

The Republic of Trinidad and Tobago

IN THE COURT OF APPEAL

**Civil Appeal No. P030 of 2021
Claim No. CV2020-1000**

Between

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

First Appellant

THE COMMISSIONER OF POLICE

Second Appellant

SUPERINTENDENT WENDELL LUCAS

Third Appellant

And

ONE CARIBBEAN MEDIA LIMITED

First Respondent

TRINIDAD EXPRESS NEWSPAPERS LIMITED

Second Respondent

OMATIE LYDER

Third Respondent

And

THE MEDIA ASSOCIATION OF TRINIDAD AND TOBAGO

Interested Party

PANEL:

**N. BEREUX J.A.
P. RAJKUMAR J.A.
J. ABOUD J.A.**

Date of delivery: 29th April 2026

APPEARANCES:

**F. Hosein SC and R. Dass SC instructed by K. Matthew, Attorneys at Law for the appellants
S. Chote SC and P. Carter instructed by S. Ramsaran, Attorneys at Law for the respondents**

JUDGMENT

Delivered by Bereaux JA

- (1) This is an appeal by the Attorney General, the Commissioner of Police and Superintendent Wendell Lucas (“Supt. Lucas”) (collectively “the appellants”) against the orders of Seepersad J (“the trial judge”) declaring two search warrants dated 11th March 2026 issued to and executed by Supt. Lucas were unconstitutional. The trial judge held that both the issue of the warrants and the seizure of items under the warrants’ authority breached the respondents’ right to freedom of the press in section 4 (k) of the **Constitution of the Republic of Trinidad and Tobago** (“the Constitution”).
- (2) The respondents are One Caribbean Media Group Limited (“OCM”), Trinidad Express Newspapers Limited (“the Express”) and Omatie Lyder as editor in chief of the Express. I shall refer to each respondent by name or collectively as “the respondents.”

Relevant Facts

- (3) The Express published an article headlined “*ACP flagged for suspicious activity. Banks report deposits of close to \$2M into 15 personal accounts*” in its online edition on 7th March 2020 and in the Sunday Express publication on 8th March 2020. The article was an investigative exclusive written by Denyse Renne who was an investigative reporter

employed by the Express. The story revealed that deputy commissioner of police Irwin Hackshaw deposited sums of money amounting to some two million dollars into fifteen different accounts standing in his name across three banks between 2014 and 2017. Those deposits were flagged by the banks and suspicious activity reports (“SARs”) were filed with the Financial Intelligence Unit (“FIU”).

- (4) This publication caused the police to open an investigation into the offence of “tipping off” in section 51 of the **Proceeds of Crime Act Chap. 11:27** and section 27 of the **Financial Intelligence Unit Act Chap. 72:01** on the basis that someone in the FIU or the police service with knowledge of the SARs disclosed the same to the Express as Ms. Renne’s source. Supt. Lucas formed the view that in order to identify the person responsible for the leak it was necessary to obtain the documents provided to the Express which informed the article.
- (5) On 11th March 2020, Supt. Lucas sought and received instructions from the deputy director of public prosecutions to obtain a search warrant for the Trinidad Express under section 51 of the **Proceeds of Crime Act** to take possession of the information relating to the article. Later that same day Supt. Lucas obtained a search warrant from Justice of the Peace Sandra Ramsaran to search premises “under the control of and managed by Omatie Lyder – Editor in Chief” (“the first warrant”).
- (6) Around 3:30pm on 11th March 2020 Supt. Lucas and a party of police officers entered Express House and attempted to execute the search warrant. However, attorney at law for OCM and the Express objected to the warrant as it read as if it was Ms. Lyder’s premises and since it was not the warrant could not authorize a search of Express House. Supt. Lucas then left Express House and returned with a fresh warrant to search the premises of the Trinidad Express Newspapers (“the second warrant”).
- (7) Pursuant to the second warrant the police entered and searched Ms. Lyder’s office and Supt. Lucas seized four flash drives. The police then left Express House.

(8) Fearful of a further search OCM obtained injunctive relief from Ramcharan J on the night of 11th March 2020 restraining the police from searching or accessing the servers of the Express. No further searches relative to this matter were conducted.

(9) On 16th March 2020, the respondents filed an originating motion under section 14 of Constitution seeking:

a. A declaration that the search warrants issued by a Justice of the Peace on March 11, 2020 upon the application(s) of the Third Defendant, Police Superintendent Wendell Lucas were unconstitutional, unlawful, arbitrary, unnecessary and disproportionate. The warrants were invalid, null and void and of no effect in that they contravened the constitutional right to freedom of the press enjoyed by the Claimants under Section 4(k) of the Constitution of the Republic of Trinidad and Tobago.

b. A declaration that the execution of the second warrant and the seizure of items namely four (4) USB flash drives from the office of Omatie Lyder located at No. 35- 37 Independence Square, Port-of-Spain was unconstitutional, unlawful, unnecessary and disproportionate in that it contravened the fundamental rights of the Second and Third Named Claimants to the enjoyment of property and the right not to be deprived thereof except by due process of law.

c. A declaration that the search warrant obtained by the Third Defendant from a Justice of the Peace and issued on March 11, 2020 to search the premises "owned and managed by Omatie Lyder" (the first warrant) was unconstitutional, unlawful, unnecessary, arbitrary and disproportionate. It was invalid, null and void and of no effect in that it contravened the fundamental right to the enjoyment of property, the right not to be deprived thereof except by due process of law, the protection of the law of the Second and Third Named Claimants.

d. A declaration that the search warrant obtained by the Third Named Defendant from a Justice of the Peace and issued on March 11, 2020 to search the premises of the Trinidad Express Newspapers situated at No. 35-37 Independence Square, Port-of-Spain (the second warrant) was unconstitutional, unlawful, unnecessary, arbitrary and disproportionate. It was invalid, null and void and of no effect in that it contravened the Claimant's fundamental right to the enjoyment of property, the right not to be deprived thereof except by due process of law, the protection of the law.

e. Damages for breach of constitutional rights.

f. Such further and/or other relief as the Court may in exercise of its jurisdiction under section 14 of the Constitution and under its inherent jurisdiction consider appropriate for the purpose of enforcing and protecting or securing the enforcement and protection of the Claimants' said rights.

g. Costs

(10) The fact that the respondents proceeded by way of constitutional motion rather than by way of a common law action for trespass begs the question of whether these proceedings were a bona fide resort to the Constitution. Having regard to the importance of the right to freedom of the press in section 4(k) on its own and as a species of free expression which is the cornerstone of a democracy, the clear invasion of that right by the coercive powers of the State on the authority of search warrants brings these proceedings within the special circumstances required for resort to the Constitution. For the reasons more properly developed herein these proceedings were not an abuse of process.

The decision of the Trial Judge

(11) The trial judge gave judgment for the respondents and declared that:

1.The two search warrants issued on March 11, 2020 were unlawful and unconstitutional as they disproportionately infringed upon the Claimants' right as articulated under Section 4(k) of the Constitution of Trinidad and Tobago.

2. The seizure of the four USB flash drives from the office of the Third Claimant was unconstitutional.

He ordered that the appellants pay compensation to the respondents for the breaches and directed that the quantum be assessed by a master in chambers.

(12) The nub of the judge's reasoning is contained in paragraphs 93, 94, 110, 111 of his judgment:

93.The necessary balancing exercise required an informed and measured determination as to whether the public interest in identifying and prosecuting the journalist's source was of greater importance than the public's right to know that a serious investigation was looming over the head of a very senior police officer especially when one considers the fact that such an investigation had to be undertaken by junior police officers.

94. In situations where there is an intent to call for the issue of a search warrant for a media house or a journalist, the special importance which is associated with this section 4(k) right must mandate that due and reasoned consideration should be given to the issue as to whether the intended search is necessary, whether the information sought could be otherwise obtained and whether the importance of the search outweighs the infringement imposed upon press freedom.

110. The two warrants executed by the Third Defendant were plainly irregular. There were errors on both warrants as to the nature of the offence, critical information as to the possibility that relevant information could have

been obtained from the FIU or the FIB was not disclosed and there was obvious uncertainty as to the statutory provision upon which the proposed investigation was premised. The decision to issue the warrants failed to strike the required balance between the interest to investigate the summary offence of “tipping off” on the one hand and the right to press freedom as well as the right of the journalist who authored the articles to protect the confidentiality of her source on the other. In addition, the language in the warrants was not circumscribed or precise nor was it confined to specific relevant areas so as to ensure that its execution would cause minimum disruption and incursion.

111. For the reasons which have been outlined the Court declares that the two search warrants issued on March 11, 2020 were unlawful and unconstitutional as they disproportionately infringed upon the Claimants’ right as articulated under Section 4(k) of the Constitution of Trinidad and Tobago.

The Appeal

(13) The substantive issue in this appeal is whether the grant and execution of the search warrants breached the respondents constitutional right to freedom of the press. This requires an evaluation of the content of the right to freedom of the press and its impact on the jurisdiction to issue search warrants. If the issue of the warrants in this case failed to comply with the statutory prescription for the same then they are unconstitutional and void and any execution also unconstitutional.

(14) Before discussing the substantive issue, I must respectfully disagree with Rajkumar J.A. that there was a breach of section 4(k) in regard to the first warrant. The first warrant was never executed. Supt. Lucas accepted that it was flawed and sought and obtained from the justice of the peace the second warrant. No prejudice was caused by the first warrant and no search was conducted in pursuit of it. The case therefore proceeds on the vires on the second warrant.

The search warrant jurisdiction

(15) The starting point is the power in the judicial branch to issue search warrants. Section 4(a) of the Constitution prescribes the right of the *“individual to...enjoyment of property and the right not be deprived thereof except by due process of law.”* In our law, so far as searches of an individual’s property is concerned “due process of law” involves the police obtaining a search warrant. In respect of summary offences, section 41 of the **Summary Courts Act Chap. 4:20** provides:

41 (1) Any Magistrate or Justice who is satisfied, by proof upon oath, that there is reasonable ground for believing that there is in any building, vessel, carriage, box, receptacle, or place—

(a) anything upon or in respect of which any summary offence has been or is suspected to have been committed;

(b) anything which there is reasonable ground for believing will afford evidence as to the commission of any such offence; or

(c) anything which there is reasonable ground for believing is intended to be used for the purpose of committing any offence against the person punishable on summary conviction,

may at any time issue a warrant under his hand authorising any constable to search such building, vessel, carriage, box, receptacle, or place for any such thing, and to seize and carry it before the Magistrate or Justice issuing the warrant or some other Magistrate or Justice, to be dealt with by him according to law.

(2) Any search warrant may be issued and executed at any time, and may be issued and executed on a Sunday.

Section 5 of the **Indictable Offences (Preliminary Inquiry) Act Chap. 12:02** states:

5. (1) Any Magistrate who is satisfied by proof on oath that there is reasonable ground for believing that there is in any building, ship, vessel, carriage, box, receptacle, or place—

(a) anything upon or in respect of which any indictable offence has been or is suspected to have been committed; or

(b) anything which there is reasonable ground for believing will afford evidence as to the commission of any such offence; or

(c) anything which there is reasonable ground for believing is intended to be used for the purpose of committing any indictable offence against the person,

may at any time issue a warrant under his hand authorising any constable to search such building, ship, vessel, carriage, box, receptacle, or place for any such thing, and to seize and carry it before the Magistrate issuing the warrant or some other Magistrate, to be dealt with by him according to law.

(2) Every such warrant may be issued and executed at any time, and may be issued and executed on a Sunday.

Section 2(2) states that for “*the purposes of this Act, Justices shall have and exercise concurrent jurisdiction with the Magistrates to issue summonses, warrants, and other process of Court, to grant bail and to fix the amount, to take recognisances, and to bind over parties and witnesses, and to administer oaths.*”

The provisions in both statutes cover the same ground. The only difference relates to the summary or indictable nature of the offences giving rise to the search. The same procedure and standard applies to both and the jurisdiction is given to magistrates or

justices of the peace irrespective of the offence. Where the procedure is flawed or the evidence is not enough to satisfy the magistrate or justice of the peace then the warrant cannot be said to be obtained by due process of law and the search is unconstitutional.

(16) Lord Hoffman in **AG v Williams (Dhanhai)**(1997) 51 WIR 264, 266 held that *“the search must be justified by law. There are cases in which the power to enter and search without the consent of the owner is necessary for the proper functioning of a democratic society. Such powers have long existed at common law and under various statutes.”* In this jurisdiction, those powers are found, so far as is relevant to this case, in section 41 of the **Summary Courts Act** and section 5 of the **Indictable Offences (Preliminary Inquiry) Act**.

(17) As Lord Hoffman explained at pages 270-272 of **AG v Williams**:

The purpose of the requirement that a warrant be issued by a justice is to interpose the protection of a judicial decision between the citizen and the power of the State. If the legislature has decided in the public interest that in particular circumstances it is right to authorise a policeman or other executive officer of the State to enter upon a person's premises, search his belongings and seize his goods, the function of the justice is to satisfy himself that the prescribed circumstances exist. This is a duty of high constitutional importance. The law relies upon the independent scrutiny of the judiciary to protect the citizen against the excesses which would inevitably flow from allowing an executive officer to decide for himself whether the conditions under which he is permitted to enter upon private property have been met.

Section 203 is clear as to the matters upon which the justice must be satisfied. It must appear to him from information on oath that the officer has reasonable cause to suspect one or more of the matters there specified. It is not sufficient that the justice is satisfied by the officer's oath that he suspects; it must appear to the justice that his cause for suspicion is reasonable. The test is an objective one...

In the present case, the matter was correctly stated by Forte JA in the following passage:

'Although it is clear in the statute that it is the customs officer who has to have "reasonable cause to suspect" it is equally clear in my view that he (i.e. the customs officer) has to make it appear to the justice that he (the customs officer) has "reasonable cause" to suspect. If it does not appear to the justice of the peace that the officer has "reasonable cause" then he ought not to issue the warrant. In coming to that conclusion, it is inescapable that the justice would also have to apply his mind to the matters upon which the officer's cause for suspicion is based and/or the credibility of the officer.'

...But there is no need for the same confidentiality in the privacy of the justice's room. The application is made ex parte and the officer must disclose to the justice all that the latter needs to know in order to discharge his duty. There may be some knowledge, for example the identity of informers, with which the justice will find it unnecessary to be burdened. But sufficient information to establish the grounds for suspicion to his satisfaction must be stated on oath. The statute does not require the information to be provided in writing. An oral statement on oath is sufficient.

In my judgment, this represents the state of the law on the authority to issue search warrants in this jurisdiction.

(18) The requirement to obtain a search warrant and that the authority to grant the same is vested in the judiciary is the due process of law required by the Constitution. The interposition of a judicial officer is to guard against the police exercising the coercive powers of the State to enter upon private property arbitrarily. The magistrate or the justice of the peace must be satisfied that there exists reasonable grounds for the police officer's belief, inter alia, that there is in any building or place anything which there are

reasonable grounds for believing will afford evidence as to the commission of an offence. This is only possible by reference to the grounds outlined by the police officer on oath.

- (19) However, the basis on which these constitutional proceedings were launched by the respondents is that the right to freedom of the press in section 4(k) of the Constitution places them into a special category in regard to the searches by the police. They contend that their right to freedom of the press is infringed if they are compelled by way of a search warrant to disclose the identity of their confidential sources.
- (20) It is uncontroversial that the rights in section 4 of the Constitution, of which freedom of the press is one, are not absolute but subject to justifiable limitations. See **Dominic Suraj v AG [2022] UKPC 26**. But what is the content of right to freedom of the press?
- (21) In Trinidad and Tobago, freedom of the press is a stand-alone right. In Canada and in the European Convention of Human Rights, it is treated as an aspect of the right to free expression and is not listed as a right in and of itself. However, that distinction does not diminish the content of freedom of the press. In the Canadian Supreme Court case of **Canadian Broadcasting Corp v Lussard [1991] SCR 421**, La Forest J stated:

I take it as a given that freedom of the press and other media is vital to a free society. There can be no doubt, of course, that it comprises the right to disseminate news, information and beliefs. This was the manner in which the right was originally expressed, in the first draft of s. 2(b) of the Canadian Charter of Rights and Freedoms before its expansion to its present form. However, the freedom to disseminate information would be of little value if the freedom under s. 2(b) did not also encompass the right to gather news and other information without undue governmental interference.

I have little doubt, too, that the gathering of information could in many circumstances be seriously inhibited if government had too ready access to information in the hands of the media. That someone might be deterred

from providing information to a journalist because his or her identity could be revealed seems to me to be self-evident. As Stewart J. (dissenting) stated in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), at p. 572:

It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows that, despite the journalist's assurance, his identity may in fact be disclosed.

(22) It is not the respondents' case, as gleaned from their submissions before this court, that the power to issue search warrants is a disproportionate infringement of the right to freedom of the press in section 4(k) of the Constitution. The constitutionality of the search warrant regime is not being challenged. Instead, the argument is that the guarantee of freedom of the press requires the judicial officer to determine whether the grant of a search warrant in the circumstances of the particular case is a proportionate limitation on press freedom. In fact, the trial judge held:

107. The search of media houses cannot be viewed as the norm. Such searches should be sanctioned only where it is essential for the administration of justice and the public interest favours the disclosure of the information sought because it is vital to the furtherance of a criminal investigation. Before such a search warrant is issued, the issuing authority should ensure that all the required statutory requirements have been met. Full disclosure of all relevant information must be made and a proportionality analysis has to be engaged by a judicial officer so as to ensure that there is a balance between the right of the police to investigate a criminal offence on the one hand and the constitutional right enshrined under section 4(k) on the other.

(23) I agree. To be lawful there must be reasonable cause to issue a search warrant. Reasonable cause and the proportionality cover essentially the same ground, that is to say, that they require the justice of the peace to carry out a balancing exercise to determine if there is probable cause to justify an invasion by the State into the private domain of individual. Where that private domain is a media house Cory J in **Lassard** at pages 444-446 sets out the following guidance for the justice of the peace:

...A search is always intrusive, upsetting and to some degree disruptive of the life or business of the individual subjected to the search. It is for this reason that a justice of the peace considering a search warrant application must undertake a careful weighing of the privacy interests of individuals in a democratic society against the interests of the state in investigating and prosecuting crimes.

The weighing and balancing which must be undertaken will vary with the facts presented on each application. Certainly in every case the requirements of s. 487 of the Code must be met. However, this is not the end of the matter. Even after the statutory conditions have been met it may still be a difficult and complex process to determine whether a search warrant should be issued. For example, a greater degree of privacy may be expected in a home than in commercial premises which may be subject to statutory regulation and inspection. At the same time, among commercial premises, the media are entitled to particularly careful consideration, both as to the issuance of a search warrant and as to the conditions that may be attached to a warrant to ensure that any disruption of the gathering and dissemination of news is limited as much as possible. The media are entitled to this special consideration because of the importance of their role in a democratic society.

*In the companion appeal **Canadian Broadcasting Corp. v. New Brunswick (Attorney General)**, I attempted to summarize the factors that must be taken into account in the balancing process in determining whether a search warrant should be issued. They are as follows (at p. 000):*

1) It is essential that all the requirements set out in s. 487(1) (b) of the Criminal Code for the issuance of a search warrant be met.

2) Once the statutory conditions have been met, the justice of the peace should consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant.

3) The justice of the peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination. It must be borne in mind that the media play a vital role in the functioning of a democratic society. Generally speaking, the news media will not be implicated in the crime under investigation. They are truly an innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant.

4) The affidavit in support of the application must contain sufficient detail to enable the justice of the peace to properly exercise his or her discretion as to the issuance of a search warrant.

5) Although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted.

6) If the information sought has been disseminated by the media in whole or in part, this will be a factor which will favour the issuing of the search warrant.

7) If a justice of the peace determines that a warrant should be issued for the search of media premises, consideration should then be given to the imposition of some conditions on its implementation, so that the media organization will not be unduly impeded in the publishing or dissemination of the news.

8) If, subsequent to the issuing of a search warrant, it comes to light the authorities failed to disclose pertinent information that could well have affected the decision to issue the warrant, this may result in a finding that the warrant was invalid.

9) Similarly, if the search itself is unreasonably conducted, this may render the search invalid.

I understand this dictum to mean that where the purpose of the search warrant is to uncover a journalistic source the section 4(k) right to freedom of the press is engaged. While the protection of confidential sources does not and cannot of itself prevent the disclosure of the identity of a source who has leaked information in breach of the criminal law, section 4(k) imposes on the justice of the peace the obligation conduct a balancing exercise to determine where the public interest falls in deciding whether to exercise the discretion in favour of issuing the warrant. It is an assessment of whether the public interest in solving the particular crime justifies a police raid on the media house. The source might be more properly discoverable elsewhere. This balancing exercise involves the consideration of all the circumstances to determine whether to exercise the discretion to issue the warrant as outlined in **Lassard**.

(24) In my judgment, that Cory J's dictum above in **Lassard** is an accurate summary of the factors which must be considered by a justice of the peace in exercising the discretion to grant a warrant to search a media house. The Strasburg Court also adopts a similar approach.

(25) In the **Case of Nagla v Latvia (Application No. 73469/10)** the European Court of Human Rights opined:

81. The Court's understanding of the concept of journalistic "source" is "any person who provides information to a journalist"; it understands "information identifying a source" to include, as far as they are likely to lead to the identification of a source, both "the factual circumstances of acquiring information from a source by a journalist" and "the unpublished content of the information provided by a source to a journalist"...

*82. The Court notes that the Government admitted that the search at the applicant's home had been aimed at gathering "information about the criminal offence under investigation" and that it authorised not only the seizure of the files themselves but also the seizure of "information concerning the acquisition of these files". While recognising the importance of securing evidence in criminal proceedings, the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources (see *Financial Times Ltd and Others v. the United Kingdom*, no. 821/03, § 70, 15 December 2009). In the present case, irrespective of whether the identity of the applicant's source was discovered during the search, as found by the Ombudsman, or at the very least confirmed during that search, as submitted by the applicant, it nevertheless remains that the seized data storage devices contained not only information capable of identifying her source of information, pertaining either to "the factual circumstances of acquiring information" from her source or to "the unpublished content" of that information, but also information capable of identifying her other sources of information. It does not need to be further demonstrated that the search yielded any results or indeed proved otherwise productive (see *Roemen and Schmit*, cited above, § 57, and *Ernst and Others v. Belgium*, no. 33400/96, § 103, 15 July 2003). The Court therefore does not accept the Government's argument that the search did not relate to journalistic sources.*

83. Accordingly, the Court concludes that the search at the applicant's home and the information capable of being discovered therefrom comes within the sphere of the protection under Article 10 of the Convention.

Where the purpose of the search is to uncover a journalistic source, then the right to freedom of the press is engaged. When this right is engaged the European Convention for Human Rights requires an assessment of whether the interference is prescribed by law. The Court in **Nagla** continued:

87. The Court reiterates that the above-cited Sanoma Uitgevers case concerned the quality of Dutch law and the lack of adequate legal safeguards to enable an independent assessment of whether the interests of the criminal investigation overrode the public interest in the protection of journalistic sources. The situation in Latvia in this respect, as noted by the Government, is quite different. Indeed, in accordance with the ordinary procedure under section 180 of the Criminal Procedure Law, the investigating judge weighs the potential risks and respective interests prior to authorising a search. Also, under section 154 of the same Law the investigating judge makes this assessment prior to issuing a disclosure order. Therefore, it appears that in principle there are procedural safeguards in place in Latvia by virtue of prior judicial scrutiny by the investigating judge for searches under the ordinary procedure and for disclosure orders.

The exercise of weighing “***the potential risks and respective interests prior to authorising a search***” to determine whether the search was ‘prescribed by law’ is the same exercise which the Canadian Supreme Court in **Lassard** has declared to be the correct approach to issuing search warrants for media houses to unearth journalistic sources and which I have accepted as correct in this jurisdiction. It is true that the European Court of Human Rights proceed to carry out a traditional proportionality test into whether the invasion of the right pursued a legitimate aim and was necessary in a

democratic society. But that is an exercise expressly required by Article 10 of the Convention. In Trinidad and Tobago and Canada there is no such further requirement.

(26) Before the justice of the peace was a complaint by Supt. Lucas on oath:

...that there are reasonable grounds for believing that...at that location computers tablets...in which there are reasonable grounds for believing that such data will afford evidence as to the commission of an Indictable Offence namely Tipping-off...

The complaint does no more than say that Supt Lucas has reasonable grounds for believing that there is data at Express House which is evidence as to the commission of the offence. No details are provided in regard to the basis for that belief. The complaint was plainly insufficient to satisfy the requirements of either the **Summary Courts Act** or the **Indictable Offences (Preliminary Inquiry) Act**.

(27) Yet so satisfied was the justice of the peace that the warrant was issued:

WHEREAS it appears, on the path of WENDELL LUCAS SUPERINTENDENT OF POLICE, of the FINANCIAL INVESTIGATIONS BRANCH

That there are reasonable grounds for believing computers, tablets, external storage devices, cellular phones including their sim cards, ST cards, images, calendars, phone books, contacts, SMS messages, emails, pictures, video recordings, audio recordings, call logs, installed application data, GPDS information, WIFI information, internet history and usage, user files, system files, and any other data, which are recorded or stored on the hard drive or other storage medium contained within the aforementioned electronic digital devices and magazines, digital recording disc, documents and articles which will afford evidence as to the commission of an Indictable Offence namely Tipping-off

(28) At the very minimum, the information placed before the justice of the peace should have been that an article was published by the Express which contained information from an unnamed source. The information could only have come from the FIU or the police. However, the disclosure of such information is a crime contrary to section 54 of the **Proceeds of Crime Act**. It follows that the source of that information is likely to be found in material at Express House. That would have satisfied the statutory requirement for the warrant but Supt. Lucas did not do that. On the basis of Supt. Lucas' complaint the justice of the peace could not have been satisfied that probable cause existed for the search. The statutory pre-conditions for a search warrant were not met with the consequence that the second warrant is invalid and void.

(29) Even if statutory conditions were met, no balancing exercise was conducted. There was no material placed before the justice of the peace to allow her to strike a balance between the competing interests of the state in the investigation and prosecution of crimes and the media's free press rights in the course of their news gathering and news dissemination. The sanctity of the confidentiality of journalistic sources is an essential element of the right to freedom of the press.

(30) The warrant authorized the search of essentially everything at the Express which stores data. There was no restriction as to particular files or devices used by the journalist who wrote the story or the editor. With a warrant so broad there is obviously the risk involved in the police rummaging through confidential information which has no relation to the crime of tipping off. Similarly, there were no conditions imposed on the execution of the search or the use of material seized. The justice of the peace was not told about any alternative sources of information.

(31) The justice of the peace could neither be satisfied that there was probable cause for the search nor that the search struck the right balance. In the result, the respondents' right to freedom of the press in section 4(k) of the Constitution was infringed. It follows from the invalidity of the warrant that the search of the premises and the seizure of the flash drives was also unlawful and unconstitutional. It is immaterial that the police conducted

the search reasonably and did not disrupt the operations of the newspaper. They had no authority to enter and search the premises housing the Express.

(32) According to Rajkumar JA the *“police refrained from accessing the server and therefore did not infringe the constitutional rights of the first respondent.”* I would take a broader view. The Express House and the Express is owned by OCM. It was OCM’s property which the search warrant unlawfully gave access to. In fact, access to the Express was given in compliance with the unlawful warrant by Dawn Thomas who was the chief executive officer of OCM. There is no distinction for the purposes of this case between the Express and OCM.

Defects in the Second Warrant

(33) The respondent’s identified some irregularities in the form of the second warrant. These included:

- i. Section 24 of the **Proceeds of Crime Act** does not create the offence of “tipping-off” or any offence at all; and
- ii. The warrant was issued under the **Indictable Offences (Preliminary Inquiry) Act** when “tipping-off” is a summary offence.

In my judgment, while these errors are unfortunate, by themselves, they did not invalidate the warrant (of course I have found the warrant invalid on other grounds). First, all that is required is that a relevant offence be identified which was done by reference to “tipping-off.” Indeed neither the **Indictable Offences (Preliminary Inquiry) Act** or the **Summary Courts Act** require the naming of the indictable or summary offence, only that the justice of the peace must be satisfied of *some* indictable or summary offence respectively. So pointing to the wrong section is not fatal when the offence named is in fact an offence created by some statute or at common law. As it relates to the wrong statute being used to issue the warrant, that argument is attenuated by the fact that whether the offence is summary or indictable in nature, the justice of the peace has jurisdiction to issue search warrants in respect of both applying the same criteria. The use of the wrong statute itself caused no prejudice to the Express.

