Court File No.: C62054

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

VICE MEDIA CANADA INC. and BEN MAKUCH

Applicants (Appellants)

- and -

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

Respondent (Respondent)

FACTUM OF THE INTERVENER, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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PART I - OVERVIEW

1. The British Columbia Civil Liberties Association (the "BCCLA") has been granted leave to intervene in this appeal to make submissions on the issue of the production order issued against the Appellants, pursuant to what is now s. 487.014 of the *Criminal Code*.

2. News consumers and the public more generally have a vital interest in ensuring that the press is able to gather and disseminate information about matters of public importance free from undue interference and influence of the state. Judicially authorized search warrants and, as in this case, production orders that target journalists and/or media organizations necessarily interfere with news gathering and dissemination activities in particular cases.

3. More importantly, if these intrusive orders are too frequently sought by law enforcement and too easily granted by courts, the values underlying freedom of the press, such as freedom of

expression and the public's right to the free flow of information, will be threatened and damaged. Upholding these values and the media's role in promoting and preserving them is crucial to all Canadians and society at large. As the Supreme Court of Canada has held, "the media play a vital role in the functioning of a democratic society."[1]

4. Sections 2(b) and 8 of the *Charter*, and society's interest both in a free and independent press and in the investigation and prosecution of crime, demand that production orders that target journalists be granted only in exceptional circumstances. Respect for the public's *Charter*-protected right to information is fundamental to the functioning of a strong democracy and must be properly reflected in the balancing test governing judicial authorization of production orders against journalists – and in how that test is applied in practice. "The public interest in free expression will *always* weigh heavily in the balance."[2]

5. The BCCLA invites this Honourable Court to develop the broad principles set out by the Supreme Court of Canada in *Lessard* in 1991 into a more specific and rigorous framework which will serve to guide authorizing judges in the exercise of their judicial discretion to issue production orders that target the media.

6. Existing case law and the facts underlying those cases provide assistance with respect to the factors that should be considered whenever a judge or justice of the peace is confronted with an application for a production order or search warrant that targets a journalist or news media organization. Particular focus should be put on the balance that is to be struck under the third *Lessard* factor. Search warrants and production orders targeting the press should only be authorized where the seriousness and nature of the crimes under investigation, the urgency of the

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[1] *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1991] 3 SCR 459, Appellants' Book of Authorities ("APP BOA"), Tab 6 ["*CBC v New Brunswick*"] and *Canadian Broadcasting Corp v Lessard*, [1991] 3 SCR 421, APP BOA, Tab 8 ["*Lessard*"].

[2] *R. v. National Post*, [2010] 1 SCR 477, Coalition Book of Authorities ("CBOA"), Tab 1 ["*National Post*"] at para 64.

investigation, and the necessity and probative value of the material sought, having considered whether alternative sources of the information sought exist, on one side, outweigh the public interest in free expression and freedom of the press on the other side, having regard to the ambit of the order sought, the nature of the journalistic material requested, and the seriousness of the chilling effect that will result if the order is granted.

PART II - FACTS

7. The BCCLA accepts the facts as set out in the factum of the Appellants.

PART III - ISSUES AND THE LAW

8. The BCCLA's submissions focus on the balancing test enunciated in the third of the nine so-called "*Lessard* factors", informed by the direction in the second of those factors, that the authorizing judge must consider "all of the circumstances" when determining whether to exercise her or his discretion to issue a production order or warrant.

9. The BCCLA makes the following points:

(a) when assessing the public interest in the investigation and prosecution of crime, the authorizing judge must consider:

(i) the seriousness and nature of the offences and the urgency of obtaining the information or material sought;

(ii) the content of the material sought and its necessity and likely probative value to the investigation and prosecution; and

(iii) whether there are alternative sources of the information sought;

(b) on the other side of the ledger, when assessing the public interest in the media's right to gather and disseminate the news, the authorizing judge must consider:

(i) the ambit and specificity of the order or warrant sought;

(ii) the nature of the material sought; and

(iii) the seriousness of the chilling effect on the media's role that will result from granting the order.

10. In exercising judicial control over production orders targeting media organizations under what is now s. 487.014 of the *Criminal Code*, judges must ensure that the vital role the media play in society is properly recognized and weighed. Performing this vital role depends on the media being as free and independent from state influence and interference as possible. It is only through a rigorous and comprehensive balancing of "all of the circumstances" that the media's role, and the public's interest in freedom of the press, will be adequately protected.

