The Coalition submits that *any* Media Order seeking a "reporter's work product" infringes the right to privacy of the media in the course of their news gathering and news dissemination. In any such case, the requesting party must provide a compelling rationale for why the state's interests in obtaining that material justifies granting the order sought.

28. But different types of Media Orders will intrude on the media's right to privacy in different ways and to different extents, depending on the circumstances. As this Court has noted, privacy is not an "all or nothing" right or concept.[11]

29. Given the facts of the present appeal and the jurisprudence interpreting and applying *Lessard* balancing test to date, two factors are particular relevant in assessing the degree to which a Media Order infringes the media's right to privacy: i) whether the material in question relates to journalist-source communications; and ii) whether the material has previously been published.

i. Whether the material sought relates to journalist-source communications

30. The biggest intrusion on the media's privacy interest flows from Media Orders for information or documents that risks revealing the identity of a journalist's confidential sources. The media has a strong privacy interest in records of communications with all sources – whether confidential or otherwise – but that does not mean that the strength of that interest is identical in every case.

31. That being said, communications with non-confidential sources form a key part of a journalist's work product, as recognized by Justice La Forest in *Lessard.* These communications may reveal techniques for how journalists locate and approach sources in order to obtain information, questions or comments made by the journalist in order to elicit information from the source, and background information not intended for publication. More fundamentally, neither a journalist who receives material from a source, nor a source who agrees to share such material, would reasonably expect that material to be turned over to the state – and particularly not for the purpose of being used against that source. If this expectation were otherwise, the ability of the media to gather news would be seriously impaired.

11 *R v Quesnelle*, [2014] 2 SCR 390 at para 37 [*Quesnelle*].

32. By contrast to situations involving communications with sources (confidential or not), a lower privacy interest might attach to images or videos of individuals who are not sources at all (as was the case in *Lessard* and *New Brunswick*).

ii. Whether the material sought has been published

33. Although a higher privacy interest may lie in material that has yet to be published, the fact that material has been published in a news story does not automatically or substantially reduce the media's expectation of privacy in that material.

34. This area of the law requires clarification by this Court. Lower courts routinely use the fact of prior publication to circumvent any broader analysis of the media's interests under the *Lessard* balancing test. In short, if material (or information contained in the material) has been published, then the material will almost always be ordered produced to the police.

35. This trend amongst lower courts reflects what the Coalition submits is a misunderstanding of this Court's treatment of prior publication as a "crucial factor" in *Lessard.* That comment in the majority's reasons must be read in light of the specific facts of that case.[12] Police sought a warrant for videotapes and photographs of protestors who were in public and who had no relationship with the media. *Lessard* and *New Brunswick* did not involve requests for records of journalist-source communications. There is a world of difference between these two types of records: one has nothing to do with news sources, while the other directly engages the journalist's ability to build a relationship of trust with potential sources to gather news.

36. The majority opinions in *Lessard* and *New Brunswick* did not examine whether forcing a journalist to turn over records of their communications with a non-confidential source would compromise the media's right to privacy. That scenario simply was not before this Court in those cases. Care must be taken not to extend *Lessard* and *New Brunswick* beyond their factual context to support propositions that the Court did not even consider, let alone endorse. As Justice Cory wrote in *New Brunswick,* "[t]he factors which may be vital in assessing the reasonableness of one search may be irrelevant in another."[13]

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

13 *New Brunswick* at para 38.

37. Adopting a privacy-based approach to the *Lessard* balancing test, the media's reasonable expectation of, and right to, privacy in journalist-source communications vis-à-vis the state remains strong – even if some or all of those communications have been published in the course of reporting a story. The media's records of journalist-source communications go to the very essence of a journalist's work product. They lie at the core of the media's right to privacy. The mere fact that the media has chosen to disclose communications for one purpose (*i.e.* in order to disseminate news by publishing a story) does not mean that the media has jettisoned its strong privacy interest in the underlying records for any and all purposes – including for the purposes of facilitating an investigation or prosecution of the source by the state. As this Court has recognized, "a person may divulge information to an individual or an organization with the expectation that it be used only for a specific purpose."[14]

38. Finally, an important distinction must be drawn between prior publication of *information* in a news article, and compelled disclosure of *underlying records or material* by way of Media Orders. Disclosing the former does not undermine the media's privacy interest in the latter. Unlike the text that appears in a reported story, the raw records of journalist-source communications may contain all manner of information that was not published, including metadata or other information embedded within the records themselves. Given the state of technology at the time of *Lessard* and *New Brunswick*, this was not a concern when those decisions were released. But it is now.

C. Assessing the state's countervailing interests

39. On the other side of the equation, the *Lessard* balancing test requires weighing the "interests of the state in the investigation and prosecution of crimes".[15] (Virtually identical language appears in s. 488.01(3)(b) of the *JSPA*, such that guidance from this Court on this issue may be relevant to both the common law and statutory analysis.[16])

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14 *Quesnelle* at para 29.