These are both errors of drafting attributable to the police who prepared the draft search warrant. This tells a disturbing tale of clear confusion on the part of the police about the nature of the offence they were investigating. As Lord Hoffman stated in **AG v Williams** at pages 278-279:

...The alleged defects in the warrants are all errors of drafting, no doubt on the part of the officers of the Revenue Protection Division by whom it was prepared for submission to the justice. So far as they may have led to substantive abuses, it is of course right that the respondents to this appeal should have a remedy. But in a case like this in which they have caused little or no prejudice to the respondents, their lordships think it would be wrong to treat them as punishable by invalidity of the entire search. Section 19(1) of the Constitution was intended to serve a higher purpose than to promote accuracy in drafting in the Revenue Protection Division.

Alternative Remedy

(34) Indeed, where it is alleged that a search warrant is invalid that warrant can be challenged in an ordinary common law action for trespass. In this case, even without reference to the Constitution the requirements of the statutes governing the jurisdiction to issue search warrants were not satisfied. That entitled the respondents to sue in trespass. However, they opted to bring constitutional proceedings instead. No point was taken by the appellants that these proceedings amounted to an abuse of process and rightly so.

(35) In **Attorney General v Siewchan Ramanoop (2005) 66 WIR 334** Lord Nicholls of Birkenhead stated:

[25] In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates

that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of State power.

*[26] That said, their lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But 'bona fide resort to rights under the Constitution ought not to be discouraged'; Lord Steyn in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 at 307, and see Lord Cooke of Thorndon in *Observer Publications Ltd v Matthew* [2001] UKPC 11, 58 WIR 188 at 206.*

The special feature in this case was the invocation of the press right in section 4(k) and its impact on the statutory discretion to grant search warrants. In an ordinary action for trespass, the respondents would not have been able to take a constitutional point that section 4(k) of the Constitution impacts on the quality of the analysis required in the judicious exercise of the discretion to issue a search warrant to search a media house to obtain the identity of journalistic sources. That was a constitutional point to be determined by a bona fide resort to the Constitution and the respondents were correct to launch these proceedings.

The preliminary point before the judge

(36) There has been some dispute as to whether the respondents should have been allowed to adduce evidence that the warrants were issued under the wrong statute in the absence of a pleading in that regard. I agree with Rajkumar JA that in the exercise of his case management powers the trial judge was entitled to permit such evidence. In my

judgment, it is plain that the search warrants were issued under the wrong statute and no specific pleading was required to demonstrate that fact. Indeed, a failure to so plead does not restrict the court from identifying that flaw and pronouncing on the consequences of the same.

(37) Supt. Lucas accepted that the crime for which he was seeking to uncover evidence by searching the premises of the Express was the offence of “tipping off” in section 51 of the **Proceeds of Crime Act**. However, section 53 (2) of that Act states:

A person who commits an offence under section 51 is liable on summary conviction to a fine of five million dollars and to imprisonment for five years.

Consequently, “tipping off” is a summary offence and it is the **Summary Courts Act** which gives to the justice of the peace the jurisdiction to issue a search warrant to search for anything in Express House which will afford evidence as to the commission of any such offence.

(38) It is inherent in testing the grant of the search warrants for constitutional compliance that the legal basis for the warrants would be in issue. Ideally, the grounds could have been more carefully drafted but the appellants cannot argue that they were not aware that the validity of the warrants were being challenged for want of compliance with the statute.

Relief

(39) The trial judge ordered that the respondents “*are entitled to receive damages for the breach of their constitutional rights and the quantum of same shall be assessed and determined by a master in chambers.*” In **Charles v Attorney General [2023] 1 WLR 177**, Lord Hamblen provided a useful summary of the legal principles on the award of compensation as appropriate redress for breach of constitutional rights at paragraph 86:

(1) When exercising its jurisdiction under section 14 the court is concerned to uphold or vindicate the constitutional right which has been contravened (Ramanoop para 18).

(2) If the person wronged has suffered damage the court may in its discretion award compensatory damages. The comparable common law measure of damages may be a guide (Ramanoop para 18).

(3) If the person wronged can establish a head of loss, the fact that it is difficult to quantify and involves speculation is not a reason for denying the assessment (Alleyne para 44).

(4) It will generally be for the local court to examine the circumstances to determine if and in what amount there should be compensation (Maharaj para 49).

(5) An award of compensatory damages may not fully vindicate the infringed constitutional right. An additional award may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. These are “vindicatory damages” but they are not designed to punish the defendant and are therefore distinguishable from punitive or exemplary damages (Ramanoop para 19).

(6) The fact that it may be very difficult to prove a financial loss may be a good reason for adding an amount to mark the importance of the constitutional right which has been violated (Alleyne para 40).

(7) Such damages may include an award for non-pecuniary loss, including distress and vexation caused by the denial of the constitutional right (Alleyne para 41).

(8) The appropriate award does not have to be large, but it should not be nominal or derisory (Alleyne para 41).

(9) These are matters which par excellence fall within the province of the local court which is much better placed to make a judgment about the significance of the breach (Maharaj para 54).

(10) If a court is to make such an award it should explain what it is doing and why (Alleyne para 41).

(40) Usually a declaration is sufficient to vindicate the right breached by the State. Ms. Chote submitted in the High Court that the respondents are entitled to compensation for the breach of their right to freedom of the press because of the distress and inconvenience they suffered when the media house was forcibly and unlawfully searched by the police but recognized that there was no pecuniary loss. In my judgment, having regard to the authorities, it is where an award of compensation is not enough to vindicate a right that an additional award is made for non-pecuniary loss like distress and inconvenience. In this case, section 4(k) is a right for the benefit of the community to allow for the free dissemination of information. While a declaration clarifying the impact of that right goes a long way towards vindicating the right, section 4(k) is sufficiently important to attract some level of compensation to reflect its importance. Consequently, I will award the respondents the sum of twenty five thousand dollars (\$25,000.00) by way of compensation for the breach in all the circumstances of this case.

Disposition

(41) The appeal is allowed in part. Insofar as the trial judge declared that the first warrant was unconstitutional and awarded damages to be assessed he erred. I would set aside his order and substitute the following:

- i. A declaration that second warrant was unlawful, unconstitutional and void as a breach of section 4(k) of the Constitution;

- ii. A declaration that the seizure of the flash drives were unlawful, unconstitutional and void;
- iii. The appellants shall pay to the respondents compensation for the breach of their section 4(k) right assessed in the sum of twenty-five thousand dollars (\$25,000.00); and
- iv. I shall hear the parties on costs.

Nolan Bereaux
Justice of Appeal

Delivered by Rajkumar JA

Background

(42) The first respondent is a media conglomerate and the owner, inter alia, of the second named respondent - Trinidad Express Newspapers (Trinidad Express). The third named respondent is the Editor in Chief of that newspaper. On March 11, 2020 the third named appellant obtained two search warrants to search the premises of the second and third named respondents. The warrants were for the stated purpose of seizing items that would afford evidence as to the commission of the offence of tipping off contrary to the Proceeds of Crime Act. The warrants were obtained before a Justice of the Peace, with the second being obtained after an alleged defect was identified on the first.

(43) The respondents challenged, inter alia, the legality of the search warrants as well as the constitutionality of their issue, based on alleged infringements of their rights under sections 4 (a), (b), and (k). Only section 4 (k) infringement – the right to freedom of the press – is now maintained. The appellants took issue with the respondents being permitted to raise unpleaded issues of illegality. The trial judge upheld challenges in respect of the two search warrants and found that they disproportionately infringed upon the respondents' rights under section 4 (k) of the Constitution.

Issues

- (44) i] Assuming that freedom of the press is not an independent constitutional right, distinct from freedom of expression or the right to privacy, what **requirements** nevertheless apply in relation to the instant search warrants for the media.
- ii] Whether in this jurisdiction the right to freedom of the press under section 4 (k) of the Constitution is in fact an independent right with its own distinct content separate from, or further to, the rights to freedom of expression or privacy/the right of the individual to respect for his private and family life.
- iii] If so what matters are required to be observed in relation to the search warrants in this case.
- iv] if so, whether the instant warrants and their procurement, content, or execution infringed the constitutional right to freedom of the press.
- v] Whether the respondents should have been permitted to, or did raise unpleaded allegations of illegality.

Conclusion

- (45) As to **the first issue**, whether or not freedom of the press is a distinct constitutional right with its own separate content, the procurement of search warrants for the media requires inter alia, a] compliance with **the statutory requirement** of the interposition of **an independent judicial officer** before such a warrant is obtained. It also requires: b] in relation to their content, **specificity in relation to the items to be seized and the premises to be searched**, and c] **reasonableness** and proportionality, and in particular specific consideration by that independent judicial officer of the potential impact of the warrant in the terms sought upon i] the ability to gather and disseminate the news and ii] the confidentiality of media sources.
- (46) As to **the second issue**, in this jurisdiction freedom of the press is a distinct constitutional right independent of the right to freedom of expression or privacy with its own unique content.
- (47) As to **the third issue**, apart from the above requirements for a search warrant for the media, (which apply whether or not freedom of the press is a distinct constitutional

right), construction of that right must take into account its purpose. The purpose of the right is to recognize and protect the role of the independent press to investigate, gather, and disseminate news and content to the public. It is to enable freedom of opinion and advance democracy in accordance with section 1 of the Constitution, which is premised upon the Republic of Trinidad and Tobago being a sovereign democratic state. To this extent, it is a right for the benefit of the public, and not for the sole benefit of the media. Many aspects of this right have long predated the Republican or even the independence constitution with one current daily newspaper have been published for over one hundred years. Recognition of the existence of a free press in this jurisdiction has been recognized by the Judicial Committee of the Privy Council from as early as 1934 (in the case of **Ambard v AG**). It is of course neither possible nor desirable to specify the entirety of the content of the right to freedom of the press (the right) in a judgment based upon a specific factual scenario. However, in the instant case it requires recognition of a **presumption of confidentiality** in relation to media sources. For reasons developed subsequently, in order for the right to be effected it requires that notice be provided to the media as a condition of the exercise of the discretion to issue a warrant, of an intention to obtain a search warrant in relation to it, particularly where the purpose of the search is to uncover a presumptively confidential media source. This is the only way to ensure the opportunity to ventilate the multiplicity of factors that apply in this situation, before the infringement of the right by the otherwise generally applicable ex parte proceedings.

(48) As to **the fourth issue** the warrants fell afoul of the requirements of specificity, proportionality and reasonableness. They would have been invalid on that basis even if section 4 (k) were not a distinct and independent constitutional right. Further however, the **content** of the search warrants in the instant case also for this reason, inter alia, infringed the rights of the second and third respondents, (though not the first), to freedom of the press. That is because they were in excessively wide terms, far exceeding what would be reasonably required for the purpose of the search. By their terms, they potentially permitted inter alia, incidental access to unspecified computer hard drives with unknown and unknowable further information, potentially not excluding

information relating to other unrelated corporate entities, (as a result of permitting unrestricted searches through the unspecified computers).

(49) On the interpretation of the police executing the second warrant it could even have permitted shut down of the server shared by the entire OCM group, clearly demonstrating its lack of proportionality and reasonableness. Only the decision by the police not to search the server of the second respondent shared with the OCM Group averted a constitutional breach in relation to the first named respondent.

(50) The excessively wide terms of the warrants were incompatible with any actual consideration of their potential impact upon publication and confidential sources, and viewed objectively, they unreasonably ignored a potential chilling effect on both.

(51) It was found by the trial judge, and assumed by the parties on appeal that the second warrant was modified without being based on a new affidavit sworn before the judicial officer. If that were in fact so then their procurement of the second warrant would have unlawfully and indefensibly dispensed with a critical and essential statutory check on the exercise of the power to search and seize by the police. However, the basis for this conclusion is unclear because the reference to the affidavit of Mr. Lucas referred to by the trial judge does not suggest this.

(52) The police refrained from accessing the server and therefore did not infringe the constitutional rights of the first respondent. The first warrant was never executed. Eventually only four flash drives were seized. The **conduct** of the search was therefore not excessive or disproportionate.

(53) As to **the fifth issue**, unconstitutionality as a result of infringement of section 4 (k) was pleaded inter alia at grounds d] and f]. The content of that right, and any infringement thereof, arising from the procurement, content, and execution of the warrants were directly in issue before the trial judge. The trial judge in the exercise of case management and constitutional discretions was entitled to permit such evidence as he

considered necessary and relevant. It has not been demonstrated that in doing so he was plainly wrong. In any event, some aspects of illegality are either no longer being pursued, or are not relevant to the instant judgment.

(54) The orders of the trial judge with respect to damages to be assessed are set aside. Apart from the seizure of four flash drives, there is no evidence of damage requiring other than an award of nominal damages in addition to the declarations being granted. If there had been cogent evidence of improper motive the position would have been different.

(55) Apart from that the trial judge's conclusion is upheld that:

*"The decision to issue the warrants failed to strike the **required balance** between **the interest to investigate the summary offence of "tipping off"** on the one hand and **the right to press freedom** as well as **the right of the journalist** who authored the articles to protect the confidentiality of her source on the other. In addition, the language in the warrants was not circumscribed or **precise** nor was it **confined to specific relevant areas so as to ensure that its execution would cause minimum disruption and incursion**".*

Orders

(56) The appeal is allowed in part. The orders of the trial judge, save his order with respect to costs which is upheld, are set aside and replaced as follows:

- [i] The appeal is allowed in relation to the first named respondent.
- [ii] It is declared that the two search warrants issued on March 11, 2020 were unlawful and unconstitutional as they disproportionately infringed upon the second and third named respondent's rights under Section 4(k) of the Constitution of Trinidad and Tobago.
- [iii] It is further declared that the seizure of the four USB flash drives from the office of the Third Claimant was unconstitutional.
- [iv] The appellant is to pay to the second and third named respondents nominal damages quantified in total in the sum of \$25,000.00.
- [v] The parties will be heard on costs.

Analysis

Background

(57) At issue inter alia is whether as a result of the circumstances relating to:

- i] the **terms** of the search warrant,
- ii] the manner in which they were **procured**,
- iii] the purpose of the search and warrants, and
- iv] the conduct of the search thereunder,

any infringement occurred including infringement of any constitutional right to freedom of the press.

The Terms of the Warrants

(58) The search warrants authorized a search for **computers, tablets, external storage devices, cellular phones** including their sim cards, ST cards, images, calendars, phone books, contacts, SMS messages, emails, pictures, video recordings, audio recordings, call logs, installed application data, GPDS information, WIFI information, internet history and usage, user files, system files, and any other data, which are recorded or stored on the **hard drive** or other storage medium contained within the aforementioned electronic digital devices and magazines, digital recording disc, **documents and articles**.

(59) While they may have allowed the search for the source of tipping off they also incidentally allowed for a search through **computers, tablets, external storage devices**, as well as cell phones and their contents. Items which not only might not relate to the source, the subject of the search, but potentially included access to a wider range of unrelated information such as financial records, other news stories and their sources, and in this case, on the evidence, material from other companies of the OCM Group.

(60) The first warrant permitted a search for the above items concealed at premises and managed by Omatie Lyder Editor in Chief of the second respondent. The second replacement warrant referred to those items as simply “being concealed at the premises of (the second respondent)”. The newspaper article, which had prompted that

search, had in fact been written by a reporter Denise Renne. No attempt was made to search her office or devices.

(61) The search warrants, and in particular the second search warrant, were in extraordinarily wide terms. It was argued that they actually covered the first four types of articles, with the remainder being particulars of the types of material on those devices. In fact, the police executing them construed the second warrant, which they had obtained, as even permitting the search of the server of the OCM Group, and, without the assistance of the respondent's IT personnel, even permitting the shutdown of that server. While commendably, they refrained from doing so, this demonstrates the width of the terms of the warrants and their potential consequences, were it not for that restraint.

(62) The width of the search warrants themselves could not be simply glossed over by the assertion that only a filing cabinet was searched in Ms. Lyder's office and some SD cards were removed. The fact is that the search warrants themselves allowed for a far more intrusive and invasive search than could reasonably be justified. In fact, the search warrants sought the identity of a person who may have been guilty of the offence of tipping off (the tipster). The tipster and the source of the newspaper article published by the newspaper in this case were the same. In obtaining the search warrants and conducting any search under the search warrants it was therefore a material consideration that the identity of a newspaper source would be identified.

The Warrants

Alleged error in first warrant

(63) The first search warrant, which was to search the premises under the control of and managed by Omatie Lyder, Editor-in-Chief, was objected to by an employee at the Express on the basis that it appeared to refer to the house of Ms. Omatie Lyder rather than the newspaper offices.

(64) It was accepted by the police, at the time they presented it, that a mistake was made on it in the description of the premises to be searched. Whether or not that were actually the case they did not execute it but returned to the Justice of the Peace (JP) with the second warrant. It is undisputed that they left and returned 45 minutes later with the second warrant, which on its face states that it was issued on the basis of complaint upon oath. Any Magistrate or JP especially one who is asked to issue a warrant in such wide terms would have to be satisfied that such a search was reasonable and proportionate in the circumstances. The interposition of an independent judicial officer cannot lawfully be dispensed with. However, there is no apparent basis from paragraphs 36 and 37 of the Lucas affidavit for the trial judge's conclusion that that warrant was not based on further information on oath.

(65) In the case of **AG of Jamaica v Williams** [1998] A.C 351 at page 358 Lord Hoffmann explained as follows:

*The purpose of the requirement that a warrant be issued by a justice is to interpose the protection of a judicial decision between the citizen and the power of the state. If the legislature has decided in the public interest that in particular circumstances it is right to authorise a policeman or other executive officer of the state to enter upon a person's premises, search his belongings and seize his goods, the function of the justice is to satisfy himself that the prescribed circumstances exist. **This is a duty of high constitutional importance.** The law relies upon the **independent scrutiny of the judiciary** to protect the citizen against the excesses which would inevitably flow from allowing an executive officer to decide for himself whether the conditions under which he is permitted to enter upon private property have been met. (Emphasis added)*

Requirements of a Warrant

(66) The obtaining of a search warrant either under the Summary Offences Act or the Preliminary Enquiry (Indictable Offences) Act requires the interposition of an independent judicial officer¹.

¹ Indictable Offences (Preliminary Enquiry) Chap. 12:01

5. (1) Any Magistrate who is satisfied by proof on oath that there is reasonable ground for believing that there is in any building, ship, vessel, carriage, box, receptacle, or place— (a) anything upon or in respect of which any

(67) The safeguard provided by the interposition of an independent judicial officer is a recognized and necessary protection which is applicable to search warrants generally and specifically for the premises of media houses. It was the existence of that statutory interposition and requirements for the exercise of the discretion thereunder which caused the majority of the U.S. Supreme Court in the case of **Zurcher v. Stanford Daily, 436 U.S. 547(1978) (Zurcher)** (infra) to conclude that no additional constitutional protection was required.

(68) As established, by the cases hereunder in which the issue has been considered, in relation to search warrants for the media, the discretion conferred requires that officer to consider the potential effect of the warrant sought, and its terms, on publication, the ability to continue to publish, and upon confidential sources. The chilling effect of a warrant, in excessively wide terms, upon a] the willingness or ability of the press to continue to be independent, and b] continued access to sources who supply information in the expectation that their confidentiality would be maintained, are not mere technicalities. They are fundamental aspects of the ability of the press to remain free.

(69) In this jurisdiction given the express separate constitutional right to freedom of the press, the interposition of an independent judicial officer in the process of obtaining every search warrant to be executed upon the premises of a media house, and the

indictable offence has been or is suspected to have been committed; or (b) anything which there is reasonable ground for believing will afford evidence as to the commission of any such offence; or (c) anything which there is reasonable ground for believing is intended to be used for the purpose of committing any indictable offence against the person, may at any time issue a warrant under his hand authorising any constable to search such building, ship, vessel, carriage, box, receptacle, or place for any such thing, and to seize and carry it before the Magistrate issuing the warrant or some other Magistrate, to be dealt with by him according to law.

Summary Courts Chap. 4:20

41. (1) Any Magistrate or Justice who is satisfied, by proof upon oath, that there is reasonable ground for believing that there is in any building, vessel, carriage, box, receptacle, or place— (a) anything upon or in respect of which any summary offence has been or is suspected to have been committed; (b) anything which there is reasonable ground for believing will afford evidence as to the commission of any such offence; or (c) anything which there is reasonable ground for believing is intended to be used for the purpose of committing any offence against the person punishable on summary conviction may at any time issue a warrant under his hand authorising any constable to search such building, vessel, carriage, box, receptacle, or place for any such thing, and to seize and carry it before the Magistrate or Justice issuing the warrant or some other Magistrate or Justice, to be dealt with by him according to law.

exercise of his/her discretion taking into account the unique considerations associated with that right, would be essential aspects of any constitutional right to freedom of the press.

(70) The issue of a warrant is not a rubber-stamping exercise. The interposition of a Judicial Officer requires a discretion which must be exercised judicially and reasonably. For the reasons set out below that discretion to issue them was not exercised reasonably in relation to the search warrants against the instant media house because of, inter alia, their excessively wide terms.

The Search

(71) At paragraph 67 of the submissions of the appellant the aborted search of the server room is described as follows:

67. At that point officers from the Cyber Crime Unit enquired about the server room. Lucas gives the following evidence about this at [R180/40]:

*“Ms. Thomas then came and started quarrelling and said that we could not go in there. Mr. Wilson subsequently opened the door to the server room and the officers attached to the Cyber Crime Unit enquired as to the identity and whereabouts of the Information Technology staff on duty. Mr. Wilson then made a telephone call and informed us that he had a conversation with the Information Technology personnel and he was informed that they had reached too far and couldn’t return to Port of Spain at the time. Corporal Walker then informed me that because no Information Technology personnel was present and they did not know the configuration of the server **they would have to shut down the entire server to get in.** Consequently, we decided not to shut down the server and end the search.” (Emphasis added)*

(72) The search warrants that they obtained encompassed the search of a server in a media house. The search required shutting down the entire server if the IT personnel were not there to assist. It carried the **potential** for the entire server to be shut down if the cooperation of the IT personnel was not obtained. That evidence demonstrates the width of the warrants. It could not possibly be denied that the server would contain far

more information than simply that being searched for, and that a search through such a server, far less its shut down, would be an excessively invasive interference completely disproportionate to what it actually sought. It makes no difference that the police decided not to do so and the server room was never accessed.

(73) The right to freedom of the press is clearly undermined when a search warrant can be obtained in terms so comprehensive and excessive that it allows the shutdown of its entire server, regardless of its contents, (let alone one shared with other companies), for the purpose of searching through it.

The Server Room

(74) The respondent contends that the server room was described inconsistently by the respondents. (This point does not detract from the fact that the search warrant was in unnecessarily wide terms which permitted a search well beyond its stated parameters). The alleged inconsistencies are:

- a] As being the IT room of Caribbean Communications Network (CCN);
 - b] As being on the premises of Caribbean Communications Network (CCN);
 - c] As being **shared** by all subsidiaries in the One Caribbean Media Limited (OCM)²
- However there is nothing inconsistent about the IT room being that of CCN, and being on the premises of CCN and also being shared by all subsidiaries of One Caribbean Media Limited.

(75) The evidence of the structure of the media group is undisputed. Caribbean Communications Network (CCN) is the parent company of the media arm which also includes the Trinidad Express Limited. One Caribbean Media is the parent company of CCN as well as media subsidiaries based in other jurisdictions apart from Trinidad and Tobago. While much ado was made about the fact that an employee of Trinidad Express had access to the server room, it matters not because the Express shared that server with the other subsidiaries of OCM, its parent company.

² See paragraph 68 of the appellant's submission

The purpose of the warrants – Uncovering the identity of a newspaper source

(76) In this case it is also quite relevant that the search was not for a] evidence in respect of the commission of any crime allegedly committed by the respondents or b] evidence which had already been published. Rather it was for the identity of that person who supplied the information for the story, (the source), and who was suspected of being guilty of the offence of tipping off. In this case the information sought, the identity of that person, was the same as the **source** of the article.

(77) **Prior publication** of the article therefore would have had no effect whatsoever upon the confidentiality of the information sought. That information had never been the subject of prior publication. Publication of the articles could have no effect on the ability or the willingness of the media to reveal the information sought, because the information sought was the **source** of the article, and not **evidence** supplied by the source which had since been published. Prior publication is simply not a relevant consideration in determining the validity of the instant warrants.

The Conduct of the Search

(78) The appellant contends that the police permitted inspection of the first warrant and provided a copy of the second warrant under which the search took place. They asked permission to access all parts of the building that they searched. They used no force, did not physically restrain or assault any person, allowed representations to be made by attorneys for the respondents, and left voluntarily when told that IT personnel were not present to facilitate a search of the server. There was no suggestion of aggression by the defendant in any respect. That conduct should reasonably be expected in respect of all searches, not a matter for commendation when it occurred in relation to this search. However, in this case that conduct could not provide any additional basis for alleging unconstitutionality. In any event, it does not affect the invalidity of the search warrants for the other reasons identified in the instant case.

Sources and Confidentiality

(79) The issue of a breach of confidence arising from the instant warrants must be inferred on the evidence from the following matters:

- a] The fact that the identity of source was not published;
- b] The fact that that the identity of the source was not voluntarily provided;
- c] Based upon the nature of the information sought and the purpose of the warrants, it is an inexorable inference that the source would necessarily have had to be a confidential source, given that disclosure of the source's identity would expose him/her to severe consequences, both as to criminal prosecution and if as suspected the source was a police officer, disciplinary proceedings. That inference must be drawn whether or not there is express evidence that confidentiality was promised;
- d] Even an attempt to identify why the source was confidential in the course of an express claim to confidentiality carries the real risk of incidentally disclosing information from which the identity of the source can be narrowed and uncovered, defeating the very purpose of confidentiality. A presumption in favour of the media that sources of investigative articles are confidential, though rebuttable, would avoid this danger.

(80) The impact of a warrant such as the instant ones on **other sources** must also be taken into account. That is because without sufficient protection against a search in overly wide terms by the police, other sources could be deterred and "dry up" if they fear that promised confidentiality could be avoided by the ability of the police to too easily obtain a warrant to uncover their identity. The presumption of source confidentiality mitigates this risk as discussed in the authorities (infra). Those authorities all agree that the effect of a search warrant upon protection of journalistic sources is a matter that must be taken into account in its issue. This is so whether or not freedom of the press is considered to be a distinct and independent constitutional right in this jurisdiction with its own content.

(81) The argument that there was no evidence that confidentiality was promised ignores the fact that inferences could readily have been drawn that the information was provided on a confidential basis, by the very nature of the information provided, the fact that the

identity of the source had not been published nor voluntarily provided, the context in which it was provided, and the indisputable consequences for that source if its identity were to be revealed. In the circumstances there is no need for evidence that such a promise was made. There must be a presumption in those circumstances that the source was confidential. It would be readily rebuttable if the newspaper or the source waived such confidentiality, or published the identity of the source.

(82) Freedom of the press often involves obtaining information which might not otherwise be obtained from sources who would be inhibited in providing it if their identities were to be readily subject to disclosure. The contention of the appellant³ was that *“this means that in the absence of the respondents providing **evidence of the nature and type of source** that there is no heightened standard which applies to a search warrant in relation to the media”*, is unrealistic and unsupported on the balance of authority. Requiring evidence of the nature and type of source would defeat the very object of ensuring that the source is confidential. Any such examination of the nature and type of source risks identifying the source by eliminating other potential sources which are not of that nature or of that type. This in itself is an argument for the presumption of confidentiality in relation to newspaper sources.

(83) Distinctions asserted between confidential and non-confidential sources carried the matter no further. In this case it is clear that in this case the source was confidential given that the source was not named in the published article. It is not unreasonable for freedom of the press to include a presumption that when sources are unnamed they can be presumed to be confidential. If they are not that could readily be discerned from a positive response to a request to identify a source, or the naming of the source in the article. Freedom of the press involves recognizing and emphasizing the presumption that journalist sources are confidential. (See Denning MR in **Senior v Holdsworth** and MacLachlin J (dissenting) in **Lessard**).

The Role of the Independent Media

³ At paragraph 94 of its submissions

(84) In examining the issue of search warrants upon the media the starting point must be an examination of the role and purpose of the independent media. Matters which affect the ability of the press/media to freely fulfil that role and purpose, such as search warrants, would fall to be considered in assessing the balance between the right of the police to investigate crime, and the right of the press to gather, analyse and disseminate information independent from any state imposed restrictions.