A. Assessing the public interest in the investigation and prosecution of crime

i) Seriousness and nature of the crime and urgency

11. The starting point for any evaluation of an application for a production order is likely to be consideration of the seriousness of the offences under investigation and how urgently the information sought is required for the investigation and/or prosecution of those offences.

12. Police should not seek evidence from media outlets where the crime under investigation is a relatively more minor one and courts should not grant invasive orders in those circumstances. The public has an interest in the investigation and prosecution of all crime, but that interest increases as the seriousness of the crime in issue increases.

13. Similarly, an intrusive order compelling a media organization to turn over information that has been shown to be important to the investigation and prosecution of a serious crime is more likely to be justified where there is a real and tangible urgency to the situation. If the matter is not an urgent one, consideration of the necessity of the information sought from the media, and of possible alternative sources of information, should then weigh more heavily in the balance.

14. In *CBC v New Brunswick*, for example, the crime in issue was the throwing of Molotov cocktails at a building, which "not only damaged the property but constituted a potential threat to

the lives and safety of others."[3] As the Supreme Court noted, this was a serious and violent crime; its investigation was important. In addition, there was an urgency to the investigation because the demonstrations in the midst of which the Molotov cocktails had been thrown were ongoing.[4] Timely investigation might have prevented further risk of harm to people and property.

ii) Necessity and probative value of the material sought

15. While the seriousness of the offence and the urgency of its investigation should be considered in every application for a judicial authorization that targets journalists, the more important factor will usually be the necessity and likely probative value of the material sought.[5]

16. Again, in *CBC v New Brunswick*, the material sought was video footage journalists had recorded of the demonstration at and around the time that the Molotov cocktails had been thrown. That is, the material the police sought from the media was direct visual evidence of the commission of the alleged crime under investigation.

17. Significantly, video recordings or photographs of violent or disruptive demonstrations or riots in public spaces were also the material targeted in *Lessard*, *R v CBC*,[6] *The Vancouver Sun v British Columbia*,[7] *CTV Inc c Barbès*[8] and *CBC v Newfoundland*.[9] In each of these cases, what was sought from the media by law enforcement was material that was likely to contain direct visual evidence of individuals engaging in the alleged criminal activity under investigation.

18. In *National Post*, the material sought was what was believed to be forged documents apparently intended to implicate a former Prime Minister of Canada in scandal and the envelope

[3] *CBC v New Brunswick*, APP BOA, Tab 6 at para 33..
[4] *Ibid*.
[5] That said, if a production order targeting a media outlet is sought in the course of the investigation of a minor shoplifting offence, for example, it is unlikely that even very probative evidence will be sufficient to outweigh the public interest in preserving the privacy of the media.
[6] *R v Canadian Broadcasting Corporation* (2001), 52 OR (3d) 757 (CA), CBOA, Tab 2 ["*R v CBC*"].
[7] 2011 BCSC 1736, APP BOA, Tab 11 ["*Vancouver Sun*"].
[8] 2008 QCCS 3992, APP BOA, Tab 14 ["*CTV Inc c Barbès*"].
[9] *Canadian Broadcasting Corporation v Newfoundland*, 1994 CanLII 4430 (NL SCTD), APP BOA, Tab 12, ["*CBC v Newfoundland*"] where the RCMP sought video of a violent demonstration inside a Department of Fisheries building.

in which the documents were delivered to a reporter. The police sought this material to conduct forensic analysis with a view to identifying the forger. As Binnie J. noted, this constituted the *corpus delicti*: physical evidence at the centre of the offence under investigation.[10]

19. In contrast, in *R v Dunphy*, police sought a reporter's written and electronic notes and recordings relating to several interviews he had conducted with Paul Gravelle, the alleged head of a criminal organization in Hamilton, over a period of four years.[11] The crime under investigation was the double murder of a prominent criminal defence lawyer and her husband; it was believed that Mr. Gravelle's criminal organization was behind the murders. Mr. Gravelle's brother was one of two people arrested and charged. Mr. Dunphy's newspaper had published several articles about the murders and the events believed to have led to them, some which quoted or relied on information provided to Mr. Dunphy by Mr. Gravelle. At least two articles contained threats allegedly made by Mr. Gravelle against an informant, whose role was thought to be central to the murders.

