

SEARCH AND SEIZURE OF THE PRESS[©]

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In the companion cases of *Canadian Broadcasting Corp. v. Lessard* and *Canadian Broadcasting Corp. v. New Brunswick (A.G.)*, the Supreme Court of Canada decided that the media should not have any special protection from police search and seizure above that afforded to ordinary citizens. In refusing to create a standard of heightened constitutional protection to be met before a search warrant can be issued against the press, the Court turned a blind eye to its past interpretations of section 8 of the *Charter* as containing a standard of reasonableness that varies depending upon the context of the search and the particular rights involved. These decisions ignore the unique role that the media play in a democratic society and will continue to have a negative impact on the constitutional guarantees of freedom of the press. It appears that a better balance of the interests of the press and of law enforcement can only be reached through legislative intervention.

Dans les cas pendants de *CBC c. Lessard* et *CBC c. Nouveau-Brunswick (P.-G.)* la Cour suprême du Canada a décidé que les médias ne doivent pas avoir des protections spéciales contre les fouilles, les perquisitions ou les saisies abusives, au-delà de celles qui sont accordées aux citoyens ordinaires. En rejetant la création d'un standard plus élevé de protection constitutionnelle à satisfaire avant de pouvoir donner un mandat contre la presse, la Cour n'a tenu aucun compte de ses interprétations antérieures de l'article 8 de la *Charte* comme comprenant un standard de ce qui est raisonnable qui est variable selon le contexte des fouilles, des perquisitions et des saisies, et les droits particuliers qui s'y impliquent. Ces décisions ne prennent pas en considération le rôle unique des médias dans une société démocratique, et elles continueront à avoir un impact négatif sur les garanties constitutionnelles de la liberté de la presse. Il paraît qu'un meilleur équilibre des intérêts de la presse et de l'activité policière ne peut être accompli que par l'intervention législative.

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I. INTRODUCTION

“Police Ransack Newspaper Offices—Supreme Court of Canada Bulldozes Over Freedom of the Press.”

This could very well have been the front page headline of a newspaper after the Supreme Court of Canada handed down its decisions in *Canadian Broadcasting Corp. v. Lessard*¹ and *Canadian Broadcasting Corp. v. New Brunswick (A.G.)*² In these companion cases, Canada’s highest court decided that the media, as innocent custodians of information relating to a crime in which the press itself is not an implicated party, do not have any special protection from police search and seizure above that afforded to ordinary citizens. What the Court failed to adequately acknowledge, however, is that organs of the media are not ordinary citizens. The press plays a unique and vital role in our society and should be provided with special protection. Instead of acknowledging this, the Supreme Court decided that section 8 of the *Canadian Charter of Rights and Freedoms*—which protects every person’s right to be secure against unreasonable search or seizure—applies in the same fashion to the press as it does to other individuals, and that section 2(b)—which protects freedom of the press—offers the press no protection from search and seizure beyond that provided to all individuals by section 8.

¹ [1991] 3 S.C.R. 421 [hereinafter *Lessard*].

² [1991] 3 S.C.R. 459 [hereinafter *New Brunswick*].

³ Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

In this article, I argue that the Court should have considered more carefully the special interests and relationships involved in searches of the press and should have set out a specific regime to provide more protection to the press. Given the Court's decisions, however, the only realistic hope that exists to combat this erosion of freedom of the press in Canada is a legislative response, setting out a rule of heightened protection for the media against police search and seizure.

II. THE PRESENT LAW

In *Lessard*⁴ and *New Brunswick*⁵ the Canadian Broadcasting Corporation (CBC) possessed video footage that was created at the scenes of incidents believed to involve criminal activities. In *Lessard*, a camera crew filmed a group of people vandalizing a post office in Pointe-Claire, Quebec. In *New Brunswick*, CBC filmed demonstrators setting fire to a company guardhouse during the course of a labour dispute at a pulp and paper mill. In each case the police executed search warrants to seize the video footage of the incidents in an effort to secure the identity of those responsible for the criminal acts.

After the searches had been executed, CBC brought an application to quash the search warrants claiming that the press is entitled to heightened protection under section 8 of the *Charter*. More specifically, CBC argued that, in order to obtain a search warrant against the press, the police must not only satisfy the criteria set out in section 487 of the *Criminal Code*,⁶ but must also show that there are no alternative sources from which the information sought could be obtained or, if alternative sources do exist, that they have been fully investigated. The majority of the Supreme Court of Canada, however, refused to create a new standard that would ensure that the press would receive heightened protection from police search and seizure.

This approach is entirely consistent with the approach of the United States Supreme Court in *Zurcher v. The Stanford Daily*⁷. In that case, a student newspaper, which had published articles and photographs of a clash between demonstrators and the police at a hospital brought an

⁴ *Supra* note 1.

⁵ *Supra* note 2.

⁶ R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

⁷ 436 U.S. 547 (1978) [hereinafter *Zurcher*].

action claiming that issuing a search warrant against a press office based on the same criteria that apply when issuing a search warrant against members of the general public deprives the press of its constitutional right under the First Amendment.⁸ The Court held that, as long as the ordinary preconditions to be met before a search warrant can be issued (*i.e.*, probable cause, reasonableness, and specificity with respect to the place to be searched and the items to be seized) are applied with “particular exactitude”⁹ when First Amendment interests would be endangered by the search, the constitutional rights of the press would be adequately protected.

III. THE *HUNTER* REGIME

By not creating a constitutionally higher standard to be met before a search warrant can be issued against the press, the Supreme Court of Canada turned a blind eye to the approach that it had established several years earlier with regard to section 8 of the *Charter*. In the past, the Court had interpreted section 8 as containing a standard of reasonableness that varies depending on the context of the search and the particular interests involved. In the seminal case of *Hunter v. Southam Inc.*, Dickson J. (as he then was) stated:

Where the state’s interest is not simply law enforcement, as, for instance, where state security is involved, or where the individual’s interest is not simply his expectation of privacy, as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one.¹⁰

The Supreme Court of Canada continued in this vein in several cases subsequent to *Hunter*. In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)*, La Forest J. stated that “[t]he degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state.”¹¹ In *McKinlay Transport Ltd. v. R.*, Wilson J. stated that, “[s]ince individuals have different expectations of privacy in different contexts

⁸ U.S. Const. amend. I states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

⁹ *Zurher*, *supra* note 7 at 565.

¹⁰ [1984] 2 S.C.R. 145 at 168 [hereinafter *Hunter*].

¹¹ [1990] 1 S.C.R. 425 at 506 [hereinafter *Thomson Newspaper*].

and with regard to different kinds of information and documents, it follows that the standard of review of what is 'reasonable' in a given context must be flexible if it is to be realistic and meaningful."¹² And, in referring to a lower court's treatment of section 8, in a case about a statutory provision requiring the mandatory production of individuals' health records by the Alberta Human Rights Commission, she commented that "[t]he rationale for this [differing standard] was that what is reasonable 'depends upon consideration of what is sought, from whom, for what purpose, by whom and in what circumstances.'"¹³ Finally, in *Descôteaux v. Mierzwinski* the Supreme Court stated that "there are places for which an authorization to search should generally be granted only with reticence and, where necessary, with more conditions attached than for other places."¹⁴

These cases suggest that the threshold standard to be met before a search warrant can be issued may be heightened or lowered depending on the circumstances and the interests, especially the privacy interests, that the individual is likely to have in those circumstances. In other words, the protection that section 8 provides at the issuance stage is contingent on context. Therefore, a closer look at the interests involved and the specific context of a search of the press is required.

IV. THE INTERESTS INVOLVED

Analysis of section 8, like all sections of the *Charter*, involves a balancing of competing interests. Accordingly, "[t]here is no ready test for determining the reasonableness of a search other than by balancing the need to search against the invasion which the search entails."¹⁵

Regarding searches of the press, there are several interests to be balanced. First, the main purpose of section 8 is to "protect individuals from unjustified state intrusions upon their [reasonable expectation of] privacy."¹⁶ The press, as an entity, has an expectation of privacy that must be protected in order for the institution to carry out its functions.

¹² [1990] 1 S.C.R. 627 at 645 [hereinafter *McKinlay Transport*].

¹³ *Ibid.* at 646, citing *Alberta Human Rights Commission v. Alberta Blue Cross Plan* (1983), 48 A.R. 192 at 195 (C.A.).

¹⁴ [1982] 1 S.C.R. 860 at 889 [hereinafter *Descôteaux*].

¹⁵ R.S. Schiffrin, "Search and Seizure in the Newsroom—Constitutional Implications for the First and Fourth Amendments—*Zurcher v. The Stanford Daily* (1978) 28 De Paul L. Rev. 123 at 130, citing *Camara v. Municipal Court*, 387 U.S. 523 at 536-37 (1967).

¹⁶ *Hunter*, *supra* note 10 at 160.