(85) In **Canadian Broadcasting Corp v Lessard [1991] 3 S.C.R 421 (Lessard)** that role was recognized in particular by McLachlin J. Although hers was a dissenting opinion, her general observations about the role of the press remain apt and have not been doubted in any of the cases under consideration. She stated⁴:

*“I pass from the history of freedom of expression in Canada to the purpose of the guarantee. The values underlying freedom of the press, like freedom of expression, include the pursuit of truth. The press furthers that pursuit by reporting on facts and opinions and offering its comment on events and ideas – **activities vital to the functioning of our democracy which is premised on the free reporting and interchange of ideas.** The press acts as the **agent of the public** in monitoring and reporting on governmental, legal and social institutions... Freedom of the press is also important to participate in the community and individual self-fulfilment... We thus see that the values identified in *Irwin Toy Limited v Quebec* [1989] 1 S.C.R 927, as central to free expression, and also underlie the guarantee of freedom of the press and media. As to the means by which these purposes are to be achieved, it may be ventured that **an effective and free press is dependent on its ability to gather, analyse, and disseminate information, independent** from any state imposed restrictions on content, form or perspective **except those justified under Section 1 of the Charter.**” (All emphasis added)*

⁴ At page 451

(86) It should be noted that the model for the list of rights of in section 1 of the 1962 Constitution of Trinidad and Tobago, which was then carried into section 4 of the Republican Constitution without change, was the Canadian Bill Rights 1960⁵.

Freedom of the Press

(87) The framers of the Constitution, in introducing a specific recognition of the right to freedom of the press, could not have intended that that right so specifically expressed should be mere surplusage, or be devoid of content. Both a literal construction and the generous and purposive construction required when interpreting the fundamental rights provisions of the Constitution, lead to the conclusion that the specific considerations which apply in relation to the role and functions of the press are not be ignored.

(88) As demonstrated by an examination of the case law below it has long been recognized throughout the Commonwealth and the U.S. that there are considerations uniquely applicable to the press which require content to be ascribed to that right separate and apart from the rights to freedom of expression and privacy applicable to all. One consideration is the issue of protection of its sources.

Whether information could be otherwise obtained

(89) The Trial Judge considered in the instant case that the police thought that the source could be narrowed to an officer of the Financial Intelligence Bureau or the Financial Intelligence Unit, (FIU).

(90) It was argued that the police investigation into the offence of tipping off could have focussed first on the group of persons with access to the information before turning to the media which published the information⁶. It is unnecessary to also address this argument given the other bases upon which it can be concluded that the search warrants were excessive, unlawful and unconstitutional.

⁵ See paragraph 62 Suraj v The Attorney General [2022] UKPC 26

⁶ Paragraph 83 of the judgment

(91) It is important to note that contrary to the submissions of the appellants, the respondents do not claim any general constitutional immunity. Nothing set out above limits the recognition in **Panday v Gordon**⁷ that, for example freedom of the press is not a licence for defamation or that the right to express political views was not absolute and unqualified. The Judicial Committee of the Privy Council stated⁸, although in relation to the right to express political views, that *“Clearly the statement of this right as a separate right in the constitution of Trinidad and Tobago underlines the special importance attached to it by those who framed the Constitution. This is self-evident.”*

(92) For reasons elaborated hereinafter, the balance of authority lies in favour of recognising that freedom of the press is a distinct and independent constitutional right with its own unique content, (see **Lessard** per MacLachlin J, **Vice Media** per Abella J, **Zurcher** decision of the minority). The right to freedom of the press involves a balancing exercise, ensuring that the press enjoys no immunity with respect to its activities, but also recognising that it requires some level of protection based upon:

- a] its role, function and activities, and
- b] any vulnerabilities which impact upon its role which includes investigating, gathering, and disseminating news.

Its content must recognise its unique role in a democratic society which seeks to preserve its democratic traditions, by investigating abuses of power, corruption, administrative inefficiency and wastage, (including with respect to public expenditure), and any number of other matters which have the potential to antagonize a wide range of interests both private and public.

(93) One such vulnerability that arises in the instant scenario would be the chilling effect that execution of unconstrained and unrestricted search warrants would pose to the media. This is especially so if the intervening Judicial Officer does not recognise or observe the duty in relation to the discretion to issue them by, for example, permitting them in circumstances where i] they are not limited in scope, ii] where the **place** of execution is **not appropriately limited**, iii] where the items to be seized are not

⁷ [2005] UKPC 36

⁸ At paragraph 19

appropriately limited and, iv] where it is apparent that the impact of the warrants in terms applied for are disproportionate or without regard to their potential impact upon:

- a] Publication;
- b] Ability to meet deadlines;
- c] The possible disruption of the media offices;
- d] Possible uncovering of material unrelated to the search warrant such as allowing inspection of material relating to editorial decisions; and
- e] The drying up of confidential sources.

(94) In the instant case no one has contended that there should never be a search warrant of the premises of a newspaper based upon its prohibition by the constitutional right to freedom of the press. Rather the contention is understood here as being that the instant search warrants, their content, their basis and manner of procurement, and their intent (to identify a tipster who was also a confidential source), triggered the constitutional right to freedom of the press, and that the issue of the warrants in this case fell afoul of the content of that right.

Summary

(95) As would be demonstrated by the subsequent analysis of the relevant authorities, the subject search warrants fell afoul of several requirements that informed the content of the right to freedom of the press in this jurisdiction. These included the following:

- a] Excessive width of the warrants and lack of specificity of items to be seized;
- b] The intent to obtain the identity of the source of tipping off, who in this case was the same as the source of the newspaper article, despite a presumption that that source was confidential. An additional reason for the presumption of confidentiality would be that given the search warrants were obtained ex parte, there was no opportunity to assert confidentiality before the warrants were executed and the identity of the source potentially uncovered. At that stage, asserting confidentiality would have been futile after the damage had been done.
- c] No consideration of the fact that the width of the search warrants:
 - i] Permitted access to information of other parties who were not the subject of the search warrant, and

- ii] Permitted the shutting down of the server, which contained information not only of the newspaper concerned but the entire media group of which it was a part and which on their face bore no relation to the reporter who authorised the articles.

The execution of any such warrants was therefore unconstitutional.

Law - Authorities

Zurcher v. Stanford Daily

(96) The starting point in considering the validity of search warrants in relation to the media is the case of **Zurcher v. Stanford Daily**, 436 U.S. 547(1978) . This case was cited and relied upon in the judgment of L'Heureux-Dubé in the Canadian Supreme Court decision of **Lessard** (and Cory J in the case of **New Brunswick** (infra)) which the appellant urged the court to follow.

(97) It is therefore necessary to examine whether that case and its analysis provide any secure basis for an argument that the constitutional right to freedom of the press was not infringed in this case. In fact, such an analysis provides support for the view that **there are existing safeguards** that apply in the case of **search warrants** generally and **to the media** in particular.

(98) At paragraph 93 of the appellant's submissions it quoted passages from **Lessard** from the judgment of L'Heureux-Dubé who cited and relied upon the judgment of the majority in the case of **Zurcher**⁹ as follows:

93. In Lessard, at p. 436 the court noted:

The respondent invokes the fear of a "chilling effect". In Zurcher v. Stanford Daily, 436 U.S. 547(1978), a case involving a similar question, the United States Supreme Court had the following response when seized with this argument:

The general submission is that searches of newspaper offices for evidence of crime reasonably believed to be on the premises will seriously threaten the ability of the press to gather, analyze, and disseminate news. [p. 563]

⁹ Cory J in **New Brunswick** also cited **Zurcher**

...

Properly administered, the preconditions for a warrant -- probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness -- should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices. [p. 565]

Nor are we convinced, any more than we were in *Branzburg v. Hayes*, 408 U.S. 665 (1972), that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. [p. 566]

The fact is that respondents and amici have pointed to only a very few instances in the entire United States since 1971 involving the issuance of warrants for searching newspaper premises. This reality hardly suggests abuse; and if abuse occurs, there will be time enough to deal with it. Furthermore, the press is not only an important, critical, and valuable asset to society, but it is not easily intimidated -- nor should it be. [p. 566]

...

And surely a warrant to search newspaper premises for criminal evidence such as the one issued here for news photographs taken in a public place carries no realistic threat of prior restraint or of any direct restraint whatsoever on the publication of the Daily or on its communication of ideas. The hazards of such warrants can be avoided by a neutral magistrate carrying out his responsibilities under the Fourth Amendment, for he has ample tools at his disposal to confine warrants to search within reasonable limits. [p. 567] [Emphasis added.]

*For the same reasons, I would dismiss the argument of the respondent. (The underlining above appears in the actual judgment in *Lessard*)*

(99) In fact the court in **Zurcher** in a passage omitted by L'Heureaux-Dubé had additionally stated at 565:

"There is no reason to believe for example that Magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with

*the timely publication of a newspaper. Nor if the requirements of **specificity** and **reasonableness** are **properly applied, policed and observed** will there be any occasion or opportunity for officers to rummage at large in newspaper files or to intrude into or to deter normal editorial and publication decisions. The warrant issued in this case authorised nothing of this sort”.*

(100) The obtaining of such a warrant has to be based upon evidence which is by affidavit.

The role of the Judicial Officer has to be far more than a rubber stamp. As noted in **Zurcher** the Judicial Officer, Justice of the Peace or Magistrate:-

- i] Is expected to be in a position to guard against searches of the type, scope and intrusiveness that would actually interfere with the timely publication of a newspaper;
- ii] would be in a position to police, observe and apply the requirement of specificity and reasonableness in relation to the warrants applied for, and therefore would be in a position to reduce the *“opportunity for officers to rummage at large in newspaper files or to intrude into or to deter normal editorial or publication decisions”*.

(101) Because of the role of the independent judicial officer the majority in **Zurcher** did not accept the need in that case for constitutional protection of the freedom of the press. It assumed that the preconditions for a warrant, properly administered by that officer should afford sufficient protection in cases involving the issuance of warrants for searching newspaper premises. It dismissed assertions based upon the potential for abuse or intimidation of the press by blithely asserting that the press is not easily intimidated, nor should it be. It also took into account that the warrant in that case was not in excessively wide terms.

(102) However the more cogent reasoning of the minority, unlike that of the majority, recognised inter alia that a] search warrants against the media should attract constitutional protection, b] the apprehension that unrestricted search warrants against the media could lead to drying up of sources was real and could not be lightly dismissed. **Zurcher** was not a case where the search warrant specifically involved the

risk of revealing a confidential source. Rather it related to information which had already been published.

(103) The reasoning of the majority in **Zurcher** emphasized that the dangers of search warrants to be executed against the offices of a newspaper would be averted simply by an application of the existing mechanism, safeguards, and requirements for the execution of search warrants generally.

(104) The safeguards recognised in **Zurcher** are safeguards that are potentially equally applicable in this jurisdiction based upon the requirements for a search warrant either under the Summary Courts Act, or the Indictable Offences Preliminary Enquiry Act. Just as in the US there is the interposition of a neutral Judicial Officer from whom permission has to be obtained before a search warrant can be issued. Under the Summary Courts Act, and in the instant case, the warrants were obtained before a JP who is not required to have legal training.

The Content of the Right to Freedom of the Press

(105) The emphasized sections of **Zurcher** recognized both the power to issue a search warrant, and the constitutional right under the First Amendment to the US Constitution to freedom of expression. The majority did not consider that it was necessary to recognize the applicability of a separate and independent right to freedom of the press and did not base its reasoning on that right.

(106) Provided that freedom of the press is recognized as a separate constitutional right independent from freedom of expression, (or from the right to privacy as in Canada), at a minimum the content of that right must include the usual safeguards which the majority considered are particularly appropriate and applicable to search warrants for newspaper offices. These are i] **probable cause**, ii] **specificity with respect to the place to be searched and the things to be seized**, and iii] **overall reasonableness**. In fact, the minority in **Zurcher** accepted that freedom of the press was an independent and distinct constitutional right and its reasoning is considered hereunder.

The Constitutional Dimension

(107) In **Zurcher** the court in its majority judgment (at page 564) stated as follows: “the district court held, and the respondents assert here, that whatever may be true of third-party searches generally, where the third party is a newspaper, there are **additional factors derived from the First Amendment** that justify a nearly **per se rule forbidding** the search warrant and permitting only the subpoena duces tecum”. (per Mr. Justice White) However, that is not the argument in the instant case.

(108) He continued: “The general submission is that searches of newspaper offices for evidence of crime reasonably believed to be on the premises will seriously threaten the ability of the press to **gather, analyse, and disseminate news**. This is said to be true for several reasons: **First, searches will be physically disruptive** to such an extent that timely **publication** would be **impeded**. **Second, confidential sources of information will dry up**, and the press will also lose opportunities to cover various events because of fears of the participants that press files would readily be available to the authorities. **Third, reporters will be deterred from recording and preserving their recollections for future use if such information is subject to seizure**. **Fourth, the processing of news and its dissemination will be chilled** by the prospects that searches will disclose internal **editorial deliberations**. **Fifth, the press will resort to self-censorship to conceal its possession** of information of potential interest to the police.”

(109) No one has contended that the right to freedom of the press requires an almost absolute rule forbidding searches of the media. Rather the contention is understood here as being that the instant search warrants, their content and width in terms of the places to be searched and items to be seized, manner of procurement and their purpose (to identify a tipster who also happened to be a confidential source), triggered the constitutional right to freedom of the press, and that the issue of the warrants in this case fell afoul of that right.

(110) It was these arguments which were rejected by the court as giving rise to the need for constitutional protection on the basis of its assumption that Magistrates could guard against the types, scope and intrusiveness which actually interfere with the timely publication of the newspaper. Its rejection of those arguments was based upon its

assumption that those fears could be negated if the requirements of **specificity** and **reasonableness** were properly applied, policed and observed.

(111) The court relied very heavily, perhaps too heavily, on its assumption that a neutral Magistrate carrying out his responsibilities under the fourth amendment had ample tools at his disposal to confine warrants to search within reasonable limits.

(112) It also was influenced by the fact that the respondents had pointed to only a few instances in the entire United States since 1971 involving the issuance of warrants for searching newspaper premises. The majority therefore held that there the reality did not suggest abuse.

(113) The argument accepted by the majority in **Zurcher** in favour of adopting a wait and see attitude to see if it becomes a pattern is illogical, un-compelling and inappropriate, especially in a jurisdiction like this one, which has a specific and express constitutional right to freedom of the press. That reasoning was rejected by the minority who recognised the dangers of that approach.

(114) In this jurisdiction, there is a specific separate constitutional right to freedom of the press. It is a right that is not found in the majority of written constitutions in the Caribbean. It is therefore a right which cannot be assumed to be devoid of any content separate from the right to freedom of expression. It would be illogical if its content were no different from that right or the right to privacy, as was in fact recognised in the minority decisions of **Zurcher**, **Lessard** and **Vice Media** infra.

Importance of the role of the Media and its Sources

(115) As noted above, in **Zurcher** (cited in **Lessard**) the Supreme Court acknowledged the role of the press as follows: *“Furthermore, the press is not only an important, critical, and valuable asset to society, but it is not easily intimidated – nor should it be”*. However, it is difficult to follow this reasoning. If it is acknowledged that the press is an

important, critical and valuable asset then it should equally be recognised that it is an asset whose function requires protection, including constitutional protection, where a Constitution expressly provides for this. It is not sufficient to simply make the unsupported generalization that it is “not easily intimidated nor should it be”. Such a statement as “the press is not easily intimidated” is almost devoid of meaning. It was a generalisation that is devoid of any basis and fails to take into account the multiple ways in which the press can be intimidated via an abuse of the power to execute search warrants at their premises.

(116) The conclusion of the Supreme Court, which is not found in the extract cited in **Lessard**¹⁰, is as follows: *“Of course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish non-constitutional protections against possible abuses of the search warrant procedure, but **we decline to reinterpret the Amendment to impose a general constitutional barrier against warrants to search newspaper premises, to require resort to subpoenas as a general rule, or to demand prior notice and hearing in connection with the issuance of search warrants**”.*

(117) Also relevant is that in **Zurcher** the warrant to search the newspaper premises was for criminal evidence in relation to an attack upon the police which had been photographed and which photographs had been published in the newspaper. That was the basis for the court’s statement, line 25 that *“and surely a warrant to search newspaper premises for criminal evidence such as the one issued here for news photographs taken in a public place carries no realistic threat of prior restraint or any direct restraint whatsoever on the publication of the Daily’s or on its communication of ideas”.*

(118) **Zurcher** therefore provides an indication of existing and recognised non-constitutional protections that apply in relation to obtaining a search warrant based on existing requirements. The existence of these therefore did not require further enhancement by a general constitutional barrier based upon freedom of the press (which in any event is not sought in the instant case).

¹⁰ At page 567 line 38

(119) While that reasoning may be applicable in the United States, (although legislation was subsequently passed in the form of the Privacy Protection Act to provide the protection denied by the majority), there is no reason why it should be applicable in this jurisdiction because:

- a] There is an express constitutional protection requiring the right to freedom of the press to be recognised;
- b] Constitutional protection does not need to await a pattern of abuse before the courts will provide content to it, more so when that content has already been recognised in the various decisions discussed hereunder; and,
- c] No one has asserted ***a general constitutional barrier against warrants to search newspaper premises.***

(120) The concurring judgment of Mr. Justice Powell at page from lines 24 to 36 recognises the fact that different considerations apply to searches of the media as follows:

“This is not to say that a warrant which would be sufficient to support the search of an apartment or an automobile necessarily would be reasonable in supporting the search of a newspaper office”

*“As the Court’s opinion makes clear, ante, at 564-565, the magistrate must judge the **reasonableness** of every warrant in light of the circumstances of the particular case, **carefully considering the description of the evidence sought, the situation of the premises, and the position and interests of the owner or occupant.** While there is no justification for the establishment of a separate Fourth Amendment procedure for the press, a magistrate asked to issue a warrant for the search of press offices **can and should take cognizance of the independent values protected by the First Amendment** – such as those highlighted by MR. JUSTICE STEWART – when he weighs such factors. **If the reasonableness and particularity requirements are thus applied,** the dangers are likely to be minimal. In any event, considerations such as these are the province of the Fourth Amendment. There is*

no authority either in history or in the Constitution itself for exempting certain classes of persons or entities from its reach". (Mr. Justice Powell)

(121) It is significant that the legality challenge to the search warrant was primarily on the Fourth Amendment to the US Constitution (protection against unreasonable search and seizure)¹¹, although it is recognised that the magistrate should take cognisance of the values protected by the First Amendment.

(122) Accordingly, nothing in **Zurcher** derogates from the content of the right to freedom of the press. In fact, it supports such content as already existing, although not on the basis of an independent constitutional right to freedom of the press, but in a statutory and constitutional context which parallels that in this jurisdiction. It also recognises that it is a relevant factor that a search warrant is being sought to be executed in relation to the offices of a newspaper.

Reasoning of the Minority in Zurcher

(123) The dissenting opinion of Justices Stewart and Marshall is far more convincing. Its reasoning is worth setting out extensively because it accords with logic, common sense and experience in this jurisdiction.

*Believing that the search by the police of the offices of the Stanford Daily **infringed the First and Fourteenth Amendments' guarantee of a free press**, I respectfully dissent.*

*It seems to me **self-evident** that police searches of newspaper offices burden the freedom of the press. **The most immediate and obvious First Amendment injury** caused by such a visitation by the police is **physical disruption of the operation of the newspaper**. Policemen occupying a newsroom and searching it thoroughly for what may be an extended period of time **will inevitably interrupt** its normal operations, and thus **impair** or even **temporarily prevent the processes of***

¹¹ See page 547 line 19 to 23

newsgathering, writing, editing, and publishing. By contrast, a subpoena would afford the newspaper itself an opportunity to locate whatever material might be requested and produce it.

But there is another and more serious burden on a free press imposed by an unannounced police search of a newspaper office: the possibility of disclosure of information received from confidential sources, or of the identity of the sources themselves. Protection of those sources is necessary to ensure that the press can fulfill its constitutionally designated function of informing the public, because important information can often be obtained only by an assurance that the source will not be revealed. Branzburg v. Hayes, 408 U.S. 665, 725-736 (dissenting opinion). And the Court has recognized that *“without some protection for seeking out the news, freedom of the press could be eviscerated.”* Pell v. Procunier, 417 U.S. 817, 833.

Today the Court does not question the existence of this constitutional protection, but says only that it is not “convinced. . . that confidential sources will disappear and that the press will suppress news because of fears of warranted searches.” This facile conclusion seems to me to ignore common experience. It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows that, despite the journalist’s assurance, his identity may in fact be disclosed. And it cannot be denied that confidential information may be exposed to the eyes of police officers who execute a search warrant by rummaging through the files, cabinets, desks, and wastebaskets of a newsroom. Since the indisputable effect of such searches will thus be to prevent a newsman from being able to promise confidentiality to his potential sources, it seems obvious to me that a journalist’s access to information, and thus the public’s, will thereby be impaired.

A search warrant allows police officers to ransack the files of a newspaper, reading each and every document until they have found the one named in the

warrant, while a subpoena would permit the newspaper itself to produce only the specific documents requested. A search, unlike a subpoena, will therefore lead to the needless exposure of confidential information completely unrelated to the purpose of the investigation. **The knowledge that police officers can make an unannounced raid on a newsroom is thus bound to have a deterrent effect on the availability of confidential news sources. The end result, wholly inimical to the First Amendment, will be a diminishing flow of potentially important information to the public.**

One need not rely on mere intuition to reach this conclusion. The record in this case includes affidavits not only from members of the staff of the Stanford Daily but also from many professional journalists and editors, attesting to precisely such personal experience. Despite the Court's rejection of this uncontroverted evidence, I believe it clearly establishes that **unannounced police searches of newspaper offices will significantly burden the constitutionally protected function of the press to gather news and report it to the public.** (All emphasis added)

(124) The court also addressed the circumstances in which the litigation arose from line 20 of page 224 as follows:

It is well to recall the actual circumstances of this litigation. The application for a warrant showed only that there was reason to believe that photographic evidence of assaults on the police would be found in the offices of the Stanford Daily. There was no emergency need to protect life or property by an immediate search. **The evidence sought was not contraband, but material obtained by the Daily in the normal exercise of its journalistic function. Neither the Daily nor any member of its staff was suspected of criminal activity.**

At line 35

...But they held, and I agree, that a warrant should issue only after the magistrate has performed the careful "balanc[ing] of these vital constitutional and societal interests." Branzburg v. Hayes, supra, at 710 (POWELL, J., concurring).

The decisions of this Court establish that a prior adversary judicial hearing is generally required to assess in advance any threatened invasion of First Amendment liberty.~ A search by police officers affords no timely opportunity for such a hearing, since a search warrant is ordinarily issued ex parte upon the affidavit of a policeman or prosecutor. There is no opportunity to challenge the necessity for the search until after it has occurred and the constitutional protection of the newspaper has been irretrievably invaded.

III

*Perhaps as a matter of abstract policy a newspaper office should receive no more protection from unannounced police searches than, say, the office of a doctor or the office of a bank. **But we are here to uphold a Constitution.** And our Constitution does not explicitly protect the practice of medicine or the business of banking from all abridgment by government. **It does explicitly protect the freedom of the press.***

(125) The decision of the majority supports the content and protections of the press in relation to search warrants, while denying those protections constitutional status as part of that right. In doing so, it responded inter alia to an argument of general constitutional immunity, which has never been asserted by the respondent here. The arguments of the minority demonstrate a far more reasoned, practical and realistic recognition and assessment of the necessity for those protections especially those that relate to protection of confidential sources, and further recognise in particular that these require constitutional protection. This was especially so where the US constitution as here, expressly and specifically recognises the right to freedom of the press.

Caribbean Broadcasting Corporation v Lessard

(126) The case of **Caribbean Broadcasting Corporation v Lessard** (1991) 3 SCR 421 a decision of the Supreme Court of Canada was cited by both parties. The fundamental rights

provisions in the Constitution of Trinidad and Tobago were modelled on the Canadian Bill of Rights 1960¹², which includes freedom of the press. In that case a camera crew from CBC had filmed a group of people occupying and damaging a post office building. Portions of the video tape had been broadcast twice. A search warrant was obtained the following day. The information sought and the basis for requesting it were described as follows: “**video tape** on which persons were filmed while causing damage to the interior of the post office at (address)”.

(127) The parties agreed that there was nothing in the information which would permit the Justice of the Peace to determine if there were **an alternative source** of information and, if there were such a source, that reasonable steps had been taken to get the information from that source. A warrant had been granted to enter, search and seize the video tapes.

(128) Significant points of distinction in that case were:

- a] The search warrant was not in the extremely wide terms of the instant search warrant;
- b] The materials sought had already been broadcast;
- c] The information sought did not relate to a source.

(129) The majority judgment was delivered by Cory J as indicated previously. A separate judgment was delivered by L’Heureux-Dubé . McLachlin J (as she then was), delivered a dissenting judgment.

(130) The written submissions of the appellant cited the decision of L’Heureux-Dubé who quoted and applied the majority decision in **Zurcher** referred to previously. He stated at page 435

*“I wish to make clear at the outset that my reasons address **only the specific facts of this case** since other sets of circumstances may warrant different considerations”.* He also was of the view that (page 436) *“the freedom of the press*

¹² See Suraj v AG [2022] UKPC 26 paragraphs 14 and 15

is not an issue here and the more so here since the material sought had already been broadcast on two occasions before the search warrant was issued”.

(131) The more nuanced view of the majority was found in the decision of Cory J. Because of the continued relevance of that judgment to date and its consideration of the specific situation of search warrants upon the media as well as the possible constitutional dimension of these in relation to freedom of the press, it is essential to fully consider the reasoning of the Supreme Court in Lessard.

Decision of Cory J

(132) Much argument was devoted to CBC’s contention that where police seek a warrant to seize items from a press organisation which is not implicated in the crime under investigation, the police must demonstrate that either no alternative source of the information exists or that the police had attempted and failed to elicit the information from those sources.

(133) Cory J¹³ set out the relevant legislation relating to the procedure for obtaining a search warrant, which as in this jurisdiction requires the interposition of the discretion of an independent judicial officer. He further identified the Constitutional context in which search warrants for the media could be located. The Canadian Charter of Rights and Freedoms provides the following at section 2: “*everyone has the following fundamental freedoms: ...b) Freedom of thought, belief, opinion and **expression**, including **freedom of the press** and other media of communication.* However, section 8 provides that “*everyone has the right to be secure against unreasonable search or seizure*”.

(134) Cory J held that because of the intrusive and disruptive nature of a search “*...a Justice of the Peace considering a search warrant application must undertake a careful weighing of the **privacy** interests of individuals in a democratic society against the interests of the state in investigating and prosecuting crimes*”¹⁴.

¹³ At page 443

¹⁴ Page 444

He continued, “the weighing and balancing which must be undertaken will vary with the facts presented on each application. Certainly, in every case the requirements of section 487 of the Code must be met. However, this is not the end of the matter. Even after the **statutory conditions have been met** it may still be **a difficult and complex process** to determine whether a search warrant should be issued.

For example, a greater degree of privacy may be expected in a home than in commercial premises which may be subject to statutory regulation and inspection. At the same time, among commercial premises, **the media are** entitled to particularly careful consideration, both as to the **issuance** of a search warrant and as to **the conditions** that may be attached to a warrant **to ensure that any disruption of the gathering and dissemination of news is limited as much as possible. The media are entitled to this special consideration because of the importance of their role in the democratic society”.**

(135) Cory J for the majority¹⁵, listed several circumstances that had to be considered in determining whether or not a Justice of the Peace should exercise his discretion to issue a warrant¹⁶. They included the following.

