NI Group Limited
M. Linklater
First Statement
Exhibits "ML1" and "ML2"
29 November 2011

IN THE MATTER OF THE LEVESON INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS

EXHIBIT ML2

This is the exhibit marked "ML2" referred to in the witness statement of Magnus Linklater dated the 29th day of November 2011.

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Magnus Linklater Injunctions are a sign of embarrassment

Wellington was right. Resist the muzzle

Something odd happens, even to the mightiest of organisations, when they are confronted by a judge in chambers and a smooth-tongued counsel. The threat of an injunction, especially one sought by the Attorney-General, is enough to reduce them to meek compliance. They forget to remind the court that the best response to any damaging disclosure is the one articulated by the Duke of Wellington: "Publish and be damned!"

Thus it was that the BBC caved in, last Friday night, to Lord Goldsmith's application for an injunction, which prevented it running a perfectly legitimate story about an alleged Downing Street cover-up. Instead of appealing immediately, the BBC sat back and waited for someone else with a bit more gumption to scoop it.

Injunctions are nearly always a sign of political or personal embarrassment and should nearly always be resisted. They are an act of desperation on the part of a litigant who has something to hide and nothing else to hide behind. They have the effect of drawing far more attention to the matter in hand than would otherwise have been the case, and they fail in the long run. More to the point, they are an infringement of freedom of expression and the public interest.

Only in cases of gross contempt of court, where publication may damage a forthcoming trial or lead to the discharge of a jury, can injunctions be justified. It is up to the judge to point out that if the story complained about is defamatory, a breach of confidence or otherwise contentious, then the litigant should sue rather than suppress.

Governments like to add national security to the list of forbidden subjects, but even that is usually a smokescreen. As a veteran of a three-year battle on behalf of *The Scotsman* newspaper against Mrs Thatcher's Government, which argued, right up to the House of Lords, that the memoirs of a Cold War spy would shatter the edifice of the State, I know whereof I speak. She lost. The Government survived.

Quite why the Attorney-General, Lord Goldsmith, should have compromised his independence in this way is a mystery. His claim that the BBC's story, about the role of a Downing Street aide in the cash-for-peerages affair, may have compromised Scotland Yard's inquiries scarcely stands up to scrutiny. Most of the regular leaks have clearly emanated from police sources, so it is hard to argue that this latest one is suddenly unacceptable.

Lord Goldsmith should have told them briskly that their attempt to suppress the story amounts to prior restraint, has no basis in law, and that, if the police think they have a case for contempt, they can institute a prosecution in due course. He may have added that, since no case, even if brought, is likely to come to court in less than two years, the idea that a leaked memo might influence a jury so far ahead is improbable.

Instead, he has opened himself to the accusation that he is seeking to protect the Government from further humiliation. The injunction thus becomes the latest in a list of half-hearted attempts at censorship, such as Tony Blair's bid to prevent the *Daily Mirror* revealing his alleged conversation with George W. Bush over bombing al-Jazeera.

We should by now have learnt from the United States, where the Supreme Court will always presume in favour of free speech. The prime test case was that of the Pentagon Papers, when the Nixon Administration argued that publication of stolen documents revealing confidential negotiations over Vietnam constituted a threat to national security, on the ground that other nations would no longer trust the US to keep its secrets.

The Supreme Court threw out that case and *The New York Times* published the results. It was a far better advertisement for American self-confidence than a cover-up. Today no one can recollect much of what was in the Pentagon Papers; but the failed attempt to suppress them is still remembered.

Challenging interfering governments should be a prime responsibility of the media. But it takes time, and involves risks, which managements too often shrink from. My three-year legal marathon on *The Scotsman* exposed that paper to potential costs of hundreds of thousands of pounds — picked up, instead, by the taxpayer after we had won. When *The Wall Street Journal* challenged an attempted injunction by a Saudi businessman over a story about financing terrorism in 2001, that case, too, went all the way to the Lords and might have cost the newspaper, had it lost, more than $4 million. The *Journal* argued that a fundamental principle was at stake, and was praised by the courts for its "responsible journalism".

So, courage — moral as well as managerial — is required in defence of media freedom, and the BBC has as much of a responsibility here as any newspaper. It does not, however, have a great track record. When, at the outset of the Hutton inquiry, ITV presented the case for televising the proceedings, its lawyer, Geoffrey Robertson, QC, invited the BBC to join him in the action. The BBC refused, perhaps because it thought that the outcome might compromise it as well as the Government.

The time has come, then, for a new slogan to be added to the legal lexicon — something along the lines of "embarrassment is no defence in law". It is as well to remember that Wellington scrawled "Publish and be damned!" on the back of a letter he had received from his mistress, who was threatening to include his name in her scandalous memoirs. He was not only declaring his immunity to exposure, he was defying a potential blackmailer. He may observe today that the line between blackmail and an injunction can be a fine one.

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