

**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
(APPELLANTS)

and

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

RESPONDENT
(RESPONDENT)

ATTORNEY GENERAL OF ONTARIO, CANADIAN CIVIL LIBERTIES ASSOCIATION,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN MUSLIM
LAWYERS ASSOCIATION, CANADIAN BROADCASTING CORPORATION,
COALITION, INTERNATIONAL COALITION

INTERVENERS

FACTUM OF THE INTERVENERS, THE INTERNATIONAL COALITION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

BLAKE, CASSELS & GRAYDON LLP

Barristers & Solicitors
199 Bay Street, Suite 4000
Toronto, ON M5L 1A9

Paul Schabas

Tel: 416-863-4274
Email: paul.schabas@blakes.com

Kaley Pulfer

Tel: 416-863-2756
Fax: 416-863-2653
Email: kaley.pulfer@blakes.com

Counsel for the Intervener Members of the
International Coalition

GOWLING WLG (CANADA) LLP

160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Jeff Beedell

Tel: 613-786-0171
Fax: 613-788-3587
Email: jeff.beedell@gowlingwlg.com

Ottawa Agents for Counsel for the
Intervener Members of the International
Coalition

ORIGINAL TO:

**THE REGISTRAR OF THE SUPREME
COURT OF CANADA**

COPIES TO:

ST. LAWRENCE BARRISTERS LLP
144 King Street East
Toronto, ON M5C 1G8

CONWAY BAXTER LLP
400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9

M. Philip Tunley
Email: Phil.Tunley@stlbarristers.ca
Jennifer P. Saville
Email: Jennifer.Saville@stlbarristers.ca
Tel: (647) 245-8284
Fax: (647) 245-8285

Colin Baxter
Tel: (613) 288-0149
Fax: (613) 688-0271
Email: cbaxter@conway.pro

Ottawa Agent for Counsel for the Appellants,
Vice Media Canada Inc. and Ben Makuch

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

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

Counsel for the Appellants, Vice Media
Canada Inc. and Ben Makuch

**PUBLIC PROSECUTION SERVICE OF
CANADA**

Ontario Regional Office
130 King Street West
Suite 3400, Box 36
Toronto, ON M5X 1K6

Croft Michaelson
Email: Croft.Michaelson@ppsc-sppc.gc.ca
Sarah Shaikh
Email: sshaikh@ppsc-sppc.gc.ca
Tel: (416) 954-7261
Fax: (416) 973-8253

Counsel for the Respondent,
Her Majesty the Queen

**DIRECTOR OF PUBLIC PROSECUTIONS
OF CANADA**

160 Elgin Street, 12th Floor
Ottawa, ON K1A 0H8

Francois Lacasse
Tel: (613) 957-4770
Fax: (613) 941-7865
Email: flacasse@ppsc-sppc.gc.ca

Ottawa Agent for Counsel for the Respondent,
Her Majesty the Queen

STOCKWOODS LLP

TD North Tower, Suite 4130
77 King Street West, P.O. Box 140
Toronto, ON M5K 1H1

Justin Safayeni

Email: justins@stockwoods.ca
Tel: (647) 593-7200
Fax: (647) 593-9345

Counsel for the Intervener Members of the
Coalition

**CANADIAN BROADCASTING
CORPORATION**

250 Front Street West
Legal Services
Toronto, ON M5V 3G7

Sean A. Moreman

Email: sean.moreman@cbc.ca
Tel: (416) 205-6494
Fax: (416) 205-2723

Counsel for the Intervener, Canadian
Broadcasting Corporation

**BERSENAS JACOBSEN CHOUET
THOMSON BLACKBURN LLP**

33 Yonge Street, Suite 201
Toronto, ON M5E 1G4

Tae Mee Park

Email: tpark@lexcanada.com

Andrew W. MacDonald

Email: amacdonald@lexcanada.com

Abbas A. Kassam

Email: akassam@lexcanada.com
Tel: (416) 982-3813
Fax: (416) 982-3801

Counsel for the Intervener, British Columbia
Civil Liberties Association

POWER LAW

130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette

Tel: (613) 702-5561
Fax: (613) 702-5561
Email: mvincelette@powerlaw.ca

Ottawa Agent for Counsel for the Intervener
Members of the Coalition

GOWLING WLG (CANADA) LLP

160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Guy Régimbald

Tel: (613) 786-0197
Fax: (613) 563-9869
Email: guy.regimbald@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener,
Canadian Broadcasting Corporation

GOLDBLATT PARTNERS LLP

500-30 Metcalfe St.
Ottawa, ON K1P 5L4

Colleen Bauman

Tel: (613) 482-2463
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for Counsel for the Intervener,
British Columbia Civil Liberties Association

LERNERS LLP

130 Adelaide Street West
Suite 2400, Box 95
Toronto, ON M5H 3P5

Brian N. Radnoff

Email: bradnoff@lernalers.ca
Tel: (416) 601-2387
Fax: (416) 867-2412

Counsel for the Intervener, Canadian Civil Liberties Association

ATTORNEY GENERAL OF ONTARIO

720 Bay Street, 10th floor
Toronto, ON M7A 2S9

Deborah Krick

Email: deborah.krick@ontario.ca
Tel: (416) 326-4600
Fax: (416) 326-4656

Counsel for the Intervener the Attorney General of Ontario

Faisal Mirza

55 Village Centre Place, #301
Mississauga, ON L4Z 1V9

Faisal Mirza

Email: fm@mirzakwok.com
Tel: (905) 897-5600
Fax: (905) 897-5657

Counsel for the Intervener, Canadian Muslim Lawyers Association

GOWLING WLG (CANADA) LLP

160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Jeff Beedell

Tel: 613-786-0171
Fax: 613-788-3587
Email: jeff.beedell@gowlingwlg.com

Ottawa Agents for Counsel for the Intervener, Canadian Civil Liberties Association