- 1) *It is essential that all the requirements set out in s. 487(1)(b) of the Criminal Code for the issuance of a search warrant be met.*
- 2) *Once the statutory conditions have been met, the justice of the peace should consider **all of the circumstances** in determining whether to exercise his or her **discretion** to issue a warrant.*
- 3) ***The Justice of the Peace should ensure that a balance** is struck between the **competing interests** of the state in the investigation and prosecution of crimes and **the right to privacy of the media** in the course of their news gathering and news dissemination. It must be borne in mind that the **media play a vital role in the functioning of a democratic society**. Generally speaking, the news media would not be implicated in the crime under investigation. They are truly an*

¹⁵ Set out from page 445

¹⁶ He also set out these factors in the companion case *CBC v New Brunswick*

innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the **consideration of imposing conditions on that warrant.**

- 4) The affidavit in support of the application must contain **sufficient detail** to enable the justice of the peace to properly exercise his or her **discretion** as to the issuance of a search warrant.
- 5) Although it is not a constitutional requirement, the affidavit material should ordinarily **disclose** whether there are **alternative sources** from which the information may be reasonably obtained and, if there is an alternative source, that it has been investigated and all the reasonable efforts to obtain the information have been exhausted¹⁷.
- 6) **If the information sought has been disseminated** by the media in whole or in part, this will be a factor which will favour the issuing of the search warrant
- 7) If the justice of the peace determines that a warrant should be issued for the search of media premises, consideration should then be given to the imposition of some **conditions** on its implementation, so that the media organisation would not be unduly impeded in the publishing or dissemination of the news.
- 8) If subsequent to the issuing of a search warrant, it comes to light the authorities **failed to disclose** pertinent information that could well have affected the decision to issue the warrant, this may result in a finding that the warrant was invalid.
- 9) Similarly, if the search itself is **unreasonably** conducted, this may render the search invalid¹⁸.

¹⁷ The resolution of the difference of opinion on this point between the majority and L'Heureux-Dubé J as to whether or not alternative sources should be exhausted is not necessary for the determination of the instant case, and therefore no concluded view on that issue is necessary here.

¹⁸ (In the instant case, it is not a major contention that the conduct of the search was such as to render the search invalid. The conduct of the search in this case does not require any further exploration as to its impact upon its constitutionality.)

(136) Cory J concluded that *“In this case the **crucial factor** is that, prior to the application for the warrant, the media had broadcast portions of the video tape depicting the commission of a crime on two occasions, both in French and English¹⁹.”*

(137) He distinguished that case from the case of Pacific Press where the search interfered with the operations of the media and delayed the publication of the newspaper. That was not the situation in the case of **Lessard**. However, by his reference to it he suggested that interference with operations of the media would be a consideration to be taken into account.

(138) He concluded that it was appropriate for the Justice of the Peace to have issued a search warrant in that case, and a significant factor in its conclusion was that the media had published the gathered information which was then in the public domain. He stated that: *“The **publication of that information is a very important factor for the justice of the peace to consider**. This is something that favours the issuing of a search warrant. When a crime has been committed and evidence of that crime has been published, society has every right to expect that it will be investigated and, if appropriate, prosecuted”²⁰*. The weight to be accorded to prior publication was later modified by the Supreme Court in **Vice Media**.

(139) He reasoned that the failure to set out the lack of alternative sources was simply another factor to be taken into account in assessing the reasonableness of the search: *“There was no interference with the operation of the news media, nor was the freedom of the press threatened. The media had already completed their basic function of news gathering and news dissemination; thus, in my view the seizure of the tapes at this stage could not be said to have a chilling effect on the media’s sources of news”²¹*.

(140) The majority did not see the need therefore to invoke the constitutional right to freedom of the press, basing their decision on the right to privacy enjoyed by the media.

¹⁹ At page 446

²⁰ At page 447

²¹ At page 447

Their reasoning is nevertheless quite relevant and applicable to search warrants involving the media in this jurisdiction, as it demonstrates that even without so doing the instant warrants were challengeable on the bases recognised in **Zurcher**, and by the majority in **Lessard**.

(141) The case of **Lessard** is therefore quite distinguishable from the instant situation where unlike in **Lessard**:

- a] The materials sought, that is the identity of the source, had not been published;
- b] The identity of the source, not having been published, and not having been voluntarily disclosed, was presumptively confidential;
- c] The terms of the warrant were excessively wide and extended far beyond material that would reasonably be sought and examined in relation to determining the identity of the source.

(142) The chilling effect on the media sources of news, so lightly disregarded by L'Heureux-Dubé applying **Zurcher** in the case of **Lessard** (and in fact the majority in **Zurcher**, **Lessard** and **New Brunswick**), on the basis that the information had already been published, could not be so easily disregarded in the instant case, or in this jurisdiction. That is because it would be naïve to suggest that a confidential source subject to criminal prosecution (and if a police officer, possibly disciplinary proceedings), whose identity could be at risk of disclosure on the basis of a search warrant, would not dry up as a source.

(143) It would similarly be naïve to ignore the real possibility that other confidential sources, noting that their identities could be revealed on the basis of a too easily obtainable search warrant, would be far more hesitant about revealing information to the media. If media sources dry up this would directly affect the role and function of the media in publishing and disseminating news. This will include a restriction, inter alia, upon the media's ability to pursue investigative journalism, uncover abuse of power, corruption and inefficiency, potentially providing an independent view, and a check on all branches of the Government.

(144) A fundamental difficulty with the nine considerations identified by Cory J is that their application would be ineffective and impractical in preventing the very matters that he had identified as requiring protection and consideration. It is unrealistic to suggest that a justice of the peace, who is not required to be legally trained in this jurisdiction, or even a magistrate who is, can on an ex parte application made to them by the police, perform the polycentric, difficult and complex balancing exercise identified by him. Even if the right to freedom of the press is not a separate constitutional right, the damage to the press and its impact upon its ability to publish and disseminate news, and protect its confidential sources, would already have occurred before any opportunity arose to challenge the validity of the warrant. All the more so if freedom of the press is a separate and distinct constitutional right, then nothing stated by Cory J could prevent its infringement by the ex parte issue of a search warrant on the media.

Reasoning of McLachlin J

(145) The minority judgment of McLachlin J (who subsequently became CJ), is far more realistic in recognising the importance of the role of the press, the significance of that role in relation to the public, and the fact that the recognition of that role pre dated the Canadian Charter of Rights and Freedoms. She recognised the ways in which a police search on offices of the media can fundamentally affect that role, and therefore the very strong arguments in favour of recognising and giving effect to the express constitutional right to freedom of the press as a separate independent right with its own content. (The decision of the majority had considered that this right was just an aspect of the general right to privacy or freedom of expression). McLachlin J concluded that search and seizure by the police in that case did infringe the right to freedom of the press and the media guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms. Her reasoning, because it comprehensively addressed these matters, also deserves to be set out extensively.

(146) She endorsed the view of Lamer J in a previous decision of the court in *Descoteaux v Mierzwinski* (1982) 1 SCR 860 at pages 889- 890 who had stated that a justice had the

right to refuse to issue a warrant in special circumstances such as “*where the search would interfere with **rights** as fundamental as freedom of the press*”.

(147) She considered the argument that searches and seizures on press premises can be permitted only in special circumstances where it is established that the state’s interest in the administration of justice outweighs the interest in freedom of the press.²² She also considered section 2(b) of the Canadian Constitution as follows:

“By specifically referring to freedom of the press, section 2(b) (of the Canadian Constitution) affirms the special position of the press and other media in our society. It affirms that the press and the media have the constitutional right to pursue their legitimate functions in our society.

*Freedom of the press under the Charter must be **interpreted in a generous and liberal fashion** having regard to the **history** of the guarantee and focusing on the **purpose** of the guarantee”. She noted that: “**long before the enactment of the Charter**, the courts recognised the special place of the press in a free and democratic society”.*

(148) Although this was a dissenting opinion, her general observations about the role of the press remain apt. She stated²³:

*“I pass from the history of freedom of expression in Canada to the purpose of the guarantee. The values underlying the freedom of the press, like freedom of expression, include the pursuit of truth. The press furthers that pursuit by reporting on facts and opinions and offering its comment on events and ideas – activities **vital to the functioning of our democracy which is premised on the free reporting and interchange of ideas**”.*

*The press acts as the **agent of the public** in monitoring and reporting on governmental, legal and social institutions...Freedom of the press is also important*

²² See page 449.

²³ At page 451

to participation in the community and individual self-fulfilment... We thus see that the values identified in *Irwin Toy Limited v Quebec* [1989] 1 SCR of 927, as central to free expression and also underlie the guarantee of freedom of the press and media. As to the means by which these purposes are to be achieved, it may be ventured that **an effective and free press is dependent on its ability to gather, analyse, and disseminate information, independent** from any state imposed restrictions on content, form or perspective except those justified under Section 1 of the Charter”.

(149) Unlike the majority, she recognised where the dangers of a police search lay, and the threats that they could potentially pose to press freedom as follows:

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

*Finally, the press may resort to self-censorship to conceal the fact that it possesses information that may be of interest to the police in an effort **to protect its sources and its ability to gather news in the future**. All this may adversely impact on the role of the media in furthering the search for truth, community participation and self-fulfilment”²⁴.*

²⁴ At page 452.

(150) She expressed her disagreement with the majority's view that the fact that publication of a portion of the material seized may have been published negated the chilling effect that seizure might have on informants and the press itself. She contended:

*"The fact that a portion of the material has been published does not negate the fact that **other portions** adversely affecting the privacy of press informants **may be disclosed** as a consequence of the search. But more fundamentally, is **the prospect of seizure of press material in future cases without the imposition of conditions to protect press freedom and the identity of informants** which creates **the chilling effect**. The fact that some of the material may have been published in no way diminishes such fears"*²⁵.

(151) McLachlin J²⁶ endorsed the view of Lord Denning in the case of **Senior v Holdsworth, ex parte Independent Television News limited [1976] 1 Q.B 23 CA** at page 34 that *"there is the special position of the journalist or reporter who gathers **news of public concern**. The courts respect his work and will not hamper it more than is necessary. They will seek to achieve a balance between these two matters. On the one hand there is the public interest which demands that the course of justice should not be impeded by the withholding of evidence...**On the other hand there is the public interest in seeing that confidences are respected** and that newsmen are not hampered by **fear of being compelled to disclose** all the information which comes their way...*

(152) McLachlin J concluded:

"In my opinion the issuance of a warrant for search and for seizure of press information may be justified provided that the following conditions are met:

- i] The search/seizure is necessary because there are no alternative sources for the information required;*
- ii] The importance of the search/seizure outweighs the damage to be caused by the infringement of freedom of the press; and*
- iii] The warrant ensures that the search/seizure interferes with the press's freedom as little as possible.*

²⁵ At page 453

²⁶ At page 455

(153) Once freedom of the press is recognised as a separate independent constitutional right, the second and third requirements identified above would be relevant to the constitutionality of any search warrant in relation to the media in this jurisdiction also. Their application would be context and fact dependent. As to the first matter, it is not necessary to consider its application for the purposes of this judgment although it may arise for consideration and determination in the future.

(154) It is significant however that McLachlin J considered that among the questions that the Justice approached for the issue of a search warrant could properly ask, in weighing the seriousness of the invasion of press freedom against the importance of the suspected evidence and the investigation, would be “***what is the likelihood of revealing the identity of informants in a way that may inhibit future communications with the press***”²⁷.

(155) She also suggested, “*matters such as timing, **specificity** of the items to be seized, and **conditions protecting the identity of informants** may fall to be considered, as may the **manner** in which the warrant is to be **executed**”*. She clearly recognised therefore that the role of the independent Judicial Officer from whom a search warrant was sought was not to merely rubber stamp the application. Rather he was required in a case involving the media to consider how a warrant in the terms sought could affect the constitutional right to freedom of the press, and specifically its operations, and the identity of informants.

(156) She concluded that: “*In summary, **the Justice of the Peace to whom an application for a warrant against the press is made possesses jurisdiction to refuse the warrant or impose conditions on its execution, so as to ensure that the limit on press freedom it represents is justified under Section 1 of the Charter. This is essential to ensure that the action of the police in searching for and seizing press materials does not violate the Charter***”²⁸.

²⁷ At page 456

²⁸ Page 457

(157) McLachlin J's analysis of the ways in which police search and seizure may impinge on the values underlying freedom of the press are far more relevant and insightful than the comments in the majority in **Zurcher**, or even the majority in **Lessard**. McLachlan J fully appreciated the impact of police search and seizure upon freedom of the press generally and upon confidential sources in particular.

(158) The majority in **Lessard** did not consider that freedom of the press was under threat in that case. They may well have been correct given the prior publication of the information and the limited nature of the search warrant in that case. However, McLachlin J's comments are particularly apt in the instant case which deals with the attempt under an excessively wide warrant to obtain **the identity of a source** of a news article which was **information which had not been published**.

(159) It was against the standards recognized in **Zurcher** and **Lessard** that the challenged search warrants needed to be assessed. In fact, they fell short because they were not specific with respect to the things to be seized. They were wide-ranging and scattershot in approach to the point where executing the second warrant would have required a shutdown of the server for the entire OCM group. They permitted a search for a source which was presumptively confidential, a matter which could arguably have been discerned from the warrant itself, and in the process for far more than that confidential source. Their excessive width was incompatible with any consideration having been given to the impact of the warrants sought upon publication and upon presumptively confidential sources.

(160) In this jurisdiction, the impact of a contingent of six police officers armed with warrants that they considered authorized them to shut down the server of a major media group is not the norm. It would have had a chilling effect not only on the media house concerned but also on all investigative journalists with confidential sources of information whether so claimed or not. They could not therefore be said to have complied with overall reasonableness in those circumstances.

(161) In the case of **CBC v New Brunswick [1991] 3 S.C.R 459**, (delivered at the same time as Lessard), the majority of the Supreme Court considered that freedom of expression, protected by section 2(b) of the Charter, did not import any new or additional requirements for the issuance of search warrants. It provided a **backdrop** against which the reasonableness of the search may be evaluated and required careful consideration to be given not only to whether a warrant should issue but also to the **conditions** which might properly be imposed upon any search warrant of media premises²⁹.

(162) In **CBC v New Brunswick** it was stated³⁰ that less can be said for refusing to make that material available to the police where the media have fulfilled their role by gathering the news and publishing it. Arguments based on the “drying up” of the media’s sources of information and on the “chilling effect” on their sources become more difficult to sustain **after** the information has been released to the public. ***“Should it be necessary, appropriate steps might be taken by the media to have the court determine what protection could properly be obtained”.***

(163) It considered however, that **section 8** of the Charter protects the overall reasonableness of a search³¹. Even without considering the specific content of the right to freedom of the press, it determined that ***“Certainly the potentially damaging effect of a search and seizure upon the freedom and the functioning of the press is highly relevant to the assessment of the reasonableness of the search”***³².

(164) It is also significant that the majority recognised that conditions could be imposed upon the execution of a search warrant. There is no reason in principle therefore why the jurisdiction to impose conditions upon the issue of a search warrant should not be recognised as an aspect of any constitutional right to freedom of the press. (The reasons why in this jurisdiction freedom of the press must be recognised as a distinct constitutional right with its own content are addressed later in this judgment).

²⁹ Page 460

³⁰ At page 461 of the case found at 1179 of the electronic bundle.

³¹ Page 478

³² Page 478

Canadian Broadcasting Corp v New Brunswick – Detailed reasoning

(165) The case of **Canadian Broadcasting Corp v New Brunswick** involved a search warrant seeking tapes from a video-taped demonstration during which a guard house was destroyed. The search warrant was for the **purpose of seizing those tapes which had already been published**. It was not for the purpose of obtaining the identity of the source of confidential information.

(166) The identity of that source in the instant case has not already been published. Not only will a source, whose identity has been sought via a search warrant be extremely likely to dry up, but other sources for other articles would also take note of the fact that their anonymity and confidentiality may not be subject to protection if they can be the subject of a search warrant without suitable protections in place.

(167) In **New Brunswick** the court gave careful consideration to the constitutional issues that arose in relation to execution of a search warrant on the media. Its focus was on the right to freedom of expression but its reasoning was of more general application. It concluded that the test as to validity of such a search warrant depended on its overall reasonableness, a matter to be decided after a balancing exercise involving several factors. It declined to elevate those factors to constitutional status though recognising that the right to freedom of expression provided a backdrop against which reasonableness might be assessed.

(168) See page 475 of **New Brunswick** under the heading of The Constitutional Protection of Freedom of Expression³³. (Emphasis added)

*Any search of premises is certain to be disquieting and upsetting. The **invasion of privacy rights** which a search entails is an important concern for all members of a democratic society. Some searches are obviously more intrusive and upsetting than others. For example, the search of a residence is likely to have graver consequences than a search of commercial premises which may be subject to*

³³ Page 1193 of the electronic bundle.

statutory regulation and inspection. **Because of its intrusive nature, a warrant to search any premises must only be issued when a justice of the peace is satisfied that all the statutory requirements have been met.** In those situations where all the statutory prerequisites have been established, the justice of the peace should still consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant. It is not a step that can be taken lightly. This is particularly true when a warrant is sought to search the offices of a news media organization, where the consequences are likely **to be disruptive of the media's role of gathering and publishing news.**

The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and wellbeing. The special significance of the work of the media was recognized by this Court in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1339-40. The importance of that role and the manner in which it must be fulfilled give rise to special concerns when a warrant is sought to search media premises.

The constitutional protection of freedom of expression afforded by s. 2(b) of the Charter does not, however, import any new or additional requirements for the issuance of search warrants. What it does is provide a **backdrop** against which the reasonableness of the search may be evaluated. It requires that careful consideration be given not only to whether a warrant should issue **but also to the conditions which might properly be imposed upon any search of media premises.**

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, the manner in which the search is to be conducted and the degree of urgency of the search. It is of particular importance that the justice of the peace consider the effects of the search and seizure on the ability of the particular media

organization in question to fulfil its function as a news gatherer and news disseminator.

If a search will impede the media from fulfilling these functions and the impediments cannot reasonably be controlled through the imposition of conditions on the execution of the search warrant, then a warrant should only be issued where a compelling state interest is demonstrated. This might be accomplished by satisfying the two factors set out by Nemetz C.J. in Pacific Press: namely, that there is no alternative source of information available or, if there is, that reasonable steps have been taken to obtain the information from that source. Alternatively, the search might be justified on the grounds of the gravity of the offence under investigation and the urgent need to obtain the evidence expected to be revealed by the search.

The balancing of interests is always a difficult and delicate task. ...It was important that the continuing work of the media should not be unduly impeded³⁴.

The factors to be weighed with regard to issuing a warrant to search any premises will vary with the circumstances presented. This is as true of searches of media offices as of any other premises. It seems to me, however, that where the media have fulfilled their role by gathering the news and publishing it, there would seem to be less to be said for refusing to make that material available to the police.Once the media have published the information, the same principles might well apply to them.

I

The media argue that the issuance of a search warrant would have the effect of "drying up" their sources of information. In my view, that argument is seriously weakened once the media have placed the information in the public domain. ...Once the information has been made public, it becomes difficult to contend

³⁴ Page 476

there would be a "chilling effect" on the media sources if that information were also disclosed to the police. At that point, it is unlikely that the police would want more than the videotape itself. With the tape in their possession, the police would usually have no interest in identifying the media's informant whose tip led to the making of the film. Should it be necessary, appropriate steps might be taken by the media to have the court determine what protection could properly be obtained³⁵.

...The essential question can be put in this way: taking into account all the circumstances and viewing them fairly and objectively can it be said that the search was a reasonable one?

It is the overall reasonableness of a search which is protected by s. 8 of the Charter. Certainly the potentially damaging effect of a search and seizure upon the freedom and the functioning of the press is highly relevant to the assessment of the reasonableness of the search. Yet neither s. 2(b) nor s. 8 of the Charter requires that the two factors set out in Pacific Press must always be met in order for a search to be permissible and constitutionally valid. It is essential that flexibility in the balancing process be preserved so that all the factors relevant to the individual case may be taken into consideration and properly weighed. (Emphasis added)

(169) In **New Brunswick** it was held that even apart from any constitutional considerations a search warrant for the media must satisfy requirements of reasonableness in relation to inter alia the nature and scope of the objects to be seized, the manner of the search, and the degree of emergency involved. The independent judicial officer had to consider the effects of the search and seizure on the ability of the media organisation to fulfil its function as a news gatherer and news disseminator. It recognised that a balancing exercise had to be conducted taking into consideration all the factors relevant to the

³⁵ Page 477

individual case and weighing them properly, and that “*the balancing of interests is always a difficult and delicate task*”.

(170) It is unrealistic in this jurisdiction to expect such a *difficult and delicate* balancing exercise to be conducted ex parte before a justice of the peace with no legal training or even ex parte before a legally trained magistrate. Further, there is no need to ignore the fact that while the situation is undesirable, (because it will permit the issue of warrants ex parte in circumstances where the necessary balancing exercise is impractical), it is not necessary in this jurisdiction. That is because there exists an express constitutional right, which with content recognised from the case law as already existing, can address that situation, and provide for the balancing exercise to be conducted before the issue of a warrant, and before the potential damage to the press has occurred. The balancing exercise recognised as necessary by the majority in **Lessard** and **New Brunswick** would in practice be rendered otiose otherwise.

R v National Post

(171) In **R v National Post** [2010] 1 R.C.S 477 the Supreme Court of Canada considered the issue of a claim to journalist – confidential source privilege. Its analysis and reasoning is set out hereunder. The court noted:

“In Lessard and New Brunswick the court accepted that freedom to publish the news necessarily involves a freedom to gather the news. We should likewise recognise in this case the further step that an important element in the news gathering function (especially in the area of investigative journalism) is the ability of the media to make use of confidential sources. The appellants and their expert witnesses make a convincing case that unless the media can offer anonymity in situations where sources would otherwise dry up, freedom of expression in debate on matters of public interest would be badly compromised. Important stories would be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment”³⁶.

³⁶ At paragraph 33

(172) In **R v National Post** the court recognised as a general proposition that:

“The law should and does accept that in some situations the public interest in protecting the secret source from disclosure outweighs other competing public interests – including criminal investigations. In those circumstances, the courts will recognise an immunity against disclosure of sources of whom confidentiality has been promised³⁷.

(173) The court in that case declined to set aside the warrant. Neither did they accept the argument of **constitutional immunity** against compelled disclosure of secret sources. There was no need to imply a constitutional immunity³⁸.

(174) The court in **National Post** concluded: *“For the reasons already stated I would not locate journalist-source protection in section 2(b) of the Charter but in the common law privilege that is supportive of it”³⁹*. It did so after considering several possible conceptual bases for such a privilege.

(175) **National Post** therefore is relevant, inter alia, for the following propositions:

- [i] Protection of journalist/confidential sources was not a constitutional requirement based upon section 2(b) - the right to freedom of the press;
- [ii] Confidential source protection was a factor to be considered on a case by case basis which could be sufficiently important in a particular case to justify the setting aside of a warrant.

(176) The Court’s reluctance in **R v National Post** to locate journalist/source protection as an aspect of the constitutional right to freedom of the press, was revisited in the case of **Vice Media**. In that case the minority confronted the dangers of a purely theoretical and academic analysis, which made no real provision for: a] recognising that freedom of the press was a distinct and independent right, and b] that it already had content which was

³⁷ See paragraph 34 of National Post.

³⁸ See paragraphs 37 to 41

³⁹ Paragraph 68

unique to and based upon the role and function of the press and the protection of those functions.

R v Vice Media Canada Incorporated

(177) In **R v Vice Media Canada Incorporated** [2018] 3 S.C.R. 374⁴⁰ the Supreme Court of Canada undertook a review of its decisions in **Lessard, New Brunswick, and National Post**, on the framework applicable to balancing the competing concepts of the State's interest in the investigation and prosecution of crime, and the media's right to privacy in gathering and disseminating news⁴¹. It concluded that the approach in **Lessard** continued to provide a suitable model, but that its suggestion of nine relevant considerations could be reduced to four. The minority's reasoning endorsed the view that the time had come for explicit recognition of the content of section 2(b) freedom of the press, and enhancement of protections applicable to search warrants as a result.

(178) The difficulty with requiring such an assessment before the issue of a search warrant on the media under current legislation in this jurisdiction is that it can be obtained ex parte either before a non-legally trained Justice of the Peace, (as in the instant case), or a magistrate who, though legally trained would have limited exposure to constitutional issues, and in any event would have very limited ability to consider them on an ex parte application. The balancing exercise contemplated could hardly be expected on an ex parte application before either. In the instant case, the time frame in which the second warrant was obtained hardly suggests that any further meaningful balancing exercise could have occurred.

(179) The majority in that case noted that its decision on the procedures applicable to obtaining a search warrant against the media did not require a formal recognition that freedom of the press enjoys distinct and independent constitutional protection under section 2(b) of the Charter. The matter was not fully argued by the parties or considered

⁴⁰ See the electronic bundle at page 1283

⁴¹ See paragraph one judgment of Moldaver J page 387

by the courts below. Additionally, the case did not involve the Journalistic Sources Protection Act. This also impacted the reasoning of the majority and its conclusion that a narrow approach should be adopted. It is significant however that it stated:

“Given that the legal landscape in this area had changed and now had a new and untested statutory component, and bearing in mind the lack of any real merit to the argument that on the facts of this case the production order should be set aside, I am of the view that we should adopt a narrow approach that is restricted to the issues raised by the parties both here and in the court below”⁴².

(180) Even therefore, without examining the content of the specific constitutional right to freedom of the press, it nevertheless identified factors that it was necessary to take into account in Canada before the issue of a search warrant against the media. Like in **Lessard** its reasoning was based upon the Constitutional right to privacy. It declined to deviate from **Lessard** save for a reframing of the 9 **Lessard** factors identified by Cory J. reducing them to four, and the modification of the emphasis upon prior publication of the material sought in a warrant.

(181) However even if retention of the majority’s reasoning in **Lessard** emphasises that reasonableness and proportionality as to the width of the warrant sought are considerations which affect its validity in the context of the constitutional rights to freedom of expression and the right to privacy, similarly, the fact that the warrant sought seeks the identity of a source, especially one that is presumptively confidential as here, was also a factor to be taken into account. To that extent, its reasoning and conclusion are also applicable in this jurisdiction, (even though not accepting that the constitutional right to freedom of the press is not engaged). In fact, if the complete ambit of the protections by all nine factors (or the four Vice Media factors as they became) do not all apply, a matter which has never been determined in this jurisdiction and which does not fall to be determined in this appeal, then the reasoning of the minority assumes far greater significance.

⁴² Paragraph 6 page 390

(182) If the right to freedom of the press is recognised in this jurisdiction as being a distinct and independent constitutional protection, the reasoning of the slim majority in **Vice Media** would therefore still be relevant to the content of the section 4(k) right. In fact the minority judgment in that case was prepared to recognise the right to freedom of the press as distinct and independent with its own unique content and their reasoning is considered herein after.

(183) In **Vice Media** the nine **Lessard** factors were reorganised to make them easier to apply in practice. The majority concluded that on an application for a production order against the media a four-part analysis should be applied (instead of the nine-factor analysis referred to in **Lessard**) as follows⁴³:

- [i] **Notice.** First, the authorising Judge must consider whether to exercise his or her discretion to require **notice** in the media;
- [ii] **Statutory Preconditions.** Second, all statutory pre-conditions **must** be met;
- [iii] **Balancing.** Third, the authorising Judge must balance the state's interest in the investigation and prosecution of crimes and the media's right to **privacy** in gathering and disseminating news; and
- [iv] **Conditions.** Fourth, if the authorising Judge decides to exercise his or her discretion to issue the order, he or she should **consider imposing conditions** to ensure that the media would not be unduly impeded in the publishing and dissemination of the news, **Lessard**. Factor 7.

(184) The court identified the factors that could be considered at the third stage of balancing the State's interest in the investigation and prosecution of crimes and the media's right to privacy in gathering and disseminating the news. In particular the court considered that in performing the balancing exercise at the third stage of the analysis, the authorising Judge should consider all of the circumstances, including, but not limited to, a] "the likelihood and extent of any **potential chilling effects**; b] **the scope of the materials sought** and whether the order sought is narrowly tailored; c] the likely

⁴³ Page 418 paragraph 82

probative value of the materials; d] whether there are alternative sources from which the information may reasonably be obtained and if so, whether the police have made all reasonable efforts to obtain information from those sources (Lessard factor five); e] the effect of prior partial publication, now assessed on a case by case basis (Lessard factor 6); and f] **more broadly, the vital role that the media plays in the functioning of a democratic society and the fact that the media would generally be an innocent third party**, (Lessard factor 3)⁴⁴.

(185) A decision as to whether to grant the order sought is discretionary, and the relative importance of the various factors guiding that discretion would vary from case to case⁴⁵. Accepting this reasoning, therefore the existence and extent of any potential chilling effects in this jurisdiction should be assessed by a case by case basis.

(186) Also based upon this reasoning, (which does **not** require recognition of a separate and independent section 4(k) right), the authorising judicial officer can, in his discretion, require as a condition, **notice to the media**.

(187) As to any further possible conditions that such an officer in this jurisdiction may, exceptionally, consider imposing upon a search warrant, it is obvious that the content of such conditions as well as the balancing exercise contemplated under **Vice Media** would be assisted by the input of the media. In this jurisdiction the balancing exercise contemplated at item 3 could only properly be conducted if the media had an opportunity to address the potential of the search warrant sought to impact upon inter alia:

- a] Its ability to gather and disseminate news,
- b] Any potential chilling effects upon that ability, or
- c] The potential for drying up of confidential sources.

