**CITATION:** Canadian Broadcasting Corporation v. Attorney General of Ontario, 2015 ONSC 3131
**COURT FILE NO.:** CV-10-409382
**DATE:** 20150723



**SUPERIOR COURT OF JUSTICE – ONTARIO**

**RE:** CANADIAN BROADCASTING CORPORATION, CANADIAN JOURNALISTS FOR FREE EXPRESSION and RTNDA CANADA, Applicants

**AND:**

ATTORNEY GENERAL OF ONTARIO, MINISTER OF COMMUNITY AND CORRECTIONAL SERVICES and COMMISSIONER OF THE ONTARIO PROVINCIAL POLICE, Respondents
**AND:**

SHAWN BRANT, Intervenor, Added Party

APPLICATION UNDER section 24(1) of the *Constitution Act, 1982*

**BEFORE:** Justice Glustein

**COUNSEL:** *M. Philip Tunley* and *Justin Safayeni*, for the Applicants

*Hart Schwartz* and *Dan Guttman*, for the Respondents

*Peter Rosenthal*, for the Intervenor, Added Party

**HEARD:** May 11 and 12, 2015

**GLUSTEIN J.:**

**NATURE OF APPLICATION AND OVERVIEW**

[1] The applicants, Canadian Broadcasting Corporation ("CBC"), Canadian Journalists for Free Expression ("CJFE"), and RTNDA Canada ("RTNDA") (collectively, the "Media Applicants") bring this application for:

(i) "a declaration that the practice of Ontario Provincial Police officers impersonating journalists for purposes of criminal enforcement and investigation violates sections 2, 7, 8 and 15 of the *Canadian Charter of Rights and Freedoms* ('*Charter*') and cannot be justified under section 1 of the *Charter*"; and

(ii) "alternatively, a declaration that, in the absence of prior judicial authorization, the practice of Ontario Provincial Police officers impersonating journalists for purposes of criminal enforcement and investigation violates sections 2, 7, 8 and 15 of the *Charter* and cannot be justified under section 1 of the *Charter*".



[2] The Media Applicants are joined in their request for a declaration by Shawn Brant ("Brant"), who was granted status to intervene in the application as an added party pursuant to a consent order of Perell J., dated October 2, 2012.

[3] Although Brant did not bring a separate application, he supports the submissions made by the Media Applicants, swore an affidavit in support of the application, and filed a separate factum. I refer to the Media Applicants and Brant collectively as the "Applicants".

[4] The respondents, Attorney General of Ontario, Minister of Community Safety and Correctional Services (the "Minister"), and Commissioner of the Ontario Provincial Police (collectively, the "Respondents") oppose the application.

[5] At the outset of the hearing, the Applicants advised the court that they were not seeking a declaration that the impugned conduct of the Ontario Provincial Police ("OPP") violated sections 7, 8, and 15 of the *Charter* and were limiting the relief sought to a declaration that the impugned conduct violated s. 2(b) of the *Charter* ("s. 2(b)"), and in particular, freedom of expression, including freedom of the press and other media of communication.

[6] The following issues arise from the application:

(i) What evidence exists on the record of a "real" practice which can be considered by the court on a constitutional application?

The Applicants seek to challenge (a) "plainclothes" surveillance by OPP officers of public protests in the presence of media (which I define as "Media-Presence Surveillance"), (b) an "undercover" operation by an OPP officer posing as an independent author to obtain information from an inmate leading to a conviction (the "Independent Author Operation"), and (c) Ontario Provincial Police Order 2.8.6 ("Police Order 2.8.6") which permits an OPP officer to pose as a member of the media subject to prior approval.

The Respondents do not challenge that there is a "real" practice of Media-Presence Surveillance. However, the Respondents submit that there is no "real" practice arising from either the Independent Author Operation or Police Order 2.8.6. The Independent Author Operation is a single instance and is not a "practice". Police Order 2.8.6 has never been used to permit an OPP officer to pose as a journalist to obtain information in an undercover role.

(ii) Do the pleadings limit the scope of the conduct that can be reviewed in the application?

The Applicants submit that Media-Presence Surveillance can be challenged as a violation of s. 2(b), on the basis of the pleadings and the application record, regardless of whether the conduct constitutes "impersonating journalists for purposes of criminal enforcement and investigation".

The Respondents submit that the Applicants cannot seek a declaration that Media-Presence Surveillance violates s. 2(b) because the notice of application only seeks a declaration prohibiting the practice of "impersonating journalists" and the Respondents submit that Media-Presence Surveillance does not constitute impersonation of a journalist.

The Applicants submit that (a) the pleadings are broad enough to include a challenge to the Independent Author Operation and Police Order 2.8.6; and (b) in any event, there is no prejudice to the Respondents in addressing such issues.

The Respondents submit that the application cannot be extended to permit a challenge of the Independent Author Operation or Police Order 2.86. These matters were not raised in the notice of application or application record but were only raised by the Respondents in response to the application, to demonstrate that the OPP does not engage in "undercover" activities to assume the identity of a journalist from a news-gathering organization for the purpose of gaining the trust of an individual in order to obtain confidential information from a witness or suspect.

In any event, the Respondents submit that the Independent Author Operation is not an example of impersonating a journalist and, as such, does not fall within the scope of the application;

(iii) Does any of the impugned conduct violate s. 2(b)?

The Applicants submit that all of the impugned conduct violates s. 2(b) since it (i) restricts the free flow of information to journalists, and (ii) increases danger to journalists which impinges on their ability to gather news.

The Respondents submit that even if all of the impugned conduct could be considered by the court on this application, it does not violate s. 2(b), as (i) there is no evidence before the court of a "chilling effect" on freedom of expression as a result of the conduct; and (ii) such a causal link is not "indisputable";

(iv) If any of the impugned conduct violates s. 2(b), is such conduct a reasonable limit prescribed by law and justified under s. 1 of the *Charter* ("s. 1")?

The Applicants submit that the impugned examples of conduct are not reasonable limits prescribed by law and, as such, are not justified under s. 1. The Respondents submit that the impugned examples of conduct are reasonable limits prescribed by law and, as such, are justified under s. 1; and

(v) Is the declaration sought by the Applicants appropriate declaratory relief?

The Applicants submit that the definitions of "impersonating" and "journalist" are clear and appropriate and, as such, declaratory relief can be granted. The Respondents submit that "the Applicants' apparent definitions of both 'impersonate' and 'journalist' are simply too imprecise and ill-defined to provide meaningful guidance or judicial manageability".

[7] For the reasons set out below, I dismiss the application. In brief, I find that:

(i) There is a "real" practice of Media-Presence Surveillance. However, there is no evidence that the practice includes responding to identity questions from protesters or others by posing as a journalist.

There is no evidence of any practice of impersonating journalists arising out of the Independent Author Operation or from Police Order 2.8.6.

Consequently, the only "real" and not "theoretical" practice which could be considered by the court is Media-Presence Surveillance;

(ii) Regardless of whether Media-Presence Surveillance constitutes "impersonating" a "journalist", the Applicants can challenge that practice under s. 2(b). The effect of Media-Presence Surveillance on freedom of expression was (a) raised through correspondence with the Minister and the OPP as soon as the Media Applicants became aware of the issue, (b) raised in the application record before the court, and (c) fully addressed by the Respondents in their responding material.

The scope of the application is limited on the pleadings to Media-Presence Surveillance. The Media Applicants raised the constitutionality of the Independent Author Operation and Police Order 2.8.6 only in their factum, without amending their notice of application, which caused prejudice to the Respondents who did not lead evidence relevant to s. 2(b) or s. 1. Even at the hearing, the Media Applicants chose not to adjourn the application to amend the notice of application to challenge the conduct.

In any event, the Independent Author Operation does not constitute impersonation of a "journalist", so it would not be within the scope of the application; and

(iii) None of the impugned conduct violates s. 2(b). The evidence before the court does not establish that Media-Presence Surveillance has a "chilling effect" on freedom of expression. Further, the connection between Media-Presence Surveillance and restricting the flow of information from journalistic sources or increasing danger to journalists is not "indisputable" or "self-evident" as that standard has been discussed in the case law.

> There is no evidence that either the Independent Author Operation or Police Order 2.8.6 has a "chilling effect" on freedom of expression, nor could such a conclusion be said to be "indisputable".

[8] Given my findings as summarized above, I do not address whether any of the impugned practices are justified under s. 1, or whether declaratory relief is the appropriate remedy.

**ANALYSIS**

**Issue 1: The existence of a practice with respect to Media-Presence Surveillance, the Independent Author Operation, and Police Order 2.8.6**

[9] Before the court can consider the constitutionality of a practice, there must be evidence of such a practice. I review the applicable law and relevant evidence on this issue below.

*a) The applicable law*

[10] The question before the court on an application for declaratory relief under the *Charter* must be "real and not theoretical" (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, at para. 46).

[11] "Potential questions and concerns" are not sufficient to ground a constitutional challenge (*S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 ("*S.L.*"), per LeBel J. concurring, at para. 58). A constitutional challenge cannot be made in a "factual vacuum" based on "the unsupported hypotheses of enthusiastic counsel" (*MacKay v. Manitoba*, [1989] 2 SCR 357 ("*MacKay*"), at 361-62).

[12] Consequently, if there is no practice established on the evidence, the court should not make a theoretical finding as to whether a practice, if it existed, would violate s. 2(b).

*b) Review of the relevant evidence*

[13] At the hearing, the evidence was that OPP officers do not engage in undercover operations as journalists, but do engage in Media-Presence Surveillance. There was no evidence of a practice by OPP officers engaged in Media-Presence Surveillance to respond to identity questions by posing as a journalist.

[14] The evidence also established that there has been no authorization under Police Order 2.8.6 for an OPP officer to pose as a journalist. Finally, there is no evidence of any practice arising from the Independent Author Operation.

[15] I review this evidence below.

1. OPP officers do not engage in undercover operations as journalists

i) An explanation of the "undercover" process

[16] The evidence at trial was that OPP officers do not engage in undercover operations as journalists.

[17] Chief Superintendent Barnum ("Barnum") of the OPP swore an affidavit on behalf of the Respondents. I summarize his evidence on this issue.

[18] The OPP relies on the use of undercover officers in many cases to obtain evidence for criminal prosecutions. Given the dangerous nature of undercover assignments, the OPP has rules in place for selection, training, and operating procedures. No undercover operation can be conducted without a formal request including an operating plan, and only upon approval by the Covert Operations Section.