BORDEN LADNER GERVAIS LLP

World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, On K1P 1J9

Nadia Effendi

Tel: (613) 237-5160
Fax: (613) 230-8842
Email: neffendi@blg.com

Ottawa Agent for Counsel for the Intervener the Attorney General of Ontario

HAMEED LAW

43 Florence Street
Ottawa, ON K2P 0W6

Yavar Hameed

Email: yhameed@hf-law.ca
Tel: (613) 232-2688 Ext: 200
Fax: (613) 232-2680

Ottawa Agent for Counsel for the Intervener, Canadian Muslim Lawyers Association

TABLE OF CONTENTS

<u>CONTENT</u>	<u>Page</u>
PART I - OVERVIEW AND STATEMENT OF FACTS	1
PART II- POSITION ON THE APPELLANTS' ISSUES	3
PART III - STATEMENT OF ARGUMENT	3
A. Journalistic Material must be protected	3
B. The deleterious impact of production orders against media	6
C. The public interest in press freedom must be considered	8
D. Conclusion	10
PART IV AND V - COSTS AND ORDER REQUESTED	10
APPENDIX A	11
PART VI - TABLE OF AUTHORITIES AND LEGISLATIVE PROVISIONS	14

PART I - OVERVIEW AND STATEMENT OF FACTS

1. This appeal raises the issue of when law enforcement should be permitted to obtain warrants and production orders against journalists and media organizations. The decisions granting and upholding the production order in this case demonstrate that the test set out in *Lessard*¹ and *CBC v New Brunswick*² fails to adequately protect the vital role of the press, is out of step with other democracies and international human rights law, and is inconsistent with the *Dagenais-Mentuck* test, which applies to discretionary court actions that limit free expression.³ The 12 members of the International Coalition⁴ submit that ordering media to produce unpublished journalistic material, which includes communications between journalists and sources, research material, notes and other journalist work product (“**Journalistic Material**”)⁵, requires a more rigorous test.

2. The United Kingdom, the European Court of Human Rights (“**ECtHR**”), and a number of states in the United States of America, have adopted stringent tests for accessing, and/or have granted a qualified privilege over, Journalistic Material, consistent with free expression guarantees contained in international instruments,⁶ principles of international law, and the First

¹ [Canadian Broadcasting Corporation v. Lessard \[1991\] 3 SCR 421, 67 CCC \(3d\) 517 \[Lessard\]](#).

² [Canadian Broadcasting Corporation v. New Brunswick \[1991\] 3 SCR 459, 67 CCC \(3d\) 544 \[CBC v. New Brunswick\]](#)

³ [Dagenais v. Canadian Broadcasting Corp., \[1994\] 3 SCR 835, 20 OR \(3d\) 816 \[Dagenais\]; R v. Mentuck, 2001 SCC 76, \[2001\] 3 SCR 442 \[Mentuck\]](#).

⁴ See Appendix A.

⁵ Journalistic Material is to be distinguished from “Confidential Material”. Journalistic Material is information gathered by a journalist, which may or may not be subject to a promise of confidentiality. Confidential Material, including the identity of a confidential source, is information obtained pursuant to a promise of confidentiality and raises additional issues:

[Journalist Sources Protection Act SC 2017, c. 22 \[JSPA\]; R. v. National Post, 2010 SCC 16, \[2010\] 1 SCR 477 at paras 30, 33, 55-64 \[National Post\]; Globe and Mail v Canada \(Attorney General\), 2010 SCC 41, \[2010\] 2 SCR 592 at para 53 \[Globe and Mail\]](#).

⁶ See e.g., [European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI 1950; International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 \(entered into force 23 March 1976\) \[ICCPR\], Art. 19.](#)

Amendment to the U.S. Constitution. In line with these approaches and with Canadian case law⁷ the International Coalition submits that, in order to obtain Journalistic Material, law enforcement must have reasonable grounds to believe that: (1) the information is of substantial value to the investigation; (2) the information is highly material and relevant to the prosecution; (3) the information cannot be obtained by alternative means; and (4) the public interest in the investigation and/or prosecution outweighs both the journalist's reasonable expectation of privacy and the public interest in freedom of the press, taking into account the chilling effect that such orders have on freedom of the press (the "**Proposed Test**").

3. The protection of Journalistic Material must be consistent with, and must not detract from, the essential protections that must be afforded to Confidential Material - a well-recognized principle in Canada⁸ and around the world.⁹ Protecting Confidential Material from compelled disclosure is "one of the basic conditions of press freedom" as, without it, "sources may be deterred from assisting the press in informing the public on matters of public interest", thereby undermining the "vital public-watchdog role of the press" and its ability to "provide accurate and reliable information."¹⁰

⁷ *Dagenais, supra; Mentuck, supra*. See also [R v. Oakes, \[1986\] 1 SCR 103, 53 OR \(2d\) 719.](#)

⁸ *JSPA, supra; National Post, supra; Globe and Mail, supra*.