(188) A purely ex parte procedure for the issue of the search warrant deprives the independent judicial officer of any assistance or meaningful opportunity to consider the

⁴⁴ Paragraph 82

⁴⁵ Paragraph 82

factors, which impinge upon the existing rights of the press, as well as any constitutional right to freedom of the press, that may be established. A procedure which simply requires a sworn affidavit by a police officer, a judge in his own cause, with presumed full disclosure, effectively eviscerates any such rights. This would be the case even if they are solely based upon the interplay of statute, the right to privacy, and the right to freedom of expression.

(189) Such a situation may lead to irreversible damage when the execution of a search warrant leads to the uncovering of a confidential source, where other confidential sources may take heed of the message sent that their identities can be easily uncovered simply by an ex parte application to a non-legally trained Justice of the Peace, and lead to their drying up.

(190) Moldaver J, while not accepting a presumptive notice requirement in situations where the police are seeking a production order on the media, recognised however that:

“absent urgency or other circumstances justifying an ex parte proceeding, the authorising Judge may well find it desirable to require that notice be given to the media, (see National Post at paragraph 83) especially if he or she considers that more information is necessary to properly balance the rights and interests at stake. That conclusion however is not mandatory.”⁴⁶

(191) He emphasised that bare assertions in the affidavit would not provide a basis for proceeding ex parte. *“Instead the police should show some evidentiary basis for why there is “urgency or other circumstances””* (to justify proceedings ex parte); *“...a broad and unsupported claim that the media is unlikely to cooperate with the police or that the media could theoretically put the materials beyond the reach of authorities if notice were to be given - which is always a risk to some degree - should not suffice”⁴⁷.*

(192) This reasoning was based upon equivalent statutory provisions, the right to privacy, and to some extent the right to freedom of expression. There is no reason why that

⁴⁶ Paragraph 66

⁴⁷ At paragraph 67

approach would not be applicable in this jurisdiction. Even though the majority declined to base its reasoning upon a separate and independent right to freedom of the press, (for reasons explained more fully in the judgment of the four-member minority in **Vice Media**, MacLachlin J in Lessard, and the minority in **Zurcher**), there is no compelling or persuasive reason why freedom of the press should not be recognised as a distinct and independent constitutional right. In fact, however, it would make little practical difference whether a notice requirement were to be imputed under the right to privacy, or the discretion under statute, or under the constitutional right to freedom of the press.

(193) What the reasoning in all the cases demonstrates, whether in the decisions of the majority or minority, is that nothing in existing law prevents the imposition of a condition in this jurisdiction, that the media be afforded notice of a proposed search under a search warrant in suitable cases. Given the role and function of the media, and the critical role of its sources, one such case would be where the proposed search is for a confidential source.

(194) The Court also modified its position on the relevance of prior partial publication, although that is not a feature that needs to be considered in the instant case, because the information sought, the identity of the source had never been published.

(195) The court in **Vice Media** declined to set aside a production order there sought because:

“The state’s interest in investigating and prosecuting the alleged crimes outweighs the appellant’s right to privacy in gathering and disseminating the news. Importantly, disclosure of the materials sought would not reveal a confidential source; no “off the record” or “not for attribution” communications would be disclosed; ...the state’s interest in investigating and prosecuting the alleged crimes – which include serious terrorism offences – weighs heavily in the balance”⁴⁸.

⁴⁸ Paragraph 5

(196) It is therefore understandable as to why the court did not choose in this case to fortify the protections of the media with respect to search warrants or production orders sought against them. It was simply inconceivable in those circumstances to deprive the police of the production order legitimately sought in those circumstances.

(197) In **Vice Media** the majority declined the invitation to reform or even abandon the existing framework established in **Lessard**, and rejected the argument that in practice it served nothing more than a rubber stamp permitting the police to access materials in the hands of the media⁴⁹. The minority in **Vice Media** accepted that invitation and their judgment reflects what that involved in practice.

(198) The instant case however nowhere approaches the facts in **Vice Media**. The disclosure in that case would not have revealed a confidential source. In fact, the source sought to publicize his views rather than seeking to remain confidential. Further, the crime being investigated there included serious terrorism offences.

Detailed Analysis of the Majority Judgment

(199) The court in that case considered four issues of which the following are relevant⁵⁰:

- i] Should the **Lessard** framework be reformed?
- ii] Where the police are seeking a production order relating to the media, should a presumptive notice requirement be imposed?
- iii] What is the standard of review to be applied on review of production orders in relation to the media?

(200) To answer the first question the court reviewed the decisions of **Lessard**, **New Brunswick** and **National Post**⁵¹. In both **Lessard** and **New Brunswick** search warrants were obtained which related to video footage captured by reporters of individuals apparently engaging in criminal activities.⁵²

⁴⁹ Paragraph 2

⁵⁰ See paragraph 8

⁵¹ From paragraph 10

⁵² Paragraph 11

(201) Moldaver J writing for the five-member majority noted that:

*“This court undertook the delicate task of fashioning a framework for determining whether an application for a search warrant relating to the media should be granted, having regard to both the right to be free from unreasonable search or seizure under section 8 of the Canadian Charter of Rights and Freedoms and the guarantee of freedom of expression under section 2(b) – that is a framework for assessing section 8 reasonableness in a section 2(b) context. Underlying this framework is the recognition that the media plays a special role in a free and democratic society and as such, investigative orders relating to the media raise unique concerns.”*⁵³

(202) It is significant that the Supreme Court did not base its decision upon an analysis of the content of section 2(b) – the right to freedom of the press, a position which the minority in **Vice Media** sought to change in that case.

(203) The reasoning in **Lessard** was explained in **Vice Media** at paragraph 15 and 16 of that judgment. At paragraph 15 it was observed that:

*“but while he stressed the vital importance of the media and acknowledged the special concerns that arise when a warrant to search media premises is sought, Cory J clarified that rather than “importing any new or additional requirements for the issuance of search warrants” the constitutional protection of **freedom of expression** afforded by section 2(b) serves as “a backdrop against which the reasonableness of a search may be evaluated”* He nonetheless emphasised that the constitutional protection afforded to freedom of expression *“requires that careful consideration be given not only to whether a warrant should issue but also to **the conditions which might properly be imposed** upon any search of media premises”*.⁵⁴ (Emphasis added)

⁵³ At paragraph 13

⁵⁴ Page 476 of Lessard

(204) Moldaver J noted that in **National Post** while Binnie J “declined to recognise a class privilege protecting the journalist/confidential source relationship”. He did acknowledge that “journalist/confidential source privilege should be assessed on a case by case basis. In the instant case no one has contended that a search warrant which permitted disclosure of a confidential source automatically amounts to an infringement of freedom of the press.

(205) In **Vice Media** the analysis addressed the proposed reforms to the **Lessard** frameworks suggested by the appellants and ultimately concluded that they could be refined to four considerations rather than the nine proposed by Cory J.

(206) Some of the arguments that were put forward in support of those suggested reforms were addressed by the court as follows:

[i] At paragraph 25 “The appellants submit that whenever the state seeks a production order relating to the media, *“a chilling effect should be presumed”* and *“that the media should not be put to the task of proving in each individual case, that the order would have a chilling effect, for such an effect is, they say, inevitable”*. The descriptions as to how that chilling effect may arise were set out at paragraph 26 of the judgment. They included:

- a] *Confidential sources may dry up*⁵⁵. *“If (newspapers) were compelled to disclose their sources they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed page 1129. If sources who are willing to speak out only on a confidential basis come to fear that their identity may be disclosed at the whim of the state then they will remain in the shadows. Consequently the media will lose opportunities to receive and disseminate important information to the public”*.
- b] *Journalists may consciously avoid recording and preserving their notes, contact lists, internal deliberations and other work product out of a concern that any such recordings may find their way into the hands of the police (see **National Post** at*

⁵⁵ See Lord Denning in *British Steel Corporation v Grenada Television* [1981] A.C 1096

paragraph 78 adopting the dissenting reasons of McLachlin J (as she then was) on this point in Lessard) at page 452.

- c] The media may self-censor in order to conceal the fact that it possesses information of interest to the police, with a view to protecting its sources and preserving its ability to gather information in the future (ibid).*
- d] The public may come to view the media as an arm of the State such that the public loses faith in the media's ability to execute its functions independently and impartially... This lack of faith in the media may in turn undermine its ability to gather and disseminate the news.*

(207) At paragraph 27, the court recognised that proving the existence and extent of such effects is no easy feat because they did not lend themselves to empirical proof because they were intangible in nature and difficult to measure. *“But that does not mean they are insignificant or unimportant. To the contrary, to the extent that chilling effects **do arise** their consequences can be considerable: a weak and fearful press, alongside a diminishing pool of sources, translates into a less informed, less open, and less vibrant society in which discussion, debate, and the flow of information are stymied. Thus concerns over potential chilling effects cannot be overlooked”.*

(208) Those observations are quite insightful and pertinent. The court's conclusion that a chilling effect cannot be presumed in all cases regardless of the circumstances does not detract from them. The court concluded,⁵⁶ *“The existence and extent of any potential chilling effect should be assessed in a case by case basis, not simply presumed in the abstract”.* That reasoning is unimpeachable. Facts always provide context. A chilling effect cannot be presumed in all cases and no one so contends.

(209) However, in the instant case a party of six police officers attended the offices of a media house with a search warrant in the wide-ranging terms as described above. In fact, the second search warrant was in even wider terms. The object of the search was the source of tipping off, who was also the source of a newspaper article. For reasons set

⁵⁶ Paragraph 28

out above he or she must, in this case, be presumed to be a confidential source. This context constitutes a situation where a chilling effect could readily be inferred.

(210) One can hardly imagine a fact scenario more consistent with a chilling effect given that a newspaper source was being sought, in relation to a news story affecting an Acting Commissioner of Police. While there is no evidence to justify assuming his involvement, given the width of the search warrant and its purpose a chilling effect upon publication and upon confidential sources has been demonstrated on the facts of this case.

(211) The court also recognised at paragraph 30 that the imposition of conditions on the (production) order (or search warrant) could neutralize potential chilling effects.

Notice to the Media

(212) At paragraph 79 the court concluded in relation to the standard of review of production orders (or search warrants) *“For the reasons I have identified, I consider it appropriate to recognise an exception where the production order relating to the media was made ex parte in circumstances where the authorising Judge did not have before him or her all the information that could reasonably have affected the decision. While the Garofoli standard applies as a general rule, “the media are entitled to this **special consideration** because of the importance of their role in a democratic society”.*

(213) At paragraph 80 of Vice Media the court emphasised the discretion to hold an inter partes hearing as follows:

*“I wish to re-emphasise that it remains open to the authorising Judge to exercise his or her **discretion to require that the media be given notice, and Judges should not hesitate to exercise this discretion** where the police have failed to provide some evidentiary basis for why there is “urgency or other circumstances”.*

*In addition where the affidavit in support of the application appears to leave important gaps in information (for example regarding the nature of the journalist/source relationship) or **where the authorising Judge is uncertain as to the effect the order may have on the specific media outlet or the media more***

broadly, the authorising Judge may well decide that it would be unwise to proceed ex parte.

While ex parte proceedings would remain the statutory status quo, authorising Judges are not bound to proceed in this manner. Requiring notice will generally obviate the need for a de novo review, with consequential savings to the administration of justice". (Emphasis Added)

The analysis of the minority in Vice Media

(214) It should be noted that even without express consideration of the content of the right to freedom of the press the majority in **Vice Media** and in **Lessard** were prepared to consider that special considerations applied in relation to search warrants against the media.

(215) The minority in **Vice Media** was prepared to go further however and expressly based its decision upon the constitutional right to freedom of the press, recognising its special status, identifying the content of that right, and requiring explicit protections (based upon that right, and not only upon the section 8 right to privacy and the right to freedom of expression).

(216) The reasoning of Abella J on behalf of the four judges in the minority is succinct and persuasive⁵⁷. The entirety of that judgment is relevant to the issues of i] the necessity for freedom of the press to be recognized as a distinct constitutional right as well as ii] the content of that right. Both issues arise directly on this appeal.

(217) The following extracts from that judgment, which cannot be improved upon by summarizing them, highlight the reasoning and analysis of the minority. They represent the product and culmination of several years of developments in Canada. It is directly relevant in this jurisdiction, which like Canada, is a sovereign democratic state with an express right to freedom of the press, and with a similar statutory context in which

⁵⁷ Paragraph 109

search warrants can be obtained after the exercise of the discretion of an independent judicial officer.

(218) The analysis and conclusions of the minority are far more relevant and persuasive than that of the majority. The majority endorsed a four-factor approach, which, even reduced from the original nine factors, merely imposed a theoretical framework for presumed application by a judicial officer, inadequately equipped to apply it especially on an ex parte application. That approach would lead in practice to permitting an infringement of the express constitutional protection by considering redress only after a warrant has already been issued and any chilling effect has already occurred. The approach of the majority therefore has the potential to effectively eviscerate the constitutional right in this jurisdiction unless modified.

(219) It is necessary to set out at length extracts of the reasoning of the minority to identify the differences of approach between them and the majority. See the following paragraphs from the judgment of Abella J (all emphasis added)

*109. "For 25 years, this Court has flirted with acknowledging that s. 2(b) of the Charter protects independent rights for the media. Unlike the majority, I see no reason to continue to avoid giving **distinct constitutional content** to the words "freedom [page430] of the press" in s. 2(b). The words are clear, the concerns are real, and the issue is ripe.*

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

111 This case explores the border between vigorous protection for the press and the state's ability to investigate crime by seeking information from the press. There are, as a result, two provisions of the Canadian Charter of Rights and Freedoms at issue in this appeal. One is s. 8, which protects a reasonable expectation of privacy.

The other is s. 2(b), which protects "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

112 Strong constitutional safeguards against state intrusion are a necessary precondition for the press to perform its essential democratic role effectively. As these reasons seek to demonstrate, **s. 2(b) contains a distinct constitutional press right which protects the press' core expressive functions - its right to gather and disseminate information for the public benefit without undue interference.** When the state seeks access to information in the hands of the media through a production order, **both the media's s. 2(b) rights and s. 8 privacy rights are engaged.** A rigorously protective **harmonized analysis** is therefore required.

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

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

*"Transparency Confined to the Courthouse: A Critical Analysis of Criminal Lawyers' Assn., C.B.C. and National Post" [page435] (2011), 54 S.C.L.R. (2d) 169). Based on the clear text and purpose of s. 2(b), **even Crown counsel graciously conceded in oral argument before this Court that "freedom of the press" is a distinct constitutionally protected right.***

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

125 *The purpose underlying protection for the press is related to, but distinct from, the broader guarantee of freedom of expression. The dichotomy in s. 2(b) between freedom of expression generally and freedom of the press specifically is a logical one, since the press plays a distinct expressive role, with both institutional and historic differences from how and why others are entitled to "freedom of expression". Section 2(b) sets out generous protections designed to facilitate the healthy functioning of our democracy. But they are incomplete if s. 2(b) is viewed only as an individual right to freedom of expression, reading out protection of "freedom of the press". **A vigorous, rigorous, and independent press holds people and institutions to account, uncovers the truth, and informs the public. It provides the public with the [page436] information it needs to engage in informed debate. In other words, it is the public's "right to know" that explains and animates***

the distinct constitutional protection for freedom of the press (Branzburg v. Hayes, 408 U.S. 665 (1972), at p. 721, per Douglas J. (dissenting); see also Houchins v. KQED, Inc., 438 U.S. 1 (1978), at p. 17, per Stewart J. (concurring)).

126 *The singular purpose of press protection has, in fact, resulted in the European Court of Human Rights concluding that the freedom of expression guarantee in Article 10 of the European Convention on Human Rights, 213 U.N.T.S. 221,⁶ which does not expressly mention any right for the press, nonetheless includes a distinct press right. A separate right was held to be necessary to protect the "vital public watchdog role of the press ... and the ability of the press to provide accurate and reliable information" (Goodwin v. United Kingdom (1996), 22 E.H.R.R. 123, at para. 39).*

127 *The question, then, is what does this s. 2(b) right include? As Crown counsel also conceded in oral argument, for a start it includes not only the right to transmit news and other information, but also the right to gather this information without "undue governmental interference" (New Brunswick (1996), [page437] at para. 24 (emphasis deleted), citing Canadian Broadcasting Corp. v. Lessard, [1991] 3 S.C.R. 421, pp. 429-30, per La Forest J.). The right to convey information to the public is fragile unless the press is free to pursue leads, communicate with sources, and assess the information acquired. Newsgathering activities form an "integral part of freedom of the press" because they are an indispensable part of the right and the ability to tell the public the facts and ideas that make up the story (Canadian Broadcasting Corp. v. Canada (Attorney General), [2011] 1 S.C.R. 19, at para. 46; see also Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, at pp. 1339-40; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; R. v. Mentuck, [2001] 3 S.C.R. 442). Without protection from undue interference in newsgathering, public access to the fruits of the media's work is diminished, as is the public's ability to understand, debate and form opinions on the issues of the day, thereby impairing its ability to participate meaningfully in the democratic process.*

131 Does s. 2(b)'s press and media guarantee include protection for journalistic "work product", such as a reporter's personal notes, recordings of interviews, or source contact lists? It seems inescapable that it usually does. The European Court of Human Rights has held that protecting the press includes protection for material in the journalist's possession that might identify a confidential source (Goodwin, at para. 39; see also Nagla v. Latvia, No. 73469/10, July 16, 2013 (HUDOC)). And in R. (Miranda) v. [page439] Secretary of State for the Home Department, [2016] 1 W.L.R. 1505, Lord Dyson held that the protection of sources is "no more than one aspect" of the Article 10 press protection, which protects "journalistic material" even where "the source is known" (paras. 102 and 107). Similarly, in his concurring opinion in Lessard, La Forest J. stated that "work product" must be protected because "[t]he fear that the police can easily gain access" to this material "could well hamper the ability of the press to gather information" (pp. 431-32).

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

140 While both Lessard and National Post were decided on the assumption that although the press had enhanced privacy interests under s. 8, there was no distinct role for the constitutionally protected right under s. 2(b). Rather, the framework acknowledged that s. 2(b) was an important aspect of the analysis for judicial authorizations that target the media. As noted in National Post, such orders "constitute a head-to-head clash between the government and the media, and the media's ss. 2(b) and 8 interests are clearly implicated" (para. 78). That is why New Brunswick and Lessard added a number of considerations to the s. 8 analysis over and above the statutory requirements for warrants so that "any disruption of the

gathering and dissemination of news is limited as much as possible" (Lessard, at p. 444). Chief among these were: (a) recognition that the press' interests should be interfered with no more than is reasonably necessary (factors 5 and 7); and (b) a balancing test that weighed the state's interest against "the right to privacy of the media in the course of their news gathering and news dissemination" (factor 3) (New Brunswick, at p. 481; Lessard, at p. 445).

141 *In my view, an independent, distinct protection in s. 2(b) requires an approach that explicitly addresses those rights, as well as the s. 8 privacy rights. An approach based solely on s. 8 privacy rights is, in my respectful view, no longer sustainable. Recognizing a distinct press guarantee in s. 2(b) of the Charter means that the press is no longer just the "backdrop" referred to in New Brunswick. Rather than being simply a balance between the constitutional privacy rights of the press and the state's [page443] interest in investigating crime, it is now a balance between the state's investigatory interest and both the media's s. 8 privacy rights and its s. 2(b) media rights.*

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

153 *And the final aspect warranting discussion is whether a production order should be made against the press without the press at the hearing. This Court, in applying Criminal Code provisions similar to s. 487.014(1), has interpreted them to permit, but not require, ex parte proceedings in order to ensure that a judge is not deprived of the option of having a hearing on notice "to ensure reasonableness and fairness in the circumstances" (R. v. S.A.B., [2003] 2 S.C.R. 678, at para. 56; R.*

*v. Rodgers, [2006] 1 S.C.R. 554, at para. 16). There are strong rationales for providing notice to the press in cases like this. If the authorizing judge lacks evidence and submissions from the party exclusively in possession of the information needed for the balancing - the innocent media third party whose s. 2(b) rights are engaged - then there is nothing to balance. And the authorizing judge would have no way of knowing some highly relevant facts, such as the nature of the relationship between a source and a journalist. For this reason, the Court in National Post held that "the media should have the opportunity to put their case against the warrant at the earliest reasonable opportunity", and that absent urgent circumstances, the issuing judge "may well [page448] conclude that it is desirable to proceed on notice" (para. 83). While the issue of notice is ultimately a matter within the discretion of the authorizing judge, **it is, obviously, highly preferable in most cases to proceed on notice to the media rather than ex parte.***

Whether section 4 (k) is a distinct constitutional right with its own unique content

(220) The court in its analysis clarified what a harmonised approach recognising in section 2(b) was a distinct constitutional right which must be given effect, would look like in practice. So, for example⁵⁸ it stated that there are strong rationales for **requiring** notice to the press in cases like this (as opposed to previous decisions of the court which permitted but did not require, ex parte proceedings.

(221) Further, it included protecting communications with potential sources, giving these wide construction to include those whose comments were off the record or not for attribution. It recognised the purpose behind that constitutional right and the significance of its being specifically mentioned in the Constitution. It also recognised the lack of justification for denying distinct constitutional meaning to that clearly expressed right. Its reasoning linked the unique role and functions of the press with the necessity for its constitutional protection, recognising also that protection was also for the benefit

⁵⁸ At page 447 paragraph 153

of the public. Finally, it recognised that many of those rights already existed and there was therefore no reason to deny them constitutional status.

(222) The decision of the majority in **Vice Media** with its incorporation of principles previously derived from **Lessard** and **National Post**, provides a sufficient basis for invalidating the search warrants in the instant case. However, on the further issue as to whether the procurement and content of those search warrants also infringed the section 4(k) constitutional right to freedom of the press in this jurisdiction, the reasoning of the minority in **Vice Media** above is directly relevant.

(223) The arguments of MacLachlin J on this issue in her dissent in **Lessard** have already been identified. The decision of the four-member minority in **Vice Media** like MacLachlin J, have argued persuasively that the express right to freedom of the Press in Canada is an independent constitutional right with its own peculiar content applicable to the unique position of the press.

(224) For reasons set out therein and discussed hereinabove, there is no compelling reason to depart from the reasoning of the **minority** in **Vice Media**. In this jurisdiction, freedom of the press is an independent constitutional right. The instant warrants did infringe that right because of a] their excessive width and lack of proportionality; b] the further impact of that upon confidential sources generally, with the potential impact of both on the ability of the press to gather and disseminate news.

(225) The approach of the minority emphasised the constitutional dimension to the right to freedom of the press, and sought to identify its distinct content, as well as to ensure its observation and protection.

(226) The minority noted⁵⁹ that both **Lessard** and **New Brunswick** were decided on the assumption that although the press had enhanced privacy interests under section 8, there was no distinct role for the press' freedom section 2(b) rights. They considered

⁵⁹ See headnote at page 381 (page 1290 of the electronic bundle)

that that was no longer an appropriate approach and that the distinct press guarantee of section 2(b) of the Charter needs to be recognised.

Television New Zealand Limited v Attorney General

(227) The position is similar to the Canadian position in other parts of the Commonwealth. See for example the case of **Television New Zealand Limited v Attorney General** [1995] 2 N.Z.L.R 641 where the reasonableness of a search warrant against a television station to obtain video or film recordings of ceremonies at which behaviour had occurred which amounted to a breach of the peace was considered.

(228) The search warrant was issued under the section 198 of the Summary Proceedings Act 1957 of New Zealand which provided “**Search Warrants** – 1) any District Judge or Justice or any Registrar (not being a Constable) who, on an application in writing made on oath, is satisfied that there is reasonable ground for believing that there is any building, aircraft, ship, carriage, vehicle, box, receptacle, premises or place

- a] Any thing upon or in respect of which any offence punishable by imprisonment has been or is suspected of having been committed; or
 - b] Any thing which there is reasonable ground to believe will be evidence as to the commission of any such offence; or
 - c] ...
- may issue a search warrant in the prescribed form.

(229) The search warrant in that case was held by the Trial Judge to have been in excessively wide terms, a finding which was reversed on appeal. The facts of that case are not relevant to the instant case, insofar as they relate to recordings of an event which had already been published. The New Zealand Court of Appeal took the opportunity to set out “*general principles or guidelines to be borne in mind, when the reasonableness of granting a warrant or executing a warrant is under consideration*”.

(230) The court made the following observations⁶⁰. (All emphasis added).

*Both the grant and the execution of a warrant are discretionary, it is possible to state as follows: **general principles or guidelines to be borne in mind, when the reasonableness of granting a warrant or executing a search is under consideration**. One guideline, In a case where there is no suggestion that the media organization has committed any offence and it has done no more than record events which might include the commission of offences by others, is that the intrusive procedure of a **search warrant should not be used for trivial or truly minor cases** (see p 647 line 25).*

*A second guideline is that as far as practicable, **a warrant should not be granted or executed so as to impair the public dissemination of news** (see p 647 line 56). *Canadian Broadcasting Corp v Lessard* [1991] 3 SCR 421; (1991) 67 CCC (3d) 517 referred to.*

A third guideline is that only in exceptional circumstances where it was truly essential in the interests of justice should a warrant be granted or executed if there was a substantial risk that it will result in the “drying up” of confidential sources of information for the media (see p 648 line 12).

*A fourth guideline is that a warrant should be **executed** considerately and so as to cause the **least practicable disruption** to the business of the media organization (see p 648 line 18).*

A fifth guideline for the grant of a warrant relates to the relative importance of the tapes for the purposes of a prosecution. ...

*It may be that **the issuing authority** – who, in a media case should preferably be a District Court Judge – **can add conditions to a warrant**; but normally it would be better to follow the prescribed form. The police general instructions are not intended as a code to which the Courts should give mandatory force, but generally they appear helpful and indicate that **media warrants have to be executed so as not to interfere with the proper freedom of the press** (see p 648 line 40).*

(231) Those observations are important because:

⁶⁰ Page 642 of the judgment

- [i] The New Zealand Court of Appeal considered the same authorities that were cited to this court, namely **Lessard, CBC v Attorney General for New Brunswick, Zurcher, Senior v Holdsworth**.
- [ii] It noted that unlike the situation in Canada and the US, where a specific right to freedom of the press existed, the freedom of the press in New Zealand was nevertheless an important constitutional right though not separately specified in the New Zealand Bill Of Rights.
- [iii] The authority to issue search warrants under the Summary Proceedings Act 1957, is in similar terms to the instant Summary Offences Act and the Indictable Offences (Preliminary Enquiry) Act in this jurisdiction

(232) Given therefore that the New Zealand Court of Appeal considered the Constitutional dimensions to the issue of a search warrant against a media house where freedom of the press was a factor, in a similar constitutional and statutory context its observations as to the general guidelines that would be applicable to such a search are relevant and useful in this jurisdiction.

(233) Cooke P. noted that:

*“Statutory powers in the field of compulsory search, whether powers to issue warrants or powers to execute them, must be exercised **reasonably**, as section 21 of the Bill of Rights Act underlines. As to the granting and scope of search warrants the section reinforces and augments the common law and established canons of interpretation regarding intrusion upon private property.*

*When media freedom may be seen to be involved, there is a further reason for restraint and **careful scrutiny**. The freedom of the press is not separately specified in the New Zealand Bill of Rights, our Bill differing in that respect from section 2 of the Canadian Charter of Rights and Freedoms and the First Amendment in the United States, but it is an important adjunct of the rights concerning freedom of expression affirmed in section 14 of the New Zealand Bill of Rights Act. ...**Decisions***

*of this court have reflected the importance of media freedom, quite apart from the Bill of Rights”.*⁶¹

(234) This is equally applicable in this jurisdiction, which:

- [i] Also provides the statutory requirement of reasonableness in relation to the obtaining of a search warrant;
- [ii] Also recognises the common law and established canons of interpretation regarding intrusion upon private property;
- [iii] Also recognises as a constitutional principle the right to freedom of expression;
- [iv] Also additionally, recognises the right to freedom of the press as a constitutional right and in fact expressly does so; and,
- [v] Equally recognises the principles that statutes are to be construed in accordance with the Constitution, the supreme law.