[19] Once an undercover operation is approved, the plan is assigned:

(i) an "undercover coordinator" who is responsible for reviewing proposed undercover operations and ensuring they are consistent with the relevant Standard Operating Procedures and Police Orders,

(ii) an "undercover handler" who is an experienced officer trained in managing undercover operations and has final decision-making authority during actual undercover operations in regards to the safety of the undercover operative, and

(iii) an "undercover operative" who is an officer acting under the authority of the Covert Operations Section who disguises his or her identity or uses an assumed identity for the purpose of gaining the trust of an individual or organization in order to obtain information or evidence. An officer who becomes an undercover operative must receive accredited training through the Criminal Intelligence Service of Ontario or the OPP.

[20] An undercover officer is trained to maintain his or her assumed role regardless of what occurs. Undercover officers typically interact with the suspect, and use their assumed roles to gain the trust of the individual or organization in order to obtain information or evidence.

[21] Undercover operations may involve a number of separate "plays" in order to gain the trust of the suspect and to obtain sufficient information to support a criminal charge. Each of those "plays" is planned, reviewed and approved by a senior officer.

ii) OPP officers do not conduct undercover operations as journalists

[22] Barnum's unchallenged evidence was that he was not aware of any occasion on which an undercover OPP officer has posed as a journalist.

[23] Barnum's evidence was that one reason why the technique of posing as a journalist is not used is that such operations would be very complicated and the risks of detection of the undercover operative would be high.

[24] Barnum's evidence was that given the internet, information about an individual or media outlet can be obtained easily. Consequently, posing as a member of a fictitious news organization would require a great deal of expense to create a website and examples of articles written by the officer in order to complete the ruse. There would be significant concerns that the suspect would have the opportunity to investigate the story of the undercover officer.

[25] Barnum repeatedly stated that "we don't do it" when asked whether such a practice existed.

[26] In a series of letters from the OPP to the Media Applicants responding to concerns about Media-Presence Surveillance, the OPP adopted the loose language of "undercover" operations, despite the accepted distinction between "plainclothes" and "undercover" operations. However, a fair reading of those letters does not suggest that the OPP has a practice of "undercover" operations posing as journalists, but instead, is maintaining that it will continue its practice of Media-Presence Surveillance.

[27] The Applicants sought to rely on the evidence of Constable Steven Martell ("Martell") at Brant's preliminary inquiry that Martell "pretended" to be a journalist in an "undercover" operation while conducting Media-Presence Surveillance. However, Martell's affidavit filed in response to the present application explains his usage of those terms at the preliminary inquiry, and that his surveillance role was to "blend in" and "hide in plain sight". That evidence does not ground a factual basis for a practice of undercover operations.

[28] Consequently, there is no evidence to support a practice of undercover operations by police posing as journalists to obtain information from suspects. The practice at issue is Media-Presence Surveillance.

### 2. OPP officers engage in plainclothes surveillance including Media-Presence Surveillance

[29] A plainclothes officer is an officer dressed in civilian clothing. Although these members may be assigned to support undercover operations, and are considered to be in a covert role, they are not undercover operatives and are not trained as such.

[30] The role of a plainclothes officer is not to take on a particular role but rather to "hide in plain sight" or "blend in" by being dressed as a civilian. Plainclothes surveillance by officers dressed in civilian clothes is frequently effective. These officers may carry a camera or small video camera, as may any member of the public. These cameras are unmarked and do not carry any media logo. In the Media-Surveillance Practice examples discussed below, the plainclothes officers were dressed in jeans, plain shirts, T-shirts, or hooded sweatshirts. They wore no clothing with logos and did not carry equipment with logos to identify themselves as members of the media.

[31] The plainclothes surveillance can take place in the presence or outside the presence of media and with or without other members of the public present. The intention is to "blend in" with the crowd of people who are filming or watching the public protest.

[32] Plainclothes officers are normally used in situations such as public protests requiring surveillance or intelligence gathering. Consequently, interaction between the plainclothes officer and the suspect (if there is one) is either very limited or not required.

[33] There are numerous situations in addition to public protests where the OPP deploys plainclothes officers to obtain surveillance evidence. Plainclothes officers may capture photos and/or video of individuals involved, analyze these images and then lay charges later if required. Plainclothes OPP officers gather intelligence during these events, including public protests, to preserve the peace and to protect the protesters and the public.



i) Impugned examples of Media-Presence Surveillance

[34] The Applicants rely on three examples of Media-Presence Surveillance to seek a declaration that the "practice of Ontario Provincial Police officers impersonating journalists for purposes of criminal enforcement and investigation" violates s. 2(b).

[35] However, the only examples on which there is evidence of Media-Presence Surveillance relate to plainclothes surveillance at (i) Ipperwash Provincial Park ("Ipperwash") on September 5, 1995 (the "Ipperwash Surveillance"), and (ii) the Aboriginal Day of Action (the "Day of Action") on June 28, 2007 (the "Day of Action Surveillance").

[36] I review each of these examples below (as well as the purported example of surveillance at the Dudley George funeral).

a. The Ipperwash Surveillance

[37] On September 5, 1995, OPP Constable Dyke ("Dyke") and OPP Constable Whitehead ("Whitehead") (collectively, the "constables") were assigned to conduct plainclothes surveillance of protesters at Ipperwash.

[38] The constables were driving a blue GMC car that was not marked in any manner associating it or them with a news agency.

[39] The constables were not wearing any article of clothing associating them with a news agency. Dyke was wearing blue jeans and a plain shirt and Whitehead was wearing blue jeans and a t-shirt.

[40] The constables were operating from an area where journalists had congregated. The surveillance footage showed marked vans and individuals carrying specialized equipment.

[41] The constables were using a small handheld video camera with no unique features to conduct surveillance.

[42] In the first minute of footage, the constables spoke to several nearby individuals who appear to be journalists, about a problem with the constables' car battery. The constables asked for assistance and advised the individuals that they had jumper cables in the trunk of their car.

[43] Someone on the scene offered to assist with the battery. Another individual in the group involved in that conversation asked whether the constables were "just here for your own interests or are you shooting for somebody". Dyke answered that he was "freelancing". He was then asked "for who?" He answered "U.P.A.". The individual asked "what's that?" Dyke did not respond to the question but the individual then repeated the question by asking "what's that stand for?" At that point, Dyke responded "United Press Associates".

[44] Dyke's response that he and Whitehead were working for "U.P.A." or "United Press Associates" was an on-the-spot (Barnum describes it as "coughed up") reaction to a series of questions. It was not part of pre-planned undercover personas. The constables were not at Ipperwash in any undercover capacity to pose as journalists. They did not attempt to interview any protesters or suspects. They did not identify themselves as journalists to any protesters or suspects.



b. No OPP surveillance activities at the Dudley George funeral

[45] The Applicants filed evidence from Peter Edwards ("Edwards"), a reporter with *The Toronto Star*, that (i) he saw "undercover" OPP officers "posing as a television news crew" at the funeral of Dudley George; and (ii) the officers acted in a "casual and flippant" manner that "conveyed a strong and unmistakable message to the First Nations people and their supporters that people in the mainstream media were amused by their situation, and by their grief".

[46] In their factum, the Applicants referred to this evidence as establishing a "strong suspicion that the OPP also posed as journalists to videotape Dudley George's funeral".

[47] However, the evidence does not support that there was OPP surveillance of the Dudley George funeral. On cross-examination, Edwards conceded that the assertions in his affidavit were based on suspicions and assumptions that he formed many years after the incident.

[48] Barnum was not aware of any OPP surveillance of Dudley George's funeral. Of the three OPP members assigned full time to the Ipperwash Inquiry, (i) the OPP member responsible to view all video taken by the OPP during the Ipperwash incident never saw any video of the Dudley George funeral and was unaware of any video footage existing of the funeral; and (ii) the two other OPP members were also not aware of any footage of the funeral.

[49] Consequently, I find that there was no OPP surveillance at the Dudley George funeral.

c. Day of Action Surveillance

[50] Martell conducted plainclothes surveillance at the Day of Action. He filed an affidavit for the application and he was extensively cross-examined. I summarize the relevant evidence below.

[51] On June 28, 2007, Martell was requested by the OPP Intelligence Unit to conduct plainclothes surveillance by taking video footage at the barricades erected at the Day of Action

protest site in the context of a dispute in the Tyendinaga Mohawk Territory. Martell was asked "to blend into the crowd". He attended at the site that evening.

[52] Martell drove an unmarked black Pontiac G6, and wore his own clothes, consisting of jeans, a hooded sweatshirt (which belonged to his brother), skateboard-style shoes, and a baseball cap. None of these items had any media-related names, logos, or other markings. Martell had a small hand-held digital video camera that was approximately the size of the palm of his hand. The camera bore no media-related names, logos, or other markings.

[53] There were two barricades at the site. Martell located a first barricade at Highway 2 and Wyman Road. He observed a number of people, including members of the media, within and outside of the barricade. Some members of that group were identifiable as media, because they wore identifying clothing such as shirts with network names or logos, and carried specialized equipment such as large video cameras and microphones that were marked with network names or logos.

[54] Martell remained outside of the barricade and took video footage of the general situation at the barricade, with the objective of getting different views of the site for intelligence-gathering purposes.

[55] Martell did not speak to anyone while outside the first barricade, and left after approximately 20 minutes.

[56] Martell located a second barricade at Wyman Road at the railway tracks. After pulling up to the barricade in his car, he spoke briefly to a protester and asked if he could take video. Martell did not explain the reason for his request or identify himself. Martell immediately left the site when the protester refused Martell's request. Martell then drove a short distance away, parked the car on the side of the road, and took a short video from the back window of his vehicle.

[57] Martell returned to the first barricade. He observed some members of the media who he identified as such because they wore clothing or carried specialized equipment with identifying names and logos.

[58] The area was controlled by the First Nations. Martell sought access to the area so that he could get a better vantage point.

[59] Martell went inside the area and took some video footage. No one was preventing access to the area. He left the blockade after approximately 20 minutes without having spoken to anyone.

[60] Martell later testified at a preliminary inquiry for Brant. In the course of his testimony, the Crown counsel conducting his examination-in-chief put to him the following question: "It was planned that you would perform – for want of a better word – some undercover duties during any blockades that took place". Martell adopted the phrase "undercover" as put to him in

the question, stating that he was assigned to "try to get close to the barricades, or the blockades, to see what was going on and possibly tape them, and blend in in an undercover capacity".