⁹ The protection of Confidential Material has been recognized by the United Nations, Council of Europe, Organization of American States, African Union, and the Organization for Security and Co-operation in Europe: [David Banisar, *Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources* 12 \(Privacy Int'l 2007\) \[Banisar\]](#). In the United States, 49 States and the District of Columbia protect Confidential Material through legislation or judicially-created privilege doctrines grounded in the common law or First Amendment: Banisar at 91. 16 jurisdictions recognize an absolute privilege in Confidential Material: [Shield laws and protection of sources by state, online: Reporters Committee for Freedom of the Press.](#)

¹⁰ [Goodwin v the United Kingdom, \(Eur Ct HR\) No. 17488/90 \(27 March 1996\) \[Goodwin\]](#) at para 39. See also, [British Steel Corp. v. Granada Television, \[1980\] EWCA \(Civ.\) 812](#) at 9: "...newspapers should not in general be compelled to disclose their sources of information... [Otherwise], they would soon be bereft of information which they ought to have... Misdeeds in the corridors of power - in companies or in government departments - would never be known."

4. Many of the same justifications and rationales for providing special protections to Confidential Material - including the importance of maintaining the actual and perceived autonomy and independence of the media, and the need to preserve trust among potential sources - also apply more broadly to Journalistic Material, in order to balance the interests of law enforcement with the media's independent newsgathering function.¹¹ This reasoning should also be reflected in Canadian law: the absence of a promise of confidentiality does not negate a journalist's right to a zone of privacy over his or her Journalistic Material in accordance with s. 8 of the *Canadian Charter of Rights and Freedoms*,¹² nor does it negate "the public interest in the free flow of accurate and pertinent information",¹³ recognized in s. 2(b) of the *Charter*, which requires that a journalist's legitimate activities be scrupulously protected.

PART II - POSITION ON THE APPELLANTS' ISSUES

5. The *Lessard* test fails to adequately protect freedom of the media, is inconsistent with international human rights law, laws in other free and democratic societies, and Canadian case law dealing with infringements on the free expression rights of media. Law enforcement access to Journalistic Material must be strictly limited to prevent undue interference with news-gathering activities. The Proposed Test appropriately balances the state's interest in law enforcement with the public interest in freedom of expression and privacy, is consistent with international human rights law and the law of other common law countries, and better accords with current Canadian free expression jurisprudence.

PART III - STATEMENT OF ARGUMENT

A. Journalistic Material must be protected

6. U.S. courts have noted that protections afforded to Journalistic Material are rooted in the

¹¹ See, e.g., [Miranda v The Secretary for the Home Department](#), [2016] EWCA Civ 6 at paras 107, 113 [*Miranda*, CA]; [United States v Marcos](#), No. SSSS 87 Cr. 598 (JFK), 1990 WL 74521 (US SDNY) at 2-3 [*Marcos*]. See also [Inter-American Declaration of Principles on Freedom of Expression](#), Inter-Am. C.H.R. 108th Sess., pmb. (2000), Principle 8; [Declaration of Principles on Freedom of Expression in Africa](#), Res. 62, African Commission on Human and People's Rights, 32nd Sess, Banjul, (2002) principle XV.

¹² [Part I of the Constitution Act, 1982](#), being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11.

¹³ *National Post*, *supra* at para 28.

recognition that compelled disclosure is an undue interference with proper journalistic activity,¹⁴ an unjustified incursion into the integrity of the editorial process,¹⁵ and a threat to the media's independence – both real and perceived.¹⁶

7. In England and Wales, the *Police and Criminal Evidence Act 1984* (“*PACE*”)¹⁷ governs how police can access journalistic material, including material that is not considered to be Confidential Material. This material, referred to as “special procedure material”, has been recognized as an important aspect of a journalist’s freedom of expression.¹⁸ To access special procedure material, there must be reasonable grounds - more than reasonable suspicion - for believing that (a) an indictable offence has been committed; (b) there is material which consists of special procedure material on the premises specified in the application; (c) the material is likely to be of substantial value to the investigation in connection with which the application is made; and (d) the material is likely to be relevant evidence.¹⁹ There must be cogent evidence demonstrating that the material would be of substantial value in the context of the investigation,²⁰ and the material sought must be “evidence” that would be “relevant and admissible” at trial - not “merely general information which might be helpful to police enquiries”.²¹ Further, the court must be satisfied that other methods of obtaining the material

¹⁴ E.g, [Shoen v. Shoen 5 F 3d 1289 \(9th Cir 1992\)](#) [*Shoen*] at paras 13-14, 23-36; *Marcos, supra* at 2-3; *Gonzales, supra* at 35.

¹⁵ [In re Grand Jury Subpoenas Served on National Broadcasting Company, Inc. et. Al, 178 Misc.2d 1052 \(1998\)](#) at 1055; [Pugh v Avis Rent A Car System Inc., No. M8-85 at p. 4-5, 1997 WL 669876 \(SDNY 1997\)](#) at 4 [*Pugh*].

¹⁶ *Gonzales, supra* at 35; *Marcos, supra* at 2. See also [The Queen on the application of British Sky Broadcasting Ltd, Independent Television News Ltd., The British Broadcasting Corporation, Hardcash Productions Ltd, Jason Neil Parkinson v Chelmsford Crown Court, Essex Police, \[2012\] EWHC 1295 \(Admin\)](#) at para 25 [*Chelmsford*].

¹⁷ [c 60 \[PACE\]](#); See also, in Northern Ireland, [The Police and Criminal Evidence \(Northern Ireland\) Order 1989, No. 1341 \(NI 12\)](#).

¹⁸ *Miranda CA, supra* at paras 106-107. Similarly, in [Nagla v Latvia, \(Eur Ct HR\) No. 73469/10 \(17 July 2013\)](#) at paras 100-101 [*Nagla*] the ECtHR found the protection of a journalist’s research material was an important component of the journalist’s freedom of expression.

¹⁹ *PACE, supra*, sched 1, para 2.

²⁰ *Chelmsford, supra*, per Lord Justice Moses (concurring) at paras 31, 34, 36, 37.

