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The Press Freedom Paradox in R. v. Vice Media: the Supreme Court of Canada's Review of Press Freedoms Versus the Investigative Powers of Police

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On November 30, 2018, the Supreme Court of Canada rendered its decision in *R. v. Vice Media Canada Inc.*, a case many describe as pitting press freedoms against the investigative powers of police. The appeal centered on articles written by reporter Ben Makuch ("**Makuch**") in 2014, based on exchanges between him and a source widely believed to be Farah Mohamed Shirdon ("**Shirdon**"). Shirdon, a 21-year-old who grew up in Calgary, gained media attention when he burned his Canadian passport in a YouTube video produced by the Islamic State of Iraq and the Levant ("**ISIS**").

History of the Case

On February 13, 2015, the RCMP successfully applied *ex parte* to the Ontario Court of Justice, under section 487.014 of the *Criminal Code*, for an order directing Vice Media Canada Inc. ("**Vice**") to produce the screen captures of the messages exchanged between Makuch and Shirdon. The Court granted the application based on the fact that Shirdon was under investigation for a number of offences related to his suspected involvement with ISIS. The RCMP would later charge Shirdon with six terrorism-related offences.

Vice brought an application in the Superior Court to quash the order. The reviewing judge dismissed Vice's challenge, holding that it was open to the authorizing judge to conclude that the public interest in obtaining reliable evidence of very serious terrorism offences outweighed the media's interest in protecting a source.

The Ontario Court of Appeal dismissed Vice's appeal, even when considering that the decision of the lower court ignored the wealth of evidence it already had against Shirdon, including comments easily obtained from his public social media presence. Vice's argument focused on the fact that it was unlikely that Makuch's materials would have any further value, and that the lower court did not properly balance the interests of press freedoms against law enforcement powers.

Appeal to the Supreme Court of Canada

In a unanimous decision, albeit with a concurring opinion, the Supreme Court of Canada held that based on the facts of the case, the RCMP's interest in prosecuting crime outweighed the media's right to privacy in gathering the news.

Justice Abella, writing for herself, Chief Justice Wagner and Justices Karakatsanis and Martin (the "**Minority**"), approached the case as an opportunity to formally recognize that freedom of the press attracted a distinct and independent constitutional protection under s. 2 (b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

Justice Moldaver, writing for himself, Justices Gascon, Côté, Brown, and Rowe (the "**Majority**"), took the view that the appeal could be readily disposed of without going so far as to rethink the s. 2 (b) *Charter* right. In essence, Justice Moldaver was of the view that the appeal was not an appropriate venue in which to formally recognize a distinct and independent constitutional protection for freedom of the press, and left that question for another day.

The Majority held that the framework set out in *Canadian Broadcasting Corp. v. Lessard*[1] (the "**Lessard framework**") provided a suitable model for considering applications for search warrants and production orders relating to the media, and provided adequate protection to the media and the special role it plays in

Canadian society. The Lessard framework was aimed at balancing the interest of the state in the investigation and prosecution of crime with the media's right to privacy in disseminating the news, through the use of nine factors that judges would need to consider when determining whether to issue a search warrant relating to the media.[2]

While supporting the Lessard framework, the Majority highlighted that certain aspects must be refined and its factors should be reorganized to make them easier to apply in practice.

Defining the Correct Standard of Review

In addition to refining and reorganizing the Lessard framework factors, the Majority outlined that the standard of review to be applied to *ex parte* production orders targeting the media should be a modified version of the standard set out in *R. v. Garofoli*[3] However, the Majority outlined that the traditional *Garofoli* standard, namely whether in light of the record before the authorizing judge, as amplified on review, the latter could have granted the authorization, was highly deferential and, in some cases, unfair due to absence of the media at the authorization stage.

Thus, the Majority outlined that the following test should be applied:

- If the media points to information not before the authorizing judge that, in the reviewing judge's opinion, could reasonably have affected the authorizing judge's decision to issue the order, then the media will be entitled to a *de novo* review.
- If, on the other hand, the media fails to meet this threshold requirement, then the traditional *Garofoli* standard will apply, meaning that the order may be set aside only if the media can establish that – in light of the record before the authorizing judge, as amplified on review – there was no reasonable basis on which the authorizing judge could have granted the order.

Accordingly, the Majority found that since Vice did not point to any information not before the authorizing judge that could reasonably have affected the decision to issue the order, the traditional *Garofoli* standard of review should apply.