Without privacy, the freedom provided to the press in section 2(b) of the *Charter* to gather, analyze, and disseminate news would be meaningless. In addition, the individual employees and reporters are also entitled to have their privacy protected from unreasonable intrusions under section 8. They enjoy constitutionally protected expectations of privacy regarding their press files, press facilities, and personal files. This protection is especially important given the fact that

[p]eople who work in offices think of their own offices as personal space in a manner somewhat akin to the way in which they view their homes, and act accordingly. ... Indeed, an office may actually be *more* private than the home in so far as one's relations with family are concerned. Whatever the reason, it is a fact that in an office one is likely to find personal letters, private telephone and address directories, and many other indicators of the personal life of its occupant.¹⁷

Searches of the press are also typically “third party” searches. This means that the press and its employees are not suspected of criminal activity, but are merely in possession of information that might aid the police in their investigation. It is arguable that innocent third parties should have greater protection of their privacy interests under section 8 than suspects should. This issue will be discussed in more depth in Part VI, below. The privacy interests of confidential sources who have provided the press with information must also be taken into account when conducting a balancing of interests under section 8.

Another important interest involved in the situation found in *Lessard* and *New Brunswick* is the freedom of the press. Section 2(b) of the *Charter* states that everyone has the “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” The press requires this freedom in order to provide a vehicle for individual expression, and to inform and educate the public by offering criticism and a forum for debate and discussion. Freedom of the press is “vital to the functioning of our democracy ... premised on the free reporting and interchange of ideas.”¹⁸ In fact, “freedom to persuade, cultivate, entreat and convince by means of various media of expression [is] one of the essential conditions of a democratic government”¹⁹ because “the maintenance of a democratic society is

¹⁷ *Thomson Newspapers* *supra* note 11 at 521-22 [emphasis in original].

¹⁸ *Lessard*, *supra* note 1 at 451.

¹⁹ S.J. Whitley, *Criminal Justice and the Constitution* (Toronto: Carswell, 1989) at 139.

dependant upon the existence of a well-informed public, which, in turn, depends upon the preservation of a free and independent press.”²⁰

The press fulfills its role in society by gathering, editing, and distributing information.²¹ If the police are given license to roam through press offices, the freedom that the press requires to carry out these constitutionally protected functions²² is endangered in several ways. First, it will become more difficult for the press to gather information, because reporters may begin refusing to make written or permanent records for fear that they will be seized by police.²³ This may also affect the accuracy of the material reported and will prevent future reference to written accounts being made by reporters involved in similar stories. Additionally, if it becomes evident that police can easily search and seize materials of the press, confidential sources will cease to come forward because there is no guarantee that they will remain confidential.²⁴ A reporter’s promise of confidentiality becomes meaningless and ineffectual in the face of a police officer armed with a search warrant that entitles him or her to look through the entire contents of the press office without prior warning. The press may also lose opportunities to cover various events because of the participants’ fears that press files will be readily available to the police.²⁵

The internal editing operations of the press may also be “chilled” if police are permitted to search press offices.²⁶ If editorial deliberations become the possible object of public scrutiny, editors will not feel free to make decisions and may alter their policies. Similarly, the press may resort to self-censorship²⁷ to protect its sources and avoid police searches. For example, editors might decide not to print a story or photograph so that the police will not become aware that the news organization has information conveying a given event. To avoid a search, the press will simply keep the information to itself.

²⁰ J.J. Durney Jr., “Search Warrants and the Press: *Zurcher v. The Stanford Daily* (1979) 8 Cap. U. L. Rev. 595 at 595.

²¹ J.S. Liebman, “Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis” (1976) 28 Stan. L. Rev. 957 at 973.

²² *Lessard*, *supra* note 1 at 429-30.

²³ *Ibid.* at 452, wherein McLachlin J. lists the six main ways in which a search of the press may impinge on freedom of the press.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

The dissemination of information to the public will not only be affected by a tendency to self-censor by the press, but will also be impeded because searches are physically disruptive and can affect the timely and efficient publication of the information.²⁸ In addition, by retaining seized materials the police may prevent, or at least delay, the press from relaying that material to the public.²⁹

It can also be argued that providing access by police to the files of the press may give rise to doubts as to the impartiality of the press.³⁰ One commentator has remarked: “If the press is informally and involuntarily impressed into the service of law enforcement agencies as a subsidiary fact gathering agent, it will lose its credibility as being the independent eye and ear of the citizenry.”³¹ The function of the press is to report the news in an independent and unbiased fashion. If the press is seen as favouring law enforcement, however unwillingly, by helping the police gather information, it will lose its credibility—which is acquired on the basis of the press’s perceived independence. To protect its impartiality, “the press must not become a source of information which saves police officers from doing their investigation work.”³²

The potential harm to the section 8 privacy rights and the section 2(b) press freedoms must, however, be balanced against the legitimate interests of the state in investigating, prosecuting, and preventing crime. It is now widely accepted that “[t]he *Charter* does not intend a transformation of our legal system or the paralysis of law enforcement.”³³ Accordingly, any rule that disproportionately favours the interests of the individual being searched at the expense of the state’s interest in effective law enforcement cannot be accepted. Searches and seizures give the state access to evidence that is required to lay charges and to prosecute and convict criminals. If the judicial system did not have a way of compelling the production of necessary evidence through searches and seizures, law enforcement could be hamstrung in two respects. First, searches are often a key element at the investigatory

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *La Société Radio-Canada v. Lessard*, [1989] R.J.Q. 2043 at 2049 (C.A.) [hereinafter *Radio-Canada*].

³¹ C.L. Cantrell, “Zurher: Third Party Searches and Freedom of the Press” (1978) 62 *Marq. L. Rev.* 35 at 48.

³² *Radio-Canada*, *supra* note 30 at 2049, Jacques J.A.

³³ M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989) at 131.

stage of the process. The search itself often produces evidence that enables the police to identify suspects of a crime. Without the search, suspects may not be identified and criminals will remain at large. Second, the state requires evidence at the trial in order to convict a suspect. Without the evidence obtained during a search, a guilty individual might be acquitted and released into society where he or she may continue to commit crimes.

It is important not to totally immunize the press from police searches because journalists are involved in investigatory processes of their own and often come upon evidence of criminal activity that may be unavailable to law enforcement. Although the Supreme Court has concluded “the press should not be turned into an investigative arm of the police,”³⁴ if the press does happen upon some critical evidence, it should not be permitted to unquestionably withhold this information from the police. It is also significant to note that if the press was completely immunized from police searches, criminals might begin “stashing” evidence relating to their crimes in press offices. This could happen if the press was sympathetic to the criminal and his or her cause or possibly without the knowledge of the press.³⁵

The interests of one other group—the public—must be taken into consideration when balancing the interests involved in searches of the press. The public’s interests, however, fall on both sides of the equation. The public has an interest in freedom of the press, for it has a right to know and be informed about events in a democratic society. It also has an interest in fighting and preventing crime. It is for the sake of the public that the courts must carefully balance the needs of the state to search press offices and the needs of the press to be free from governmental intrusions.

V. CONTEXT: THE RELATIONSHIP BETWEEN THE PRESS AND THE POLICE

The competing interests involved in searches of the press are not the only factors that should be taken into consideration when deciding upon a standard of reasonableness under section 8 of the *Charter*. Another important factor is the relationship between the police and the press. Even the most perfunctory review of social science literature

³⁴ *Lessard*, *supra* note 1 at 432.

³⁵ *Liebman*, *supra* note 21 at 999.

reveals that “there is always tension between the police and the press”³⁶ and that “the relationship has traditionally been a hostile one, chilled by conflicts which inhibit the flow of information that the public has both the right and the need to know.”³⁷ This finding appears counter-intuitive since a symbiotic relationship could be considered most beneficial—to the press, which needs information from the police to write stories, to the police, who need access to the public in order to capture criminals by relaying descriptions of suspects and crimes, and to the public, who need confidence in the abilities of both. In addition, studies have established that the police and the press have a great deal in common. They both strive toward the goals of “good environment, justice, public confidence, and equal treatment of all citizens.”³⁸ Similarly, both are powerful, visible institutions that take pride in ingenuity, individual effort, and investigative skills, and rely on anonymous sources and secretive methods to collect information.³⁹

Despite the striking similarities and (apparent) common goals, the relationship that has developed between the press and the police is often one of “a very basic mistrust and perhaps even mutual dislike.”⁴⁰ In fact, psychological studies have cited the relationship as one of the primary examples of profession-induced anxiety.⁴¹ Police officers complain that the press deliberately portrays law enforcement in a poor light, sacrificing truth in favour of sensationalism.⁴² The press, on the other hand, feels that police officers deliberately shut it off from sources of information in an attempt to impede its information gathering function.⁴³

This battlefield is the context in which the Supreme Court of Canada had to decide if the press should be entitled to heightened protection from police searches above that afforded to ordinary citizens.