²¹ [R v Central Criminal Court ex parte Bright, \[2000\] EWHC 560](#) at para 79 [*Bright*].

have been tried and failed, or were bound to fail, and that the public interest in the investigation justifies overriding the public interest in a journalist's right to free expression.²²

8. At least twenty US states offer protection, either in the form of press shield laws or common law privilege, for non-confidential information.²³ The Colorado shield law, for example, applies to all information, “regardless of whether such items have been provided to or obtained by such newspaper in confidence.” The Connecticut shield law applies to “any information obtained or received, whether or not in confidence, by the news media in its capacity in gathering, receiving or processing information for potential communication to the public, the identity of the source of any such information, or any information that would tend to identify the source of such information.” The District of Columbia, Maryland and North Carolina have similar legislative provisions.²⁴

9. In New York, Confidential Material enjoys absolute privilege, while a qualified privilege applies to “unpublished news obtained or prepared by a journalist or newscaster...where such news was not obtained or received in confidence...”.²⁵ This means that a journalist cannot be compelled to reveal unpublished materials or information not received in confidence, unless the party seeking such material has made a clear and specific showing that the information sought is (a) highly material and relevant; (b) critical or necessary to a claim, defence or proof of an issue material thereto; and (c) not obtainable from any alternative source.²⁶

10. A number of federal appellate courts have recognized the existence of a qualified privilege to protect Journalistic Material based on the First Amendment to the U.S. Constitution, or federal common law. For example, in *Gonzales*,²⁷ the Second Circuit affirmed that Journalistic Material is protected by a qualified privilege, rooted in the crucial role of reporters in collecting

²² See, e.g., *PACE*, *supra*, s 9 and sched 1; and *Nagla*, *supra* at paras 80, 101.

²³ [Anthony L. Fargo \(2002\) "The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws", *Communication Law & Policy*, 7:3, 241-273 at pp. 255-256.](#)

²⁴ *CO Revised Statute* §13-90-119(1)(b) (2016); *CT Gen Stat* §52-146t(b) (2013); *Code of the District of Columbia* §16-4702(1) (1995); *Maryland Code Ann., Cts. & Jud. Proc* §9-112(c)(1) (2010); *North Carolina Gen. Stat.* §8-53.11(b) (1981).

²⁵ *NY Civ Rights L* § 79-H(b) (2015) (emphasis added).

²⁶ *Ibid*; [In re Application to Quash Subpoena to NBC, Inc. \(Graco\)](#), 79 F 3d 346 at (2nd Cir 1996).

²⁷ *Gonzales*, *supra* at 35. See also *Marcos*, *supra*.

and disseminating information, as well concern for the public interest in maintaining a vigorous, independent press, capable of engaging in robust debate over controversial matters.²⁸ The test to obtain Journalistic Material applied in *Gonzales* requires that the material be “of likely relevance to a significant issue in the case and not reasonably obtainable from other available sources”.²⁹

11. Article 10 of the *European Convention on Human Rights*, which guarantees the right to freedom of expression, protects Confidential Material and Journalistic Material from compelled disclosure by the State.³⁰ As the English Court of Appeal has observed:

The central concern is that disclosure of journalistic material (whether or not it involves the identification of a journalist’s source) undermines the confidentiality that is inherent in such material and which is necessary to avoid the chilling effect of disclosure and to protect article 10 rights. If journalists and their sources can have no expectation of confidentiality, they may decide against providing information on sensitive matters of public interest. That is why the confidentiality of such information is so important.³¹

12. Accordingly, any production order for such information will violate Article 10 unless it is (1) prescribed by law; (2) in pursuit of a legitimate aim; and (3) necessary in a democratic society, which requires the State to show that (a) the interference corresponds with a “pressing social need”; (b) the interference is proportionate to the legitimate aim pursued; and (c) the reasons adduced by the State are relevant and sufficient to justify the interference.³²

B. The deleterious impact of production orders against media

13. The deleterious impact of production orders on the media is also well-recognized in international human rights law and by courts outside Canada. In order to protect the “vital public-watchdog role of the press”, courts issuing such orders must consider the effect they have on the free flow of information between reporters and sources and their potential to undermine

²⁸ *Gonzales, ibid*, at 35, citing [In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation](#), 680 F.2d 5 (1982) at 8.

²⁹ *Gonzales, ibid*, at 36; *Shoen, supra* at para 36. See also [Prosecutor v. Brdjanin and Talic, Case No. IT-99-36-AR73.9 \(Dec 11, 2002\)](#).

³⁰ [Nordisk Film & TV A/S v. Denmark, no. 40485/02, ECtHR 2005 XIII](#) at 11-12 [*Nordisk Film*].

³¹ *Miranda CA, supra*, para 113. And see *Nagla, supra*, at paras 81, 100-101.

³² *Nordisk Film* at 11-12; *Nagla, supra*, at paras 84-102.

the crucial role the press plays in free and democratic societies.³³ As the ECtHR has held, the “compulsory handover of research material” can have a “chilling effect on the exercise of journalist freedom of expression.”³⁴

14. The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has acknowledged that on top of “the normal rules that apply” to state searches, “a higher burden should be imposed in the context of journalists and others gathering and disseminating information”.³⁵ The Special Rapporteur also emphasized the importance of legal systems that provide sufficient protection to those who communicate information to the public:

...disclosure typically requires three basic elements: a person with knowledge who is willing and able to shed light on what is hidden; a communicator or a communication platform to disseminate that information; and a legal system and political culture that effectively protect both. Without that combination — source, dissemination and protection — what is secret all too often remains hidden, and the more that remains hidden, the less authorities are held accountable and individuals are able to make informed decisions about matters that may most affect them and their communities.³⁶

15. The ability of the press to freely obtain and disseminate news is often dependent on its role as neutral observer.³⁷ Too readily permitting state authorities to seize Journalistic Material risks turning journalists into investigative arms of the state, eroding public trust, and deterring sources from providing journalists with information on matters of public interest.³⁸ As the

³³ See, e.g., *Goodwin*, *supra*, at paras 14-15; *Miranda CA*, *supra*, at paras 106-107, 113; *Chelmsford*, *supra*, per Lord Justice Moses (concurring) at para 44; *Marcos*, *supra*, at 2-3.