[61] Similarly, Crown counsel asked Martell: "Now, you were acting in an undercover capacity as you've told us, and you had a video camera. What were you pretending to be?" Martell answered, "I just pretended to be part of the media".

[62] On cross-examination at the preliminary inquiry, Martell also agreed with Mr. Rosenthal, counsel for Brant (the same counsel as on this application) when Mr. Rosenthal suggested that Martell was "pretending to be part of the media".

[63] However, it was clear from Martell's evidence at the preliminary inquiry, and his affidavit and cross-examination evidence before the court on this application, that Martell was assigned to a plainclothes role, not an undercover one.

[64] In 2007, Martell had not received any training as an undercover operative, and he was not authorized to undertake an undercover assignment.

[65] Martell explained in his affidavit on this application that he accepted Crown counsel's use of the word "undercover" because he understood that most lay people do not distinguish between the words "undercover" and "plainclothes", and the difference between those words as the OPP understands them did not seem important for the purpose of the hearing. He understood the questioning from Crown counsel (and later from Mr. Rosenthal on cross-examination) to be directed at understanding that he was not wearing a police uniform but rather, was attempting to "blend in" with the crowd.

[66] Martell explained in his affidavit that he used the word "pretending" that was suggested by the Crown, because he was in an area where there were many members of the media and he was trying to blend in. Martell explained that the word "pretending" was not an accurate description of his activities and that a more accurate description was that he was attempting to "hide in plain sight" or "blend in" with the media. He does not know if anyone thought he was a member of the media, or another member of the public, or whether they noticed him at all.

[67] Even at the preliminary inquiry, Martell switched to more accurate terminology during the cross-examination by Mr. Rosenthal. Martell described himself as being in "plainclothes" and agreed with Mr. Rosenthal's characterization that "plainclothes" means "people trying to blend in".

[68] The evidence of Martell (both at the preliminary inquiry and at the present application) establishes that regardless of the language used by counsel or Martell at the preliminary inquiry, Martell did not do anything to identify himself as a member of the media. He did not tell anyone that he was a member of the media, and he did not have any specialized clothing or equipment designed to make people believe that he was a member of the media. Consequently, I find that Martell was engaged in Media-Presence Surveillance.

3. No practice of responding to identity questions by posing as journalists during police surveillance

[69] The Applicants sought to rely on the statement by Dyke that he was with "United Press Associates" to establish a practice that plainclothes officers represent their identity as journalists. However, the evidence does not support such a practice.

[70] There is no "practice" of posing as journalists either in undercover operations, or in response to questions (if asked) about a plainclothes' officer's identity in the course of Media-Presence Surveillance. An "on-the-spot" response by Dyke to a repeated question about his identity does not constitute a practice to be considered by the court.

[71] Martell's evidence as to his practice while conducting Media-Presence Surveillance is that he will not respond to questions about his identity by saying that he is a member of the media. Martell's cross-examination evidence was that if asked his identity by someone (including a protester) while filming, his response to the situation would be "I wouldn't have said anything" and "I would have disengaged" and walked away if the questioning continued.

[72] Martell gave evidence that the purpose of plainclothes surveillance is to "blend in" with others engaged in filming the crowd, whether or not members of the media, and not to interact with those engaged in the public protests.

[73] The Respondents acknowledged in their factum that a response such as that given by Dyke at Ipperwash would constitute "posing" as a member of the media and could not be provided without prior authorization under Police Order 2.8.6 (described in more detail at paragraphs 78-80 below). The Applicants agreed with that interpretation.

[74] Barnum took the position that a "coughed-up" answer such as from Dyke would not constitute "posing" under Police Order 2.8.6.

[75] In any event, regardless of whether Police Order 2.8.6 permits a response similar to that of Dyke, there is no evidence of any other incident of a police officer responding as did Dyke. Consequently, there is no evidence of any practice by OPP officers conducting Media-Presence Surveillance to respond to identity questions by posing as journalists (perhaps because such a claim could be easily disproved as the plainclothes officer would have no identification as a journalist available to establish such a claim).

[76] The Applicants also seek to rely on a report on CBC's "The National" on January 21, 2004. In that report, Susan Ormiston ("Ormiston") of the CBC, who did not swear an affidavit for the application, refers to a response from Superintendant Bill Crate of the OPP when he states that "it does happen, but it happens rarely". The evidence is inadmissible hearsay. Further, it is not clear from the report transcript whether Supt. Crate's response refers to the practice of Media-Presence Surveillance in general or to OPP officers identifying themselves as journalists if asked about their identity while conducting plainclothes surveillance. Finally, something which happens "rarely" is not a practice.

4. There is no practice of impersonating journalists under Police Order 2.8.6

[77] OPP policy is set out in Ontario Provincial Police Orders ("Police Orders") enacted pursuant to s. 17(2) of the *Police Services Act*, R.S.O. 1990, c. P. 15, which gives the OPP Commissioner "the general control and administration of the Ontario Provincial Police and the employees connected with it."

[78] On July 29th, 2011, new Police Orders governing a number of areas relating to covert operations came into force. Police Order 2.8.6 provides:

> An employee working in an undercover or a plain clothes role shall not pose as a person in authority unless he/she has prior approval from the Commander, POIB through Covert Operations Section. This includes gathering intelligence or making/enhancing prosecutorial actions. Approval shall only be granted if the situation relates to a significant threat to public safety, is exigent in nature, and where no other alternative exists.

[79] Under Police Order 2.8.6, a "person in authority" includes a member of the media.

[80] Approval has only been sought once under Police Order 2.8.6 for an officer to pose as a member of the media in relation to a homicide investigation. Approval was denied since the Bureau Commander was not satisfied that there were no "reasonable alternatives". Consequently, there is no practice of impersonating journalists under Police Order 2.8.6.

[81] The Applicants also submit that the inclusion of a "member of the media" in Police Order 2.8.6 was done because the "OPP itself recognized … special concerns about freedom of expression raised by the practice of impersonating journalists". The RTNDA had written to the OPP Commissioner on August 7, 2008 asking "that guidelines [be] imposed to require authorization at the most senior levels of the force".

[82] Further, by the date of Police Order 2.8.6, the Media Applicants had served their notice of application.

[83] However, the evidence does not support that the OPP recognized freedom of expression concerns if an officer seeks to obtain information by posing as a journalist.

[84] In his cross-examination, Barnum gave the following evidence about the reasons for inclusion of a "member of the media" in Police Order 2.8.6:

(i) The OPP group that prepared Police Order 2.8.6 "discussed … at length" whether inclusion of a "member of the media" in Police Order 2.8.6 was "something that's going to impact our operational capability", [whether] "have we done it a lot in the past" and concluded that "there's not a lot of value [in undercover operations as a journalist] … with all the Internet and things of that nature, it would be next to impossible to build a cover story that was adequate"; and

(ii) The media was added because Barnum knew of the media's concerns about freedom of expression "from the intention of this application" and "also, it's really not something that we do. So, again, we looked at it and said, 'Well, we can put it in policy [*sic*] because it doesn't really impact our day-to-day operations'".

[85] Consequently, Barnum did not "recognize" "special concerns about freedom of expression raised by the practice of impersonating journalists". Barnum recognized that the Media Applicants had raised those concerns, and included a member of the media as a person in authority since it had no impact on the OPP's day-to-day operations.

[86] The Applicants submit that there is no evidence that police officers receive any training on Police Order 2.8.6. However, Barnum's evidence is that "[e]very member in the organization knows they exist and is responsible to work within the guidelines of Police Orders". Barnum's evidence is that the Police Orders are "accessible", "searchable" and available through every member's computer. Barnum describes the process by which the "day-to-day officer … will search Police Orders" to find a reference to conduct which he or she must consider on a daily basis. Barnum's evidence is that "it captures every member of the organization, regardless of what function you are doing".

5. There is no practice arising from the Independent Author Operation

[87] There is no evidence of any practice under which the OPP engage in impersonating independent authors.

[88] In 2009, an OPP undercover officer posed as an independent author, not affiliated with any publisher or organization, in order to interview a federal inmate. The officer's "cover story" was that she hoped to publish a book with funding from her father.

[89] The officer told the inmate that she was interested in writing a book compiling the life story of an accused who was already imprisoned for committing murder but was suspected of having committed another murder that had remained unsolved. In fact, the officer had been sent to obtain evidence from the accused linking him to this second murder.

[90] The officer met with the accused on numerous occasions, and eventually elicited enough evidence to link the accused to the unsolved murder. During the operation, it was also discovered that the accused had not committed the first murder for which he was already imprisoned, as he had confessed in order to protect another individual who had committed it. The other individual was located and charged with committing the first murder.

[91] The Applicants sought to attach, as exhibits to the Barnum cross-examination, newspaper articles about the Independent Author Operation which purported to set out details of the operation. However, the Applicants acknowledged at the hearing that they could not rely on the articles for the truth of their contents and could only rely on them for the fact that the incident became known in the media.

[92] An example of a single undercover operation in which an OPP officer obtained information by posing as an independent author does not constitute a factual basis for the court to find a "practice".

*c) Conclusion*

[93] On the basis of the above evidence, there is no evidence of a practice of undercover operations in which OPP officers pose as journalists.

[94] There is a "real" practice of Media-Presence Surveillance and, as such (subject to the pleadings issue I discuss below), it can be considered by the court on a constitutional challenge.

[95] However, there is no practice of plainclothes OPP officers engaged in Media-Presence Surveillance to identify themselves as journalists if questioned as to their identity. Consequently, it cannot be considered a "real" practice and, as such, I do not address the theoretical constitutional validity of the issue.

[96] There is no practice relating to Police Order 2.8.6 before this Court. The only evidence is that there has been only one request under Police Order 2.8.6 to pose as a journalist and that request was denied. Consequently, any concern as to the effect of Police Order 2.8.6 is based on a theoretical situation which should not be considered by the courts.

[97] Similarly, even if impersonating an independent author could be considered impersonating a journalist (which I reject for the reasons I discuss below), there is no evidence of any "practice" arising from the Independent Author Operation. Consequently, the Independent Author Operation cannot be considered a "real" practice and, as such, I do not address the theoretical constitutional validity of the issue.

[98] For the above reasons, the only practice properly before the court (subject to the issue of pleadings which I address below) is Media-Presence Surveillance.