20. The material sought by police in *Dunphy* was not direct visual evidence of the commission of the crimes under investigation. Rather, they sought production of a reporter's private notes and recordings of interviews he had conducted, during which information <u>relating to</u> the crimes under investigation had been discussed. Among other considerations, the relatively limited probative value of this material – as compared to that which was sought in *Lessard* and other similar cases – must be viewed as having been important to Glithero J.'s decision not to grant the production order sought. He held that there was no evidence that Mr. Dunphy's notes

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[10] *National Post*, CBOA, Tab 1, at para 72.
[11] *R. v. Dunphy*, 2006 CarswellOnt 1234, [2006] OJ No. 850 (ON SC), APP BOA, Tab 3 ["*Dunphy*"].

contained any information not already the subject of the articles he published, which were all available to police; Glithero J. viewed the application as a "fishing expedition".[12]

21. In *CBC v Manitoba*,[13] too, the material sought was not direct visual evidence of the alleged crimes being committed – in that case the accused had been charged with assaulting his sister and a police officer. Instead, the police sought footage of a press conference at which the accused had made comments about the alleged crime and of one-on-one interviews certain media organizations had conducted with the accused afterward.

22. There was a suggestion that the accused had made inculpatory statements in the presence of reporters. The media targets had broadcast and published stories about the press conference, including broadcasting parts of the footage recorded. Even so, neither the reviewing judge nor the Court of Appeal was convinced that, in the circumstances, the material sought would afford evidence that was sufficiently probative to warrant a production order against the media.

23. The BCCLA submits that *Lessard* and *CBC v New Brunswick*, and the more recent decisions in cases like *CBC v Manitoba* and *Dunphy*, stand for the principle that the necessity and probative value of the journalistic material sought through a production order or search warrant must be carefully assessed and then weighed by the authorizing judge. The material sought in *Lessard* and *CBC v New Brunswick* was necessary to the police investigation into the criminal activity captured on video by the media; it was likely to be highly and directly probative to the crimes under investigation in a way that no other information or evidence could be.[14] In

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[12] *Ibid* at para 48.

[13] *Canadian Broadcasting Corp v Manitoba (Attorney General)* , 2008 MBQB 229, BCCLA Book of Authorities ("BCCLA BOA"), Tab 1, aff'd 2009 MBCA 122, APP BOA, Tab 2 ["*CBC v Manitoba*"].

[14] In *Lessard* both Cory J. and McLachlin J. stated that the public interest lies in ensuring that crimes do not go uninvestigated or unprosecuted, not in the police having access to every scrap of evidence that might exist: "…society has every right to expect that [a crime that has been committed] will be investigated and, if appropriate, prosecuted" (at para 20, per Cory J.); "What we are faced with, then, is the delicate task of finding the proper balance between the public interest in the right of the press to conduct

CBC v Manitoba and *Dunphy*, on the other hand, the material sought was tangential to the crimes under investigation and there was no evidence that it was necessary to their investigation, especially given the availability of other sources of similar information, as discussed below.

iii) Alternative sources of the information sought

24. The Supreme Court of Canada held in *Lessard* and *CBC v New Brunswick* that it was not a mandatory or constitutional requirement that alternative sources of the information sought be exhausted before a search warrant could be issued against a media organization. But the majority of the Court nonetheless held that the person seeking judicial authorization should "ordinarily disclose" the existence or non-existence of alternative sources and that "reasonable efforts" to obtain the information from any other sources had been "exhausted".[15]

25. This is hardly a free pass to law enforcement agencies that do not make reasonable efforts to exhaust alternative sources of information before seeking to interfere with the integrity of the media's news gathering and editorial activities. In *Lessard*, Cory J. stated, "I would expect that in the future, this information would in most cases be placed before the justice of the peace."[16]

26. The courts in both *Dunphy* and *CBC v Manitoba* did not treat the holding in *Lessard* on this point as a free pass. In both cases, it was held that the police could and should have made more effort to obtain the information they sought from non-media sources. This failure, in combination with other factors, resulted in the denial or quashing of the authorization sought.