³⁴ *Nordisk Film*, *supra* at p. 11.

³⁵ [General Assembly, 70th Sess, 8 September 2015, Report of the Special Rapporteur, A/70/361](#) at paras 7, 24 [*UN Report on freedom of opinion and expression*].

³⁶ *Ibid*, at para 1 (emphasis added).

³⁷ *Chelmsford*, *supra*, at para 25.

³⁸ See, e.g., *Miranda CA*, *supra*, at para 113; *Bright*, *supra*, at para 98 and 140. And see, e.g., *Gonzales*, *supra*; *United States v Burke*, 700 F 2d 70 at 8 (2nd Cir 1983) at para 23; *Marcos*, *supra* at p 2; *Holland v. Centennial Homes, Inc.* 22 Media L. Rep 2270 (ND Tex 1993); *Rolfesen and Association of Norwegian Editors v the Norwegian Prosecution Authority*, Supreme Court of Norway, HR-2015-2308-A, No. 2015/1462 at para 54 [*Rolfesen*].

And see [Becker v Norway \(Eur HR Ct\) No. 21272/12 at para 70 \(5 October 2017\)](#) [*Becker*] clarifying the approach to journalistic material involving non-confidential sources.

Norwegian Supreme Court has held, important investigative journalism is often possible because a reporter has special access to sources, based on trust.³⁹ The media’s “efforts to maintain their independence and gain the trust of sources [...] will be severely impaired if mere relevance [...] makes their non-public records available on request.”⁴⁰

16. This chilling effect has been recognized in circumstances where Journalistic Material does not involve the identification of a confidential source.⁴¹ For example in *Chelmsford*, the High Court of England and Wales held:

The judge should have feared for the loss of trust in those hitherto believed to be neutral observers, if such observers may be too readily compelled to hand over their material. It is the neutrality of the press which affords them protection and augments their ability freely to obtain and disseminate visual recording of events. There was no basis on which the judge could dismiss the evidence of a number of witnesses of the effect of handing over a vast amount of film, whether under compulsion or no. Still less should he have done so in the furtherance of a merely speculative exercise.⁴²

C. The public interest in press freedom must be considered

17. As this Court has noted, there is a strong public interest in protecting the “special position of the media.”⁴³ Therefore, it is well-recognized that the issuance of a search warrant or production order against the media does not simply involve a weighing of the public interest in law enforcement against the privacy rights of the journalist or media outlet. Rather, there is a balancing between two aspects of the public interest, which includes the high public interest in protecting press freedom.⁴⁴ Accordingly, “the interest of democratic society in ensuring and maintaining a free press” must “weigh heavily in the balance”.⁴⁵

³⁹ *Rolfsen, ibid*, at para 70.

⁴⁰ [Patterson v. Burge, 33 Media L. Rep. 1200, 2005 WL43240.](#)

⁴¹ *Pugh, supra* at 5: compelling production of reporter’s resource materials has a chilling effect on newsgathering and editorial process.

⁴² *Chelmsford, supra*, per Lord Justice Moses (concurring) at para 44. [Financial Times Ltd and Others v the United Kingdom, \(Eur Ct HR\) No. 821/03 at para 70 \(15 December 2009\)](#) [*Financial Times*].

⁴³ *National Post, supra*, at para 64.

⁴⁴ *Chelmsford, ibid*, at paras 21-31. [Miranda v Secretary of the Home Department, \[2014\] EWHC 255, \[2014\] WLR 3140](#) (overturned on other grounds in *Miranda v The Secretary for the Home Department*, [2016] EWCA Civ 6) [*Miranda*, Div Ct] at paras 71, 73 and *Miranda*,

18. A requesting party must show a substantial or “clear and compelling case” to justify interference with the fundamental public interest in the freedom of the press.⁴⁶ Under *PACE*, it is not enough to meet the statutory threshold. Judges must engage in a balancing exercise, as an important and “final safeguard against an oppressive order”,⁴⁷ which involves considering freedom of expression,⁴⁸ the “importance of the impartiality and independence of the press” and “the importance of ensuring that members of the press can photograph and report what is going on without fear of their personal safety”.⁴⁹ So, in *Chelmsford*, the High Court held that production orders for media recordings should not have been made because, in balancing the “competing public interest considerations in the context of journalistic material”, there was no basis to conclude that the evidence was of substantial value such that the order was necessary and proportionate, to justify interfering with the media’s right to free expression.⁵⁰

19. The ECtHR has also recognized the high public interest in press freedom in considering whether the interference is “prescribed by law”, which involves assessing whether the interference was done within a framework that has sufficient safeguards against abuse.⁵¹ One important safeguard is giving the journalist notice of, and the opportunity to resist disclosure by attending and making submissions at the hearing, as exists in the UK, under *PACE*.⁵²

20. International and comparative law also provide helpful guidance. The protection afforded to journalists is not contingent upon, and cannot be automatically removed by, the conduct of the

Appellate Court, *supra*, at para 100; [Sanoma Uitgevers B.V. v the Netherlands, \(Eur Ct HR\) No. 38224/03 at paras 50-51 \(14 September 2010\)](#).