**Issue 2: The scope of the application under the pleadings**

[99] The Applicants submit that the pleadings are broad enough to encompass a challenge to Media-Presence Surveillance, as well as to the Independent Author Operation and Police Order 2.8.6.

[100] The Respondents submit that none of those issues can be raised under the pleadings. With respect to Media-Presence Surveillance, the Respondents submit that (i) the notice of application limits the constitutional challenge to "the practice of Ontario Provincial Police Officers impersonating journalists for purposes of criminal enforcement and investigation"; and (ii) Media-Presence Surveillance does not constitute "impersonating" journalists.

[101] With respect to the Independent Author Operation and Police Order 2.8.6, the Respondents submit that the constitutionality of the conduct was not raised until the Applicants' factum and, as such, is not properly before the court.

*a) The applicable law*

[102] The issues in a civil action must be decided within the boundaries of the pleadings. In *Musicians' Pension Fund of Canada (Trustees of) v. Kinross Gold Corp.*, 2014 ONCA 6070 ("*Kinross*"), the plaintiff sought leave under s. 138.8(1) of the Ontario *Securities Act* to proceed with a statutory action for misrepresentation and to certify the action as a class proceeding, based on alleged misrepresentations concerning two gold mines.

[103] In *Kinross*, the plaintiff submitted before the motions judge that there was an additional misrepresentation (which the Court of Appeal defined as the "Expansion Claim") that the corporate defendant's "planned expansion project for the Tasiast mine remained on schedule when, in fact, the schedule was unrealistic" (*Kinross*, at paras. 1-4).

[104] The motions judge dismissed the Expansion Claim because it was not pleaded by the appellants (*Kinross*, at para. 6).

[105] Speaking for the Court, Cronk J.A. dismissed the appeal on the basis that the Expansion Claim was not raised in the pleadings. She held (*Kinross*, at paras. 83-84):

> The appellants' final complaint about the leave ruling is that the motion judge erred by failing to consider the Expansion Claim because the appellants failed to plead this claim. **The appellants maintain that this was an overly 'technical' and erroneous basis** on which to deny leave to proceed with the Expansion Claim.
>
> I disagree. As this court has consistently emphasized, **it is central to the litigation process that issues in a civil action be decided within the boundaries of the pleadings. Fundamental fairness and the efficacy of the civil litigation process demand no less.** [Emphasis added.]

[106] Similarly, in *Wilson v. Beck*, [2013] ONCA 316 ("*Wilson*"), MacPherson J.A. set out the principle that "It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings" (*Wilson*, at para. 27).

*b) Analysis*

[107] The issue of the scope of the application depends on a review of the pleadings as a whole, as well as the evidence led in the application record on the various issues, to determine the "boundaries of the pleadings" and whether "fundamental fairness and the efficacy of the civil litigation process" is served by permitting the issues to be argued before the court on the basis of the pleadings.

[108] I consider the evidence related to the Media-Presence Surveillance, Police Order 2.8.6, and the Independent Author Operation below.

1. Media-Presence Surveillance

[109] A review of the pleadings and evidentiary record filed by the Applicants and addressed by the Respondents in their responding material demonstrates that the practice of Media-Presence Surveillance is properly before the court in this application.

[110] The Respondents submit that based on the notice of application, the Applicants cannot challenge Media-Presence Surveillance since the Respondents submit that such conduct does not constitute "impersonating" a "journalist".

[111] I do not agree. I find that the practice of Media-Presence Surveillance is raised in the application and can be challenged under s. 2(b), regardless of whether the practice constitutes impersonation of a journalist.

[112] At paragraph 1(a) of the notice of application, the Media Applicants seek a declaration that "the practice of Ontario Provincial Police officers impersonating journalists for purposes of criminal enforcement and investigation violates sections 2, 7, 8 and 15 of the [*Charter*] and cannot be justified under section 1 of the *Charter*."

[113] While paragraph 2(g) of the notice of application refers to OPP officers being engaged in "undercover" operations, the same paragraph makes clear that Media-Presence Surveillance is the impugned practice:

> By way of specific example, O.P.P. Constable Steve Martell has admitted under oath to impersonating a journalist in order to infiltrate protest activities during the 2007 Aboriginal Day of Action. By way of further example, the Ipperwash Inquiry heard evidence confirming that O.P.P. officers impersonated journalists in order to infiltrate the protesters occupying Ipperwash Provincial Park.

[114] Paragraph 2(k) of the notice of application also makes clear that it is the Media-Presence Surveillance practice raised by the Ipperwash and Day of Action examples, as referred to in correspondence between the Media Applicants and the Minister and OPP Commissioner, which is impugned by the Applicants:

> Despite written requests by the Applicants to the Minister, the Minister has failed or refused to take any steps in the exercise of his oversight role, to ensure that appropriate legislation, policies or procedures are in place govern [*sic*] the practice of journalist impersonation.

[115] The affidavit evidence specifically sets out the letters of complaint by the Media Applicants of the OPP conduct at Ipperwash and the Day of Action. The CJFE 2008 letter raised the issue of Martell's surveillance at the Day of Action. The RTNDA's letters of 2004 and 2008 raised both the Ipperwash and Day of Action concerns. The CBC raised the Ipperwash concerns

in its January 2004 report in "The National" and referred in its 2008 letter to both the Ipperwash events and Martell's surveillance at the Day of Action.

[116] The above letters reflect the concern of the Media Applicants that the practice of Media-Presence Surveillance was impeding the media's ability to gather information and could put journalists in danger. It is those concerns that underlie the present application.

[117] I note that the use of the word "undercover" in the correspondence is similar to the use of the word in Martell's preliminary inquiry. There was never any suggestion in the correspondence that the OPP was engaged in undercover operations with officers using a false persona to pose as journalists to obtain information, but the term "undercover" was used loosely by all to address the practice of Media-Presence Surveillance.

[118] At the hearing, the Applicants submitted that Media-Presence Surveillance constituted "impersonating journalists" since the surveillance took place in areas where media congregated. The Respondents submitted that such surveillance was not "impersonating" since the OPP officers were in plainclothes with no identifying media signs.

[119] However, the debate over whether Media-Presence Surveillance constitutes "impersonation" or "undercover operations" is irrelevant. The constitutionality of the practice of Media-Presence Surveillance was raised in the pleadings and evidentiary record and is properly before the court.

[120] The Applicants raised the issue throughout their application that there was a practice of Media-Presence Surveillance as demonstrated by the Ipperwash and Day of Action examples and the Respondents fully addressed those issues in the responding material through the affidavits of Barnum and Martell.

[121] In his affidavit filed for this hearing, Martell explains that members of the public often do not make the distinction between "plainclothes" and "undercover" and that he used "undercover" at the preliminary inquiry since those were terms considered appropriate by Crown counsel at that hearing. Having often used the words "undercover" in addressing plainclothes surveillance, both in responding to correspondence from the Media Applicants and in Martell's preliminary inquiry, the Respondents cannot preclude the consideration by the court of the practice of Media-Presence Surveillance simply because the Applicants used the same "undercover" term.

[122] For the above reasons, I do not accept the Respondents' submission at paragraph 65 of their factum that:

> The Notice of Application is limited to 'the practice of impersonating journalists in undercover operations' (Notice of Applicaton [*sic*], para. 2(g)), and does not challenge nor make any reference to the plainclothes surveillance of public protests. […] If this Court concludes that plainclothes surveillance of public protests does not constitute the 'impersonation of journalists' than [*sic*] this Application should be dismissed.

[123] Consequently, the scope of the application encompasses whether Media-Presence Surveillance violates s. 2(b). The issue is raised in the pleadings. Further, there is evidence that (i) such a practice exists; and (ii) the OPP has indicated that the practice will continue.

2. Can the Applicants challenge whether Police Order 2.8.6 or the Independent Author Operation violate s. 2(b)?

[124] I have already found above that the evidence does not establish a practice of the OPP posing as journalists through either Police Order 2.8.6 or the Independent Author Operation and for those reasons, I found that they are not proper constitutional issues to be considered by the court.

[125] However, I also find that the constitutionality of these issues was not raised in the application and cannot be raised as an argument in a factum before the court without a proper pleading on the issue.

[126] The Media Applicants chose not to amend their pleadings, even though the issue was raised as late as the outset of the hearing, when the court asked the Media Applicants whether they sought any further amendments, given the Respondents' submissions in their factum that (i) Police Order 2.8.6 and the Independent Author Operation were not raised in the pleadings; and (ii) as such, the constitutionality of those matters could not be considered by the court.

[127] In the present application, the Media Applicants did not rely in their notice of application or application record on either (i) Police Order 2.8.6 or (ii) the Independent Author Operation. The Applicants submit that they could not have done so since (i) Police Order 2.8.6 was not in effect at that time; and (ii) they had no knowledge of the Independent Author Operation until the example was raised in the responding material. However, I do not agree that such a response is satisfactory.

[128] I address the issues relevant to Police Order 2.8.6 and the Independent Author Operation below.

i) Police Order 2.8.6

[129] The Respondents raised Police Order 2.8.6 in their responding application record as evidence that the OPP does not impersonate journalists in undercover operations, to respond to that issue as set out by the Media Applicants in their notice of application. The Respondents did not bring the constitutionality of Police Order 2.8.6 into play, but instead relied upon it as a factual basis to address the lack of any undercover journalist operations.

[130] Upon being advised of Police Order 2.8.6 and its application to a "member of the media", the Media Applicants could have amended their notice of application to plead that Police Order 2.8.6 violated s. 2(b). The Media Applicants did not do so. If they had, the Applicants could have filed evidence before the court as to the "chilling effect" of Police Order 2.8.6 on freedom of expression, and the Respondents could have led evidence on the effects of Policy

2.8.6 on freedom of expression and evidence relevant to the factors to be considered in a s. 1 analysis.

[131] Consequently, there is prejudice to the Respondents in having the court make a finding of constitutionality on Police Order 2.8.6 in the absence of a pleading on the issue.

ii) Independent Author Operation

[132] Similarly, the Independent Author Operation was raised by the Respondents as an example of an undercover operation not involving a journalist, in order to contrast "undercover" operations with the practice of Media-Presence Surveillance.

[133] The Independent Author Operation was not raised in the application record (as the Media Applicants would not have been aware of it). In their factum filed in support of the application and in their oral submissions to the court, the Media Applicants sought to rely on the Independent Author Operation as an example of impersonation of a journalist.