Requirement for Notice

(235) A search warrant in relation to the media cannot be a mere rubber-stamping exercise. Given the multiple considerations that must go into the exercise of that discretion, in order to balance the interest of the State in investigating and prosecuting crime, and the right of the Press to gather and disseminate news, it would be necessary that such search warrants be obtained before a high court judge and that that be a condition attached to the discretion to issue a search warrant of the media. This will be all the more so when the search is for or involves a media source, which must be presumed to be confidential unless rebutted by evidence to the contrary. That is because such a notice requirement is the only way to ensure protection of the right **before** its possible infringement.

(236) **A requirement for notice** to be afforded to the press as a condition of the search warrant would enable issues as to, inter alia, voluntary production, scope of the warrant, protection of confidential sources, and the correct balance between the right to investigate and the right to publish to be considered. This is in contra-distinction to

⁶¹ At page 646 line 40 of the judgment

the situation where such examination takes place after the fact potentially after the right may have been irrevocably infringed.

(237) The position in Canada is that bare assertions that the information may be disposed of or that the press may not cooperate are insufficient to dispense with any requirement that notice be given to the press before the issue of a search warrant. There is absolutely no reason why that should not be the case in this jurisdiction in relation to the identical right and statutory context.

(238) Alternatively, even if section 4 (k) were not to be recognised as a distinct constitutional right, this will still be the only way to provide the opportunity for the necessary balancing exercise or for the voluntary production, or at least preservation of the material. Failure to be so guided would carry the enormous risk that if a warrant is obtained before a non-legally trained officer that the special considerations required for such a warrant would be overlooked or ignored.

(239) Recognition of the importance of newspaper sources and the effect of a search warrant upon them has been recognised in the US (**Zurcher**), Canada (**Lessard**, and **Vice Media**). There should not be any reason why it should not be recognised in this jurisdiction which has a similar constitutional protection for the press, as in the US and Canada and when Canada, the US and New Zealand authorities all recognise the role of a free and independent press as vital to democracy.

Confidential Sources

(240) Based upon the nature of confidential sources, and the danger of them disappearing or drying up if searches of the media are not constrained, it would be essential to recognise that newspaper sources are presumptively confidential and are entitled to protection.

(241) While this presumption might be rebuttable, it must be the starting position in any discussion of newspaper sources. Without such a presumption it would be for the media to prove that their sources are confidential, which could logically involve, inter alia, i] an identification of the type of source, ii] the reasons for the confidentiality being

asserted and, iii] the possible dangers to the source of revealing its identity. All of these matters run the risk of narrowing the potential category of persons who could be the source, and may well lead to the identification of the source even while attempting to preserve its confidentiality.

The Constitutional Right to Freedom of the Press in this Jurisdiction

(242) The Constitution of Trinidad and Tobago by its preamble recognizes that Trinidad is a sovereign democratic State. It is in that context that the constitutional right to freedom of the press must be understood and given effect. It cannot be regarded as mere surplusage, given the importance of the press as recognized in all the authorities previously cited from the US, Canada, New Zealand and the UK.

(243) The role of an independent press has long been recognized in this jurisdiction. One local newspaper has been in continuous operation for over 100 years. In the case of **Ambard v AG** [1936] UKPC 16 the Judicial Committee of the Privy Council emphasised the right of the press to criticize the judiciary in the context of proceedings brought for contempt of court against the publisher of the Gazette newspaper. The recognition of the role and function of an independent press has been recognized by the highest court long before independence or the independence constitution.

(244) In summary, therefore:

- i] **Lessard**, and **Zurcher**, and in fact all the Canadian cases up to and including **Vice Media** (majority judgment) all recognized, as does the appellant itself, that there may be special considerations that apply to search warrants in relation to the media. Further, that those special considerations, even without importing them as a constitutional requirement under section 4(k) of the Constitution, still provide 'inter alia' for:
 - a] An independent Judicial Officer;
 - b] Consideration as to the width of the search warrant in the context of reasonableness and proportionality; and
 - c] Recognition that source protection is a consideration with varying levels of emphasis as to its significance and evidential requirements.

(245) In this jurisdiction, the right to freedom of the press guaranteed under the constitution is a distinct independent constitutional right based upon the unique role and function of the press and the specific protections required for it to continue to perform that role. Attacks upon the press are often early warning signals of an erosion of democracy with attacks upon other fundamental constitutional rights not far behind. The right has always included and must continue to include: -

- [i] The right to gather information without undue interference from Government;
- [ii] The right to transmit news and other information without undue interference from Government;
- [iii] a] Protection for journalistic product, such as a reporter's personal notes, recording of interviews, or source contact list;
b] **communications with confidential sources** as well as those whose comments are "off the record" or "**not for attribution**";
c] Similarly, it must include the journalist documentation of his or her investigative work.

(246) Any distinction between confidential and non-confidential sources in this regard must be artificial. Any source not actually published or revealed voluntarily must be so presumed to be a confidential source unless the presumption is rebutted by evidence or inference from the context as in Vice Media itself. It also includes a right to be protected from any search which does not comply with existing requirements of:

- i] proper administration by the independent Judicial Officer from whom the warrant is obtained;
- ii] probable cause for obtaining it;
- iii] specificity with respect to the place to be searched;
- iv] specificity with respect to the things to be seized;
- v] overall reasonableness in the exercise of the discretion to issue search warrants against newspapers to be confined within reasonable limits. (See **Zurcher** and **Lessard**)

Refusal to supply a copy of the warrants

(247) It is not disputed that the police refused to allow even a photo of the warrant to be taken by the respondent, although they contend that they promised to supply a copy at a future date. There is absolutely no justification for the police refusing to allow a copy of the warrant to be taken. That is a complaint which is almost universal in these types of matters suggesting a deliberate practice. For the purpose of a search, which almost by definition is invasive, and in this particular case was definitely by its terms intended to be, the justification for a search must be produced by the police. There is absolutely no basis for not producing it to the parties whose premises are to be searched. This leaves it open to dispute as to whether a warrant had even been shown. It is not acceptable to contend that a copy would be supplied in future after the search. In fact, in the instant case the search warrant itself disclosed defects which required the police to leave and return with an amended search warrant. This alone demonstrates that it was essential the police provide a copy of a search warrant rather than risk proceeding with a search warrant which contained on its face errors, especially ones which did not permit it to search the premises that they sought to search.

Conclusion

(248) As to **the first issue**, whether or not freedom of the press is a distinct constitutional right with its own separate content, the procurement of search warrants for the media requires inter alia, a] compliance with **the statutory requirement** of the interposition of **an independent judicial officer** before such a warrant is obtained. It also requires: b] in relation to their content, **specificity in relation to the items to be seized and the premises to be searched**, and c] **reasonableness** and proportionality, and in particular specific consideration by that independent judicial officer of the potential impact of the warrant in the terms sought upon i] the ability to gather and disseminate the news and ii] the confidentiality of media sources.

(249) As to **the second issue**, in this jurisdiction freedom of the press is a distinct constitutional right independent of the right to freedom of expression or privacy with its own unique content.

(250) As to **the third issue**, apart from the above requirements for a search warrant for the media, (which apply whether or not freedom of the press is a distinct constitutional right), construction of that right must take into account its purpose. The purpose of the right is to recognize and protect the role of the independent press to investigate, gather, and disseminate news and content to the public. It is to enable freedom of opinion and advance democracy in accordance with section 1 of the Constitution, which is premised upon the Republic of Trinidad and Tobago being a sovereign democratic state. To this extent, it is a right for the benefit of the public, and not for the sole benefit of the media. Many aspects of this right have long predated the Republican or even the independence constitution with one current daily newspaper has been published for over one hundred years. Recognition of the existence of a free press in this jurisdiction has been recognized by the Judicial Committee of the Privy Council from as early as 1934 (in the case of **Ambard v AG**). It is of course neither possible nor desirable to specify the entirety of the content of the right to freedom of the press (the right) in a judgment based upon a specific factual scenario. However, in the instant case it requires recognition of a **presumption of confidentiality** in relation to media sources. For reasons developed subsequently, in order for the right to be effected it requires that notice be provided to the media as a condition of the exercise of the discretion to issue a warrant, of an intention to obtain a search warrant in relation to it, particularly where the purpose of the search is to uncover a presumptively confidential media source. This is the only way to ensure the opportunity to ventilate the multiplicity of factors that apply in this situation, before the infringement of the right by the otherwise generally applicable ex parte proceedings.

(251) As to **the fourth issue** the warrants fell afoul of the requirements of specificity, proportionality and reasonableness. They would have been invalid on that basis even if section 4 (k) were not a distinct and independent constitutional right. Further however, the **content** of the search warrants in the instant case also for this reason, inter alia, infringed the rights of the second and third respondents, (though not the first), to freedom of the press. That is because they were in excessively wide terms, far exceeding what would be reasonably required for the purpose of the search. By their terms, they potentially permitted inter alia, incidental access to unspecified computer hard drives

with unknown and unknowable further information, potentially not excluding information relating to other unrelated corporate entities, (as a result of permitting unrestricted searches through the unspecified computers).

(252) On the interpretation of the police executing the second warrant it could even have permitted shut down of the server shared by the entire OCM group, clearly demonstrating its lack of proportionality and reasonableness. Only the decision by the police not to search the server of the second respondent shared with the OCM Group averted a constitutional breach in relation to the first named respondent.

(253) The excessively wide terms of the warrants were incompatible with any actual consideration of their potential impact upon publication and confidential sources, and viewed objectively, they unreasonably ignored a potential chilling effect on both.

(254) It was found by the trial judge, and assumed by the parties on appeal that the second warrant was modified without being based on a new affidavit sworn before the judicial officer. If that were in fact so then their procurement of the second warrant would have unlawfully and indefensibly dispensed with a critical and essential statutory check on the exercise of the power to search and seize by the police. However, the basis for this conclusion is unclear because the reference to the affidavit of Mr. Lucas referred to by the trial judge does not suggest this.

(255) The police refrained from accessing the server and therefore did not infringe the constitutional rights of the first respondent. The first warrant was never executed. Eventually only four flash drives were seized. The **conduct** of the search was therefore not excessive or disproportionate.

(256) As to **the fifth issue**, unconstitutionality as a result of infringement of section 4 (k) was pleaded inter alia at grounds d] and f]. The content of that right, and any infringement thereof, arising from the procurement, content, and execution of the warrants were directly in issue before the trial judge. The trial judge in the exercise of case management and constitutional discretions was entitled to permit such evidence as he

considered necessary and relevant. It has not been demonstrated that in doing so he was plainly wrong. In any event, some aspects of illegality are either no longer being pursued, or are not relevant to the instant judgment.

(257) The orders of the trial judge with respect to damages to be assessed are set aside. Apart from the seizure of four flash drives, there is no evidence of damage requiring other than an award of nominal damages in addition to the declarations being granted. If there had been cogent evidence of improper motive the position would have been different.

(258) Apart from that the trial judge's conclusion is upheld that:

*"The decision to issue the warrants failed to strike the **required balance** between **the interest to investigate the summary offence of "tipping off"** on the one hand and **the right to press freedom** as well as **the right of the journalist** who authored the articles to protect the confidentiality of her source on the other. In addition, the language in the warrants was not circumscribed or **precise** nor was it **confined to specific relevant areas so as to ensure that its execution would cause minimum disruption and incursion**".*

Orders

(259) The appeal is allowed in part. The orders of the trial judge, save his order with respect to costs which is upheld, are set aside and replaced as follows:

- [i] The appeal is allowed in relation to the first named respondent.
- [ii] It is declared that the two search warrants issued on March 11, 2020 were unlawful and unconstitutional as they disproportionately infringed upon the second and third named respondent's rights under Section 4(k) of the Constitution of Trinidad and Tobago.
- [iii] It is further declared that the seizure of the four USB flash drives from the office of the Third Claimant was unconstitutional.
- [iv] The appellant is to pay to the second and third named respondents nominal damages quantified in total in the sum of \$25,000.00.

[v] The parties will be heard on costs.

Peter A. Rajkumar
Justice of Appeal

DISSENTING JUDGMENT

Delivered by Aboud JA

Outline Introduction

(260) The issue on appeal is the extent to which the constitutionally protected freedom of the press was engaged on the facts before the trial judge. The intersection between the constitutionally guaranteed freedom of the press and the State’s right to have the right to investigate criminal behaviour was under the trial judge’s microscope.

(261) The appeal is against the 13 January 2021 judgment of the trial judge on the constitutionality of two search warrants obtained by the third appellant, Police Superintendent Wendell Lucas (“Supt Lucas”). Supt Lucas is a police officer and Head of the Financial Investigations Branch (“FIB”). He is also an attorney-at-law. The FIB is a branch of the Trinidad and Tobago Police Service (“TTPS”). Among other things, it acts on intelligence provided by the Financial Intelligence Unit of Trinidad and Tobago (“FIU”) established under the Financial Intelligence Unit of Trinidad and Tobago Act, Chap. 72:01.

(262) Based on received information the FIU conducts investigations. The FIU is not a branch of the TTPS. It is an independent government agency which receives suspicious transaction reports from banks, credit unions, and other supervised entities. It analyses these reports and shares intelligence with the TTPS when criminal activity is suspected. The warrants were executed by Supt Lucas and a team of six TTPS officers at the offices of the second respondent, Trinidad Express Newspapers Limited (“Trinidad Express”),

following its publication of an online article on 7 March 2020. The online article contained confidential information about the ongoing FIB investigation into the suspicious financial activities of Assistant Commissioner of Police, Irwin Hackshaw (“ACP Hackshaw”).

(263) The article divulged his allegedly suspicious financial transactions at several banks. The banks reported these allegedly suspicious transactions to the FIU. The FIU then reported these suspicious activities to the FIB.

(264) The release of the confidential investigative files to Trinidad Express, which published it to the world, including ACP Hackshaw, most likely by someone within the FIU or FIB potentially amounted to the crime of tipping off, contrary to section 51 of the Proceeds of Crime Act, Chap 11:27.

(265) The first respondent, One Caribbean Media Group Ltd (“OCM”), is a media conglomerate and the owner of, among other entities, Trinidad Express. The third respondent, Omatie Lyder (“Ms Lyder”), is the editor-in-chief of that newspaper. The respondents, namely, OCM, Trinidad Express, and Ms Lyder, were the claimants in the court below. They said that the issuance and execution of the warrants infringed their constitutional rights, particularly the right to freedom of the press protected by section 4(k) of the Constitution. The Media Association of Trinidad and Tobago (“MATT”), while not a claimant, was granted leave to intervene and therefore participated in the High Court proceedings as an interested party, but not before us.

(266) The trial judge ruled that the issuance and execution of the warrants were unlawful and unconstitutional as they disproportionately infringed the respondents’ section 4(k) rights to freedom of the press. He found that the seizure of four USB flash drives from the office of Ms Lyder was unconstitutional. The respondents were also awarded vindictory damages for breach of their constitutional rights.

(267) In coming to these conclusions the trial judge was plainly wrong.

The facts before the trial judge

(268) OCM and Trinidad Express physically conduct their operations from “Express House”, at 35-37, Independence Square, Port of Spain. At all material times, Ms Lyder was the editor-in-chief of Trinidad Express.

(269) On 7 March 2020, an article was published in Trinidad Express’s online e-newspaper. The article, written by **Denyse Renne, an investigative journalist employed by the Trinidad Express** (“Ms Renne”), was headlined **“ACP FLAGGED FOR SUSPICIOUS ACTIVITY—BANKS REPORT DEPOSITS OF CLOSE TO \$2M INTO OVER 15 PERSONAL ACCOUNTS”**. The article reported that three financial institutions had flagged **ACP Hackshaw** for suspicious transactions from **2014 to 2019**. These transactions involved **substantial deposits made into multiple personal bank accounts**.

(270) On the same day that the Trinidad Express published the online article the then Deputy Commissioner of Police, Mc Donald Jacob, appointed Supt Lucas to investigate, among other things, a suspected breach of confidentiality in relation to the disclosure of the FIB investigation.

(271) The 7 March 2020 online article was later republished in the printed **Sunday Express Newspaper** on **8 March 2020**. In both publications, Trinidad Express reported that it reached out to the acting director of the FIU who declined to comment, citing the confidential nature of the FIU’s investigation. The FIU’s acting director emphasised that an intelligence report is usually compiled to facilitate criminal investigations by the TTPS. He also told Ms Renne that any FIU comment on her enquires might amount to the crime of tipping off, a fact that Trinidad Express relevantly, for the purposes of determining this appeal, published. Ms Renne also asked ACP Hackshaw for a comment

on her intended publication, but he was evasive, to put it mildly. His response was also published.

(272) Three days later, on 10 March 2020, another article written by Ms Renee was published in Trinidad Express headlined “COPS UNDER PCA PROBE: \$2M DEPOSITED INTO BANK ACCOUNTS”. This article revealed that the Police Complaints Authority (“PCA”) had launched a twofold independent investigation under section 26 of the PCA Act, Chapter 15:05. One aspect focused on suspicious financial transactions linked to ACP Hackshaw between 2014 and 2019; the other examined the alleged leak of sensitive information by officers of the PCA’s Professional Standards Bureau.

(273) The 10 March 2020 Trinidad Express article for the third time reported that over 15 personal accounts belonging to or opened by ACP Hackshaw received deposits between 2014 and 2019, prompting several banks to file Suspicious Activity Reports with the FIU. The 10 March 2020 article went on to report that the FIU reaffirmed its legal obligation to maintain the confidentiality of all collected intelligence. Ms Renee fully quoted and paraphrased the FIU’s response, which cited Section 23(1) of the FIU Act, warning that anyone (other than an FIU officer) who knowingly discloses FIU information commits an offence punishable by a \$250,000 fine and three years’ imprisonment on summary conviction. The FIU highlighted that under Sections 51(1) and 53(2) of the Proceeds of Crime Act, the disclosure of information could prejudice a money laundering investigation and is a criminal offence punishable by a \$5 million fine and five years’ imprisonment. The FIU warned her and the Trinidad Express that unauthorized disclosures could jeopardize personal safety, damage reputations, and undermine business and individual security. It must be assumed that Ms Renne and Ms Lyder understood the legal implications of what was contained in the 10 March 2020 news report.

(274) On the morning of 11 March 2020, Supt Lucas consulted the Deputy Director of Public Prosecutions, Joan Honore-Paul. This consultation was prompted by concerns that Trinidad Express’s publication of the sensitive information in the three articles would likely jeopardize the ongoing internal investigation into ACP Hackshaw. Another

concern was to trace the source of the leak and identify those within or without the TTPS involved in the dissemination.

(275) Acting on Ms Honore-Paul's advice, Supt Lucas began the process of obtaining a search warrant. He directed Acting Corporal Keston Abraham to draft the required documents and later that day, appeared before Sandra Ramsaran, Justice of the Peace, at the Port of Spain Magistrates' Court, where he secured a warrant ("the first warrant") to search the premises, wrongly identified as being controlled and managed by Ms Lyder.

(276) At approximately 3:30 pm on that day, Supt Lucas, accompanied by six TTPS officers, entered the "Express House" premises. Supt Lucas, in his affidavit, explained that the security guard on duty told him that she first needed to consult her supervisor. Supt Lucas expressed the view that the security personnel at Express House were "delaying" their entry for approximately 20 minutes. He further recounted that a female employee eventually entered the building, and upon being informed of their identities, she opened the door and permitted them to accompany her inside. Supt Lucas and the TTPS officers entered the elevator with her, and she escorted them directly to the newsroom. Upon arrival, Supt Lucas met the Deputy Editor in Chief, Curtis Rampersad, who indicated the newspaper's willingness to co-operate but noted that Ms Lyder was abroad and expected to return in a few days [paras 35 - 36, of his affidavit, Record, p 178]. While in the newsroom an in-house Attorney-at-Law for Trinidad Express then objected to the first warrant, noting it was worded as if the premises solely belonged to Ms Lyder. Upon receiving this information, Supt Lucas returned to the office of the Justice of the Peace and obtained another warrant that specified "the premises of the Trinidad Express Newspaper" ("the second warrant").

(277) On receiving the second warrant Supt Lucas returned to Trinidad Express about 45 minutes later. He and members of the TTPS conducted a search of Ms Lyder's office, seizing four USB flash drives. Additionally, they attempted to enter the main-frame server room on the third floor but abandoned this part of the search due to the absence of IT personnel, who were required to prevent a complete server shutdown. These servers contained business records belonging to OCM and its affiliated companies. Supt

Lucas and the officers departed Express House around 6:30 pm. However, they did not rule out the possibility of returning for additional searches. During these events Trinidad Express photographers and reporters were present and Supt Lucas described the scene as "chaotic".

(278) The search was executed under the two warrants issued by the Justice of the Peace pursuant to section 5(1) of the Indictable Offences (Preliminary Enquiry) Act, Chap. 12:01. The initial warrant authorized a search of "premises under the control and managed by Omatie Lyder, Editor-in-Chief of the Trinidad Express Newspaper," ("the first warrant") but was later amended to specify "the premises of the Trinidad Express Newspaper" ("the second warrant").

(279) The first warrant, which forms part of the Record, is set out like this:

"Republic of Trinidad and Tobago

SEARCH WARRANT

(Chap 12:01 Sec. 5(1))

County of St. George West SW-0025-2020

To all Constables: Including **WENDELL LUCAS SUPERINTENDENT OF POLICE**

WHEREAS it appears, on the oath of **WENDALL LUCAS SUPERINTENDENT OF POLICE of the FINANCIAL INVESTIGATIONS BRANCH**

That there are reasonable grounds for believing that computers, tablets, external storage devices, cellular phones including their SIM cards, SD cards, images, calendars, phone books, contacts, SMS messages, emails, pictures, video recordings, audio recordings, call logs, installed application data, GPS information, WiFi information, internet history and usage, user files, system files and any other data which are recorded or

stored on the hard drive or other storage medium contained within the
aforementioned electronic digital devices; and magazines, digital
recording discs, documents and articles which will afford evidence as to
the commission of an Indictable Offence namely Tipping-off.

Contrary to Section 24 of the
Proceeds of Crime Act
Chapter 11:27
as amended.

Are concealed at the premises under the control of and managed by
OMATIE LYDER Editor-in-Chief of the **TRINIDAD EXPRESS NEWSPAPERS**
situated at **NO. 35-37 INDEPENDENCE SQUARE, PORT-OF-SPAIN.**

This is therefore to authorize and require you to enter into the premises
situated as aforesaid at any time, with such assistance as may be
necessary, to diligently search, take possession of and secure the said
data, and to bring the same before me or some other Magistrate or
Justice to be dealt with according to the law.

Dated this 11th day of March, 2020

At POS Magistrate Court

Signed

Justice of the Peace

[Stamped – Justice of the Peace, Magistracy, Trinidad and Tobago, St.
George West]"

(280) The first warrant authorized a search of "premises under the control and managed by
Omatie Lyder, Editor-in-Chief of the Trinidad Express Newspaper." This was plainly a

wrong description of who was in control or management of the premises. Trinidad Express was a company owned by OCM and had offices together with several other entities at that address. Ms Lyder was not in control or management of those premises.

(281) Consequently, a second warrant was sought and obtained on these terms:

“Republic of Trinidad and Tobago

SEARCH WARRANT

(Chap 12:01 Sec. 5(1))

County of St. George West SW-0025-2020

To all Constables: Including **WENDELL LUCAS SUPERINTENDENT OF POLICE**

WHEREAS it appears, on the oath of **WENDALL LUCAS SUPERINTENDENT OF POLICE of the FINANCIAL INVESTIGATIONS BRANCH**

That there are reasonable grounds for believing that computers [*and the other items listed in the first warrant*] . . . which will afford evidence as to the commission of an Indictable Offence namely Tipping-off.

Contrary to Section 24 of the
Proceeds of Crime Act
Chapter 11:27
as amended.

Are concealed at the premises of the **TRINIDAD EXPRESS NEWSPAPERS** situated at **NO. 35-37 INDEPENDENCE SQUARE, PORT-OF-SPAIN.**

[The second warrant continues in the same terms as the first warrant and is signed and stamped by the Justice of the peace].”

(282) Both warrants were issued pursuant to a Complaint Upon Oath. A copy of the Complaint Upon Oath was not adduced save for the inclusion of the text in the submissions of the respondents before the trial judge. The accuracy of the wording of the Complaint Upon Oath was not contested in the High Court or the Court of Appeal. This is the transcript of the Complaint Upon Oath quoted by the respondents (Record, pp 231-232):

“REPUBLIC OF TRINIDAD AND TOBAGO

COMPLAINT UPON OATH

(Chap 12:01 Sec 5(1)

SW-0025-2020

County of St. George West

WENDALL LUCAS SUPERINTENDENT OF POLICE

Informant

v.

OMATIE LYDER

Defendant

The information of **WENDALL LUCAS SUPERINTENDENT OF POLICE** of the **FINANCIAL INVESTIGATIONS BRANCH**, who said on his oath that there are reasonable grounds for believing that

OMATIE LYDER Editor-in-Chief of the **TRINIDAD EXPRESS NEWSPAPERS** situated at **NO. 35-37 INDEPENDENCE SQUARE, PORT-OF-SPAIN.**

Has at that location, computers, tablets, external storage devices, cellular phones including their SIM cards, SD cards, images, calendars, phone books, contacts, SMS messages, emails, pictures, video recordings, audio recordings, call logs, installed application data, GPS information, WIFI

information, internet history and usage, user files, system files and any other data which are recorded or stored on the hard drive or other storage medium contained within the aforementioned electronic digital devices; and magazines, digital recording discs, documents and articles in which there are reasonable grounds for believing that such data will afford evidence as to the commission of an Indictable Offence namely Tipping-off.

Contrary to Section 51(1) of the
Proceeds of Crime Act
Chapter 11:27
as amended.

And the said **WENDALL LUCAS SUPERINTENDENT OF POLICE** prays that a warrant may be issued to search the premises under the control of and management of **OMATIE LYDER** and situated as aforesaid, for the said data which would afford evidence relating to the commission of the offence of Tipping-off.”

It is to be noted that the Complaint Upon Oath recites that Supt Lucas “said on oath that there are reasonable grounds for believing that” the items sought will afford evidence as to the commission of tipping-off. The Complaint upon Oath used for the first warrant was relied upon in obtaining the second warrant. The only difference between both warrants was the description of Ms Lyder as the person in control and management of the premises to be searched. In both warrants the premises were identical.

(283) Both warrants authorised the search and seizure of copiously identified digital and physical items. These items were believed to be stored at the premises of the Trinidad Express and were expected to provide evidence related to the commission of an indictable offence - specifically, tipping off in violation of section 24 of Proceeds of Crime Act.

(284) As it was later discovered, the warrants were erroneously issued for the investigation of a crime under section 24 of the Proceeds of Crime Act. The respondents condemned this because the crime of tipping off is created by section 51 of that Act and not section 24. I will examine the legal effect of this error in detail below.

(285) **On the night of 11 March 2020—the same day that the warrants were executed—**OCM applied for an interim injunction to prevent access to its **network servers, among other orders. Ramcharan J granted an *ex-parte* injunction and ordered that OCM file and serve an application for leave for judicial review and or a motion under section 14(1) of the Constitution by 16 March 2020.**

(286) On 16 March 2020, OCM, Trinidad Express and Ms Lyder filed a Fixed Date Claim Form seeking constitutional redress under section 14(1) of the Constitution. They sought among other things, a declaration that the search warrants were unconstitutional, unlawful, arbitrary, unnecessary, and disproportionate. The warrants were said to be invalid, null and void, and of no effect in that they contravened the constitutional right to freedom of the press enjoyed by the respondents under section 4(k) of the Constitution. They also sought a declaration that the execution of the second warrant and the seizure of four USB flash drives from Ms Lyder’s office was unconstitutional, unlawful, unnecessary and disproportionate in that it contravened the fundamental rights of Trinidad Express and Ms Lyder to the enjoyment of property and the right not to be deprived thereof except by due process of the law.

(287) The Attorney General of Trinidad and Tobago (“AGTT”) was named as the first defendant. The Commissioner of Police and Supt Lucas were named as second and third defendants.

(288) On 17 March 2020, the case was listed before Seepersad J. The parties provided cross-undertakings. The appellants, AGTT, the Commissioner of Police and Supt Lucas, agreed to refrain from accessing or searching the data stored on the network servers, while the respondents, OCM, Trinidad Express and Ms Lyder, undertook not to remove any data

related to the publication of information concerning ACP Hackshaw until the constitutional claim was resolved. These cross-undertakings are important.

(289) On 27 August 2020, MATT, an organization dedicated to supporting and representing journalists and media practitioners across the country, filed an application to intervene in the proceedings. Seepersad J **granted MATT's application**, allowing it to participate in the case before him.