³⁶ M. Kiernan, “Police vs. the Press: There is Always Tension” in P.A. Kelly, ed., *Police and the Media: Bridging Troubled Waters* (Springfield, Ill.: Charles C. Thomas, 1987) 65 at 66 [hereinafter “Always Tension”].

³⁷ P.A. Kelly, “Police and The Media: Debunking The Myths” in Kelly, ed., *supra* note 36, 127 [hereinafter “Debunking The Myths”].

³⁸ D.M. Mozee, “Police/Media Conflict” in Kelly, ed., *supra* note 36, 141 [hereinafter “Conflict”].

³⁹ “Always Tension,” *supra* note 36 at 67.

⁴⁰ G.W. Garner, *The Police Meet the Press* (Springfield, Ill.: Charles C. Thomas, 1984) at 4.

⁴¹ “Debunking the Myths,” *supra* note 37 at 127.

⁴² *Ibid.* at 128.

⁴³ “Conflict,” *supra* note 38 at 142 and 148.

The Court, however, never mentioned the hostile underpinnings of the relationship. This is an unfortunate oversight because the antagonistic relationship strengthens the argument that the press needs greater protection than other individuals under section 8. Letting the police, with their apparent dislike for the press, into media offices armed with search warrants will likely have the same consequences as letting the proverbial fox into the chicken coop. Although one may argue that a search warrant clearly delineates what the police may search and seize, and thus controls the behaviour of the police, there is “simply no conceivable way to search for a few documents in a room filled with many, without doing precisely that.”⁴⁴ There is really nothing to prevent ransacking and searching of irrelevant material other than an application to quash the warrant, which would be made after the search and seizure has taken place and, consequently, after the damage to the privacy and freedom of the press has already occurred. In the long term, easy access by the police to the files of the press will only serve to accentuate the antagonism and “may put the press in a situation of perpetual conflict with the police officers.”⁴⁵

VI. THE *HUNTER* REGIME REVISITED

The section 8 regime set in place by the Supreme Court of Canada in cases such as *Hunter*,⁴⁶ *Thomson Newspapers*,⁴⁷ and *McKinlay Transport*⁴⁸ establishes that the standard of reasonableness can be heightened where the interest of the individual being searched is “not simply his or her expectation of privacy”⁴⁹ or where the context and circumstances give rise to a high expectation of privacy. Section 8, according to the Court, is not a monolith to be applied the same way in all contexts.

Searches of the press involve interests other than simply the privacy interest of the individual being searched. The constitutionally protected freedom of the press is also at stake when media offices are searched. Surely Dickson J. (as he then was) in *Hunter* would have

⁴⁴ Schiffrin, *supra* note 15 at 136.

⁴⁵ *Radio-Canada*, *supra* note 30 at 2049.

⁴⁶ *Supra* note 10.

⁴⁷ *Supra* note 11.

⁴⁸ *Supra* note 12.

⁴⁹ *Hunter*, *supra* note 10 at 168.

considered this a sufficiently important interest to warrant creating a different standard of protection under section 8.

In addition, the degree of privacy that the press can reasonably expect may be higher than that of an ordinary citizen. The press is merely an innocent custodian of information that it has collected as part of its role to gather, edit, and disseminate news to the public. This role could not be fulfilled without privacy from undue governmental interference and is protected under section 2(b) of the *Charter*. Thus, to borrow La Forest J.'s analysis in *Thomson Newspapers*⁵⁰ the activity that brings the press into contact with the state is the constitutionally protected activity of gathering news for the purpose of disseminating it to the public. Surely this activity creates a higher expectation of privacy than many other activities that are performed by ordinary citizens. Additionally, no court should ever interpret one section of the *Charter* (*i.e.*, section 8) in a way that infringes upon another section (*i.e.*, section 2(b)). Freedom of the press would be meaningless without a high degree of privacy to protect it.

In *Lessard*,⁵¹ the majority of the Court did pay lip-service to the regime set out in *Hunter*, stating that “the media are entitled to particularly careful consideration as to the issuance of a search warrant ... because of the importance of its role in a democratic society,”⁵² but it did not provide any substantial protection for the press above that which is provided to every citizen.

A. *Cory J.’s Nine Factors*

The majority of the Supreme Court of Canada went further than the United States Supreme Court’s requirement of “particular exactitude”⁵³ in applying the test of whether a search warrant should issue against the press. Cory J. set out nine factors that a justice of the peace should take into consideration before deciding to exercise his or her discretion to issue a search warrant against the press. The factors are as follows:

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

⁵⁰ *Supra* note 11 at 506.

⁵¹ *Supra* note 1.

⁵² *Ibid.* at 444, Cory J.

⁵³ *Zurcher*, *supra* note 7 at 565.

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. 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 [that] 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.⁵⁴

While this approach is somewhat preferable to that taken in the United States because it sets out specific items that a justice of the peace should consider and thereby provides some guidance, it does not give a higher standard of protection to the press for several reasons.

First, a justice of the peace is not bound to “find” that all nine of Cory J.’s factors are present, but is merely required to “consider” the factors in the exercise of his or her discretion. The factors do not set down any solid rule or definitive guidelines and, accordingly, the results in each case will differ depending on the particular views of the issuing justice of the peace. One justice of the peace could merely turn his or her mind to the fact that very few of Cory J.’s factors are present and issue the warrant regardless, whereas another might refuse to issue a

⁵⁴ *Lessard, supra* note 1 at 445 [emphasis added].

warrant unless all factors are present. The result is inadequate and inconsistent protection of the press's interests.

The danger that the justice of the peace may not give sufficient weight and protection to the interests of the press is especially high given the *ex parte* nature of search warrant applications. A justice of the peace only hears and assesses input from the perspective of the police and "it is inconceivable that the police would or could carefully explain the newspaper's constitutional objections."⁵⁵ The system of warrant issuance, therefore, becomes biased in favour of the interests of law enforcement: "[b]y stating that the newspaper's objections are not needed, the Court has assured a process that will consistently work in favour of law enforcement."⁵⁶

Justices of the peace are also "often people in whose decision-making the legal system reposes less confidence, given their limited responsibility and authority."⁵⁷ Given this state of affairs, it is odd that Cory J. would entrust cases concerning a conflict between section 2(b) and section 8 values, which the Court itself has great difficulty balancing, to justices of the peace. Cory J. is wrong to assume that justices of the peace will be able to balance these important interests based solely on sparse information contained in papers "normally drafted by non-lawyers [*i.e.*, police officers] in the haste of criminal investigations"⁵⁸ without the adversarial input of the press and without definitive guidelines from the Court.

In addition, justices of the peace work closely with the police and "are likely to have a symbiotic rather than a supervisory relationship with the police."⁵⁹ There is, indeed, substantial evidence to support the contention that justices of the peace are often not acting as neutral and impartial arbitrators. The Law Reform Commission of Canada⁶⁰ stated that 58.9 per cent of all search warrants issued are issued invalidly. The invalidity stems not from a lack of reasonable grounds to believe that evidence will be found at a given location, but from a lack of compliance with legal and constitutional requirements in the supporting paperwork

⁵⁵ Cantrell, *supra* note 31 at 50.

⁵⁶ *Ibid.* at 51.

⁵⁷ Liebman, *supra* note 21 at 986.

⁵⁸ *Ibid.* at 987.

⁵⁹ *Ibid.* at 986.

⁶⁰ Law Reform Commission of Canada, *Police Powers—Search and Seizure in Criminal Law Enforcement* (Working Paper 30) (Ottawa: Law Reform Commission of Canada, 1983) at 84 [hereinafter *Police Powers*].

of the police.⁶¹ This paperwork (*i.e.*, the Information sworn by the police officer) is generally the only ground on which a justice of the peace issues a warrant. Instead of slapping police officers' wrists for their slipshod approach to the process, justices of the peace condone such methods by issuing warrants based on insufficient evidence.

Additional evidence of the collusive relationship between justices of the peace and police officers is the number of warrants certain justices of the peace actually refuse to issue. In the case of *R v. Baylis*,⁶² the justice of the peace in question had not denied a single application for a search warrant in two-and-a-half years. In fact, police officers who were refused warrants by other justices of the peace came to realize that they could then go to that justice of the peace and be granted the warrant. The court found that this justice of the peace was not acting in a *bona fide* judicial capacity. *Baylis* illustrates the potential danger of giving justices of the peace the unfettered discretion to decide if the police should be permitted to invade press offices.