[134] If the Media Applicants had amended the notice of application to submit that the Independent Author Operation was "impersonation" of a "journalist" and, as such, violated s. 2(b), the Respondents would have been put on notice of that issue for the application, and again could have led evidence relevant to both s. 2(b) and s. 1.

[135] Consequently, there is prejudice to the Respondents in having the court make a finding of constitutionality on the Independent Author Operation in the absence of a pleading on the issue.

[136] I would also preclude any challenge to the Independent Author Operation on the basis that even if it could be relied upon in the pleadings, there is no admissible evidence before the court that the OPP officer posing as an author impersonated a journalist. The Applicants acknowledge that the newspaper article relating to how the operation took place, attached as an exhibit to the Barnum cross-examination, is inadmissible hearsay.

[137] On the evidence before the court, the OPP officer did not pose as a journalist. There was no suggestion that the officer had any certification as a journalist or represented that she was a member of any media organization. The evidence was that she said she was writing a book with funding from her father.

[138] Further, I find that an "independent author" is not a "journalist". While the Applicants submit that some journalists also are non-fiction authors, that proposition does not lead to the corollary that any non-fiction author is a journalist. The Supreme Court, in *Grant v. Torstar Corp.*, 2009 SCC 61 ("*Torstar*"), distinguished between the "traditional media" (the same or similar term used by the Applicants to describe the Media Applicants) and others engaged in "communicating on matters of public interest … **which do not involve journalists**" [Emphasis added.] (*Torstar*, at paras. 96-97).

[139] Similarly, in *R. v. National Post*, 2010 SCC 16 ("*National Post*"), the court did not grant a constitutionally-entrenched immunity to protect journalists against the compelled disclosure of secret sources, since an "ill-defined group of writers and speakers" could not necessarily be considered journalists but "everyone" could choose "to exercise his or her freedom of expression on matters of public interest" (*National Post*, at para. 40):

> **[T]he protection attaching to freedom of expression is not limited to the 'traditional media', but is enjoyed by 'everyone' (in the words of s. 2(*b*) of the *Charter*) who chooses to exercise his or her freedom of expression on matters of public interest whether by blogging, tweeting, standing on a street corner and shouting the 'news' at passing pedestrians or publishing in a national newspaper.** To throw a constitutional immunity around the interactions of such a heterogeneous and ill-defined group of writers and speakers and whichever 'sources' they deem worthy of a promise of confidentiality and on whatever terms they may choose to offer it (or, as here, choose to amend it with the benefit of hindsight) would blow a giant hole in law enforcement and other constitutionally recognized values such as privacy. [Emphasis added.]

[140] Consequently, the submission that a non-fiction author should be considered a journalist is not consistent with decisions in *Torstar* and *National Post*. While everyone enjoys freedom of expression, it does not mean that an author who chooses to write a book on a subject is a journalist.

*c) Conclusion*

[141] For all of the above reasons, I limit the scope of the application to the issue of whether Media-Presence Surveillance constitutes a violation of s. 2(b).

**Issue 3: Does Media-Presence Surveillance violate s. 2(b)?**

*a) Overview*

[142] It is settled law that freedom of expression is "crucial to any notion of democratic rule", is "reliant on a free and vigorous press", and "encompass[es] the right to transmit news and other information, but also the right to gather this information" (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 SCR 480 ("*New Brunswick*"), at paras. 18-19, 23-24). Consequently, the ability of the media to publish news and gather news is protected under s. 2(b) (*New Brunswick*, at para. 26).

[143] However, the above general statements do not address the issue before the court, which is whether Media-Presence Surveillance violates s. 2(b).

[144] To determine that issue, the Applicants accept that they must satisfy the court that the practice of Media-Presence Surveillance creates a "chilling effect" on the ability of journalists to gather news, whether on the evidence or by "common sense".

[145] The Applicants submit:

> That this chilling effect results from the OPP's practice can be seen from the ample record before the Court, and is equally supported by common sense and judgment about human behaviour.
>
> …
>
> The applicants submit that the evidence in the record is sufficient to find an infringement of s. 2(b). However, that record is also consistent with common sense and judgment about human behaviour.

[146] The Applicants submit that the chilling effect arises in two ways, as stated in all of the affidavits filed by the applicants:

(i) "Police impersonation of journalists destroys public trust in the profession of journalism, making it far more difficult or impossible for journalists to access information that ought, in the public interest, be reported"; and

(ii) "Police impersonation of journalists creates a heightened risk of physical harm to journalists" which affects news gathering because "it reduces the willingness of journalists to take on these risks and report on these stories".

[147] The Respondents submit that "neither the evidentiary record nor common sense supports a finding that there is a 'direct relationship' between plainclothes surveillance of public protests and the 'drying up' of news sources, or that plainclothes surveillance of public protests has any 'chilling effect' on freedom of expression or of the press".

[148] Consequently, the issue of whether Media-Presence Surveillance violates s. 2(b) depends on two sub-issues: (i) whether the evidentiary record supports a finding that there is a chilling effect on news gathering as a result of the practice, and (ii) in any event, whether such a finding can be made by the court as a matter of common sense. I first consider the applicable law as to the evidentiary standard and then address each sub-issue below.

*b) The applicable law*

[149] The burden of proof that there has been a violation of s. 2(b) rests on the Applicants (*Moysa v. Alberta (Labour Relations Board)*, [1989] 1 SCR 1572 ("*Moysa*"), per Sopinka J., at 1581).

[150] Courts have used different expressions to express the onus on an applicant in a constitutional application to establish that the impugned legislation or practice violates s. 2 of the

*Charter*. However, the essence of the required connection is the same and has been settled for decades: the applicant must establish a "direct link" (*Moysa*, at 1581) or a "causal connection between the [impugned practice or legislation] and the chilling of expression" (*R. v. Khawaja*, 2012 SCC 69 ("*Khawaja*"), per McLachlin C.J., at para. 81).



[151] There are two ways that such a causal connection can be established. Generally, the applicant is required to lead evidence as to the "chilling effect" of the impugned practice on the *Charter* freedom. In exceptional cases, the chilling effect may be "self-evident" or "can be inferred from known facts and experience" (*Moysa*, at 1581; *Khawaja*, at paras. 79-80).

[152] The standard to establish that a chilling effect is "self-evident", or "can be inferred from known facts and experience" is high. A court will only make such a finding when "no reasonable person would dispute … the chilling effect" of the impugned practice or law on the *Charter* freedom (*Khawaja*, at para. 79), or when it is "indisputable" (*Moysa*, at 1581) or "exceptional" (*Danson v. Ontario (Attorney General)*, [1990] 2 SCR 1086 ("*Danson*"), per Sopinka J., at 1101).

[153] In *Danson*, Sopinka J. reviewed the "theoretical example" considered by Beetz J., in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110 at 133, "where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion". Sopinka J. distinguished between that "exceptional case" and the typical constitutional challenge in which evidence of the alleged effects is required. Sopinka J. held (*Danson*, at 1101):

> **The unconstitutional purpose of Beetz J.'s hypothetical law is found on the face of the legislation, and requires no extraneous evidence to flesh it out. It is obvious that this is not one of those exceptional cases. In general, any *Charter* challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred.** As Morgan put it, op. cit., at p. 162: '... the process of constitutional litigation remains firmly grounded in the discipline of the common law methodology.' [Emphasis added.]

[154] The Applicants rely on several cases in which the court stated that a direct link may be established without evidence in certain clear cases. By way of example, in *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182 ("*St. Elizabeth*"), Sharpe J.A. held (*St. Elizabeth*, at para. 32):

> Courts routinely craft legal rules without the need for elaborate empirical evidence. They instead employ their judgment as to the likely impact rules will have on human behaviour, particularly where the issue is encouraging the free flow of information.

[155] In *St. Elizabeth*, the issue before the court was the disclosure of a journalist's source in a contempt hearing. There was evidence at the show cause hearing from the journalist's

publisher and Vincent Carlin ("Carlin"), a veteran journalist who was qualified as an independent expert witness. Carlin "explained the importance of confidential sources as 'the lifeblood' of the media's watchdog function and that if journalists did not maintain confidentiality and protect their sources, the sources would 'dry up'" (*St. Elizabeth*, at paras. 14 and 31).

[156] In those circumstances, the court held that "no more [evidence] was required" (*St. Elizabeth*, at para. 31). However, the court relied on the evidentiary record.

[157] Similarly, the Applicants rely on the decision in *National Post*, in which Binnie J. stated (*National Post*, at para. 64) that in determining whether an impugned practice violates the *Charter*, "the court will weigh up the evidence on both sides (supplemented by judicial notice, common sense, good judgment and appropriate regard for the 'special position of the media')". However, Binnie J. relied on the evidentiary record, including expert evidence, to consider the importance of confidentiality of sources to freedom of expression. He held (*National Post*, at para. 33):

> 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 recognize 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 will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment. [Emphasis added.]

[158] Finally, the Applicants rely on the concurring decision of La Forest J., in *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 SCR 421 ("*Lessard*"), in which La Forest J. commented "[t]hat someone might be deterred from providing information to a journalist because of his or her identity [being disclosed] seems to me to be self-evident" (*Lessard*, at 430).

[159] However, La Forest J. held that there was no constitutional violation because there was no link between the impugned practice (the seizure of films and photographs of public demonstrations) and the alleged effect that people would be less likely to provide information to the media. He held (*Lessard*, at 431):

> **I find the CBC's argument that there will be a 'chilling effect' on newsgathering unpersuasive, in so far as that argument pertains to films and photographs taken of an event. I think the chill is already there. Absent a promise of confidentiality, no one can reasonably believe that there is no danger of identification when he is being captured on film by the press.**

> **When the press is covering an event under circumstances such as those in the present case, the very reason for the presence of cameramen is to take film and photographs for the purpose of broadcasting. While not all of the photographs will get published, there is a very real possibility that someone who commits a crime in front of the camera will find himself on the evening news or on the front page of a newspaper.** The situation might be different if the press had made an undertaking to edit the film so that no identities would be revealed, or had promised confidentiality. Absent such a promise, however, **it should be apparent that a photograph of a demonstrator 'caught in the act' of vandalizing a post office or factory is precisely the sort of 'newsworthy' item that is likely to make it into the paper.** [Emphasis added.]