(290) Judgment on the claim was subsequently delivered by Seepersad J on 13 January 2021 in favour of the respondents.

Findings of the Trial Judge

(291) Seepersad J ruled that the search warrants issued on 11 March 2020 were unconstitutional and unlawful as they disproportionately infringed upon the constitutional right to freedom of the press under Section 4(k) of the Constitution of Trinidad and Tobago.

(292) Additionally, the seizure of the four USB flash drives from Ms Lyder's office was ruled unconstitutional, as it infringed upon the fundamental rights of the respondents to enjoyment of property and the protection of the law.

(293) Seepersad J found at pp 33 -34 of his judgment that the two warrants were flawed. Both contained errors regarding the nature of the offence, failed to disclose to the Justice of the Peace "critical information about the potential availability of relevant details from the FIU or FIB" to establish clear and credible grounds to support the necessity and utility of the warrants, and exhibited uncertainty regarding the statutory basis for the investigation. According to him, the issuance of the warrants did not appropriately balance the need to investigate the summary offence of tipping off against the fundamental right to press freedom and the journalist's right to protect the confidentiality of their sources. Furthermore, the wording of the warrants lacked

precision and was not sufficiently restricted to specific relevant areas and failed to minimize the disruption and intrusion during their execution.

(294) The trial judge declared that the respondents were entitled to damages for the breach of their constitutional rights, with the quantum to be assessed by a Master in Chambers. The appellants were ordered to pay costs to the respondents.

(295) Seepersad J in delivering the decision also advocated for legislative reform, recommending to the executive that search warrants for media houses should be issued by a judge rather than a Justice of the Peace to better protect press freedom and journalistic sources.

The Appeal

(296) On 16 February 2021, the appellants filed a Notice of Appeal challenging the judgment. The appeal challenges 31 findings of mixed fact and law made, supported by 36 grounds of appeal as set out at pp 15 to 21 of the Record.

(297) Having considered the submissions of both sides—both oral and written— and voluminous Records of Appeal, we are asked to determine the following issues:

- (1) whether the issuance, contents, and execution of either or both of the two search warrants executed at Trinidad Express complied with applicable legal safeguards and constitutional or procedural standards;
- (2) whether any failure in this regard resulted in a violation of the respondents' constitutional right to freedom of the press under section 4(k) of the Constitution;
- (3) whether the seizure of the four flash-drives was contrary to law; and
- (4) whether damages flowed from any of these alleged breaches.

Discussion

(298) Section 4 of the Constitution guarantees certain fundamental rights and freedoms including the right to protection of the law:

“4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

...

- (b) the right of the individual to equality before the law and the protection of the law;
- (c) the right of the individual to respect for his private and family life;
- (d) the right of the individual to equality of treatment from any public authority in the exercise of any functions;

...

- (i) freedom of thought and expression;

...

- (k) freedom of the press.”

(299) The discrete constitutional recognition of the “freedom of the press” expands the ambit of protection afforded to press entities, as opposed to the freedom of private individuals, in publishing news, current affairs, or investigative journalism. The question whether the “freedom of the press” extends to individuals that use social media to post news reports is an important question that does not arise on this appeal. I confine myself, for present purposes, to the constitutionally guaranteed freedom to the then-recognised print, radio, and television media when the 1976 Republican constitution was passed. Another court, if asked, will say whether the freedom of the press extends to news published in social media or on the internet by private individuals who consider themselves and are publicly considered as publishers of news.

(300) When I refer to the freedom of “the press” in this judgment I mean the press as it existed in 1976, long before the advent of the publication of news on social media and on the

internet. I will refer to those established corporate individuals as “press entities” or “the press”. I adopt a literalist interpretation of the words “the press” in the Constitution.

Requirements for a search warrant on a press entity

(301) An application for a search warrant on a press entity must be carefully scrutinized to ensure that it does not infringe the guaranteed fundamental right of freedom of the press.

(302) In Trinidad and Tobago search warrants must be issued by a judicial officer.

(303) The Act which governs the issuance of search warrants involving indictable offences is the Indictable Offences (Preliminary Enquiry) Act Chap 12:01 (“Indictable Offences Act”). Section 5(1) of the Indictable Offences Act says this:

“5. (1) Any Magistrate who is satisfied by proof on oath that there is reasonable ground for believing that there is in any building, ship, vessel, carriage, box, receptacle, or place—

- (a) anything upon or in respect of which any indictable offence has been or is suspected to have been committed; or
- (b) anything which there is reasonable ground for believing will afford evidence as to the commission of any such offence; or
- (c) anything which there is reasonable ground for believing is intended to be used for the purpose of committing any indictable offence against the person,

may at any time issue a warrant under his hand authorising any constable to search such building, ship, vessel, carriage, box, receptacle, or place for any such thing, and to seize and carry it before the Magistrate issuing the warrant or some other Magistrate, to be dealt with by him according to law.” (emphasis mine)

(304) Although the section identifies a Magistrate as the issuing judicial officer, a Justice of the Peace is also authorised, in my opinion, to issue a search warrant. Section 2(2) of this Act provides that: “For the purposes of this Act, Justices shall have and exercise concurrent jurisdiction with the Magistrates to issue summonses, warrants, and other process of Court, to grant bail and to fix the amount, to take recognisances, and to bind over parties and witnesses, and to administer oaths.” (emphasis mine). A warrant includes a search warrant. According to the Oxford Dictionary a warrant is “a document issued by a legal or government official authorising the police . . . to make an arrest, search premises, or carry out some other action relating to the administration of justice”. Section 2(2) does not distinguish between arrest and search warrants.

(305) In the case of the issuance of a search warrant connected to the commission of a summary offence the judicial officer can be either a Magistrate or a Justice of the Peace: section 41 of the Summary Courts Act, Chap 4:20 (“the Summary Courts Act”).

(306) Section 41 of the Summary Courts Act says this:

“41. (1) Any Magistrate or Justice who is satisfied, by proof upon oath, that there is reasonable ground for believing that there is in any building, vessel, carriage, box, receptacle, or place—

- (a) anything upon or in respect of which any summary offence has been or is suspected to have been committed;
- (b) anything which there is reasonable ground for believing will afford evidence as to the commission of any such offence; or
- (c) anything which there is reasonable ground for believing is intended to be used for the purpose of committing any offence against the person punishable on summary conviction,

may at any time issue a warrant under his hand authorising any constable to search such building, vessel, carriage, box, receptacle, or place for any such thing, and to seize and carry it before the Magistrate or Justice issuing the warrant or some other Magistrate or Justice, to be dealt with by him according to law. (emphases mine)

(307) Before issuing a search warrant, the Justice of the Peace or Magistrate must therefore be satisfied, on the basis of proof upon oath that there are reasonable grounds for believing that its execution will afford evidence of the commission of a summary offence: *AG v Williams* [1998] AC 351 (“Williams”).

(308) According to *Williams*, in England, proof on oath means that the applicant (usually a police officer) must swear an affidavit or give sworn oral testimony before the judicial officer.

(309) In this appeal a Complaint upon Oath was used. There is no statutory definition of the form of the oath that should be given to the judicial officer. There is no requirement as to whether the oath is given in writing or orally. The law in England as explained in *Williams* is different from the law in Trinidad and Tobago and perhaps it would be expedient for Parliament to more carefully legislate the swearing process, not only in relation to the press but for everyone.

(310) The Complaint upon Oath, the wording of which was not contested, narrates that Supt Lucas gave an oath that there are reasonable grounds for believing that the items subject to the search warrant would provide evidence of the crime of tipping off. The Complaint upon Oath does not say whether Supt Lucas’s oath before the Justice of the Peace was given orally or in writing and it was not an issue in the case as to how the oath was given. A Justice of the Peace is generally empowered to act on the basis of an oath.

(311) The sworn statement in either indictable or summary offences should identify amongst other things the factual basis for the application, establish a clear nexus between the individual (in this appeal, a media entity) and the alleged offence, and demonstrate that the materials sought are relevant and necessary to the investigation. In *Williams*, Lord Hoffmann emphasized that the function of a judicial officer in issuing a warrant is to act as a constitutional safeguard between the citizen and the state. The judicial officer must be satisfied, on the basis of sworn evidence, that the statutory and constitutional conditions for issuing a warrant are met. At p 385 he described this as a matter of high constitutional importance.

(312) This is what *Blackstone's Criminal Practice* (2025), Part D, Section D1.167, says:

“The necessary foundation for the issue of a warrant should be on the face of the information . . . both the applicant and the court must be able to identify the basis for the grant of the warrant.”

(313) Given the constitutional protections afforded to the press, heightened standards should apply when the subject of the warrant is a media entity. It generally goes without saying that the warrant must be strictly necessary to the investigation of the suspected crime and proportionate to the legitimate aim of the investigation. Consideration must be given to whether less intrusive means, for example, voluntary disclosure, could achieve the same objective.

(314) The warrant must, generally, therefore be carefully tailored to avoid fishing expeditions.

(315) It must, of course, properly identify the premises to be searched and the specific items sought. Sufficient evidence of the connection between those items and the alleged offence should be contained in the sworn testimony or oath.

(316) In so far as the freedom of the press is concerned, consideration should also ordinarily be given to the potential impact on confidential sources, editorial independence, and

the potentially paralysing effect of the warrant on the press's right to publish news. The constitutional protections afforded to the press should normally amplify the intensity of a court's investigation.

(317) To determine whether the respondents' constitutional rights were violated in this appeal, we must evaluate the rationality of the trial judge's findings on whether either or both of the search warrants met these procedural standards and, if they were not met, whether the deficiencies were substantial enough to void them as unlawful or unconstitutional.

Analysis of the relevance of the proven facts

(318) In the appeal before us, the FIU received reports from several banking institutions regarding suspicious deposits into ACP Hackshaw's personal bank accounts. These reports were forwarded to the TTPS by the FIU, prompting a secret police investigation into their senior officer's suspicious activities. During the course of that secret investigation, someone—either within the police department, the FIU, or elsewhere—was suspected of sharing these files to Ms Renne. Her published article made it clear that she had “inside information”. It is not farfetched for anyone to suspect or reasonably believe that the transfer of the files was done electronically. The TTPS investigation was being secretly conducted. Supt Lucas cannot be faulted for having had that reasonable suspicion.

(319) When Ms Renee contacted the FIU to request a comment for the intended news article, the FIU officer declined to respond, explaining that doing so could expose him to liability for the offence of tipping off, which is an offence intended to prevent suspects in a criminal investigation from concealing or destroying evidence when they become aware of an investigation into their activities.

(320) During this exchange, Ms Renee ought to have become aware of the potential criminal implications associated with her informant's disclosure of confidential information. Despite this FIU warning, Trinidad Express nonetheless proceeded to publish articles

about the investigation. Trinidad Express obviously alerted ACP Hackshaw that he was being investigated for questionable banking activities. It is not rational to believe that until the time of her call to ACP Hackshaw for a comment and the subsequent publication of the confidential information he was not aware of the FIB investigation into his activities. By then the cat was out of the bag.

(321) By publishing the FIU warning Trinidad Express naturally became aware of the informant's potential crime of tipping off.

(322) After the third publication on 10 March 2020, Supt Lucas promptly obtained a search warrant on 11 March 2020. It was sought pursuant to the Indictable Offences Act instead of the Summary Courts Act. The crime of tipping off is a summary offence and this was an error on the face of both warrants. I will deal with the effect of this error later on in this judgment.

(323) When it was discovered that the first warrant misdescribed Ms Lyder as being in control or management of the targeted premises it was replaced by the second warrant that identified "the premises of the Trinidad Express Newspaper".

(324) Both warrants sanctioned the search and seizure of the specific items listed in them. These items were believed by Supt Lucas to be stored at the premises of Trinidad Express and were expected to provide evidence related to the commission of the indictable offence of tipping off, in violation of the Proceeds of Crime Act. Both search warrants were attached to the affidavit of Supt Lucas (Record, pp 189 - 193).

(325) Supt Lucas testified on affidavit that on 11 March 2020 when he met with the Justice of the Peace he had reasonable grounds for believing that the data stored on those devices would assist in furthering his investigation into the illegal sharing of the FIB's confidential information to Trinidad Express and in determining whether the information provided to Trinidad Express might have emanated from the FIU or the FIB or from someone else.

(326) It cannot be doubted that Supt Lucas sought the search warrants to specifically investigate a potential crime, namely, who within the FIU or FIB (or elsewhere) disclosed the confidential information to Trinidad Express. While the act of sending the files may or may not amount to tipping off (the question remains legally undetermined), the interview of ACP Hackshaw and the publication of the information clearly had the effect of alerting him of the secret FIB investigation. Someone, by sharing the confidential FIB files to Trinidad Express and that newspaper's publication of them caused ACP Hackshaw to be alerted. The question for Supt Lucas was who did this.

Analysis of the respondents' case before the trial judge

(327) A legal challenge was mounted by the respondents against the issuance and execution of the two search warrants. They challenged the alleged violations of constitutional rights, particularly the freedom of the press. They argued that both search warrants (issued on 11 March 2020) were unconstitutional, unlawful, arbitrary, unnecessary, and disproportionate.

(328) The grounds of their legal challenge were set out in the Fixed Date Claim Form. Here is a summary:

- (a) The first search warrant was allegedly invalid because it failed to accurately describe the premises to be searched.
- (b) The first search warrant was obtained unlawfully by misrepresenting to the Justice of the Peace and the respondents what was being sought—specifically, according to the respondents, a “source document and another document identified by Supt Lucas”. The ground of this challenge was based on the words used by Supt Lucas when he spoke with Ms Chote SC during the course of the search. Ms Chote did not testify and Supt Lucas did not mention this conversation in his evidence.
- (c) Both warrants were issued without due regard for the constitutional protections afforded to the press. The application and issuance process

for the search warrants failed to consider the “special legal safeguards” applicable to media entities.

- (d) The appellants allegedly ignored the essential role of the media as a public watchdog and the constitutional right of journalists to protect their sources.
- (e) The actions of the Commissioner of Police and Supt Lucas in seeking, obtaining, and executing the second warrant were described as unconstitutional, unnecessary, arbitrary, disproportionate, and oppressive.
- (f) The second warrant was deemed unlawful because it authorized a broad search of the entire premises of the premises in which Trinidad Express was located, without considering the impact on the media’s ability to fulfil its public interest role.

(329) I note that the first warrant was never executed. Nothing was seized, but its validity was still challenged.

(330) The second warrant was executed, leading to the seizure of four USB flash drives from Ms Lyder’s office.

(331) Both warrants were said to infringe the section 4(k) right to the freedom of the press. The respondents asserted that the warrants failed to consider the special protections afforded to the press, including the right to protect sources and the media’s role in a democratic society. They contended that the warrants were obtained without proper consideration of the constitutional implications for the press. The second warrant (which was the warrant that was executed) was criticized for being too broad, authorizing a search of the entire newspaper premises without assessing, according to the trial judge, the “chilling effect” on journalistic activity. Although the police were said to have behaved reasonably during the search, the fact of execution itself was challenged as unconstitutional due to its impact on press freedom.

(332) This challenge does not make sense to me. The warrant authorised a search of the premises occupied by Trinidad Express. No search was conducted on OCM's separate premises within "Express House". Supt Lucas withdrew when, due to the absence of OCM IT personnel, he was unable to access the mainframe computer. While the search might have been alarming upon its execution I do not see why it ought reasonably to have had a "chilling effect" on journalistic activity or the freedom of the press.

(333) The trial judge upheld the respondents' other legal challenges. He found that the issuance and execution of the warrants were unconstitutional, unlawful, arbitrary, unnecessary and disproportionate. He noted that there were evident errors on the face of both warrants, which were not identified or corrected by the Justice of the Peace who issued them. He said that the first warrant inaccurately described the premises as being managed by Ms Lyder. He was right to say this but the first warrant was never executed and it was replaced by the second warrant which correctly identified Trinidad Express as the operator of the premises.

(334) He found that the warrants and their execution breached the constitutional right to freedom of the press under section 4(k) of the Constitution. He stressed that the issuance of search warrants is a duty of high constitutional importance and must not be treated casually or as "a rubber stamp process".

The role of the appeal court in reversing a trial judge on questions of law

(335) To determine whether the trial judge was plainly wrong in these constitutional findings, an appellate court must ask itself whether his legal conclusions were those that no reasonable judge, properly directing his or herself to the law and evidence, could have reached: *Beacon Insurance Company Limited v Maharaj Bookstore Limited* [2014] UKPC.

(336) In so far as the powers of an appellate court are concerned in reversing a judge's findings of law on undisputed facts the window of reversal is more widely opened than in a reversal on findings of fact: (see *Dr Keith Rowley v Christo Gift & Anor* [2025] UKPC 37)

Analysis of the specific grounds on which the respondents relied in the High Court

(337) I will now examine the material or foundational bases of the grounds in the Fixed Date Claim.

The mislabelling of the statute under which the warrants were issued when they identified an indictable offence instead of a summary offence

(338) The warrants were obtained under section 5 of the Indictable Offences Act, Chap 12:01. However, the respondents correctly say that the offence of tipping off is a summary offence. On that basis they argue that any application for a search warrant ought to have been made under the provisions of the Summary Courts Act rather than under the Indictable Offences Act.

(339) While the categorisation of the offence may affect which statute governs the issuance of the warrant, the practical procedural requirements for the issuance of a search warrant under both Acts are identical.

(340) Both Acts require a judicial officer to be satisfied that there is “reasonable ground for believing” that a warrant should be issued. A justifiable belief is ordinarily based on rational grounds. The facts before the trial judge do not materially affect the validity of the warrants for the purposes of this particular constitutional challenge as they are the same.

(341) Furthermore, the Justice of the Peace was legally empowered under both Acts to issue the warrants. The question is whether the issuance of the warrants under the Indictable Offences Act instead of the Summary Courts Act invalidates the warrants. As I said earlier, the criminal offence of tipping-off is a summary offence.

Are the warrants invalid for the reasons stated by the trial judge?

(342) In my opinion, and for the reasons I will give below, the mislabelling of the statute under which the warrants were issued does not automatically invalidate them. This was the respondents' first argument. Their second invalidation argument was based on the misdescription of who was in control and management of the premises. I will explain below why that argument does not hold water. The third argument concerned the second warrant. It was submitted that it was invalid because a second Complaint on Oath was not made. I do not agree with that.

Does the issuance of the warrants under incorrect sections of the law invalidates them?

(343) For context, section 11(1) of the Indicatable Offences Act expressly provides that no irregularity in the form or substance of a warrant shall affect its validity:

“11. (1) No irregularity or defect in the substance or form of the complaint, summons, or warrant, and no variance between the charge contained in the summons or warrant and the charge contained in the complaint, or between any of them and the evidence adduced on the part of the prosecution at the preliminary enquiry, shall affect the validity of any proceeding at or subsequent to the hearing.”

(344) Similarly, section 118(2) of the Summary Courts Act states that:

“(2) No objection shall be taken or allowed, in any proceeding in the Court, to any complaint, summons, warrant, or other process for any alleged defect therein in substance or in form, or for any variance between any complaint or summons and the evidence adduced in support thereof.

(345) The warrants were issued by the proper authority, using a standard that satisfied both statutory tests. The clerical error in the heading of the warrants is therefore not material

enough to make them illegal or void. The clerical error was not demonstrated to have been so prejudicial as to invalidate either warrant.

(346) The respondents targeted the incorrect citation of section 24 of the Proceeds of Crime Act, instead of the correct provision, namely section 51. Section 51 creates the offence of tipping off. This error was acknowledged and accepted by the appellants who submitted that the mis-reference was due to a clerical error that did not automatically invalidate the warrant. They further said that the error is immaterial and did not mislead or prejudice the respondents because the crime of tipping off was specifically identified in the body of the warrant. The respondents were therefore aware of what crime was being investigated.

(347) *WPC Joseph v Rajae Ali and Ors.*, Magisterial Appeal, No. P010 of 2018 (“*Rajae Ali*”) was a case that dealt with an error in an indictment. There, the respondents were charged indictably under section 5(1)(a) of the Anti-Gang Act, No 10 of 2011. The magistrate incorrectly classified the offence as a hybrid offence, suggesting it could be tried either summarily or indictably. The prosecution laid the charge as an indictable offence, using an “information” instead of a “complaint on oath”, which is required for summary proceedings. Because the charge was laid indictably, and the statutory time limit for laying a summary complaint had expired, the magistrate refused to allow an amendment and dismissed the charge as a nullity.

(348) The decision was appealed and the Court of Appeal held that the magistrate erred in law by refusing to allow an amendment. The error was described by the accused as a substantial error, incurable, and incapable of correction under section 118 of the Summary Courts Act. Yorke-Soo Hon JA, in delivering the decision of the Court of Appeal, emphasised that the substance of the offence—being a gang member—was clear, and the error related only to the mode of trial and not the nature of the alleged wrongdoing. Yorke-Soo Hon JA adopted the classification from *New Southgate Metals Ltd v London Borough of Islington* (1996) Crim L.R. 334, which distinguishes between incurable errors (fatal to the charge), substantial errors (requiring amendment) and trivial errors (which

do not mislead and do not require amendment). Yorke-Soo Hon JA said this at para 15 with reference to *New Southgate Metals Ltd*:

“In that case, where the charge referred to the wrong statute, the court held that the error was of a trivial nature and the accused was in no way misled or disadvantaged. It was also held that it did not invalidate the conviction, which was founded upon an erroneous Information, even though such Information was not amended at the time of conviction. The court further held that the full particulars of the offence, as contained in the statute, were correctly laid out in the Information and that the accused were therefore aware of the true nature of the charge against them and so suffered no prejudice.”

(349) The Court of Appeal’s ruling in *Rajae Ali* excuses certain errors in charging documents.

A charge is quite different from a search warrant. It seems to me that *Rajae Ali* provides guidance on clerical errors in search warrants. Search warrants, although of critical constitutional importance, do not initiate arrests or prosecutions and there is less at stake in an erroneously drafted search warrant with a clerical error. It therefore seems to me that the standard of accuracy is ordinarily higher when formulating a criminal charge as opposed to a search warrant. Of course, if the effect of the clerical error on a search warrant compromises the freedom of the press the matter must be looked at differently.

(350) In the appeal before us, the warrants themselves, as confirmed in the affidavits of Dawn Thomas, the Chief Executive Officer of OCM and Supt Lucas, explicitly referenced the offence of tipping off. The phrase “the commission of an indictable offence namely tipping off” appears at the bottom of both warrants, leaving no reasonable ambiguity as to what crime was being investigated at Trinidad Express’s premises. The respondents ought to have been aware of the suspected offence and cannot credibly say that they were injuriously harmed or disadvantaged by the statutory misdescription on the warrants.

(351) The mis-reference on the two warrants to Section 24 of the Proceeds of Crime Act instead of Section 51 of the Summary Courts Act is an unfortunate error but it cannot automatically invalidate the substance of the warrants. Both warrants plainly identified the criminal offence of tipping-off. The warrants were issued by a competent authority. The respondents were in no way reasonably misled or disadvantaged by any ignorance of the actual offence being investigated. In fact, the respondents, at the time of the execution of the second warrant, sought and relied on legal advice and allowed it to be executed.

Misidentification of the legal owner or occupier of the premises

(352) In analysing the validity of the two search warrants, the first warrant was never executed but its validity was nonetheless challenged in the court below and before us. The first warrant was not executed because it contained an error as to who was in control and management of the premises. Although the address of the premises was correct, it authorized a search of "premises under the control and managed by Omatie Lyder, Editor-in-Chief of the Trinidad Express Newspaper". Supt Lucas, recognizing this defect on that day, did not proceed with the first warrant and instead sought and obtained the second warrant. The misdescription in the first warrant is irrelevant to this appeal because it was not executed.

(353) The second search warrant amended the name of the proprietor of the premises. It now specified "the premises of the Trinidad Express Newspaper". The location of the premises remained unchanged.

(354) In the Irish case of *The People (DPP) v Veronica Balfe* [1998] 4 IR 50 ("*Balfe*"), a burglary took place at a home resulting in the theft of certain appliances. Investigations led the Gardaí to believe that the stolen appliances were located at Forest Hills, Rathcoole, in the possession of one Veronica Balfe. An application was made for a search warrant. The information provided to the judicial officer contained clerical and factual errors, including: (1) misidentification of the suspect's name as "Eddie Balfe" (not Veronica); (2)

incorrect address listed initially as 5 Forest Hills, later amended to 34 Forest Hills; (3) the date of the offence was misstated as 5 January 1994 instead of 1995; and (4) the warrant did not specify the items being sought. The search warrant was executed and the stolen items were recovered.

(355) The validity of the search warrant was challenged on appeal due to its defects. The Irish Court of Criminal Appeal upheld the conviction, ruling that the errors were not material or misleading; the warrant was issued in good faith and remained valid; and the defects did not justify the exclusion of evidence.

(356) *Balfe* supports a finding that clerical errors do not automatically invalidate a warrant. This is obviously a fact-based enquiry. Courts should carefully assess the facts to decide whether the clerical error compromised the legal authority to execute the warrant or misled those who were subject to it. Nowhere on the Record in this appeal is there any evidence of malice or mischief in the issuance of either of the warrants. Ineptitude in crafting the wording of these warrants cannot and does not mechanically amount to malice or an intention to deceive.

(357) The reasoning in *Balfe* was applied in *DPP v Mallon* [2011] IECCA 29, also before the Irish Court of Criminal Appeal. There, the search warrant misdescribed the premises. omitted the word "Lane" in the address ("4 Marrowbone Close" instead of "4 Marrowbone Lane Close"). The misdescription was held not to be a jurisdictional defect. The court held that unless an error is misleading or of a fundamental nature the warrant remains effective.

(358) In *Northern Construction v Attorney General of Trinidad and Tobago* HCA 733 of 2022, Jamadar J (as he then was) affirmed that technical inaccuracies in the description of premises do not, by themselves, invalidate the execution of a search warrant.

(359) As established in *Balfe*, *Mallon*, and *Northern Construction*, clerical or typographical errors in warrants—such as, for example, a misnamed proprietor—do not invalidate the

warrant. This is so particularly where, as in this case, the physical premises are unmistakeably identified. In this appeal, only the name of the proprietor was changed in the second warrant. The correction in the second warrant did not mislead the true proprietor as to whose premises were to be searched or rise to such an unreasonable or intolerable level to cause its invalidation. The correction in the second warrant did not alter the substantive legal basis for the warrant.

Validity of the second warrant: re-use of the first oath and procedural integrity

(360) A key argument for the respondents was that the second warrant was not issued by way of a second Complaint Upon Oath before the Justice of the Peace. The second warrant was issued following a correction to the first, and it appears—based on the oral submissions by Mr Dass SC on behalf of the appellants—that the same oath and supporting documents were reused before the Justice of the Peace.

(361) Both section 5(1) of the Indictable Offences Act and section 41 of the Summary Courts Act authorise a Justice of the Peace to issue a search warrant upon Complaint made on Oath that there is “reasonable ground for believing” that evidence located at the specified premises “will afford evidence of the commission of any such offence”. The test of “reasonable ground for believing” applies whether or not the crime, the subject of the search warrant, is an indictable or a summary offence.

(362) The language of the Acts does not require a new oath for a second warrant, nor does it prohibit reliance on a prior sworn Complaint Upon Oath where the substance of the crime remains unchanged. The wording for a summary offence search warrant is identical to an indictable offence search warrant.

(363) There is no statutory prohibition against correcting the name of a proprietor of premises in a second warrant based upon an oath previously given in relation to the issuance of an earlier search warrant. It does not seem to me that such a such a requirement is rational where the person in control or management is misdescribed. Naturally, in such cases, the Justice must be satisfied with the sufficiency of the first oath. By issuing the

second warrant she was obviously satisfied. The decision is, of course, discretionary. A Justice of the Peace is not an agent of the State, but an independent judicial officer.

(364) The trial judge was starved of any direct evidence from the Justice of the Peace. The respondents issued no witness summons to her. The trial judge was not aware of all the circumstances upon which the second warrant was issued. Neither do we, as I said before, know whether the first warrant was obtained on oral or written testimony.

(365) In my opinion, barring a statutory or common law requirement for a second Complaint on Oath, the original oath retains its legal effect unless its factual or legal foundation is being altered. The second warrant simply corrected the name of the proprietor at the same street address and does not rationally require another Complaint on Oath to be given. The amendment did not invalidate the second search warrant.

(366) There is no evidence of prejudice to the respondents, nor any indication that the Justice of the Peace lacked jurisdiction or was misled to an extent that would invalidate either search warrant. The correction was administrative, not substantive, and the complaint namely, the crime of tipping off, remained unchanged in both warrants.