⁴⁵ *Goodwin, supra*, at para 11-12. See also *National Post, supra*, at para 64: “The public interest in free expression will *always* weigh heavily in the balance.” [emphasis in original]

⁴⁶ *Chelmsford, supra*, at para 34; and see *UN Report on freedom of opinion and expression* at paras 21-22 discussing [Act on the Protection of Journalistic Sources \(7 April 2005\) \(Belgium\)](#).

⁴⁷ *Bright, supra*, at para 84.

⁴⁸ *Chelmsford, supra*, at paras 14, 24.

⁴⁹ *Bright, supra*, at paras 80, 84-85.

⁵⁰ *Chelmsford, supra*, at para 24; see generally paras 21-31.

⁵¹ *Nordisk Film, supra* at 11; [Telegraaf Media Nederland Landelijke Media B.V. and Others v The Netherlands, \(Eur HR Ct\) No. 39315/06 \(22 November 2012\)](#) [*Telegraaf*]; *Nagla, supra*, para 101.

⁵² *PACE*, Sched. 1, Para 7.

source,⁵³ nor can it be automatically removed on the basis that a source's identity is known.⁵⁴ Similarly, whether or not assurances of confidentiality were given, or were sufficient, is not conclusive of either source privilege or the protections afforded to Journalistic Material, and courts should not “embark on an exercise to establish what assurances were or were not given to sources and whether such assurances were sufficient” to invoke privilege.⁵⁵ Courts must also take into account the potential threat caused by the production order to other human rights, such as a journalist's safety.⁵⁶

D. Conclusion

21. The *Lessard* test is outdated and inadequate. The Proposed Test for compelling production of Journalistic Material is consistent with international human rights law and laws in other free and democratic societies, and more appropriately accords with recent Canadian jurisprudence balancing freedom of expression and other interests.

PART IV AND V - COSTS AND ORDER REQUESTED

22. The International Coalition seeks no order as to costs and asks that no award of costs be made against it. The International Coalition is intervening in the public interest and does not take a position on the orders as against the parties.

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

Paul Schabas

Kaley Pulfer
Counsel for the International Coalition

⁵³ *Becker, supra* at para 74; *Financial Times, supra* at paras 63, 66; *Telegraaf, supra*, at para 128.

⁵⁴ *Financial Times, supra*, at paras 74, 75; *Nagla, supra*, at para 95.

⁵⁵ See, e.g., *Becker, supra*, at paras 73-77; [Ryanair Limited v Channel 4 Television Corporation and Blakeway Productions Limited, \[2017\] IEHC 651 \(High Court \(Ireland\)\)](#) at para 66.

⁵⁶ *UN Report on freedom of opinion and expression, supra*, para 19, citing [Youth Initiative for Human Rights v Serbia, \(Eur HR Ct\) No. 48135/06 \(25 June 2013\)](#); *Rolfesen, supra*, at para 68.

APPENDIX A

Members of the International Coalition

- (a) Media Legal Defence Initiative (“MLDI”): an international non-governmental organization that provides legal support to, and helps defend the rights of, journalists, bloggers and independent media across the world. Based in London, MLDI works closely with a world-wide network of experienced media and human rights lawyers, as well as local, national and international organizations, donors, foundations and advisors concerned with defending media freedom. MLDI has extensive experience representing journalists and independent media, and has intervened in numerous freedom of expression cases before the European Court of Human Rights (“ECtHR”), the Inter-American Court of Human Rights, and the Court of Justice of the European Union.
- (b) Reporters Without Borders/Reporters Sans Frontières (“RSF”): an international non-profit, non-governmental organization that promotes and defends freedom of information and freedom of the press. RSF has a long and active history of involvement in issues concerning the free expression rights of journalists and the media, and in the promotion and protection of independent news reporting. RSF has joined with other press freedom organizations to intervene in many cases involving free expression rights before courts in the United States. RSF also enjoys consultative status at the United Nations and UNESCO to which it has provided opinions on free expression and media rights.
- (c) International Press Institute (“IPI”): an independent, non-governmental, not-for-profit association. IPI is a global network of media professionals, including editors, journalists and media executives, in more than 120 countries. IPI is dedicated to advancing and safeguarding press freedom, protecting free expression, and promoting the free flow of news and information. IPI advocates to promote conditions that allow journalism to fulfill its public function, undertakes extensive research and regularly produces publications on issues relevant to the media and freedom of the press, as well as authors’ reference and training manuals for journalists and other professionals. IPI enjoys consultative status with the UN, UNESCO and the Council of Europe and regularly issues letters of appeal.
- (d) Reporters Committee for Freedom of the Press (“Reporters Committee”): an unincorporated non-profit association of reporters and editors based in Washington, D.C. The Reporters Committee works to defend the First Amendment rights and freedom of information interests of the news media. Its mission is to protect the right to gather and distribute news; to keep government accountable by ensuring access to public records, meetings, and courtrooms; and to preserve the principles of free speech and an unfettered press. The Reporters Committee regularly files amicus briefs before courts in the U.S. and intervened as part of a coalition before this Court in *Google Inc. v Equustek Solutions Inc.*, and at the Ontario Court of Appeal in *Bangoura v Washington Post*. The Reporters Committee has also intervened in the Court of Justice of the European Union.
- (e) Media Law Resource Centre (“MLRC”): a non-profit membership association for content providers in all media. MLRC provides a wide range of resources on policy issues relating to media law, including newsletters and analyses of legal, legislative and

regulatory developments, litigation resources and practice guides, and national and international media law conferences and meetings. MLRC has been part of media coalition interveners in Canada, including in *Google Inc. v Equustek Solutions Inc.* before this Court and *Bangoura v Washington Post* before the Ontario Court of Appeal.