[160] Consequently, while La Forest J., in *Lessard*, commented that it is "self-evident" that disclosure of a source could deter someone from providing information, he did not find a breach of s. 2(b) because he required evidence that the impugned practice would result in such an effect on newsgathering. La Forest J. relied on the reasons of Sopinka J. in *Moysa*, which reiterated the importance of evidence to establish that the impugned practice would detrimentally affect journalists' ability to gather information. In *Moysa*, Sopinka J. held (*Moysa*, at 1581):

> Even if I assume for the moment that the right to gather the news is constitutionally enshrined in s. 2(b) **the appellant has not demonstrated that compelling journalists to testify before bodies such as the Labour Relations Board would detrimentally affect journalists' ability to gather information. No evidence was placed before the Court suggesting that such a direct link exists. While judicial notice may be taken of self-evident facts, I am not convinced that it is indisputable that there is a direct relationship between testimonial compulsion and a 'drying-up' of news sources as alleged by the appellant**. **The burden of proof that there has been a violation of s. 2(b) rests on the appellant.** Absent any evidence that there is a tie between the impairment of the alleged right to gather information and the requirement that journalists testify before the Labour Relations Board, I cannot find that there has been a breach of s. 2(b) in this case. [Emphasis added.]

[161] The need for reliability and trustworthiness increases directly with the centrality of the fact to the disposition of the controversy. In *R. v. Spence*, 2005 SCC 71 ("*Spence*"), the Supreme Court was asked to take judicial notice that jurors of the same race as the complainant would be biased in favour of the complainant because of a "sympathy factor".

[162] Binnie J. held that it was not appropriate to take judicial notice of the bias proposition advanced by the intervenor, African Canadian Legal Clinic. Binnie J. held (*Spence*, at para. 54):

> I do not think the African Canadian Legal Clinic's view of race-based sympathy for victims (or partiality in favour of certain witnesses) is so notoriously correct

> as 'not to be the subject of debate among reasonable persons'. Nor is it capable of immediate demonstration by resort to 'readily accessible sources of indisputable accuracy' (*Find*, at para. 48).

[163] Binnie J. held that (i) "the closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter Morgan criteria [for judicial notice]" (*Spence*, at para. 61); and (ii) "the Morgan criteria will have great weight when the legislative fact or social fact approaches the dispositive issue" (*Spence*, at para. 63).

[164] Binnie J. distinguished between cases in which judicial notice was sought of "background facts" and those cases in which judicial notice was sought of facts central to the disposition of the case. He emphasized the high threshold required for judicial notice when the fact alleged is the central issue before the court. Binnie J. held (*Spence*, at para. 65):

> When asked to take judicial notice of matters falling between the high end already discussed where the Morgan criteria will be insisted upon, and the low end of background facts where the court will likely proceed (consciously or unconsciously) on the basis that the matter is beyond serious controversy, I believe a court ought to ask itself whether such 'fact' would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute *for the particular purpose for which it is to be used*, keeping in mind that **the need for reliability and trustworthiness increases directly with the centrality of the 'fact' to the disposition of the controversy.** [Italics in original; emphasis added.]

[165] Binnie J. then considered the example of a "chill" to the gathering of news and compared the evidentiary requirements when it was a central issue or "adjudicative fact" (as in *Moysa*) as compared to "legislative" or background facts in defamation proceedings. Binnie J. held (*Spence*, at para 66):

> Both of these examples dealt with the 'legislative facts' underlying a claimed rule giving effect to journalistic privilege. For the purposes of regulating procedures in defamation proceedings, the courts were prepared to accept as a reasonable generalization that failure to respect confidential sources would 'chill' the gathering of news, which would not be in the public interest. **In *Moysa*, however, for the very different purpose of considering whether the underlying 'legislative fact' was sufficiently beyond controversy to support a claim to entrenchment as a *Charter* privilege, the generalization was subjected to closer scrutiny.** [Emphasis added.]

[166] A further guiding principle in determining whether an impugned practice violates the *Charter* is that "a chilling effect that results from a patently incorrect understanding of a provision cannot ground a finding of unconstitutionality" (*Khawaja*, at para. 82).

[167] Finally, a chilling effect that results from police misconduct and not the impugned legislation or practice is not a chill created by the impugned legislation or practice (*Khawaja*, at para. 83).

[168] On the basis of the above cases, I summarize the following principles:

(i) Objective evidence is required to establish that the impugned legislation or practice results in a chilling effect on a *Charter* freedom, unless it is an exceptional circumstance or self-evident;

(ii) Expert testimony can assist the court, although it may not be required;

(iii) The evidentiary standard is stricter when the "fact" to be established is central to the determination of the *Charter* violation;

(iv) A chilling effect that results from a patently incorrect understanding of a provision cannot ground a finding of unconstitutionality; and

(v) A chilling effect that results from police misconduct and not the impugned legislation or practice is not a chill created by the impugned legislation or practice.

[169] I now consider the evidentiary record before the court.

*c) Does the evidentiary record support a finding that there is a chilling effect on news gathering as a result of the practice of Media-Presence Surveillance?*

[170] The Applicants submit that the practice of Media-Presence Surveillance "demonstrates a serious effect on freedom of expression" by:

(i) "making it difficult or impossible for journalists to gather news and information from members of the public that ought, in the public interest, to be reported – particularly stories that depend on members of closed societies, gatekeepers, individuals who have allegedly broken the law and whistleblowers"; and

(ii) "creating a heightened risk of physical harm to journalists in certain situations, leaving journalists less willing to take on these risks, gather this news and information, and report these stories of public importance".

[171] I first review the evidence filed on the effects on freedom of expression of Media-Presence Surveillance. I then consider whether that evidence establishes a "direct link" or "causal connection" between Media-Presence Surveillance and a chilling effect on news gathering, or whether such a finding is "indisputable". Finally, I review the evidence filed on the effect on freedom of expression as a result of the Independent Author Operation and Police Order 2.8.6.

1. The Applicants' evidence

[172] The Applicants filed affidavits from six journalists, and from Brant.

i) The evidence of Kelly Toughill ("Toughill")

[173] Toughill was the primary affiant for the application. Toughill is currently a professor of journalism and has been employed by various newspapers including *The Toronto Star*. Toughill was a member of the board of directors of CJFE and is a member of CJFE.

[174] Toughill filed a lengthy affidavit. Her evidence focused primarily on the importance of public trust in journalists, particularly in "closed societies" such as "sex trade workers", "drug addicts", "political or protest groups", "marginalized ethnic communities", "childhood sexual abuse victims" and "aboriginal rights activists".

[175] Toughill emphasized the importance of "journalist access to closed societies and other sources" and "the principles of professional practice that create conditions of trust with sources who do not have confidence in other authorities". She also commented on the "function of the press in a free and democratic society" and provided her analysis of the "comparative experience in the United States".

[176] However, with respect to the effect of Media-Presence Surveillance on freedom of expression, Toughill's evidence was limited to the following statements:

> Impact of the practice of police impersonation of journalists on public trust
>
> In my view, the impersonation of journalists by police for investigative purposes is likely to cause substantial harm to the public trust enjoyed by journalists, which enables the work I have described above. As I described above, many closed societies are already fearful that journalists observing or reporting on their activities may be police operatives, particularly in the context of public protest.
>
> Now that the Ontario Provincial Police, at least, have publicly confirmed the use of this practice and the absence of any applicable guidelines when it is appropriate to do so, it is likely that this concern will become more common-place. If journalists lose the ability to penetrate closed societies and interact with criminals and others who face or perceive risk from speaking to authorities, society's ability to discover and understand the facts underlying issues of public policy will be harmed. While journalists will still be free to write about powerful, well-entrenched interests who neither face nor perceive risk from dealing with the public authorities, they will lose the ability to report on the impact of new laws, regulations, and governmental or corporate actions on those who are often most affected by such changes. A classic definition of public service journalism is to 'give voice to the voiceless'; without the ability to have relationships of trust with the most marginalized in society, the press cannot serve that function.

Impact of police impersonation of journalists on journalist safety

The police impersonation of journalists creates an equally serious concern about journalist safety and working conditions. Journalists often encounter circumstances where their safety is threatened by those on whom they are reporting. It is only due to individual journalists' willingness to take those risks that many stories can be reported at all. Of the examples outlined above, the most frequent circumstance involving risk is where journalists report on protest situations. The publicly disclosed examples of the Ontario Provincial Police using this practice have typically involved just such situations.

In some cases, journalists deliberately enter into situations that police consider too dangerous for themselves. By way of example, I covered a riot in Crown Heights, Brooklyn, in which police remained behind a barricade in full riot gear whilst reporters followed and mingled with the crowd. Had the rioters suspected I was a police officer, I would have been in very grave danger; however, I could not interview the rioters, and understand and report on their motivation, without mingling with them on the street.

These direct risks to journalists are exacerbated where police elevate the level of mistrust of journalists through a publicly-known practice of impersonating journalists.

The indirect harm resulting from this elevated risk is that it reduces the willingness of journalists to take on these risks and report on these stories. This disincentive in turn has the effect of reducing the level of neutral information disseminated to the public about these issues and disputes. [Underlining in original.]

ii) The evidence of Peter Edwards

[177] Edwards is a reporter with *The Toronto Star*. With respect to the effects of "police impersonation of journalists", he agreed with Toughill's "analysis, and her opinions and conclusions on the matters at issue".

[178] Edwards also gave evidence that he observed "a group of undercover Ontario Police officers, posing as a television news crew" "at various times, among the journalists", and that "this conduct continued, even at George's funeral" (which I do not accept as set out at paragraphs 47-49 above).

[179] Edwards commented that "the means [police] employ should not interfere with journalists who are attempting to do their jobs in a safe and effective way" and "[i]t is important to have it widely understood that there is a clear line between information gathering by police and by journalists".

iii) The evidence of Arnold Amber

[180] Arnold Amber ("Amber") is the president of CJFE. He gave evidence about the CJFE and its correspondence with the Minister (copied to the Commissioner of the OPP). With respect to the effects of "police impersonation of journalists", he agreed with Toughill's "analysis, and her opinions and conclusions on the matters at issue".

[181] Amber's evidence is that he had been involved as a journalist in violent street demonstrations and that "I know first hand how important it is for journalists to be seen as independent reporters, not as possible agents or members of the police".

iv) The evidence of Cal Johnstone

[182] Cal Johnstone ("Johnstone") is the past president of the RTNDA. He gave evidence about the RTNDA and its correspondence with the Commissioner of the OPP. With respect to the effects of "police impersonation of journalists", he agreed with Toughill's "analysis, and her opinions and conclusions on the matters at issue".