Another significant problem with simply providing a justice of the peace with a list of factors to consider is proving that he or she did actually consider these factors. In *R. v. Moran*, the Ontario Court of Appeal stated: "[i]t is clear that judges are not compellable to testify as to their mental processes or how they reached a decision in a case before them ... [and] this rule is not confined to judges of superior courts. A justice of the peace in deciding to grant a search warrant is performing a judicial function"⁶³ and, accordingly, should be provided with the same protection. The Court went on to say that it did "not wish however, to be thought in any way to accept the proposition that a justice of the peace is compellable, or even competent, to testify as to his mental processes in deciding to grant the warrant."⁶⁴ Although these comments were *obiter* in *Moran*, they have been followed in subsequent cases.⁶⁵ It appears, therefore, that there is no way to prove that a justice of the peace did actually consider Cory J.'s factors and, accordingly, the standard set out by the majority of the Supreme Court of Canada is unworkable.

⁶¹ *Ibid.* at 85.

⁶² (1988), 66 Sask. R. 268 (C.A.).

⁶³ (1987), 21 O.A.C. 257 at 269 (C.A.).

⁶⁴ *Ibid.* at 270.

⁶⁵ See *R. v. Voss* (1989), 33 O.A.C. 190 (C.A.); *R. v. T.* (21 November 1989), Doc. No. CA 942/88 (Ont. C.A.); and *R. v. Doucette* (1990), 49 C.R.R. 177 (Ont. Dist. Ct.).

Beyond the fact that it is virtually impossible to police the discretion given to justices of the peace when issuing search warrants, closer examination of Cory J.'s factors reveals that they do not add anything significant to the existing standard of reasonableness. They provide little, if any, special protection for the press against search and seizure. Factors one through four and seven through nine are nothing new. These criteria must be taken into consideration in the warrant issuing process in any event.⁶⁶ Thus, the only new points introduced by Cory J. are factors five and six. Factor five requires a justice of the peace to consider whether there are alternative sources from which the information could be obtained. A finding that no alternative sources exist, however, is in Cory J.'s own words "not constitutionally required"⁶⁷ for the issuance of a search warrant. This factor does not raise the constitutional standard for the press, but is merely another consideration that a justice of the peace can use in the exercise of his or her discretion. Indeed, in *Lessard*, there was no discussion of whether alternative sources exist, yet Cory J. upheld the issuance of the warrant.⁶⁸

Factor six, which requires a justice of the peace to consider whether the information has been disseminated by the media to the public, appears to be the most important factor to Cory J. He stated that the "crucial factor" in deciding whether the issuance of the warrant in *Lessard* was reasonable was the fact that the media had already broadcasted portions of the video tape. Since the information had passed to the public domain, Cory J. concluded that "the media had already completed their basic function of news gathering and news dissemination; thus ... the seizure of the tapes ... could not be said to have a chilling effect on the media's sources of news."⁶⁹

The proposition that, if portions of the information have been transmitted to the public it is acceptable to search and seize the information, is tenuous at best. As McLachlin J. (dissenting) pointed out in *Lessard*, "the fact that a portion of the material seized may have been published [does not] negate the fact that other portions adversely affecting the privacy of press informants may be disclosed as a

⁶⁶ See generally *Hunter*, *supra* note 10; *R. v. Annett* (1984), 6 O.A.C. 302 (C.A.); *R. v. Rao* (1984), 46 O.R. (2d) 80 (C.A.); and *R. v. Noble* (1984), 48 O.R. (2d) 643 (C.A.), for the requirements to be met before a search warrant may be issued and how the manner of execution of a search can invalidate a search.

⁶⁷ *Lessard*, *supra* note 1 at 446.

⁶⁸ *Ibid.* at 447.

⁶⁹ *Ibid.*

consequence of the search.”⁷⁰ The press might have consciously edited out portions that revealed confidential sources before transmitting the information to the public. By allowing the whole of the information to be searched and seized, these sources will be revealed. If Cory J. had limited the search and seizure to transmitted material, his argument would be much stronger. Instead, he held that if any portion of the material was transmitted to the public, the whole of the material can be seized. Thus, a promise of confidentiality (and editing processes to protect that promise) are rendered ineffective and meaningless.

Moreover, Cory J.’s test ignores the main problem that future sources will be reluctant to come forward. If it becomes obvious that the police can seize material if any portion has been disseminated to the public, sources will refuse to come forward because there is no way to protect their confidentiality: “[i]t 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 created the chilling effect.”⁷¹

Further, Cory J.’s test focuses solely on the danger to confidential sources and to the news gathering function that is dependant upon confidential sources. He failed to acknowledge that by allowing material to be searched and seized merely because portions of it were broadcast to the public, other functions of the press will be affected. The editing function, for example, will be greatly affected. In *Lessard*, Cory J. stated that the fact that media had broadcast portions of the video tape, “is something that favours the issuing of a search warrant.”⁷² This sends a message to editors that if they choose to publish any portion of a story or film a justice of the peace will almost automatically issue a search warrant on request. This is undeniably a hindrance to freedom of the press.

Allowing searches to proceed against the press because information has been published will not only affect the choice to publish, but will also affect the choice of how to publish. For example, editors might be forced to publish all of their material in a single issue rather than in a series of stories due to the risk of seizure of the material remaining after the first few installments.⁷³

⁷⁰ *Ibid.* at 453.

⁷¹ *Ibid.*

⁷² *Ibid.* at 447.

⁷³ R.A. Podboy & L.M. Davison, “Search and Seizure Involving Nonsuspect Third Parties—Legislative Responses” (1980) 10 N.M. L. Rev. 443 at 452-53.

The distinction between untransmitted and transmitted material as a basis on which to issue a search warrant does not protect confidential sources and will interfere with the freedom of the press to edit and disseminate news. The press must have the freedom to decide what stories to print and how to print them without having to worry about the consequences that the act of publishing will have on unpublished but related material.

B. *Third Party Nonsuspects*

Perhaps the root of the hesitation on the part of the Supreme Court of Canada and the United States Supreme Court to extend a higher degree of protection to the press against search and seizure is the holding of both Courts that the press is merely an innocent third party in possession of information that could aid the police in investigating a crime. In *Zurcher*, White J. stated that:

the issue here is how the Fourth Amendment is to be construed and applied to the “third party” search ... where state authorities have probable cause to believe that ... evidence of a crime is located on identified property but do not have probable cause to believe that the owner or possessor of the property is himself implicated in the crime.⁷⁴

In *Lessard*, L’Heureux-Dubé J. stated that “the sole issue in the case concerns the right of the police to obtain a warrant to search the premises of an innocent third party ... in order to obtain evidence of the commission of a crime.”⁷⁵ Although Cory J. acknowledged that the media is entitled to special consideration because of the importance of its role in a democratic society, by not accepting CBC’s section 2(b) arguments against searches of the press and by not creating a unique standard for the press, he “necessarily classifie[d] the press as a simple third party nonsuspect.”⁷⁶ Indeed, Cory J. even stated that the press is “truly an innocent third party [and] [t]his is a particularly important factor to be considered.”⁷⁷ The Court’s rejection of the press’s argument that section 2(b), or that the First Amendment in the United States, presents additional factors that justify elevating the standard of reasonableness for the press above the standard in place for third parties.

⁷⁴ *Zurcher*, *supra* note 7 at 553.

⁷⁵ *Supra* note 1 at 434.

⁷⁶ Cantrell, *supra* note 31 at 45.

⁷⁷ *Lessard*, *supra* note 1 at 445.

If, however, the courts are correct in assuming that the press is merely an innocent third party, then the press should not be afforded greater protection from search and seizure than ordinary citizens because nonsuspects should not be afforded greater protection than suspects. Although one could argue that third parties should be entitled to a higher standard of protection (because they are not alleged to have done anything wrong), there are several reasons why it would be impossible to create a higher standard of reasonableness to be applied in situations where there is no nexus between the crime and the owner/occupant of the premise to be searched. First, to determine if the issuance of a warrant is reasonable, one must look to the requirements in section 487 of the *Criminal Code*. This section states that if there are reasonable grounds to believe that evidence relating to an offence will be found in a certain location, then a warrant may be issued: “[t]he ‘critical’ element of a reasonable search was whether probable cause [existed] for believing that the evidence to be seized [was] located at the place to be searched.”⁷⁸ Thus, “[t]he culpability of the owner or possessor of the evidence is ... immaterial in the context of a [section 8] search.”⁷⁹ If suspicion of the owner was required as an element of probable cause to search, there would be little difference between a search warrant and a warrant to arrest. If the police could show reasonable grounds to believe that the owner or possessor of the evidence was implicated in the crime they would have grounds to arrest the individual. The courts were correct in concluding that the legality of a search is not dependent on proving that the possessor of information is implicated in the crime.

Creating a higher standard of protection for third parties would also undermine police investigations. Search warrants are often used in the early stages of an investigation before the police have identified any suspects. Indeed, the search is often used as a tool to obtain evidence that enables the police to identify suspects. If a standard was created that made it very difficult for police to obtain warrants against third parties, police might not be able to identify suspects. There is also always the possibility that the party who claims to be an innocent nonsuspect may, in fact, turn out to be involved in the crime or be sympathetic to the guilty party and hide or destroy the evidence. Similarly, there is the practical problem that in order to obtain a search warrant needed to gather evidence to identify suspects, the police would

⁷⁸ Schiffrin, *supra* note 15 at 127.