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its activities free from state interference, and the public interest in seeing that those guilty of offences are charged and convicted." (at para 73, per McLachlin J.), APP BOA, Tab 8.

[15] See the fifth *Lessard* factor: *CBC v New Brunswick*, APP BOA, Tab 6, at para 44; *Lessard*, APP BOA, Tab 8, at para 15.

[16] *Lessard*, APP BOA, Tab 8, at para 17.

27. In cases in which the order sought was granted, in addition to the fact that what was sought was direct visual evidence of the alleged crimes in progress, there was also an indication that alternative sources did not exist or would not result in material of similar probative value.[17]

28. Furthermore, how both journalism and police work are carried out is very different today from when the events in issue in *Lessard* and *CBC v New Brunswick* took place in 1987 and 1998, or even from when those underlying *National Post* occurred in 2001.[18] Law enforcement officers possess many relatively inexpensive and very powerful investigative and research tools that were hardly imagined 15 or 25 years ago. The BCCLA submits that, as a result, there should now be a greater onus on police to show that they have exhausted alternative sources of information before they seek judicial authorization compelling journalists to turn over the results of their own investigative efforts.

29. Civil liberties groups like the BCCLA already have deep and well-founded concerns about how and when the various arms of the state are using the far-reaching and intrusive investigative and other techniques available to it to monitor and collect data about Canadians. In addition to the state's own capabilities, the proliferation of closed circuit television cameras in private businesses and of individuals' ownership of smart phones with increasingly powerful camera and recording capabilities means that the state has potential access to many times more alternative sources of information than was the case less than a generation ago.

30. Recent revelations that police forces have engaged in seemingly routine and prolonged surveillance of Canadian journalists have only heightened civil liberties groups' concerns about the state's intrusion into the private spheres of citizens. At the same time, it has been widely

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[17] See *CBC v New Brunswick*, *R v CBC* and *Vancouver Sun*. While in *Lessard* there was no evidence as to alternative sources, Cory J. seems to have concluded that no other source of similar probative value, if any, existed.
[18] See *National Post*, CBOA, Tab 1, at para 12. In addition, of course, the sealed "plain brown envelope" is an ancient form of journalistic sourcing.

reported that crime rates in Canada are at their lowest in decades. If anything, given this reality, the BCCLA submits that courts today should be more reticent to issue search warrants and production orders targeting media organizations than ever before.

B. Assessing the public interest in the media's right to gather and disseminate the news

i) Ambit of the production order sought

31. Applications for production orders targeting media organizations should be narrowly tailored. They should seek only that material which is necessary to the investigation and which will cause minimal harm to the targeted media organization's privacy interest.

32. Thus, the order sought in *Lessard* sought video footage only of the events under investigation: "Videotape on which persons were filmed causing damage to the interior of the Post Office…".[19] In *National Post*, the items sought were restricted to the allegedly forged documents and the plain brown envelope containing them.[20] By contrast, in a 2007 case, a decision quashing a search warrant targeting the CBC was upheld in part because the application failed to address "why the police needed the whole of the four hours of tape", when the stated purpose was to obtain footage of specific remarks believed to have been recorded.[21]

33. The public interest in freedom of expression and freedom of the press demands that applications that seek material beyond that which is necessary should militate in favour of rejecting or quashing the order when the balancing exercise is carried out. While the doctrine of severability applies to these sorts of authorizations, in the weighing up of competing public interests, if the police seek a sweeping type of order, this should compel the authorizing judge to

[19] *Lessard*, APP BOA, Tab 8, at para 3.
[20] *National Post*, CBOA, Tab 1, at paras 2, 13, 21.
[21] *R v Canadian Broadcasting Corporation*, 2007 NLCA 62, BCCLA BOA, Tab 2, at para 41. See also the comments at para 53 in *Dunphy*, APP BOA, Tab 3.

take a more critical view of the request and accord more weight to the media's right to be free from state interference and intrusion in the conduct of its work.

ii) The nature of the material sought

34. An important distinction is to be drawn between material that constitutes the product of a journalist's research and investigation, to which a high expectation of privacy attaches, and material that is more akin to an eyewitness account of events that occurred in a public space. In *Lessard*, La Forest J. highlighted the distinction between "films and photographs of an event and items such as a reporter's personal notes, recordings of interviews and source 'contact lists'".[22] In his view, "barring exigent circumstances," courts should be more reticent to permit the seizure of materials in the latter category because too easy access to material such as a reporter's personal notes would hamper the press's ability to carry out its function.[23]

35. As noted above, courts have granted applications seeking the media's raw footage of demonstrations or riots that occurred in public spaces. In addition to the likelihood of the heightened probative value of such material, there is a lowered privacy interest in it when compared to information obtained by a journalist mining human and documentary sources.