[183] Johnstone referred to "principles of neutrality and objectivity" journalists rely upon "in order to gain the trust of their audience as well as those we interview during the newsgathering process".

v) The evidence of David Seglins

[184] David Seglins ("Seglins") is a journalist with the CBC. He gave evidence about the CBC, the January 2004 report in "The National", and the CBC's correspondence with the Minister and the Commissioner of the OPP. With respect to the effects of "police impersonation of journalists", he agreed with Toughill's "analysis, and her opinions and conclusions on the matters at issue".

[185] Seglins gave evidence that in the summer of 2009, while he was walking in Caledonia, Ontario on "disputed Douglas Creek Estates lands in connection with CBC's coverage of the ongoing dispute between Aboriginal and non-Aboriginal groups regarding those lands, I was confronted by a Mohawk watchperson who challenged me to confirm that I was indeed a journalist, and not a police officer in disguise" which "highlighted for me the importance of the issues related to the effects of this policy practice on newsgathering and journalists' safety".

vi) The evidence of Linden MacIntyre

[186] Linden MacIntyre ("MacIntyre") describes himself as being "continuously employed in journalism for more than forty-six (46) years" and "the author of four books". He agreed with Toughill's conclusions. MacIntyre stated that "impersonation of journalists by police, for investigative purposes or otherwise, fundamentally undermines" the "trust between members of the media and people they rely on for the effective conduct of their work" and that

"such practices raise tensions and suspicion that create a potential barrier between a journalist and a subject whose confidence is vital to the process of information gathering".

[187] MacIntyre's opinion was that "it is reasonable to expect that the law should … [recognize] the importance of authenticity in the practice of journalism and [forbid] the impersonation of journalists for purposes of law enforcement, intelligence gathering or any other activity that is unrelated to the free, open and truthful business of informing the public".



vii) The evidence of Brant

[188] Brant's evidence can be summarized as follows:

(i) Brant has been "involved in numerous protests concerning violations of First Nation peoples' rights";

(ii) When Brant speaks to media and to the police, he does so "as two distinct and separate entities" and, as such, "messaging to the media is completely different from messaging to the police"; and

(iii) "From what I learned from the media about events at Ipperwash, and from the testimony of Officer Martel [*sic*] at my preliminary inquiry, I have become aware that officers might pose as media representatives when they attend protests by First Nations people. This awareness has made me cautious in speaking to people who claim to represent the press. This has limited my expression to the press".

2. Analysis of the Applicants' evidence

i) There is no expert evidence before the court

[189] Unlike the situation in *St. Elizabeth* or *National Post*, the Applicants did not file independent expert evidence in support of their submission that the practice of Media-Presence Surveillance has a chilling effect on freedom of expression.

[190] An independent expert has a duty to provide opinion evidence that is fair, objective and non-partisan. Those principles exist at common law and were confirmed by the 2010 amendments to Rule 53.03 which were "intended to clarify and emphasize the existing duties of expert witnesses" (*Moore v. Getahun*, 2015 ONCA 55, at para. 52).

[191] Toughill acknowledged that she was a supporter of the litigation and she hoped it would be successful. She did not sign a Form 53 to acknowledge her independence as an expert. Consequently, she is not an independent expert witness.

[192] The Applicants submit that Toughill can be considered a "participant expert" as that term was recently considered in *Westerhof v. Gee Estate*, 2015 ONCA 206 ("*Westerhof*"), in which the court permitted treating physicians to provide opinion evidence if they were not retained by a party to the litigation and (i) the witness gave an opinion as to conclusions the

witness reached "based on the witness's observation of or participation in the events at issue"; and (ii) the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events (*Westerhof*, at para. 60).

[193] However, Toughill was not a participant in the events at issue, unlike the treating physicians in *Westerhof*. She purports to provide evidence to the court as "a stranger to the underlying events who gave an opinion based on a review of documents or statements from others concerning what had taken place". Consequently, Toughill's affidavit evidence is not admissible as opinion evidence from a participant witness (*Westerhof*, at para. 70).

[194] I do not find that expert evidence is always required to establish a causal connection between an impugned practice and a *Charter* violation. However, the court must review the evidence filed in support of the application to determine whether a direct link exists.

ii) Toughill's evidence does not support a direct link between Media-Presence Surveillance and a chilling effect on freedom of expression

[195] To establish a direct link between an impugned practice and chilling effects on freedom of expression, the court requires objective evidence and not the subjective opinions of the parties involved.

[196] In *S.L.*, Deschamps J. dismissed an application under s. 2(a) of the *Charter* seeking a declaration that the Quebec mandatory ethics and religious culture program violated freedom of religion. Deschamps J. held that "an infringement of this right cannot be established without objective proof of an interference with the observance of that practice" (*S.L.*, at para. 2). Deschamps J. elaborated on the need for objective evidence (*S.L.*, at paras. 23-24):

> **At the stage of establishing an infringement, however, is not enough for a person to say that his or her rights have been infringed. The person must prove the infringement on a balance of probabilities… based on facts that can be established objectively.**
>
> It follows that when considering an infringement of freedom of religion, the question is not whether the person sincerely believes that a religious practice or belief has been infringed, but whether a religious practice or belief exists that has been infringed. The subjective part of the analysis is limited to establishing that there is a sincere belief that has a nexus with religion, including the belief in an obligation to conform to a religious practice. As with any other right or freedom protected by the *Canadian Charter* and the *Quebec Charter*, **proving the infringement requires an objective analysis of the rules, events or acts that interfere with the exercise of the freedom. To decide otherwise would allow persons to conclude themselves that their rights had been infringed and thus to supplant the courts in this role.** [Emphasis added.]

[197] Without any independent expert evidence, the evidence on this application is from the affiant witnesses and there is no objective evidence in any of the affidavits.

[198] Toughill was not aware of any empirical, academic or other published studies that supported any of her opinions or assumptions, including:

(i) Her assumption and speculation regarding the public's ability to identify members of the media or who the public may assume is a member of the media;

(ii) Her opinion that plainclothes police officers videotaping a public protest while standing near a journalist could destroy public trust in the profession of journalism or increase the risk of physical harm to journalists, even if those officers do not attempt to speak to any suspects or witnesses;

(iii) Her view that the risk caused by police impersonation of journalists has reduced the willingness of journalists to report their stories; and

(iv) Her opinion that a requirement of prior judicial authorization would reduce the suspicion of prospective sources and the risk to journalists.

[199] Toughill gave an undertaking to produce any relevant articles to support her position but provided no such articles.

[200] Further, any opinion of Toughill that a member of a closed society would be unwilling to speak with a journalist out of concern that the person they are speaking with is a police officer posing as a journalist is based on an "incorrect understanding" of the practice and "cannot ground a finding of unconstitutionality" (*Khawaja*, at para. 82).

[201] Toughill's concerns are based on the premise that "members of 'closed societies' speak to journalists because they are a conduit to the broader public on issues of importance" and that "[b]ecause of these strong professional traditions, individuals who face real or perceived risk in communicating their stories or revealing information of public interest are often prepared to speak to journalists, despite being unwilling to speak to police or, indeed, to speak publicly at all".

[202] Toughill's concern is based on a misunderstanding of the practice of OPP officers engaged in Media-Presence Surveillance. There is no evidence that any such OPP officer attempts to speak with any member of a closed society in order to obtain information. Rather, the evidence is to the contrary.

[203] OPP officers engaged in Media-Presence Surveillance are conducting surveillance, not speaking with those they are watching. Those officers do not seek to earn the "trust" of members of closed societies in mainstream major media (as represented by the Media Applicants) through discussions with individuals in "closed societies". OPP officers conducting Media-Presence Surveillance are only engaged in filming or other surveillance as part of a crowd

of media or others who are engaged in the same activity either for their media organization or for their personal expression on matters of public interest "whether by blogging, tweeting, standing on a street corner and shouting the 'news' at passing pedestrians" (as per Binnie J. in *National Post*, at para. 40).

[204] Further, even if there could be a trust relationship when a member of a closed society speaks with a member of the mainstream major media, Toughill's evidence is that those communications require individual trust in the particular journalist, which is even more removed from general surveillance by OPP officers in a group of people who are filming or watching a public protest.

[205] Toughill's evidence was that any "trust" relationship with a journalist which would lead a member of the public to speak was "based on their belief in that specific journalist's commitment to fairness and neutrality rather than the profession's commitment to fairness and neutrality" and that a journalist establishes the trust of the people that he or she is trying to interview by, for example, having a "body of work that they can point to that a source can look at and determine if they think they have been generally fair."

[206] In essence, the Applicants ask the court to rely on Toughill's subjective opinion to conclude that Media-Presence Surveillance, without OPP officers engaging in any way with the people they are observing at public protests, will (i) result in members of closed societies being less willing to talk to journalists, and (ii) make it more dangerous when journalists seek to talk to such individuals. Toughill's limited paragraphs in which she states that opinion are not supported by any objective evidence before the court.

[207] I adopt the following submission from the Respondents' factum with respect to Toughill's evidence:

> Anyone can take a camera (or cellphone with a camera) to a public protest and video the event. The protesters have no expectation that their conduct will remain confidential – indeed the purpose of a public protest is to be seen and gain publicity. Anyone who takes a video of a public protest can give the video to the press or to the police or distribute it over the internet. There is no evidence that the public perceives plainclothes videographers at public protests to be journalists, let alone journalists working for or on behalf of a major news organization. There is no evidence that the public perceive plainclothes police officers standing beside or among journalists to be journalists. There is no evidence that people who take pictures or videos at public protests subscribe to any code of ethics or have a 'trust relationship' with members of the public or members of closed societies. There is no evidence that plainclothes police officers standing beside journalists at public protests will lead people to believe that undercover police also pose as journalists working for major news agencies.

iii) The evidence of the other affiants does not support a direct link between Media-Presence Surveillance and a chilling effect on freedom of expression

a. The evidence of the other Media Applicants' affiants

[208] The Media Applicants' other affiants generally adopt Toughill's opinions that the practice of "impersonating journalists" by "posing as a television news crew" (i) makes it more difficult for journalists to access information, and (ii) creates a heightened risk of physical harm. These affidavits provide no objective evidence to the record before the court.

[209] A repetition of conjecture does not constitute evidence (see Abella J.A. (as she then was) dissenting, but not on this point, in *Payne v. Ontario Human Rights Commission*, [1990] OJ No. 2987 (CA), at para. 110). The additional affidavits offer no objective evidence needed to satisfy the court of the chilling effect of Media-Presence Surveillance.