⁷⁹ Podboy & Davison, *supra* note 73 at 444.

have to show that the possessor of the evidence was a suspect in the crime. This, of course, would be impossible.

Another strong argument against creating a higher standard of protection for third parties is that it would undermine one of the central tenets of our criminal justice system. Section 11(d) of the *Charter* guarantees that every individual is presumed innocent until proven guilty. Simply because the police say that someone might be a suspect in a criminal investigation is no reason to afford that person a lesser right to privacy and individual dignity than a nonsuspect. Liebman, in particular, has commented:

The privacy interests of individuals should not rise or fall according to the allegations of police. The presumption of innocence is too central to our judicial tradition to allow room for varying levels of privacy rights based on allegations of criminality, no matter how intuitively appealing that notion may be.⁸⁰

The Supreme Court of Canada and the United States Supreme Court were correct in concluding that section 8 of the *Charter* and that the Fourth Amendment,⁸¹ respectively, cannot provide special protection for the press as a third party nonsuspect. The press, however, is not merely an innocent third party. The role that the press plays in society differentiates it from almost all other parties.

In *Lessard*, McLachlin J. (dissenting) recognized that the press is unique. She stated that “the history of freedom of press in Canada belies the notion the press can be treated like other citizens or legal entities when its activities come into conflict with the state.”⁸² Even in the United Kingdom, where there is no comparable protection provided for the press, the courts recognize 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.”⁸³ Moreover, in Canada the courts concluded that the press is unique and deserving of special protection from search and seizure before the

⁸⁰ Liebman, *supra* note 21 at 996.

⁸¹ U.S. Const. amend. IV states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

⁸² *Supra* note 1 at 450.

⁸³ *Senior v. Holdsworth, Ex Parte Independent Television News Ltd*[1976] 1 Q.B. 23 at 34 (C.A.).

Charter was put into place.⁸⁴ Surely the “position of the press can be no less privileged under the *Charter*.”⁸⁵

It must be noted, however, that many people do not think that the press, as an institution, deserves special or different treatment than ordinary citizens. In *Moysav. Alberta (Labour Relations Board)* the trial court suggested that “freedom of the press is simply a kind of intellectual freedom which one is entitled to exercise in relation to his thoughts, his beliefs, his opinions and his expressions”⁸⁶ and should not be seen to impart a separate right to the press as an entity. In *Re Canada Post Co. and Canadian Union of Postal Workers (Varma)* K.P. Swan stated that section 2(b) “should be seen as a broad right to intellectual freedom, and not as a special concession to any class of individuals.”⁸⁷

Although it may be accepted that freedom of the press is a constitutional guarantee that protects everyone’s intellectual freedom, it cannot be denied that:

An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large ... [and] performs a crucial function in effecting the societal purpose of [section 2(b)].⁸⁸

Where the press is faced with a search and seizure, its section 2(b) rights and, consequently, the section 2(b) rights of every individual for which the press acts as an agent, are threatened. Thus, in heightening the protection from search and seizure for the press, we are actually heightening the protection of section 2(b) rights of all individuals. Without a protected institutionalized way of gaining access to information, the right of freedom of the press afforded to individuals would be meaningless.

The press cannot only be differentiated from ordinary third parties because of the fundamental role that it plays in society, but also because of the relationship involved between the press and the police.

⁸⁴ See *Pacific Press Ltd. v. British Columbia (A.G.)* [1977] 5 W.W.R. 507 (B.C.S.C.), where the Court decided that a search warrant can only be issued against the press after all alternative sources have been exhausted.

⁸⁵ *Lessard*, *supra* note 1 at 451, McLachlin J.

⁸⁶ (1986), 71 A.R. 70 (Q.B.), *aff’d* (1987), 79 A.R. 118 (C.A.), *aff’d* [1989] 1 S.C.R. 1572.

⁸⁷ (1985), 19 L.A.C. (3d) 361 at 375 (Canada).

⁸⁸ J.P. Buhrman, “Search and Seizure of a Third-Party Newspaper” (1979) 20 B.C. L. Rev. 783 at 805, citing *Saxbe v. Washington Post Inc.*, 417 U.S. 843 at 863, note 142 (1974), Powell J. dissenting.

As discussed in Part V, above, there is a strong perception that the press and the police have a mutual dislike and distrust of one another. Accordingly, the press is not in the same position *vis-à-vis* the police as ordinary nonsuspects are. The police may appear to have a vendetta against the press⁸⁹ and the press has a vested interest in trying to keep information in its possession away from the police (*i.e.*, to protect confidential sources, editorial policy, and so on). On the other hand, in most cases the police do not have any vendetta against members of the general public and members of the public are generally willing to help the police if it will prevent crime or help convict criminals. The press does not begin on the same footing that an ordinary third party does when being searched because of the hostile relationship that exists between the press and the police.

Another problem with focusing on the press as a third party, and concluding that it does not, as such, deserve special protection, is that the press should not be viewed as a type of person but as a type of premise. Section 487 of the *Criminal Code* focuses on the location of a search and not on the owner's culpability or identity. Canadian courts have always accepted that different types of premises deserve differing degrees of protection under section 8 depending on the level of expectation of privacy associated with them. For instance, in *Thomson Newspapers*⁹⁰ the Supreme Court of Canada pointed out that commercial premises deserve less protection from search and seizure because of the lower expectation of privacy associated with them. In *R. v. Thompson*,⁹¹ the Court held that residences deserve heightened protection from search and seizure. Sopinka J. stated that the police must indicate on the face of the information submitted to obtain an authorization to wiretap whether the location is a dwelling house and the intentions of the police with respect to that home.⁹² If the justice of the peace is not made aware that the location is a dwelling house, the issuance of the warrant is considered unconstitutional.

In *Thompson*, the Court created a legal and constitutionally heightened standard of protection for dwelling houses against wiretaps because of the intense privacy interests surrounding the home. This case provides a precedent for creating a constitutionally required higher standard of protection for certain premises under section 8. If section 8

⁸⁹ See *supra* notes 36-40 and accompanying text.

⁹⁰ *Supra* note 11.

⁹¹ [1990] 2 S.C.R. 1111.

⁹² *Ibid.* at 1153-54.

can be elevated to provide heightened protection for the home, it can be argued, similar to Liebman writing in the American context, that section 8 “should provide special protection from governmental intrusion for those places where other fundamental freedoms—such as freedom of the press—normally reside.”⁹³

The press is not merely an innocent third party, as the courts would have one believe. It has special interests that need to be protected, it has a special relationship with the police that necessitates a higher degree of protection from search and seizure, and the press, as a location or premise which houses the fundamental freedom of the press, should be protected.

VII. POSSIBLE SOLUTIONS⁹⁴

The Supreme Court of Canada has clearly rejected the possibility of implementing a rule that requires police officers to list and investigate all possible alternative sources from which the information sought could be obtained before a search warrant can be issued. There are, however, other possible routes the Court could have taken to ensure that a search of the press would only be a last resort for police.

A. *The Subpoena Duces Tecum*

A *subpoena duces tecum* is an order of a court that requires an individual to produce documents to be admitted as evidence in judicial hearings. In Canada, unlike in the United States, a *subpoena* cannot be issued for purely investigatory processes in criminal law. The Court in *Lessard*,⁹⁵ however, could have created an exception to this rule and required that the police obtain a *subpoena* that ordered the press to

⁹³ Liebman, *supra* note 21 at 997.

⁹⁴ Another possible solution, which is not mentioned in the body of the paper, is the approach taken by McLachlin J. in *Lessard*, *supra* note 1. She dealt with the problem of searches of the press under s. 2(b) of the *Charter* and not under s. 8. She concluded that search and seizure of the press violates s. 2(b) and cannot be upheld under s. 1. While this approach has the benefit of protecting freedom of the press, it will have a negative impact on law enforcement. If the press is completely immunized from police searches, valuable evidence regarding crimes may not be available to law enforcement agencies. A better approach, therefore, would be to create a balance between the rights of the press and the rights of law enforcement rather than swinging too far in favour of press interests.

⁹⁵ *Supra* note 1.

produce the items sought. Only if the use of a *subpoena* is impractical, as, for example, if the press refuses to voluntarily hand over the information or if there is a danger that the press may destroy the items rather than produce them, should a justice of the peace consider issuing a search warrant.

This approach is more sensitive to the interests involved and would provide more protection for the press in several ways. First, although a search warrant must delineate the area that can be searched and the items that can be seized, it has been opined that “there is simply no conceivable way to search for a few documents in a room filled with many, without doing precisely that.”⁹⁶ Searches for photographs or writings “actually require the police to read and examine every document until they have found either the ones specified in the warrant or satisfied themselves that the evidence is not there.”⁹⁷ Thus, the Court’s holding in *Lessard* that the concern that the police will rummage through unrelated files and reveal confidential sources can “best be addressed by limiting the warrant to specifically delineated items”⁹⁸ is entirely specious.