36. In *CBC v Manitoba*, the Court of Appeal approved of the reviewing judge's inference that any video-recorded interviews the media targets conducted with the accused were "private".[24] The reviewing judge in that case remarked that, depending on the circumstances, where a television journalist records an interview, the "use of a microphone and the videocassette or audiocassette on which the interview is recorded, may be analogous to a print

[22] *Lessard*, APP BOA, Tab 8, at para 27.
[23] *Ibid*, at para 29.
[24] *CBC v Manitoba* (MBCA), APP BOA, Tab 2, at para 56.

journalist's use of a pen and notebook," noting that "great care" should be taken before issuing an order providing access to the contents "of such professional and private material."[25]

37. An explicit promise of confidentiality given to a source will be an important, additional element militating against production, as was explained in *National Post*, but it is the journalist's right to privacy in her work product, and the protection of that privacy from state intrusion, that is at the heart of the public interest in a free press. Police should not have easy access to the private work product of journalists even if it has been gathered or recorded for the purpose of publication. The privacy interest journalists have in their notes, recordings and other materials is fundamental to their vital role as news gatherers and disseminators. Society benefits from a press that is able to report intelligently and resourcefully about issues of public importance. Society is deprived of that benefit the more closely intertwined the media is with law enforcement. A press whose private work product is too easily co-opted and appropriated by the state harms the public interest and the public whom it represents.

iii) The chilling effect on journalists, their sources and free expression

38. Authorizing courts should recognize that every production order (or search warrant) should be considered, presumptively, to have a chilling effect on news gathering and news dissemination. In a particular case, depending on the facts in issue, that effect may be higher or lower and it may be more or less grounded in particular evidence. However, it must be taken as a given that court-ordered seizure by the state of journalists' work product will almost always be detrimental to the media's ability to carry out its vital role in a functioning democratic society.

[25] *CBC v Manitoba* (MBQB), BCCLA BOA, Tab 1, at para 102. In *CTV v Her Majesty the Queen*, 2015 ONSC 4842, the reviewing judge refused to quash a production order seeking video footage of an interview with an accused, part of which had been put on-air, finding that it had been intended for public broadcast. However, the reasons in that case contain relatively little analysis or detail in their discussion of the weighing up that must be done under the third *Lessard* factor.

39. Echoing the comments of Justices La Forest[26] and McLachlin[27] (which have found favour in more recent appellate jurisprudence[28]), the Manitoba Court of Appeal articulated the possible chilling effect of production orders if the media's "special role" is not properly recognized:

> …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. "Allowing the state to look to the press as a ready source of evidence can only interfere with the legitimate efforts of the press to gather and, ultimately, disseminate news" (Hutchison, Morton & Bury, at p. 10-22). 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.[29]

40. If production orders are too frequently sought and too frequently or easily granted, journalists, who are trained to have as much of what they publish "on the record" as possible, may be encouraged to make broader promises of confidentiality more often as a means of better protecting their sources and their work product. This would undermine the openness and transparency that is fundamental to a properly functioning news media and society.

41. Other consequences must also be considered. The public interests in the investigation of crime and in freedom of expression are not always competing or antagonistic. Law enforcement officials benefit from a press that is able to communicate freely with the public and potential sources, and to publish the fruits of those communications or investigations. When journalists' ability to conduct their own investigations or to report on them in as open and transparent a manner as possible is hindered, this may result in the police having fewer leads to act on.

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[26] *Lessard*, APP BOA, Tab 8, at para 25.
[27] *Ibid*, at para 67.
[28] For example, the passage from McLachlin J's dissenting reasons cited above was quoted in full by the Supreme Court in *National Post* at para 78 and by this Court, per Justice Moldaver, in *R v CBC* at para 46.
[29] *CBC v Manitoba* (MBCA), APP BOA, Tab 2, at para 74. See also paras 102ff of the reasons below, BCCLA BOA, Tab 1.