(367) I therefore hold that the second warrant was not invalidated by the absence of a second Complaint Upon Oath.

Scope of the Warrants

(368) The warrants, the subject of this appeal, authorized a search and seizure action that targeted certain digital media and physical items stored at the premises of Trinidad Express. I have already set them out in the text of the first warrant and there is no need to again set them out.

(369) These items were identified as potentially containing evidence relevant to the investigation of a summary offence, namely, the alleged crime of tipping off under the

Proceeds of Crime Act. There is no reason to doubt that, on the evidence before the trial judge, Supt Lucas asserted reasonable grounds for the Justice of the Peace to believe that such material was stored at the premises of Trinidad Express and that access to this material was necessary to support his investigation of a crime.

(370) The warrants did not authorize arbitrary seizures but were limited to devices and data believed to contain relevant evidence. Some of the items listed—SMS messages, emails, and GPS data—are not reasonably atypical digital sources in tipping off investigations involving digital communications and metadata trails. Evidence of tipping off is characteristically embedded in phones, SMS messages, and emails which record communications with suspected third parties. Call logs and contacts would typically reveal interactions and traceable networks. GPS and Wi-Fi data are capable of placing individuals at specific locations. Similarly, installed applications such as VPN or file sharing apps would likely reveal avenues for the transfer of information to circumvent detection. User/system files store logs, edited documents, drafts of disclosures, while external storage media is often used to back up the evidence being sought. Digital recording discs may contain unpublished content or recorded exchanges. The breadth and scope of the warrants is therefore not excessive but rather purposive and tailored to capture electronic footprints of an alleged tipping off event.

(371) While broad in appearance, the language of the warrants plainly enumerated both device types and data categories. This level of detail avoids vague or generic authorizations. It confirms the State's intent to remain within its constitutional boundaries in the investigation of a crime.

(372) In my view, the warrants were properly confined to well-defined digital and physical sources reasonably connected to the crime of tipping off and cannot reasonably be likened to a fishing expedition. By listing the categories of physical and digital items, the police investigators rationally satisfied the constitutional and procedural threshold required for such a search. The warrants were proportionate to legitimate aims and the trial judge was plainly wrong to have held otherwise.

Full and frank disclosure: reasonable grounds justifying the issuance of the warrants

(373) The trial judge concluded that there was no clear and convincing evidence presented to the Justice of the Peace establishing reasonable grounds for believing that the warrants were necessary or that they would significantly assist the investigation into the alleged crime of tipping off. He said this at paragraph 75 of his judgment:

“75. Prior to the issue of search warrants, the judicial nature of the function imposed upon the authorising officer an obligation to be satisfied that there is evidence capable of providing reasonable grounds for the holding of the belief, that the warrant(s) sought, were necessary and would assist in the investigation of the stated offence. The evidence before this Court suggests that there was no such clarity and certainty on the face of the warrants sought or in the complaint on oath.”

(374) For the reasons given before I do not agree with this finding.

(375) Additionally, the trial judge found that the police had failed in their duty of full and frank disclosure as they withheld material information when applying for the warrants. He said this at paragraph 86:

“86. The articles which catalysed the obtaining of the warrants did not identify the source of the material which the journalist used. At the time the warrants were issued, Supt Lucas evidently had in his possession, information which had been generated by the Financial Intelligence Unit (FIU) and the Financial Intelligence Bureau (FIB) and he outlined at paragraph 15 of his affidavit that the information in the Express articles was similar to the information contained in the confidential documents and reports from the FIU and the FIB.

This information was however not disclosed to the Justice of the Peace and would have been relevant when deciding whether or not the warrants should have been issued. Accordingly, the obligation for full and frank disclosure was not discharged and this material non-disclosure, in the round and having regard to the operative factual matrix, is significant and should lead to the quashing of the warrants.” (Emphasis added)

(376) A copy of the actual Complaint Upon Oath is not included in the Record before us. I searched everywhere without success. It was however textually reproduced in the respondents’ written submissions before the trial judge. I earlier quoted the wording. The textual reproduction does not specify whether the oath was made orally or in writing and what were the contents of the oath. It was wrong for the trial judge, in the absence of a *Huddleston* complaint or an application for specific disclosure, to conclude that there was no full and frank disclosure to justify the issuance of the warrants.

(377) It was therefore not reasonable for the trial judge to find that reasonable grounds were not provided to the Justice of the Peace. Further, the trial judge was plainly wrong to hold that the FIU and FIB’s confidential information should have been presented to the Justice of the Peace. We do not even know what was disclosed to the Justice of the Peace, save for what is recorded in the Complaint upon Oath. What is plain is that the Justice of the Peace was satisfied with the oath, as she issued the warrants.

(378) In *Central Broadcasting Services Limited v Commissioner of Police* CV2019-02135, Boodoosingh J (as he then was) at para 17 cited the 2018 edition of *Stone’s Justice Manual*, which offers procedural guidance on the correct approach to be taken when seeking a search warrant. He said that that the disclosure must be as “full and frank” as the circumstance of each case requires.

The constitutionally guaranteed freedom of the press: issuance of a search warrant

(379) In *Canadian Broadcasting Corporation v Lessard* (1991) 3 SCR 421 ("*Lessard*"), a case cited by both parties, the Supreme Court of Canada addressed the issue of the constitutional rights of the media in which the right to freedom of the press is a right that is protected under the freedom of expression. However, according to the court, freedom of expression does not mean it is a less protected right. In Canada, freedom of the press is not listed as a separate constitutional right in their Charter. Instead, it is understood to be part of the broader right to freedom of expression under Section 2(b) of the Canadian Charter of Rights and Freedoms. The court in *Lessard* clarified that just because freedom of the press is grouped under freedom of expression, it does not mean it is weaker, secondary, or less protected.

(380) In that Canadian appeal, a CBC camera crew recorded individuals occupying and vandalizing a post office. Segments of the footage capturing the commission of the crime were twice broadcast. The following day, police authorities obtained a search warrant to enter, search, and seize the video tapes. The warrant application described the material sought as: "video tape on which persons were filmed while causing damage to the interior of the post office . . .". Section 487 of the Criminal Code, R.S.C., 1985, c.C-46 (formerly s. 443) sets out the conditions upon which a justice of the peace has jurisdiction to issue a search warrant:

"487 (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

- (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
- (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
- (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing

- any offence against the person for which a person may
be arrested without warrant, or
- (c.1) any offence-related property,

may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant

- (d) to search the building, receptacle or place for any such thing and to seize it, and
- (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect of it to, the justice or some other justice for the same territorial division in accordance with section 489.1”

(381) Section 487(1) essentially says that same things in section 5(1) of the Indictable Offences Act and section 41 of the Summary Courts Act, although with more depth and in clearer language. Importantly, it says that the oath must be in writing and made in a prescribed form. Our statutes do not say so.

(382) Cory J, in delivering the majority decision, said this at page 444:

“A search is always intrusive, upsetting and to some degree disruptive of the life or business of the individual subjected to the search. It is for this reason that a justice of the peace considering a search warrant application must undertake a careful weighing of the privacy interests of individuals in a democratic society against the interests of the state in investigating and prosecuting crimes”.

(383) He went on to say:

“The weighing and balancing which must be undertaken will vary with the facts presented on each application. Certainly in every case the requirements of s. 487 of the Code must be met. However, this is not the end of the matter. Even after the statutory conditions have been met it may still be a difficult and complex process to determine whether a search warrant should be issued. For example, a greater degree of privacy may be expected in a home than in commercial premises which may be subject to statutory regulation and inspection. At the same time, among commercial premises, the media are entitled to particularly careful consideration, both as to the issuance of a search warrant and as to the conditions that may be attached to a warrant to ensure that any disruption of the gathering and dissemination of news is limited as much as possible. The media are entitled to this special consideration because of the importance of their role in the democratic society”. (Emphases added)

(384) Cory J laid out a framework for determining whether a Justice of the Peace should exercise a discretion to issue a search warrant, particularly when it involves media premises. He stated at p 445 that they included the following:

“(1) It is essential that all the requirements set out in s. 487(1)(b) of the Criminal Code for the issuance of a search warrant be met.

(2) Once the statutory conditions have been met, the justice of the peace should consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant.

(3) The Justice of the Peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination. It must be

borne in mind that the media play a vital role in the functioning of a democratic society. Generally speaking, the news media would not be implicated in the crime under investigation. They are truly an innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant.

(4) The affidavit in support of the application must contain sufficient detail to enable the justice of the peace to properly exercise his or her discretion as to the issuance of a search warrant.

(5) Although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which the information may be reasonably obtained and, if there is an alternative source, that it has been investigated and all the reasonable efforts to obtain the information have been exhausted.

6) If the information sought has been disseminated by the media in whole or in part, this will be a factor which will favour the issuing of the search warrant.

(7) If the justice of the peace determines that a warrant should be issued for the search of media premises, consideration should then be given to the imposition of some conditions on its implementation, so that the media organisation would not be unduly impeded in the publishing or dissemination of the news.

(8) If subsequent to the issuing of a search warrant, it comes to light the authorities failed to disclose pertinent information that could well have affected the decision to issue the warrant, this may result in a finding that the warrant was invalid.

(9) Similarly, if the search itself is unreasonably conducted, this may render the search invalid.” (Emphases added)

(385) The *Lessard* principles require a focussed constitutional balancing exercise. Justices of the Peace in Canada have legal training. Search warrant applications are made speedily and without adversarial input. This limits the authorizing officer's ability to assess competing constitutional rights with precision.

(386) Demanding that the Justice of the Peace should have conducted a *Lessard*-type rights analysis in this case is impractical under our statutory laws. This does not mean that the Justice of the Peace is beyond reproach. It is the duty of the courts to carry out an *ex post facto* assessment on the proven facts of how she exercised her discretion. Heightened sensitivity to the freedom of the press is of course very important.

(387) In my opinion, *Lessard* does not support the respondents case. I say so for the following reasons:

(a) The wording of section 487(1) of the Canadian Criminal Code specifically directs that an affidavit be sworn in a prescribed form. Our legislation does not specify whether the oath is made in writing or orally. Further, in the case before us, the statutory conditions that Cory J emphasised were met: a Complaint on Oath was made and there is no evidence to dispute that the Justice of the Peace had reasonable grounds for believing that the search warrant should be issued.

(b) Cory J was careful to say this: "Generally speaking, the news media would not be implicated in the crime under investigation." It is not known as yet what the main frame servers will disclose about the electronic or other interactions between Ms Renne and her informant, the subject of the criminal investigation. We know that the acting director of the FIU warned her that the information she sought from him might amount to the crime of tipping off. Trinidad Express therefore had knowledge of a potential crime. The parties gave cross-undertakings at the injunction stage: the appellants undertook not to execute the second or any further search warrant and the respondents undertook to preserve all of the items listed in the warrants. At this stage, therefore, the second warrant having been voluntarily stayed it cannot be said that

Trinidad Express was implicated in the crime under investigation, and it must be treated as an innocent third party.

(c) The publication of the information to the public had already occurred when the warrant was issued. According to Cory J, this is a factor that favours the issuing of the search warrant.

(d) The execution of the first and second warrants did not unduly or in any way impede or prohibit Trinidad Express from publishing or disseminating the news on that or any day. In fact, the execution of the warrants was itself the subject of breaking news. This strongly suggests that the newspaper was fully operational as a press entity and its freedom to publish was not infringed.

(e) Cory J said that according to the Canadian Code the failure to disclose pertinent information “may” invalidate the warrant. The invalidation of a warrant is a matter of judicial discretion that must be reasonably exercised on the basis of the proven facts. The discretion not to invalidate a warrant, even in the face of the non-disclosure of pertinent information, will depend on the pertinence of the information that is allegedly undisclosed.

(388) For these reasons I hold that *Lessard* supports the appellants case on the validity of the warrants.

(389) The trial judge ruled that the warrants were unlawful because there was a lack of convincing evidence and material non-disclosure. He was plainly wrong to have so held.

(390) Neither Section 5(1) of the Indictable Offences Act nor Section 41 of the Summary Courts Act stipulate any procedural requirements save that the Justice of the Peace must be satisfied by “proof on oath” that there is “reasonable ground for believing”. Notably, there is no statutory requirement or obligation for an affidavit in writing or that the proceedings to be recorded. The legislation permits a degree of unwelcome procedural informality in such applications.

(391) The non-existence of a formal record of the application, the oath, and any oral submissions for the warrant, the information presented to the Justice of the Peace (which is not on the Record) does not mean that no evidence was provided or that the issuance of the warrants was unlawful. I earlier set out a transcript of the Complaint upon Oath, a copy of which was not on the Record.

(392) At para 83 of the respondents' submissions in the court below, they submitted that there was no evidence of additional sworn evidence before the Justice of the Peace and that the Complaint Upon Oath was the only evidence before her. This submission ignores the fact that the Justice of the Peace plainly recorded that evidence on oath (it is not known whether written or oral) was submitted to her.

(393) In my opinion there was no credible evidence before the trial judge to contest the validity of the process used to obtain the warrants or to establish non-compliance with the statutory requirements. I disagree with the trial judge, on the record before him, that the statutory criterion of reasonable grounds for believing that the warrant should be issued were not satisfied. He fell into error by so holding.

The constitutionally guaranteed freedom of the press: non-disclosure

(394) The Justice of the Peace only need only be satisfied by sworn information that meets a reasonable grounds test. A non-disclosure that crosses the threshold of deliberateness, deceit, or sleight-of-hand and of an unjustified or unexplained clerical error will, in the circumstances of individual cases, invalidate the search warrant.

(395) The trial judge's findings on non-disclosure were however based on an inference. He said that the non-disclosed information might have altered the Justice of the Peace's decision. He said this without any clear evidence that its absence had that effect on her.

The respondents never issued a witness summons to the Justice of the Peace. An application for specific disclosure was not made.

(396) What is the non-disclosed information that the trial judge held onto? According to the trial judge at the time the warrants were issued, Supt Lucas was in possession of confidential information generated by the FIU and the FIB. At para 15 of his affidavit, Supt Lucas stated that the information published in the Trinidad Express articles was similar to that contained in the FIU and FIB's confidential documents and reports. However, the trial judge noted that this FIU and FIB information was not disclosed to the Justice of the Peace.

(397) However, the Record does not say exactly what was disclosed to the Justice of the Peace. That evidence would logically be relevant to whether there was any non-disclosure.

(398) A search warrant should not be automatically invalidated on the inferential basis that an oath containing sufficient details was not given to the judicial officer. Proof that the judicial officer was deliberately or intentionally misled would of course be highly relevant.

(399) In my opinion the trial judge did not properly evaluate what the statute actually required in light of the facts before him, which was his first duty, and instead became absorbed by conjectural risks to the constitutional right to freedom of the press. In short, he did not correctly evaluate whether the police followed the procedural steps set out in the Indictable Offences Act and the Summary Courts Act. Did Supt Lucas submit adequate sworn evidence providing reasonable grounds to issue a warrant? The answer to that question required a careful judicial interrogation. In my opinion, as I earlier said, the evidence presented to the Justice of the Peace crossed the threshold of adequacy based on the wording of the uncontested Complaint upon Oath, and the wording of the search warrants themselves.

Was the constitutionally guaranteed freedom of the press infringed?

(400) The trial judge spent a lot of time exploring whether a journalist's rights might be violated, even though the warrant application process essentially followed the law and there was no direct evidence that such constitutional harm occurred or was likely to occur to any of the respondents, or indeed, to any other press entity.

(401) In my opinion, this was case before the trial judge, and the one that he should studied:

- (a) Some unknown person had digital or other access to a confidential police investigation into the suspected criminal activities of ACP Hackshaw;
- (b) that person, without lawful authority, shared the information with Trinidad Express;
- (c) Trinidad Express published the confidential information;
- (d) the publication and the interview of ACP Hackshaw alerted the suspected criminal of the investigation into his activities;
- (e) ACP Hackshaw was tipped off about the secret investigation when he was interviewed and the articles were published;
- (f) the unknown person who secretly shared the confidential information was reasonably suspected of a criminal act, and the identity of that person was known to Trinidad Express; and
- (g) Supt Lucas needed to discover the identity of that person for the purpose of investigating the crime of tipping off.

(402) I am satisfied that it was reasonable for the Justice of the Peace on the evidence before her, based on the Complaint upon Oath, that sufficient grounds existed for issuing the

search warrants. I therefore find that the search warrants were lawfully issued. The trial judge was plainly wrong not to find so on the facts before him.

(403) The use of a warrant to conduct a search of the Trinidad Express premises, did not infringe the respondents' rights under section 4(k) of the Constitution. Section 4(k) guarantees the constitutional right to freedom of the press which safeguards the institutional independence of media houses and the functional integrity of journalistic activities. Of course, the press is a public watchdog, facilitating transparency, accountability, and informed public discourse.

(404) This right, while fundamental, is not absolute. It may be limited where the interference, such as in the issuance of a search warrant in the facts of this case, is prescribed by law, the measure pursues a legitimate aim, or the intrusion is necessary and proportionate in a democratic society. The parameters of the constitutional right are determined by the courts.

(405) In *Panday v Gordon* [2006] 2 WLR 39, paragraphs 17–25, Lord Nicholls of Birkenhead emphasized that the rights declared in Section 4 are not absolute. They are subject to such limitations as are reasonably justifiable in a society that has a proper respect for the rights and freedoms in a democratic society. This principle was reaffirmed in *Suraj & Ors v Attorney General of Trinidad and Tobago* [2022] 3 WLR 309. The Board in *Suraj* applied a proportionality test, which is now the accepted standard for assessing whether an interference with a constitutional right is justified.

(406) The judgment of the Supreme Court of the United States in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) is useful in assessing the reasonableness and constitutional validity of executing a search warrant on media premises. In that case, the Stanford Daily, a student newspaper, published articles and photographs depicting a clash between demonstrators and police officers. Believing that unpublished photographs might assist in identifying individuals involved in assaults on police personnel, police officers obtained a warrant to search the newspaper's offices. Notably, the newspaper's staff were not suspects in any criminal investigation.

(407) The newspaper challenged the search under 42 U.S.C. § 1983, arguing that it infringed their constitutional rights, specifically the freedom of the press guaranteed under the First Amendment, protection against unreasonable searches under the Fourth Amendment, and the due process safeguards provided by the Fourteenth Amendment. Both the U.S. District Court and the Ninth Circuit Court of Appeals agreed, holding that a *subpoena* should have been issued instead of a warrant, unless there was compelling evidence that *subpoena* compliance would be impracticable or that evidence was at risk of destruction. The Supreme Court reversed the decision.

(408) Delivering the majority opinion, Justice White held that neither the Fourth nor the Fourteenth Amendments precluded the issuance of a search warrant to a third party—even a newspaper—not suspected of criminal conduct, as long as probable cause exists that evidence of a crime is located on the premises. The Supreme Court emphasized that the critical standard for Fourth Amendment compliance is the presence of probable cause, not the suspect status of the person or entity occupying the premises.

(409) Further, the court cautioned that favouring *subpoenas* over search warrants might undermine law enforcement effectiveness by allowing evidence to be moved or destroyed. While recognizing the sensitive nature of searches involving the press, it concluded that constitutional safeguards are nonetheless preserved by judicial review. The court firmly rejected the notion that the press is entitled to any special exemption from general search and seizure rules, reiterating that media premises are subject to the same legal standards as other private entities.

(410) This persuasive authority supports the proposition that so long as the warrant is narrowly tailored, supported by credible or sufficiently credible evidence, and executed under proper judicial supervision, its application, even to press entities, does not violate the constitutional guarantee of freedom of the press.

(411) In *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)* [1991] 3 S.C.R. 459, journalists of the Canadian Broadcasting Corporation (“CBC”) filmed a demonstration at a construction site where protestors caused damage, including the destruction of a guardhouse. Police officers were present. The Royal Canadian Mounted Police applied for a warrant to seize the video tapes. The affidavit supporting the warrant claimed that alternative sources were either unavailable or unwilling to testify but it omitted the fact that police identification specialists had attended the scene.

(412) A Justice of the Peace issued a warrant under s. 487(1) of the Criminal Code. CBC challenged the warrant, arguing its issuance violated s. 2(b) and s. 8 of the Canadian Charter of Rights and Freedoms. CBC successfully brought an application in the Queen’s Bench to quash the warrant and to order the return of the seized video tapes. However, the Court of Appeal allowed the Crown’s appeal and upheld the issuance of the warrant. At issue was whether the freedom of the press, as protected by s. 2(b) of the Canadian Charter of Rights and Freedoms requires that a Justice of the Peace, before issuing a warrant to search media offices, be satisfied that no reasonable alternative source of the information exists.

(413) The majority (Sopinka, Gonthier, Cory and Stevenson JJA) held that freedom of expression, protected by section 2(b) of the Canadian Charter, does not import any new or additional requirement for the issuance of search warrants. It provides a backdrop against which the reasonableness of the search may be evaluated and requires that careful consideration be given not only to whether a warrant should be issued but also to the conditions which might properly be imposed upon any search of media premises. In a nutshell, the majority held that the essential question is this: “. . . taking into account all the circumstances and viewing them fairly and objectively can it be said that the search was a reasonable one?” The court also held that, “It is essential that flexibility in the balancing process be preserved so that all the factors relevant to the individual case may be taken into consideration and properly weighed” (pp 475-478).

(414) The legal standards in *New Brunswick* and *Zurcher*, affirm that lawfully issued search warrants against media entities are not inherently unconstitutional. Both judgments support the proposition that a Justice of the Peace need not refuse to grant a search warrant solely due to its impact on press activity, provided the statutory requirements are met.

(415) In this appeal, police officers obtained search warrants for the specific purpose of investigating a probable crime, namely, to determine who within the FIU or the FIB disclosed confidential information to the media thus committing the crime tipping-off the alleged subject of their investigation.

(416) The publication of that information undeniably had the effect of alerting ACP Hackshaw. The reporter was alerted of this consequence. The Editor nonetheless decided to publish the articles. Courts should ordinarily be less considerate of free press freedoms involving crimes when the press has already published the information: *New Brunswick*.

(417) Accordingly, a breach of freedom of the press was not engaged in this appeal because the search warrants were not directed at suppressing journalistic activity or punishing the publication of information. Instead, the warrants were part of a narrowly defined criminal investigation into a potential breach of confidentiality within the ranks of the police service or within the FIU (or elsewhere) that amounted to the crime of tipping off.

(418) It seems plain to me that as the editor-in-chief, Ms. Lyder was responsible for the publication's content, the editorial decisions, and the handling of its sensitive information. She must have read the reporter's account of the likely crime of tipping off. She most likely had access to internal communications, source materials, and digital storage systems where journalistic data, including the sought information, was archived or reviewed. The editor-in-chief is usually the gatekeeper of institutional knowledge, including unpublished materials, source identities, and editorial processes.

(419) I do not accept Ms Chote's argument that the police had a constitutional or other legal obligation to first informally request the information. The law does not require that less intrusive methods be used before seeking a search warrant in the circumstances of this appeal. The police acted within their legal authority and the warrants were supported by a reasonable suspicion of a crime and with judicial oversight. Ms Chote's argument that the warrants were disproportionate fails to recognize that proportionality does not always require the least intrusive method, but rather it requires a judicial balance between investigative necessity and constitutionally protected individual rights. This was achieved in the case before the trial judge. The seizure of the USB drives was conducted under judicial authorization and aimed at collecting evidence relevant to the crime of tipping-off an Assistant Commissioner of Police to a police investigation into his suspicious conduct.

(420) The trial judge was plainly wrong to conclude that the respondents' constitutional rights under section 4(k) were infringed. His findings misapply well-known constitutional principles and overextend the scope of press freedom in the context of a legitimate criminal investigation.

(421) There is no known blanket immunity in section 4(k) if a member of the press becomes mixed up in facilitating the commission of a crime. The press is not immunised from the inconvenience of a search warrant if there are reasonable grounds for believing that it possesses crucial information relevant to the investigation of a crime. If the protection of "confidential news sources" enjoyed such widespread blanket protection then the press would be able to hide the identity of criminal suspects in a news story that cause the police to reasonably suspect that it knows their identity. It cannot reasonably be said that Ms Renne or Ms Lyder were unaware that their informant was potentially liable for the crime of tipping off.

(422) The search warrants were not issued to suppress journalistic activity but to identify the source of an unauthorized disclosure of confidential information. The media entity was

not the subject of prosecution, nor was its right to publish in any way restricted. The judge failed to distinguish between State action aimed at suppressing the press and State action aimed at the prosecution of an alleged crime.

(423) In the circumstances of this appeal the mere fact that a media entity was the subject of a search warrant does not, without more, establish an infringement of section 4(k). The manner in which Supt Lucas and other members of the TTPS conducted the search reflects a high level of professionalism and respect for constitutional safeguards. The officers withdrew the first warrant, which misdescribed Ms Lyder as the manager of the premises and they obtained the second warrant. They sought permission before accessing various sections of the OCM building. They used no physical force. They assaulted no one and freely accommodated the participation of the respondents' attorneys. They voluntarily exited the premises upon learning that IT personnel were unavailable, thereby avoiding unnecessary disruption and protecting the integrity of OCM's mainframe server.

(424) This conduct exceeds mere procedural courtesy: it evidences a conscious effort to uphold the constitutional value of the freedom of the press. Rather than being supplementary, such restraint and accountability are very relevant in assessing whether the execution of the search violated any constitutional guarantees. When weighed against the serious nature of the criminal offence under investigation and the procedural fairness in the execution of the warrants, I am satisfied that it provides a compelling argument in favour of the proportionality and lawfulness of the search warrants.

(425) Furthermore, the judge did not explain how the warrants directly interfered with editorial independence, source confidentiality, or the ability to publish. The judgment gave insufficient weight to the State's powerful interest in investigating a serious crime. The trial judge's balancing exercise was flawed. It elevated speculative harms to press freedom over the concrete need to uphold the integrity of law enforcement processes.

(426) While the protection of journalistic sources is a vital component of press freedom, such protection is not bullet-proof. This privilege can be superseded where disclosure is necessary in the interests of justice, national security, or the prevention of crime. In this case, the warrants were issued not to suppress press freedom or prevent publication, but to investigate the offence of tipping off.

(427) The public interest in investigating a breach of anti-money laundering laws, particularly those that might reasonably compromise the integrity of law enforcement operations, outweigh any residual claim to “confidential source” protection.

(428) I hold that the issuance of the warrants does not constitute a violation of press freedom but is rather a lawful and proportionate response to a serious criminal offence. Therefore, the legal protections usually afforded to journalistic sources were not engaged, and the warrants were lawfully issued to investigate the already committed act of publication. A press entity cannot erect an impenetrable “source of information” argument when the reasonably suspected crime of a third party is involved.

(429) The trial judge’s conclusion that the warrants had a “chilling effect” on journalistic activity is not supported by the evidence on the record before us. On the evidence before him the newsroom was not shutdown or and no reporters were intimidated. In fact, the newsroom was fully operational. The trial judge’s findings were therefore speculative and unsupported.

(430) The trial judge’s finding that the search warrant was unnecessarily wide and permitted a search beyond its stated parameters is also entirely misconceived.

(431) The scope of the warrant does not amount to overreach. The police exercised restraint and discretion. While the server may have contained wide-ranging OCM data, the warrant did not authorize the indiscriminate rummaging of OCM’s data banks. It targeted clearly defined categories of evidence allegedly in the possession of Trinidad Express, and the seizure was narrowly tailored to support that investigation.

(432) Neither search warrant targeted journalistic freedom or editorial processes but rather sought evidence of a criminal offence.

(433) While the warrant had the potential to access a wide array of data, its actual execution was measured, lawful, and proportionate. The media's rights were respected in practical terms, and the warrant served a legitimate investigative purpose in the public interest without infringing any constitutional protections.

(434) For these reasons, I hold that the judge was plainly wrong.

(435) The search warrants were therefore lawful, proportionate, and constitutionally valid.

Disposition

(436) The appeal is therefore allowed. The judgment of the High Court is set aside. It is declared that the issuance and execution of the search warrants did not violate section 4(k) of the Constitution.

(437) It is further declared that the seizure of the four USB flash drives from the office of the third respondent was not unconstitutional.

(438) Having regard to the cross-undertakings at the injunction stage the effect of this judgment is that the items sought in the second warrant, which have been preserved in the respondents' undertaking, may now be seized by the TTPS as part of their investigation into the crime of tipping off.

(439) We will now hear the parties on the issue of costs.

James C Aboud
Justice of Appeal