A *subpoena*, on the other hand, would allow the press sufficient time to locate the material and to produce the items requested. This would avoid an unannounced search that would needlessly expose unrelated materials and the identities of confidential sources. In addition, if the information requested would reveal the identity of a confidential source, the press could choose whether to comply with the order or to challenge it. In this way, a promise of confidentiality is meaningful. In the case of an unannounced search, however, the police simply barge in and rifle through material and the press cannot prevent confidential sources from being revealed. Allowing the press the opportunity to comply with an order to produce items would also avoid a time consuming search that causes the physical disruption of the institution and that delays or prevents timely publication of the news.

The *subpoena* process would also provide additional protection⁹⁹ for the press because a *subpoena* can always be challenged on a motion

⁹⁶ Schiffrin, *supra* note 15 at 136.

⁹⁷ *Ibid.*

⁹⁸ *Lessard*, *supra* note 1 at 433.

⁹⁹ The *subpoena duces tecum* issuance procedure itself provides as much protection for the press as the search warrant issuance procedure. In *Thomson Newspapers* *supra* note 11, the majority decided that a *subpoena duces tecum* constitutes a seizure within the meaning of s. 8 of the *Charter*. Thus, all of the requirements for the issuance of a search warrant must be met before a *subpoena duces tecum* can validly be issued.

to quash filed with the court before the sought-after materials are produced. If the press did choose to challenge a *subpoena*, a court would be forced to hear and re-evaluate evidence from the perspective of the press before any violation of rights occurs. In contrast, the search warrant procedure is an *ex parte* hearing in which the justice of the peace only hears the arguments put forth by the police and “once the warrant is issued, nothing can restrain its operation until it has overrun whatever press interests stand in its way.”¹⁰⁰ The only remedy available to the press for an invalid search is a motion to quash the warrant made after the search has taken place and after the damage to press interests has already occurred. The *subpoena* process, however, can prevent a violation of section 8 and section 2(b) rights before it happens.

The *subpoena* process would not frustrate law enforcement efforts because it would only be available in a limited number of cases. The “overwhelming majority of search warrants are used in an attempt to procure fruits, instrumentalities of a crime or contraband.”¹⁰¹ This is the very type of evidence that would lead to the inference that the possessor is likely involved in the crime and is not a mere innocent custodian of evidence. If the party was a suspect in the crime under investigation, a *subpoena* would be impractical because it would provide warning to the suspect, who might then destroy the evidence before the police could find it. Thus, a justice of the peace in the first instance would be justified in issuing a search warrant instead of going through the *subpoena* process. “Since, therefore, only evidence in the form of documents, photographs, and the like could even raise the possibility that a *subpoena* would be required, it is difficult to subscribe to the ... (majority’s) ... conclusion that law enforcement efforts”¹⁰² would be impeded.

Finally, newspapers are not likely to conceal evidence when presented with a *subpoena*. The press might protest if the identities of confidential sources were at stake, but it would likely comply with an order for production because it would be in its best interests to do so. If the press began destroying evidence as soon as it was presented with a *subpoena*, justices of the peace would begin to accept claims of the police regarding the impracticality of issuing subpoenas and would tend to issue search warrants if the slightest question arose. The media’s “contemptuous disregard of *subpoenas*, [therefore], would serve only to

¹⁰⁰ Liebman, *supra* note 21 at 993.

¹⁰¹ Schiffrin, *supra* note 15 at 131.

¹⁰² *Ibid.* at 132-33.

undermine their own best interests by increasing the chances that future evidence would be secured through searches.”¹⁰³ Thus, the use of the *subpoena* acts in everyone’s best interests; the police will obtain the evidence they require and the press can avoid extensive searches of unrelated material. The press would only refuse to comply and challenge the *subpoena* in serious situations, in which case the courts should be forced to hear and consider their arguments carefully.

Although the *subpoena* process appears to be more protective of press interests than the search warrant process, there are several arguments that illustrate weaknesses in the use of *subpoenas*. Requiring *subpoenas* to be issued before a search warrant can be obtained could lead to negative effects on law enforcement. The Law Reform Commission pointed out that “the decision to give an individual the benefit of the doubt and to refrain from exercising a search power involves a possible risk of losing the items sought.”¹⁰⁴ Previous experience has shown that media personnel often risk contempt citations and incarceration rather than respond to a *subpoena* requiring them to testify in court. In fact, one study indicated that in 96 per cent of all cases journalists have chosen to accept contempt citations.¹⁰⁵ There is, therefore, reason to suspect that the media might choose to destroy documents and photographs when presented with a *subpoena duces tecum* ordering their production. Indeed, in *Zurcher*,¹⁰⁶ *The Stanford Daily* had a policy of destroying any documents that might aid the police in an investigation. In addition, members of the media have publicly admitted that they “do not provide such material or information on demand. [They] do not willingly turn over reporters’ notebooks to police [and] have no intention of becoming professional witnesses or of betraying confidences given to [them].”¹⁰⁷ It appears that members of the media might prefer to destroy the evidence sought and face contempt charges rather than cooperate with a police officer bearing a *subpoena*.

Another negative effect on law enforcement would be the time involved if the press chose to challenge a *subpoena*. The time and money

¹⁰³ *Ibid.* at 140, note 105.

¹⁰⁴ *Police Powers*, *supra* note 60 at 251.

¹⁰⁵ Schiffrin, *supra* note 15 at 140, note 105.

¹⁰⁶ *Supra* note 7.

¹⁰⁷ P.J. O’Callaghan, “Comment” in P. Anisman & A.M. Linden, eds., *The Media, The Courts and The Charter* (Toronto: Carswell, 1986) 293 at 299.

spent litigating the issue of the *subpoena's* validity would only serve to impede ongoing investigations.

The Law Reform Commission also argued that a *subpoena* is just as coercive as a search. It pointed out that the coercive element of a search is the assertion of state control over the objects sought¹⁰⁸ and, since a *subpoena duces tecum* requires the item to be produced as ordered, it is equally coercive. In addition, although a *subpoena* does not involve the police entering private zones, it must be personally served by a police officer. The mere presence of a uniformed officer at one's doorstep can be highly coercive and induce the production of the items requested. In fact, in the vast majority of non-residential searches the police never need to go past the front door, since the items are turned over on request.¹⁰⁹

A *subpoena* might even lead to harsher consequences than a search does. In *Thomson Newspapers* Wilson J. noted that when an individual is compelled to produce documentary evidence, he or she "may well produce evidence beyond that which the governmental authorities had reasonable grounds to believe existed."¹¹⁰ Thus, there could be a greater invasion committed against the individual than was deemed constitutionally permissible at the time the *subpoena* was issued.

Perhaps the strongest argument against the use of *subpoenas* in criminal investigations is the fact that the drafters of the Constitution and of the *Criminal Code*¹¹¹ did not set out this special protection for the press. In the United States, the Fourth Amendment "emerged largely in response to governmental invasions of the press."¹¹² Accordingly, the American framers appeared to have the press in mind when they were creating the constitutional protection from unreasonable search and seizure, and it would seem that if the framers had intended to prohibit searches of the press or had wished to create a higher standard of reasonableness before the press could be searched, they would have so stated. The wording of section 8 is very similar to the wording of the American Fourth Amendment, illustrating that Canada at least considered the American Constitution as a template. Both constitutions, however, fail to set out special considerations for searches

¹⁰⁸ *Police Powers*, *supra* note 60 at 251.

¹⁰⁹ *Ibid.*

¹¹⁰ *Thomson Newspapers* *supra* note 11 at 494.

¹¹¹ *Supra* note 6.

¹¹² *Durney*, *supra* note 20 at 600.

of media offices. The Canadian drafters obviously felt that the justice system could guard against unreasonable searches of the press.

Moreover, the legislators have created special protection in other sections of the *Criminal Code*. For example, section 186(1)(b) states that an authorization to wiretap can only be given where a justice of the peace is satisfied that other investigative procedures have been tried and have failed, and other procedures are unlikely to succeed. The fact that special protection and less restrictive options exist in other sections speaks directly against the argument that these precautions should be read into section 487 of the *Criminal Code* and section 8 of the *Charter*, where they are not explicitly stated. It has been argued that:

When something is not specifically mentioned in the constitution this does not mean that it is sanctioned in all its particulars. The framers themselves recognized that as conditions change, so must the law. It is doubtful that they foresaw the rise in importance of confidential news sources, or the damage of chilling effects, but they left [section 8] open enough to encompass them.¹¹³

The more convincing approach, however, seems to be that section 8

has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the [section] and strike a new balance by denying the search warrant in the circumstances present here and by insisting that the investigation proceed by *subpoena duces tecum*, whether on the theory that the latter is a less intrusive alternative, or otherwise.¹¹⁴

Thus, only Parliament could impose a requirement that a *subpoena duces tecum* be issued prior to a search warrant, since the courts do not have the power to alter the existing statutes.