C. Application to this case

42. In this case, there is no urgency to the investigation or prosecution of the accused. The accused has been charged *in absentia* and has apparently been somewhere in the Middle East since prior to the commencement of the RCMP's investigation; his location remains unknown. It is unclear that the accused will ever be tried in Canada.

43. Further, the material sought was neither necessary nor probative to the investigation and possible prosecution. It could only possibly marginally add to an apparent mountain of evidence of the accused's claims that he left Canada to join ISIS somewhere in the Middle East and was promoting ISIS over social media networks. The application judge noted that the RCMP believed that the accused "had made statements to Mr. Makuch with respect to his involvement with ISIS."[30] But the application judge did not acknowledge that the RCMP appears to have accumulated ample evidence of the accused's "statements…with respect to his involvement with ISIS."[31] The RCMP did not articulate why the statements believed to have been made to Mr. Makuch might be any different <u>or more probative</u> than the dozens of statements its officers have collected. The application judge appears not to have turned his mind to that key factor either. In addition, as in *Dunphy*, there is no evidence to contradict the Appellants' contention that no relevant information contained in the screenshots did not make it into the articles they published.

44. The production order sought was not narrowly tailored and it seeks material that is the product of journalistic research and investigation, not material that is akin to photographs or video recordings of violent or disruptive events that occurred in a public space. In holding that what was sought – the screen captures of an interview conducted using new technology, Kik

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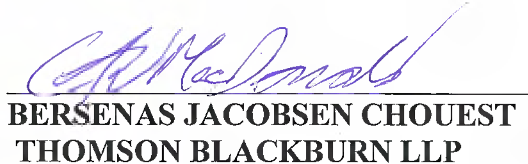
[30] Reasons of MacDonnell J. dated March 29, 2016, Appeal Book and Compendium, Tab 2, at para 21, citing para 15 of the ITO.
[31] One need look no further than the ITO sworn in this case, where many such statements have been logged and itemized in great detail. See, in particular, paragraphs 35-39 of the ITO, Appeal Book and Compendium, Tabs 6 & 7.

Messenger – is similar to a recording of the conversation, the application judge failed to recognize that there is a significant privacy interest in a journalist's notes and recordings of interviews. Journalists' – and the public's – interest in the protection of their work product should be respected even in circumstances where the identity of the source is known and the reporter's research and investigation have resulted in publication.

45. The public's interest in law enforcement in this case does not appear to be sufficient to outweigh the significant public interest in preserving the integrity of the newsgathering activities of the Appellants and in a vital free press more generally.

46. Upholding the granting of the production order in these circumstances could have a serious chilling effect on the willingness of potential sources to speak to the press about issues of public importance and could cause journalists to alter their practices in a way that results in less openness and transparency, to the detriment of the public's right to freedom of expression and the free flow of ideas and information.

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



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SCHEDULE "A"
LIST OF AUTHORITIES

TAB	CASE
1.	*Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1991] 3 SCR 459
2.	*Canadian Broadcasting Corp v Lessard*, [1991] 3 SCR 421
3.	*R v National Post*, [2010] 1 SCR 477
4.	*R v Canadian Broadcasting Corporation* (2001), 52 OR (3d) 757 (CA)
5.	*The Vancouver Sun v British Columbia*, 2011 BCSC 1736
6.	*CTV Inc v Barbès*, 2008 QCCS 3992
7.	*Canadian Broadcasting Corporation v Newfoundland*, 1994 CanLII 4430 (NL SCTD)
8.	*R v Dunphy*, 2006 CarswellOnt 1234, [2006] OJ No 850
9.	*Canadian Broadcasting Corp v Attorney General for Manitoba*, 2008 MBQB 229
10.	*Canadian Broadcasting Corp v Manitoba (Attorney General)*, 2009 MBCA 122
11.	*R v Canadian Broadcasting Corporation*, 2007 NLCA 62

SCHEDULE "B"
RELEVANT STATUTES

Current Provisions of the *Criminal Code*, RSC 1985, c. C-46

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 Provisions of the *Criminal Code*, RSC 1985, c. C-46

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.

VICE MEDIA CANADA INC. and BEN MAKUCH

Appellants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

Court File No.: C62054

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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