- (f) ARTICLE 19: a human rights organization based in London, England. ARTICLE 19 champions freedom of expression as a fundamental human right that is also central to the protection of other rights. With regional offices and more than 100 staff in Bangladesh, Brazil, Kenya, Mexico, Myanmar, Senegal, the United States and Tunisia, ARTICLE 19's work spans most of the world's continents. It also partners with nearly 100 organizations in more than 60 countries around the world. ARTICLE 19 regularly assists courts in different countries by providing information about international human rights law and comparative standards to give meaning to freedom of expression in a variety of jurisdictions and contexts. ARTICLE 19 has intervened in landmark cases before the ECtHR, was part of a coalition of interveners in *Google v Equustek* before this Court, and has intervened before the Court of Justice of the European Union.
- (g) PEN International: the world's leading association of writers, PEN International works to defend freedom of expression and writers at risk around the world. It spans over 100 countries, with 150 PEN Centres worldwide. PEN International documents freedom of expression violations, protects writers at risk, and undertakes high-level missions and trial observations in Turkey. PEN frequently intervenes before the ECtHR.
- (h) PEN Canada: the Canadian centre of PEN International is a non-partisan organization of writers that defends freedom of expression and provides assistance to persecuted writers. PEN Canada has supported an increasing number of journalists fleeing violence in Bangladesh, Brazil, Ethiopia, Honduras and Turkey, helping them in claiming asylum, settling into new communities, and seeking family reunification. PEN Canada has intervened in a number of cases before the Supreme Court of Canada, including *Crookes v Newton* and *R v National Post*.
- (i) Index on Censorship ("Index"): a non-profit organization that advocates for and defends free expression worldwide. Index's goal is to tackle censorship by raising awareness about threats to free expression and the value of free speech. It works by informing, influencing, debating and by supporting groups and individuals through Index's freedom of Expression Awards Fellowships.
- (j) Committee to Protect Journalists ("CPJ"): an independent, non-profit organization comprised of 40 experts around the world, which promotes press freedom worldwide and defends the right of journalists to report the news without fear of reprisal. Based in New York, CPJ ensures the free flow of news and commentary and is recognized as a leader in the press freedom movement. CPJ's work has helped win positive legal reforms, obtain convictions in journalist murders, and secure the early release of jailed journalists.
- (k) World Association of Newspapers and News Publishers ("WAN-IFRA"): consists of 72 national associations of newspaper publishers from 67 countries. WAN-IFRA represents more than 18,000 publications, 15,000 online sites and over 3,000 companies. It serves as

a knowledge hub and a leading global resource for publishers, editors, and research centres with a focus on, among other things, regulation and global media policy and media freedom. WAN-IFRA has frequently intervened before the ECtHR.

- (1) The International Human Rights Program, University of Toronto Faculty of Law (“IHRP”): seeks to enhance the legal protection of existing and emerging international human rights obligations through advocacy, knowledge-exchange, and capacity-building initiatives that provide legal expertise to civil society. The IHRP is a recognized expert in international human rights law, and has particular expertise in the domestic application of international law. Since 2010, the IHRP has partnered with PEN International and PEN Canada to jointly investigate and expose rights violations against journalists, and produce comprehensive fact-finding reports on threats against journalists. The IHRP has intervened a number of times before the Supreme Court of Canada.

PART VI - TABLE OF AUTHORITIES AND LEGISLATIVE PROVISIONS

No.	<u>Authority</u>	<u>Paragraph(s)</u>
Case Law		
1.	<u>Becker v Norway (Eur HR Ct) No. 21272/12 (5 October 2017)</u>	15, 20
2.	<u>British Steel Corp. v. Granada Television, [1980] EWCA (Civ.) 812</u>	3
3.	<u>Canadian Broadcasting Corporation v. Lessard [1991] 3 SCR 421, 67 CCC (3d) 517</u>	1
4.	<u>Canadian Broadcasting Corporation v. New Brunswick [1991] 3 SCR 459, 67 CCC (3d) 544</u>	1
5.	<u>Dagenais v. Canadian Broadcasting Corp., [1994] 3 SCR 835, 20 OR (3d) 816</u>	1, 2
6.	<u>Financial Times Ltd and Others v the United Kingdom, (Eur Ct HR) No. 821/03 (15 December 2009)</u>	16, 20
7.	<u>Globe and Mail v Canada (Attorney General), 2010 SCC 41, [2010] 2 SCR 592</u>	1, 3
8.	<u>Gonzales v National Broadcasting Co. Inc., 194 F 3d 29 at 5-6 (2nd Cir 1999)</u>	6, 10, 15
9.	<u>Goodwin v the United Kingdom, (Eur Ct HR) No. 17488/90 (27 March 1996)</u>	3, 13, 17
10.	<u>Holland v. Centennial Homes, Inc. 22 Media L. Rep 2270 (ND Tex 1993)</u>	15
11.	<u>In re Application to Quash Subpoena to NBC, Inc. (Graco), 79 F 3d 346 (2nd Cir 1996)</u>	9
12.	<u>In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 680 F.2d 5 (1982)</u>	10
13.	<u>In re Grand Jury Subpoenas Served on National Broadcasting Company, Inc. et. Al, 178 Misc.2d 1052 (1998);</u>	6
14.	<u>Miranda v Secretary of the Home Department, [2014] EWHC 255, [2014] WLR 3140</u>	17
15.	<u>Miranda v The Secretary for the Home Department, [2016] EWCA Civ 6</u>	4, 7, 11, 13, 15, 17