B. *Video Versus Documents*

In *Lessard*, La Forest J. (dissenting in part) set up a test that distinguishes between photographs and reporters' personal notes, contact lists, or interview recordings.¹¹⁵ The logic for this differentiation is a belief that the chilling effect on news gathering is always present with respect to video and photographs—for if one is captured on film committing an offence there is a danger of being identified. The reason

¹¹³ Note, "Supreme Court Review: Fourth Amendment—Search Warrants and the Right to Free Press" (1978) 69 J. Crim. L. & Criminology 528 at 535.

¹¹⁴ Cantrell, *supra* note 31 at 41, citing *Zurcher*, *supra* note 7 at 559.

¹¹⁵ *Lessard*, *supra* note 1 at 431-32.

the press is taping the event is obviously to broadcast the film and, absent a promise of confidentiality, the persons being filmed have no reason to believe that photographs of them will not be published. Accordingly, no extra protection should be afforded against search and seizure of photographs or film taken by the press.

With respect to personal notes or contact lists, however, there is a danger that allowing the police to gain access to these could hamper the ability of the press to gather information. The persons interviewed or providing information to reporters may have a reasonable expectation that their identities will not be revealed. All alternative sources of information, therefore, should be exhausted before the police can obtain a search warrant for these materials.

La Forest J.'s test not only makes sense intuitively, but acknowledges the regime set up in *Hunter*,¹¹⁶ which declares that section 8 is not a monolith. The reasonableness requirement in section 8 varies according to context and the reasonable expectation of privacy found in that context. Individuals have a reduced expectation of privacy when they are conducting their actions in a public place. In fact, the police could easily have been there to identify the perpetrators themselves. Thus, the standard of reasonableness regarding a search of video film made in a public forum should not be increased.

This analysis, however, should be taken one step further. Although the individuals in a public place have a reduced expectation of privacy, the press may have a heightened expectation of privacy with respect to the control of the information contained on the film. In *R. v. Dymont*,¹¹⁷ La Forest J. stated there are three types of privacy: spatial, bodily, and informational. Informational privacy describes the right of an individual to determine for himself or herself when, how, and to what extent he or she will release personal information.¹¹⁸ It can be argued that after the reporter makes the video tape it becomes the property of that reporter and that he or she has an informational privacy interest in it. An individual perpetrator caught on film forfeits his or her privacy interest by conducting himself or herself in public, but the film of the incident now belongs to members of the press. The press collected the information and it now has a recognizable privacy interest in controlling how, when, and to what extent it will release the information contained on the video tapes. It is not the privacy interest of the persons captured

¹¹⁶ *Supra* note 10.

¹¹⁷ [1988] 2 S.C.R. 417.

¹¹⁸ *Ibid.* at 428-30.

on film that should concern La Forest J., but the privacy interests of journalists in controlling the dissemination of information that they now own. Thus, while the persons captured on film might have a reduced expectation of privacy and should be subjected to a lower threshold of reasonableness, the press as the owner of the videotaped information does not have such a reduced expectation of privacy regarding the films. Consequently, the press should not be subjected to a lower standard of reasonableness for photographs or video than the one that is applied in the case of reporters' notes or contact lists.

La Forest J.'s test also has other defects. If, for example, it became known that events captured on video tape were subjected to a lower standard of reasonableness and could be searched and/or seized more easily than written notes, individuals might be less willing to invite the press to film events such as protests or demonstrations. This would result in either the loss of sources of information for the press or in the press becoming more secretive in its methods of gathering visual information. These results illustrate that freedom of the press to gather information has been impinged upon and negate La Forest J.'s argument that individuals performing in front of a camera have a reduced privacy interest. If the perpetrators are not aware that the press is filming them because reporters have resorted to more secretive methods, La Forest J.'s argument loses its poignancy.

The test also only focuses on the importance of confidential sources and the likelihood of their disappearance if video tapes are allowed to be seized. The judge ignores the impact that his decision will have on other aspects of the press's functions, such as editorial policy. If the press knows that video tapes or photographs could be searched and seized easily, editors would begin questioning whether they should broadcast footage in their possession for fear of showing the police that the press is in possession of information regarding a particular incident. It will inevitably lead to self-censorship or an alteration of how information is presented to the public.

La Forest J.'s analysis is more sensitive to the need to protect freedom of the press in a search and seizure situation than that of Cory J.'s, and it does heighten protection for reporters' notes and documentary evidence. But La Forest J.'s approach to video footage and photographic evidence is not sufficiently sensitive to the privacy interests that members of the press have in that information, or to aspects of freedom of the press, such as editorial decision making. His

test is preferable to that of the majority in *Lessard*,¹¹⁹ but it still does not provide sufficient protection for the press.

C. *Execution Versus Issuance*

The Law Reform Commission held the view that the problem surrounding searches of the press is “really a sub-category of the general dilemma regarding searches of unsuspected third parties”¹²⁰ and that the press should be offered the same protection as an unsuspected party. The Commission went on to say that what really differentiates an unsuspected party from a suspected one is “the likelihood that in the absence of forceful action by the police, the information in the hands of the suspected parties sought may be lost.”¹²¹ Accordingly, the best place to give additional protection to the unsuspected party is at the execution stage of the warrant process where the methods of searching become relevant. Unsuspected parties will not likely conceal or destroy the evidence sought. Therefore, the police do not need to use the same search methods as they do when searching the premises of a suspect.

While it is arguable that the press is merely an unsuspected third party as discussed in Part IV, above, the suggestion that the press ought to receive heightened protection at the execution stage does possess some merit. Since freedom of the press is endangered by the physical disruption of operations and by the exposure of confidential sources and editorial policies that invariably take place during a search, it would make sense to place conditions on the execution of the warrant such as limiting the search to certain areas of the office and to certain items and confining it to off-hours when the disruption will not prevent the publication of the news. A limitation could also be placed on the police such that they are only permitted to search if at least one editor is present who could point out which items are confidential. The police would then be required to place these items in sealed packages until a hearing took place to determine if the seized material had been taken legitimately. The courts could also require that the police request the items at the door first and only if their request is denied could law enforcement personnel enter and search press offices.

¹¹⁹ *Supra* note 1.

¹²⁰ *Police Powers*, *supra* note 60 at 259.

¹²¹ *Ibid.* at 252.

There is judicial authority for requiring different methods of search and seizure depending on the type of premises involved. In *Descôteaux*, a case which involved the search and seizure of a law firm, Lamer J. (as he then was) noted that:

one does not enter a church in the same way as a lion's den, or a warehouse in the same way as a lawyer's office. One does not search the premises of a third party who is not alleged to have participated in the commission of a crime in the same way as those of someone who is the subject of such an allegation.¹²²

This appears to create a regime in which the nature of the premises to be searched is relevant when deciding upon the manner in which a search is to be conducted. The approach has also been followed in the United States in the case of *Roaden v. Kentucky*, where the Supreme Court noted that the methods of a "seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to a different kind of material."¹²³ L'Heureux-Dubé J. in *Lessard* accepted this regime by stating that:

conditions can be imposed by a justice of the peace as to the manner in which a warrant can be executed and, in that regard, particular considerations for the media are quite relevant, such as the hours during which the normal media operations would be less disturbed, the areas of the search and so on.¹²⁴

Another factor that should be considered here is the relationship between the police and the press. It is not inconceivable, given the hostile feelings of the police towards the press, that once inside press offices the police may begin to vent their frustrations in the methods they use to search the premises. It is at the execution stage that the clash between two long-time foes really takes place and, consequently, it is at the execution stage that heightened protection for the press would be most effective.

The problem with the approach of creating higher standards of reasonableness for the press at the execution stage is that each justice of the peace could decide to impose different conditions on the methods of search. Unless a list of required conditions was created, all the problems of judicial discretion discussed earlier come back to haunt the process. As Jacques J.A. stated in the Quebec Court of Appeal in *Radio-Canada*, "[o]ne would risk a multitude of 'laws' which, by the very nature of

¹²² *Descôteaux*, *supra* note 14 at 889.

¹²³ 413 U.S. 496 at 501 (1973).

¹²⁴ *Supra* note 1 at 438.

things, would be in large part contradictory.”¹²⁵ A standard procedure for all searches of the press must be created by Parliament and be applied in all situations.