Refining and Reorganizing the Lessard Framework

The Majority outlined that the new framework that a court must apply when reviewing an application for a production order against a media source is four-fold:

(1) The authorizing judge must consider whether to exercise his or her discretion to require notice to the media

With respect to the first stage of the analysis, the Majority highlighted that a presumptive notice requirement should not be imposed in situations where the police are seeking a production order in relation to the media. In support of this concept, the majority referred to the Supreme Court of Canada's decision in *R. v. National Post*.[4] There, the Court considered the principles to be applied when the state's interest in investigating and prosecuting crime collides with the media's right to be secure against unreasonable search or seizure under section 8 of the *Charter*, in the context of freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication under section 2(b) of the *Charter*.

In the case at bar, the Majority found that the authorizing judge was justified in relying on the police's explanation for seeking the order *ex parte*, which included the risk that Vice could move the materials beyond the reach of Canadian courts if alerted to the police's interest in the material. Therefore, it was open to the authorizing judge to proceed *ex parte* and decline to exercise his discretion to require notice.

(2) All statutory preconditions must be met

With regard to the second stage of the analysis, the Majority held that the *Criminal Code* permits *ex parte* applications for production orders, subject to the authorizing judge's overriding discretion to require notice where he or she deems it appropriate. Absent urgency or similar circumstances that would justify proceeding *ex parte*, the authorizing judge has the ability to require that notice be given to the media,

especially in cases where the judge considers that more information is necessary to properly balance the rights between press freedoms and the investigative powers of police.

The Majority held that the statutory preconditions for the issuance of a production order were satisfied in the case at bar. Notably, the evidence of the police provided reasonable grounds to believe that:

- the source had committed certain offences;
- Vice had in its possession the materials sought; and
- those materials would afford evidence respecting the commission of the alleged offences.

(3) The authorizing judge must balance the state's interest in the investigation and prosecution of crimes and the media's right to privacy in disseminating the news

In performing the balancing exercise at the third stage of the analysis, the Majority highlighted that an authorizing judge must consider all of the circumstances, including, but not limited to:

- the likelihood and extent of any potential chilling effects;
- the scope of the materials sought by the police and whether the order sought is narrowly tailored;
- the likely probative value of the materials;
- whether there are alternative sources from which the information may reasonably be obtained and, if so, whether the police have made all reasonable efforts to obtain the information from those sources;
- the effect of prior partial publication of the materials sought; and, more broadly,
- the vital role that the media plays in the functioning of a democratic society and the fact that the media will generally be an innocent third party.

While the above-listed factors provide helpful insight as to what may be persuasive to an authorizing judge, the decision as to whether to grant the order sought is discretionary, and the relative importance of the various factors guiding that discretion will vary from case to case.

In reviewing the facts at hand in this case, the Majority held that it was open to the authorizing judge in conducting the Lessard balancing exercise to conclude that the state's interest in the investigation and prosecution of crime outweighed the media's right to privacy in gathering and disseminating the news. Even through consideration of a *de novo* review, the Majority outlined that the order was properly granted, based on the following:

- disclosure of the materials sought would not reveal a confidential source;
- ·no "off the record" or "not for attribution" communications would be disclosed;
- there is no alternative source through which the materials sought may be obtained;
- the source used the media to publicize his activities with a terrorist organization as a sort of spokesperson on its behalf; and
- the state's interest in investigating and prosecuting allegations of serious terrorism offences weighs heavily in the balance.

Additionally, the Majority outlined that a strict necessity test for production orders should not be imposed. While probative value may be a relevant consideration, requiring the police to demonstrate that a production order is necessary to secure a conviction would effectively transform the production order application into a trial of the alleged offence on the merits and would seriously undermine the ability of the police to investigate and gather evidence of potential criminality.

(4) If the authorizing judge decides to exercise his or her discretion to issue the order, the judge

should consider imposing conditions to ensure that the media will not be unduly impeded in the dissemination of the news

The Majority emphasized that if the authorizing judge decides to exercise discretion to issue the production order, the judge should consider imposing conditions on the order to ensure that the media will not be unduly impeded in the publishing and dissemination of the news. This factor is essentially the reaffirmation of the seventh factor in the Lessard framework. The authorizing judge may also see fit to order that the materials be sealed for a period pending review. In the case at bar, the Majority held that the authorizing judge imposed adequate terms in the production order, providing Vice with ample time to comply with the order. Vice thus had sufficient opportunity to move to have the production order set aside, as it did.