<u>No.</u>	<u>Authority</u>	<u>Paragraph(s)</u>
16.	<u><i>Nagla v Latvia</i>, (Eur Ct HR) No. 73469/10 (17 July 2013)</u>	7, 11, 12, 19, 20
17.	<u><i>Nordisk Film & TV A/S v. Denmark</i>, no. 40485/02, ECtHR 2005 XIII</u>	11, 12, 13, 19
18.	<u><i>Patterson v. Burge</i>, 33 Media L. Rep. 1200, 2005 WL43240</u>	16
19.	<u><i>Prosecutor v. Brdjanin and Talic</i>, Case No. IT-99-36-AR73.9 (Dec 11, 2002)</u>	10
20.	<u><i>Pugh v Avis Rent A Car System Inc.</i>, No. M8-85, 1997 WL 669876 (SDNY 1997)</u>	6, 16
21.	<u><i>R v Central Criminal Court ex parte Bright</i>, [2000] EWHC 560, [2001] 2 All ER 244 (QB)</u>	7, 15, 18
22.	<u><i>R v. Mentuck</i>, 2001 SCC 76, [2001] 3 SCR 442</u>	1, 2
23.	<u><i>R. v. National Post</i>, 2010 SCC 16, [2010] 1 SCR 477</u>	1, 3, 4, 17
24.	<u><i>R v. Oakes</i>, [1986] 1 SCR 103, 53 OR (2d) 719</u>	2
25.	<u><i>Rolfsen and Association of Norwegian Editors v the Norwegian Prosecution Authority</i>, Supreme Court of Norway, HR-2015-2308-A, No. 2015/1462</u>	15, 20
26.	<u><i>Ryanair Limited v Channel 4 Television Corporation and Blakeway Productions Limited</i>, [2017] IEHC 651 (High Court (Ireland))</u>	20
27.	<u><i>Sanoma Uitgevers B.V. v the Netherlands</i>, (Eur Ct HR) No. 38224/03 (14 September 2010)</u>	17
28.	<u><i>Shoen v. Shoen</i> 5 F 3d 1289 (9th Cir 1992)</u>	6, 10
29.	<u><i>Telegraaf Media Nederland Landelijke Media B.V. and Others v The Netherlands</i>, (Eur HR Ct) No. 39315/06 (22 November 2012)</u>	19, 20
30.	<u><i>The Queen on the application of British Sky Broadcasting Ltd, Independent Television News Ltd., The British Broadcasting Corporation, Hardcash Productions Ltd, Jason Neil Parkinson v Chelmsford Crown Court, Essex Police</i>, [2012] EWHC 1295 (Admin)</u>	6, 7, 13, 15, 16, 17, 18
31.	<u><i>United States v Burke</i>, 700 F 2d 70 at 8 (2nd Cir 1983)</u>	15
32.	<u><i>United States v Marcos</i>, No. SSSS 87 Cr. 598 (JFK), 1990 WL 74521</u>	4, 6, 10, 13, 15

<u>No.</u>	<u>Authority</u>	<u>Paragraph(s)</u>
33.	<u><i>Youth Initiative for Human Rights v Serbia</i>, (Eur HR Ct) No. 48135/06 (25 June 2013)</u>	20
Legislation		
34.	<u><i>Act on the Protection of Journalistic Sources (7 April 2005) (Belgium)</i></u>	18
35.	<u><i>Part I of the Constitution Act, 1982</i>, being Schedule B to the <i>Canada Act 1982 (UK)</i>, 1982, c. 11</u>	4
36.	<u><i>CO Revised Statute §13-90-119(1)(b) (2016)</i></u>	8
37.	<u><i>Code of the District of Columbia §16-4702(1) (1995)</i></u>	8
38.	<u><i>CT Gen Stat §52-146t(b) (2013)</i></u>	8
39.	<u><i>Maryland Code Ann., Cts. & Jud. Proc §9-112(c)(1) (2010)</i></u>	8
40.	<u><i>Journalist Sources Protection Act SC 2017, c. 22</i></u>	1, 3
41.	<u><i>North Carolina Gen. Stat. §8-53.11(b) (1981)</i></u>	8
42.	<u><i>NY Civ Rights L § 79-H (2015)</i></u>	9
43.	<u><i>The Police and Criminal Evidence (Northern Ireland) Order 1989, No. 1341 (NI 12)</i></u>	7
44.	<u><i>Police and Criminal Evidence Act 1984 (UK), c. 60</i></u>	7, 19
45.	<u><i>Declaration of Principles on Freedom of Expression in Africa, Res. 62, African Commission on Human and People’s Rights, 32nd Sess, Banjul, (2002)</i></u>	4
46.	<u><i>European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI 1950</i></u>	2
47.	<u><i>General Assembly, 70th Sess, 8 September 2015, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/70/361</i></u>	14, 18, 20
48.	<u><i>Inter-American Declaration of Principles on Freedom of Expression, Inter-Am. C.H.R. 108th Sess., pmbL. (2000)</i></u>	4
49.	<u><i>International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) [ICCPR]</i></u>	2

<u>No.</u>	<u>Authority</u>	<u>Paragraph(s)</u>
50.	<u>Anthony L. Fargo (2002) "The Journalist's Privilege for Nonconfidential Information in States Without Shield Laws", Communication Law & Policy, 7:3, 241-273</u>	8
51.	<u>David Banisar, <i>Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources</i> 12 (Privacy Int'l 2007) [Banisar].</u>	3
52.	<u>Shield laws and protection of sources by state, online: Reporters Committee for Freedom of the Press</u>	3