15 *Lessard* at 445 (*per* Cory J).

16 The Coalition submits that the *Lessard* framework is broad enough to encompass Media Orders both within and outside of the criminal sphere. The media's right to privacy may be engaged where they are compelled to turn over material in the course of administrative, regulatory of disciplinary proceedings: see, for example, *Moysa v Alberta (Labour Relations Board)*, [1989] 1 SCR 1572; *Mulgrew v The Law Society of British Columbia*, 2016 BCSC 1279 at paras 66*ff*. In the absence of statutory provisions speaking directly to the question of how the media's interests ought to be weighed and protected in these various regimes, the common law *Lessard* factors ought to fill the void.

40. The Coalition submits that the nature of the state's interest must be carefully scrutinized. In particular, the *urgency* and *timing* of the requested Media Order should be considered.

41. Some Media Orders will serve an urgent investigative or public safety objective, such as identifying perpetrators in order to charge them or prevent them from engaging in imminent or ongoing criminal activity. Such was the case in *Lessard* and *New Brunswick*. Depending on the gravity of the offence and the risk of further criminal activity, Media Orders may have significant benefits in these kinds of situations. More often, however, Media Orders are sought to assist in building the prosecution's case against the source (or someone else). In these circumstances, courts should ensure that even if the requesting party's interest is sufficiently compelling, the timing of a Media Order does not risk compelled disclosure for no practical purpose.[17] At a minimum, Media Orders should not be made to assist the prosecution if there is no reasonable assurance that a trial (or regulatory proceeding) will even be taking place.

PART IV - SUBMISSIONS ON COSTS

42. The Coalition does not seek costs, and requests no order as to costs be made against it.

PART V - ORDER SOUGHT

43. The Coalition asks that its submissions be taken into account in the disposition of this appeal. The Coalition takes no position on the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of May, 2018

Justin Safayeni
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Lawyers to the Coalition

17 For example, in this case, the prospects of Farah Shirdon standing trial appear to be very slim, at least at this point in time.

PART VI - TABLE OF AUTHORITIES

	AUTHORITY	REFERRING PARAGRAPH
1.	*CBC v Lessard*, [1991] 3 SCR 421 at 445	2,4, 5, 8, 11, 12, 15, 166, 17, 19, 21, 23, 26, 29, 31, 32, 24, 35, 36, 37, 38, 39, 41
2.	*Canadian Broadcasting Corp v Manitoba (Attorney General)*, 2009 MBCA 122	22
3.	*CBC v New Brunswick*, [1991] 3 SCR 459	2, 26, 32, 35, 36, 38, 41
4.	*Moysa v Alberta (Labour Relations Board)*, [1989] 1 SCR 1572	39
5.	*Mulgrew v The Law Society of British Columbia*, 2016 BCSC 1279	39
6.	*R v National Post*, [2010] 1 SCR 477	21
7.	*R v Quesnelle*, [2014] 2 SCR 390	28, 37

PART VII - STATUTORY PROVISIONS

Criminal Code Provisions

General production order

487.014 (1) Subject to sections 487.015 to 487.018, on ex parte application made by a peace officer or public officer, a justice or judge may order a person to produce a document that is a copy of a document that is in their possession or control when they receive the order, or to prepare and produce a document containing data that is in their possession or control at that time.

Conditions for making order

(2) Before making the order, the justice or judge must be satisfied by information on oath in Form 5.004 that there are reasonable grounds to believe that

(a) an offence has been or will be committed under this or any other Act of Parliament; and

(b) the document or data is in the person's possession or control and will afford evidence respecting the commission of the offence.

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

Production order

487.012 (1) A justice or judge may order a person, other than a person under investigation for an offence referred to in paragraph (3)(*a*),

(*a*) to produce documents, or copies of them certified by affidavit to be true copies, or to produce data; or

(*b*) to prepare a document based on documents or data already in existence and produce it.

Production to peace officer

(2) The order shall require the documents or data to be produced within the time, at the place and in the form specified and given

(*a*) to a peace officer named in the order; or

(*b*) to a public officer named in the order, who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament.

Conditions for issuance of order

(3) Before making an order, the justice or judge must be satisfied, on the basis of an ex parte application containing information on oath in writing, that there are reasonable grounds to believe that

(*a*) an offence against this Act or any other Act of Parliament has been or is suspected to have been committed;

(*b*) the documents or data will afford evidence respecting the commission of the offence; and

(*c*) the person who is subject to the order has possession or control of the documents or data.

Terms and conditions

(4) The order may contain any terms and conditions that the justice or judge considers advisable in the circumstances, including terms and conditions to protect a privileged communication between a lawyer and their client or, in the province of Quebec, between a lawyer or a notary and their client.

Power to revoke, renew or vary order

(5) The justice or judge who made the order, or a judge of the same territorial division, may revoke, renew or vary the order on an *ex parte* application made by the peace officer or public officer named in the order.