[210] The only additional evidence to the arguments filed by the Media Applicants is from Seglins who states that in the summer of 2009, he was "confronted by a Mohawk watchperson who challenged me to confirm that I was indeed a journalist, and not a police officer in disguise". Seglins chose to leave the premises rather than have the situation escalate.

[211] However, a single example from one journalist about one person who questioned whether he was a journalist or police officer does not demonstrate on an objective basis that Media-Presence Surveillance has a chilling effect on members of "closed societies" that prevents them from communicating with the media or increases the danger to journalists working with such members. The concern of that individual could just as easily have been based on the fact that Seglins was walking alone in a disputed territory without any visible media identification. Seglins' example is not a case of Media-Presence Surveillance in which an OPP officer "hides in plain sight" in the presence of media who are all filming a public protest.

[212] An unidentified individual journalist on his own in a highly disputed area might be questioned as to whether he was a police officer. However, there is no "causal connection" between Seglins being stopped in an isolated area (or Toughill's example of reporting from the middle of a riot in Crown Heights or Amber's example of reporting from street demonstrations) and the practice of Media-Presence Surveillance.

[213] In any event, it would not be appropriate to draw any causal connection to danger to journalists (even if the Seglins' incident could logically be linked to Media-Presence Surveillance) from a singular example which is now six years old without any other objective evidence.

b. The evidence of Brant

[214] The Applicants seek to rely on the evidence of Brant. However, his evidence is also subjective, based on his opinion, and does not provide an objective basis to find a causal link between Media-Presence Surveillance and a restriction on freedom of expression.

[215] The evidence of Brant is unclear as to the basis of his concern that "officers might pose as media representatives when they attend protests by First Nations people".

[216] The evidence is uncontested that OPP officers engaged in Media-Presence Surveillance only attend to "blend in" or "hide in plain sight" in a plainclothes capacity for surveillance and do not seek to engage in any discussion posing as journalists with protesters in order to obtain information. Martell's evidence is that he will disengage if asked whether he is a journalist. The evidence is that OPP officers engaged in Media-Presence Surveillance wear no identifying clothing and do not carry any identifying logos to suggest that they are a member of the media. They blend in with the media and any other member of the public taking video footage.

[217] Consequently, the "caution" that Brant claims to have in talking to the press is not based on any evidence that OPP officers seek to engage in such a conversation. If Brant's belief is that OPP officers gather evidence by interviewing people while posing as members of the media, such a mistaken belief cannot ground a s. 2(b) claim (*Khawaja*, at para. 82).

[218] Even if Brant has become "cautious" in speaking with the media at protests because of Media-Presence Surveillance (which would not be logical on a proper understanding of the practice), his personal caution does not suffice to establish an objective causal link between Media-Presence Surveillance and a restriction on freedom of expression.

[219] In any event, Brant's claim of purported caution to speak to the media because of Media-Presence Surveillance is a bald assertion unsupported by evidence. Brant provides no specific example in which he interacted differently with someone from the media because of a belief that that person may be a police officer. As Deschamps J. concluded in *S.L.*, "it is not enough for a person to say that his or her rights have been infringed. The person must prove the infringement on a balance of probabilities… based on facts that can be established objectively" (*S.L.*, at paras. 23-24).

[220] Consequently, for the above reasons, I find that the evidentiary record before the court does not establish a direct link or causal connection between Media-Presence Surveillance and restriction on freedom of expression.

*d) Can Media-Presence Surveillance be found to have a chilling effect on freedom of expression as a matter of common sense?*

[221] In their factum, the Applicants submit that the effects of Media-Presence Surveillance can be found to violate s. 2(b) as "self-evident" or by "common sense". I do not agree.

[222] As I discuss above, it requires an exceptional case to find, on the basis of common sense or as "self-evident", that an impugned legislation or practice violates a *Charter* freedom. Since the comments of Beetz J. in *Metropolitan Stores* in 1987, La Forest J. in *Moysa* in 1989, Sopinka J. in *Lessard* in 1991, Binnie J. in *Spence* in 2005, and up to the comments of McLachlin C.J. in *Khawaja* in 2012, the Supreme Court has reiterated the importance of an "evidentiary basis", and has limited "common sense" or "self-evident" findings to situations in which (i) the violation is "indisputable" (*Moysa*, at 1581); or (ii) "no reasonable person would dispute" the "chilling effect" of the practice (*Khawaja*, at para. 79).

[223] The standard to require judicial notice is at its highest in the present case, as the "fact" to be established is dispositive of the case (*Spence*, at para. 65).

[224] It is not "indisputable" that Media-Presence Surveillance would either (i) make journalists' ability to gather news more difficult, or (ii) create an increased risk of harm for journalists leaving them less willing to accept risks.

[225] At a public protest, participants attend to be in a public forum with full knowledge that they may be watched or filmed in the course of such a protest. I restate and adopt the comments of La Forest J. in *Lessard* which are equally applicable in the present application:

> I find the CBC's argument that there will be a 'chilling effect' on newsgathering unpersuasive, in so far as that argument pertains to films and photographs taken of an event. I think the chill is already there. **Absent a promise of confidentiality, no one can reasonably believe that there is no danger of identification when he is being captured on film by the press. When the press is covering an event under circumstances such as those in the present case, the very reason for the presence of cameramen is to take film and photographs for the purpose of broadcasting.** While not all of the photographs will get published, there is a very real possibility that someone who commits a crime in front of the camera will find himself on the evening news or on the front page of a newspaper. The situation might be different if the press had made an undertaking to edit the film so that no identities would be revealed, or had promised confidentiality. Absent such a promise, however, **it should be apparent that a photograph of a demonstrator 'caught in the act' of vandalizing a post office or factory is precisely the sort of 'newsworthy' item that is likely to make it into the paper.** [Emphasis added.]

[226] If there is no "common sense" or self-evident" causal link to a *Charter* violation for police seizing films and photographs of public demonstrations (as in *Lessard*), then no such link should exist in the present case with respect to Media-Presence Surveillance when the "very reason for the presence of cameramen is to take film and photographs for the purpose of broadcasting".

[227] I adopt the following submission from the Respondents' factum:

> Moreover, given the ubiquity of video cameras at public events (including public protests) no one can reasonably believe that everyone with a camera is a journalist or member of the press, and given the ability of everyone with a camera (or cell phone) to post such videos or photos on internet sites like Facebook and YouTube, no one can reasonably believe that their conduct at such public events is confidential.

[228] Further, the Applicants' witnesses acknowledged on cross-examination that a person participating in a public protest cannot know whether a person with a camera or cell phone is a journalist or member of the press.

[229] Finally, it is not a "common sense" or "self-evident" conclusion that journalists would be in increased danger as a result of Media-Presence Surveillance. There is no evidence that OPP officers conduct video surveillance as part of a crowd of protesters, or even try to "blend in" with a crowd engaged in protest.

[230] Consequently, any danger to a journalist who reports from a crowd is not connected to Media-Presence Surveillance and any concern that a member of a closed society might have in such a public protest would be based on an incorrect understanding of the practice of Media-Presence Surveillance. Such a misunderstanding cannot ground a claim of unconstitutionality (*Khawaja*, at para. 82).

[231] While a protester may be concerned that an unidentified individual walking on disputed land might be an OPP officer conducting surveillance (as took place with Seglins), that effect does not arise out of Media-Presence Surveillance. Seglins' confrontation cannot be tied to the impugned practice of Media-Presence Surveillance as an "indisputable" fact.

[232] For the above reasons, I do not find it "self-evident", or a matter of "common sense", or that "no reasonable person would dispute" that Media-Presence Surveillance would have a chilling effect on freedom of expression.

*e) Does the evidence or "common sense" support a finding that there is a chilling effect on news gathering as a result of the Independent Author Operation or Police Order 2.8.6?*

[233] Even though I have set out above the basis for my conclusion that (i) there is no practice with respect to either the Independent Author Operation or Police Order 2.8.6; (ii) neither the Independent Author Operation or Police Order 2.8.6 is properly within the scope of this application; and (iii) impersonating an independent author does not constitute impersonating a journalist; I find that, in any event, the evidentiary record would not support any direct link or causal connection between these matters and restriction of freedom of expression, nor would such a conclusion be "indisputable".

[234] With respect to the Independent Author Operation, there is no evidence to support the Applicants' contention that Toughill's concerns have any relationship to police posing as "independent authors". There is no evidence that:

(i) the public perceive "independent authors" to be journalists, let alone journalists working for or on behalf of a major news organization;

(ii) independent authors subscribe to any code of ethics or that the practices of independent authors have led to a "trust relationship" with members of the public or members of closed societies;

(iii) "independent authors" have privileged access to members of the public or members of closed societies; or

(iv) undercover police posing as "independent authors" will lead people to believe that undercover police also pose as journalists working for major news agencies.

[235] Consequently, there is no evidence of a direct relationship between undercover police posing as "independent authors" and the "drying up" of news sources.

[236] With respect to Police Order 2.8.6, the only evidence is that the undercover impersonation of journalists by OPP officers has not been approved since this policy came into effect. There is no evidence that the operation of this policy has had any negative effect on the Applicants' freedom of expression.

[237] Further, I do not find it "indisputable" that an undercover operation by an OPP officer posing as an independent author, or a Police Order permitting posing as a journalist only in "exigent" circumstances with a "significant threat to public safety" "where no other alternative exists" (and has never been approved with respect to posing as a journalist), would have a chilling effect on freedom of expression.

*f) Conclusion*

[238] Consequently, the Applicants have not established that Media-Presence Surveillance (or the Independent Author Operation or Police Order 2.8.6) violates s. 2(b).

[239] Given this finding, I do not address the various issues under s.1 of the *Charter*, or whether declaratory relief is appropriate in the present case.

**ORDER AND COSTS**

[240] For the above reasons, I dismiss the application. If counsel cannot agree on costs, I will consider written costs submissions from each party of no more than three pages (not including a bill of costs), to be delivered by the Respondents within 14 days of this order, with the Applicants to respond within 14 days from receipt of the Respondents' submissions. The Respondents may provide a reply of no more than two pages to be delivered within 10 days of receipt of the Applicants' costs submissions.

[241] I thank counsel for their thorough written and oral submissions which were of great assistance to the court.

_____

Justice Glustein

**DATE:** 20150723