Commentary on the Supreme Court's Conclusion

Ultimately, as is the case for many Supreme Court decisions, two opposing opinions are likely to form as to whether the Majority was correct in outlining that this was not an appropriate venue in which to formally recognize a distinct and independent constitutional protection for freedom of the press.

On one side, in a statement provided after the decision was delivered, Vice called it a "dark day for press freedom." Boiled down, the question Vice likely has is, *if not now, then when?* As Justice Abella said in her opinion for the Minority:

"…I see no reason to continue to avoid giving distinct constitutional content to the words "freedom of the press" in s. 2 (b). The words are clear, the concerns are real, and the issue is ripe."

For many, the main concern with the decision is that it may have a chilling effect on the right of freedom of expression, as sources may not wish to communicate with journalists given the risk that such material may have to be turned over to law enforcement and potentially used against the source. To many, this concern is further accelerated by the risks compromising media pluralism in the country in the wake of the recent closure of more than forty independent newspapers following an agreement between two of the country's largest publishers.

On the other side, one must consider the balance between section 8 and section 2(b) of the *Charter* in light of the world we live in. For example, a factor observed by Justice Moldaver was the fact that in this case, Shirdon used the media to publicize his activities with a terrorist organization and broadcast its views as a sort of spokesperson. The Majority also gave credence to the possibility of sources drying up by adding that, in determining whether an order should be granted or refused, a judge should consider whether the order sought would likely have a chilling effect. In this case, the Majority found that the state's interest in prosecuting the alleged crime outweighed Vice and Makuch's right to privacy in gathering and disseminating the news. For many, the Majority decision continues to provide a judge the ability to fairly balance these competing rights in freedom of the press cases in the future.

[1] And its companion case: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*

[2] As outlined in *Lessard*, at p. 445, and *New Brunswick*, at pp. 481-82: (1) All statutory requirements for the issuance of the search warrant must be met; (2) If all statutory requirements have been met, then the authorizing judge "should consider all of the circumstances in determining whether to exercise his or her discretion to issue [the] warrant." (3) The authorizing judge "should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news gathering and news dissemination," bearing in mind that "the media play a vital role in the functioning of a democratic society" and that the media will generally be an innocent third party. (4) The affidavit supporting the application must contain "sufficient detail" to enable the authorizing judge to properly exercise his or her discretion as to whether to issue the warrant. (5) Although it is not a constitutional requirement, the affidavit should "ordinarily" disclose whether there are alternative sources from which the information may reasonably be obtained and, if so, that those sources

have been investigated and all reasonable efforts to obtain the information from those sources have been exhausted. (6) If the information sought has been disseminated by the media in whole or in part, then this "will be" a factor favouring the issuance of the warrant. (7) If the authorizing judge determines that a warrant should be issued, then he or she should consider imposing conditions on its implementation so that the media "will not be unduly impeded in the publishing or dissemination of the news." (8) If it comes to light after the warrant is issued that the police "failed to disclose pertinent information that could well have affected the decision to issue the warrant," then this may result in a finding that the warrant was invalid. (9) If the search was unreasonably conducted, then this may render the search invalid.

[3] In that case, the Supreme Court found that failure by an authorizing judge to impose conditions minimizing the interception of irrelevant communications did not result in the authorization of an unreasonable search and seizure in violation of section 8 of the *Charter*.

[4] The *National Post* case concerned a secret source who supplied a journalist at the National Post with a plain brown envelope containing a document said to implicate a former Canadian prime minister in a financial conflict of interest in exchange for an unconditional promise of confidentiality. Upon receiving a complaint that the document was forged, the RCMP applied for a search warrant and an assistance order permitting them to search the premises of the National Post and seize the document and the envelope in which it was contained. Although the search warrant and assistance order were initially granted, they were later quashed by the reviewing judge, only to be reinstated by the Ontario Court of Appeal. At the Supreme Court, Justice Binnie, writing for a seven-justice majority, set out the "general rule" when it comes to search and seizure: "[t]he public has the right to every person's evidence." Justice Binnie declined to recognize a class privilege protecting the journalist-confidential source relationship. Instead, he held that journalist-confidential source privilege should be assessed on a case-by-case basis, applying the *Wigmore* criteria (*Wigmore on Evidence (McNaughton Rev.* 1961), vol. 8, at § 2285. The Court concluded that no such privilege could be established on the facts. In the result, the majority upheld the validity of the search warrant and assistance order.

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