D. Legislative Response

Both the *subpoena duces tecum* and the execution method alternatives require that Parliament step in and alter the existing standard of reasonableness in section 8 with respect to the press. In the United States the legislatures have created a unified and heightened standard for police searches of the press. After the United States Supreme Court decided in *Zurcher*¹²⁶ that the press did not deserve heightened protection within the Fourth Amendment, the legislatures reacted to the potential danger to freedom of the press by enacting protective statutes. Congress, for example, enacted the *Privacy Protection Act of 1980*¹²⁷ which prohibits (in the context of interstate and foreign commerce) the search and seizure of media “work product materials”¹²⁸ and “documentary materials”¹²⁹ in connection with the investigation or prosecution of a criminal offence, with a few notable exceptions. Those include where the possessor of the materials is implicated in the crime, where the seizure is necessary to prevent death or bodily injury, where there is reason to believe that the possessor would destroy the evidence if supplied with a *subpoena duces tecum*, or where such a document has been served and not complied with and all challenges to the *subpoena* have been exhausted.

This legislative approach protects the interests of the press by creating a “bright line” rule to guide justices of the peace. In the United States, it is no longer left solely to the discretion of a magistrate whether to issue a search warrant against the press at the request of federal law enforcement. The legislation also embodies a least restrictive approach that requires a *subpoena duces tecum* to be issued first. Only where a *subpoena* proves ineffective, or where there is a danger of bodily harm or destruction of the items sought, can a search warrant be issued in the first instance. As discussed earlier, the main difficulty with a court

¹²⁵ *Supra* note 30 at 2046.

¹²⁶ *Supra* note 7.

¹²⁷ 42 U.S.C. § 2000aa (1988) [hereinafter *Privacy Protection Act*].

¹²⁸ *Ibid.* § 2000aa(a).

¹²⁹ *Ibid.* § 2000aa(b).

concluding that a *subpoena duces tecum* must be issued before a search warrant can validly be issued is that the drafters of the Constitution and the *Criminal Code* did not set out this special protection for the press in the text of the legislation. It is, therefore, the responsibility of Parliament, and not the courts, to correct or alter the situation. This is exactly what has been done, to a degree, in the United States.

The *Privacy Protection Act* strikes a sensible balance between the need of the press to be free from unwarranted intrusions into private materials and the need of law enforcement agencies to pursue all possible leads in an attempt to identify culpable parties. The exceptions in the *Act* regarding urgent situations allow a warrant to be issued against the press only when absolutely necessary. The *Act* acknowledges the value of retaining an unfettered press and at the same time recognizes the need of law enforcement agencies to obtain information regarding crimes in order to protect the general public from harm.

It is interesting to note that the Supreme Court of Canada, in *Lessard*, followed the decision of the United States Supreme Court in *Zurcher*, even though that decision has been effectively overturned by legislation enacted by nine states¹³⁰ and by Congress. The *Lessard* decision should be sending a message to Parliament that the appropriate remedy lies in a legislative response: “[o]nly through the mechanism of legislation can the proper balance be reinstated between the press and law enforcement.”¹³¹

VIII. THE POST-LESSARD SITUATION

The decisions of the Supreme Court of Canada in *Lessard*¹³² and *New Brunswick*¹³³ are having, and will continue to have, a negative impact on freedom of the press. In October 1992, a year after the two decisions were released, for example, CBC, *The Globe and Mail*, and CTV brought an application to invalidate the seizure of unpublished video tapes and photographs taken at a riot that occurred during an anti-racism demonstration in downtown Toronto. Although there was no

¹³⁰ As of 1992, the following states passed laws that, by varying degrees, limit the use of search warrants against the press: California, Connecticut, Illinois, Nebraska, New Jersey, Oregon, Texas, Washington, and Wisconsin. See R.A. Smolla, *Free Speech In An Open Society* (New York: Vintage Books, 1992) at 273.

¹³¹ Cantrell, *supra* note 31 at 52.

¹³² *Supra* note 1.

¹³³ *Supra* note 2.

information to indicate that those organizations were in possession of crucial information or that the media was even present during the crimes, a justice of the peace issued a warrant to search the media premises. Moldaver J. upheld the issuance of the search warrants and the seizure of the materials.¹³⁴ This case demonstrates that Cory J.'s nine-factor test has not had the effect of protecting the press from unwarranted searches and seizures. In fact, Moldaver J. implicitly dismissed Cory J.'s test, stating that the sole issue in the application before him was whether the criteria in section 487 of the *Criminal Code* were met. He stated that:

in this regard, it matters not whether the place to be searched is a private dwelling or a business. As for media premises, while the Supreme Court of Canada has given considerable guidance regarding additional factors and criteria which the justice ought to consider before issuing a search warrant, compliance with the provisions of s. 487(1)(b) remains essential.¹³⁵

This is the only mention that was made of Cory J.'s test; Moldaver J. focused instead on section 487(1)(b) of the *Criminal Code*, assuming that the test to be met for the issuance of a search warrant against the press is simply the "reasonable grounds" requirement set out in the section.

This case also provides support for the idea that justices of the peace continue to issue search warrants for "fishing expeditions" in newsrooms and that Ontario courts continue to sanction the ensuing invasions on freedom of the press. Here, both the Crown and the applicants "conceded the factual deficiencies in the information"¹³⁶ sworn to obtain the search warrant, and the judge even stated that "the evidence presented to the issuing judge amounted to nothing more than speculation."¹³⁷ Moldaver J., however, validated the search and seizure on the basis that the section should be read as simply requiring that the materials sought *might* afford evidence with respect to the commission of an offence. This is a remarkable extension of the words of the *Criminal Code*, which require reasonable grounds to believe the items sought *will* afford evidence with respect to the commission of an offence.

Moldaver J. also implicitly extended Cory J.'s test with respect to media materials that are unpublished. In this case, none of the

¹³⁴ *R. v. Canadian Broadcasting Corp.* (1992), 77 C.C.C. (3d) 341 (Ont. Ct. (Gen. Div.)) [hereinafter *CBC 1992*], aff'd (1993), 84 C.C.C. (3d) 574 (C.A.).

¹³⁵ *Ibid.* at 347.

¹³⁶ *Ibid.* at 350.

¹³⁷ *Ibid.*

applicants had published photographs. The police merely assumed that the news organizations had evidence because *other* newspapers and media operations had published relevant information. This case, therefore, establishes that if *any* media operation has published information, search warrants can be issued to seize material from other media offices that have not published information upon the mere suspicion that the second offices might have relevant information.

The case also demonstrates that Cory J.'s test in *Lessard* has not provided extra protection for the press against search and seizure. In fact, it represents an unsurpassed low in the fight against police invasions of press facilities. Obviously Cory J.'s reliance on the discretion of justices of the peace was misplaced and what is required is a firm rule spelling out exactly when a search warrant may be issued against the press. The only viable solution appears to be for Parliament to step in, as Congress did in the United States, and correct the problems that the court refused to address adequately in *Lessard*.

IX. CONCLUSION

The majority decisions in *Lessard* and *New Brunswick* have fashioned a construction of section 8 that relies on the discretion of justices of the peace and denies the regime set out in *Hunter*,¹³⁸ which required the standard of "reasonableness" in section 8 to vary according to the context and interests involved in any situation: "[i]f probable cause to search always overcomes a recognized privacy right regardless of the type of evidence, crime, or privacy right involved, then 'reasonableness' has been effectively ousted as the touchstone of" section 8 of the *Charter*.¹³⁹

No argument is being made to immunize the press from all searches and seizures, but merely to control the means by which police officers are permitted to obtain the information sought. Parliament should step in and require that a *subpoena duces tecum* be issued, and only where compliance with the *subpoena* is refused or where there is a threat of bodily harm or destruction of the evidence should a search warrant be issued against press operations. This approach would balance the interests of the press in privacy and freedom to gather, edit, and disseminate news as against the interests of law enforcement to prevent or detect crime.

¹³⁸ *Supra* note 10.

¹³⁹ Cantrell, *supra* note 31 at 42.

The *Lessard* and *New Brunswick* cases have created a situation, as demonstrated by the *CBC 1992* case,¹⁴⁰ in which the police are able to use their powers of search and seizure to interfere with the privacy and freedom of the press. The courts justify this invasion and limitation on freedom of the press by stating that the interests of the state in law enforcement outweigh the needs of the press to freedom. The most troubling aspect of these decisions is, however, that “small restrictions [on freedom] accumulate into large restrictions, and in the process, may become as habitual as, before, freedom was. Restrictions justified as necessary safeguards of the freedom [of society to be protected from crime] may in fact safeguard freedom out of existence altogether.”¹⁴¹ If the courts are allowed to pick away at the constitutionally protected freedom of the press, even in the slightest way, Canadians may become habituated to the slow decline of our freedoms and will eventually be coaxed into giving them up entirely.

¹⁴⁰ *Supra* note 134.

¹⁴¹ *R. v. Landry*, [1986] 1 S.C.R. 145 at 188, La Forest J., citing A. Maloney, “Law Enforcement and the Citizen’s Liberty” (1966) 9 Can. Bar. J. 168 at 170.