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An Unduly Free Press and Other Vices: The *Vice Media* Case

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This post examines the recent Supreme Court ruling in *R v Vice Media Canada Inc*, 2018 SCC 53. It is a bit of a strange case in its facts, and its precedential value is unclear because it was decided without reference to the *Journalistic Sources Protection Act*, S.C. 2017, c. 22.[1] Despite this, it remains an interesting case due to the differing stances of the majority and dissent. I take the view here that the majority under Moldaver J presented the better analysis, and that the position forwarded by the dissent under Abella J is both unsound and undesirable. The analytic framework forwarded by Moldaver J is reasonable and balanced, and his view that it was neither necessary nor appropriate to alter our understanding of s 2(b) of the *Charter* in this case was entirely proper.[2] On the other hand, Abella J's analysis rests on a questionable interpretation of the *Charter* text, and offers scant detail on how her alternative approach would actually be implemented.

Vice Media deals with a challenge to a production order sought by the RCMP. In 2014 a reporter employed by the appellant began communicating with an individual suspected of joining the Islamic State in Iraq and Syria (ISIS) over Kik messenger. The substance of these communications led the reporter, Ben Makuch, to write three stories, which were published by Vice. Following publication, the RCMP applied for a production order requiring Vice to provide them with screenshots of the Kik conversations.[3] In these conversations, the suspect individual, Farah Shirdon, confirmed that he was a Canadian citizen and openly discussed his activities with ISIS.[4] One of the unusual aspects of this case is that Shirdon never sought any form of

[1] Tim Quigly, Case Comment on *R v Vice Media Canada Inc*, 2018 SCC 53, 2018 CarswellOnt 19988 (WL Can).
[2] *R v Vice Media Canada Inc*, 2018 SCC 53 at para 103 [*Vice*].
[3] *Ibid* at para 7.
[4] *Ibid* at para 115.

confidentiality; rather, he seems to have viewed Makuch and Vice as a "channe[l] through which he would speak to the whole world". It is also of note that the RCMP sought the order after the stories were published, and had therefore entered the public sphere.[5]

The issues before the Court included the suitability of the *Lessard* framework for deciding whether a production order should be made against the media, whether such an order should include presumptive notice, the standard of review for such an order and whether this particular order should be set aside.[6] Ultimately, both the majority and the dissent reached the conclusion that the order should not be set aside in this case. However, the majority effectively upheld the *Lessard* framework, with some alterations, while the dissent argued that an overhaul was in order. This overhaul would have recognised freedom of the press as a distinct an independent right under s 2(b).[7]

The *Lessard* framework sets out 9 factors for judges to consider when determining whether to grant a production order relating to media. Due to the length of these factors, I shall not reproduce them here. Moldaver J summarises the test's history in his reasons, and sets out the 9 factors at paragraph 16. Essentially, the majority makes three changes to the existing framework:

> • First, rather than treating prior partial publication as a factor that *always* militates in favour of granting an order, I would assess the effect of prior partial publication on a case-by-case basis.
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> • Second, with respect to the standard of review to be applied when reviewing an order relating to the media that was made *ex parte*, I would adopt a modified *Garofoli* standard (see *R. v. Garofoli*, [1990] 2 S.C.R. 1421 (S.C.C.)): 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. Otherwise, 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

[5] *Ibid* at para 119.
[6] *Ibid* at para 8.
[7] *Ibid* at paras 109, 112.

before the authorizing judge, as amplified on review — there was no reasonable basis on which the authorizing judge could have granted the order.

• Third, I would reorganize the *Lessard* factors to make them easier to apply in practice.[8]

The majority's reorganisation of the *Lessard* factors consisted of compressing the test into 4 parts, with most of the old steps becoming sub-considerations under the interest balancing stage.

At its core, this case is about finding the best system for balancing the state's interest in the investigation and prosecution of crime with the media's right to privacy in gathering and disseminating the news.[9] I prefer Moldaver J's approach because it provides greater flexibility to judges in determining how this balance should be struck in a given situation. While some might assert that such a contextual approach is too subjective when an interest as significant as press freedom is on the line, I would argue that this approach recognises the incredible fineness of the line between these two interests. Consider the changes that the appellant proposed to the framework:

1. Presumption of a chilling effect whenever a production order is made relating to media;

2. Removal of the distinction between confidential and non-confidential sources;

3. Re-characterisation of the effect of prior partial publication (so that it no longer inherently favours granting the order).

4. The addition of requirements that judges consider the likelihood of a trial occurring and should only grant an order where the evidence sought will make the difference between acquittal and conviction.[10]

[8] *Ibid* at para 4.
[9] *Ibid* at para 1.
[10] See generally the reasons of the majority; *Ibid* at *Analysis*, para 25-58.

While the appellant surely characterized these changes as strong protections of media interests, their actual effect would be to prevent judges from considering important contextual factors. As Moldaver J rightly points out, for example, it makes a big difference whether a media source requested and/or was promised confidentiality or not.[11] This is precisely the sort of fact that I would expect a judge to consider when attempting to balance these two extremely important interests, not ignore. If the media needs protection, it should be done thoughtfully and in a sensible fashion, not through the imposition of arbitrary and irrational presumptions such as this.

It is also not as though the majority's alterations to the *Lessard* framework favoured only the Crown. It was also found that the prior partial publication of the material sought through the order should no longer be considered as inherently favouring granting of the order. Instead, the effect of this factor is now to be decided on a case-by-case basis.[12] Considered in its totality, the substance of the majority judgement is to enable judges considering production orders to consider as many relevant factors as possible, determining their weight and effect contextually. On my own view this is a good thing.

There are only two reasons for imposing presumptions of the kind suggested by the appellant: either you do not trust the judges to dispose of certain facts in an unbiased manner, consciously or unconsciously, or; a fact is so consistent in practice that it is efficient and not unjust to shift the burden of disproving it. As demonstrated above, the latter reason is simply not applicable to facts such as whether a guarantee of confidentiality was given. As for the former line of reasoning, if a judge is that biased in favour of the Crown, then adding presumptions to the test will do little to stop them. Realistically, judges have significant power in making these types of decisions, and equally significant deference is afforded to them on review. In short, if

[11] *Ibid* at para 34.
[12] *Ibid* at para 43-44.

the problem is in the judiciary, it will not be solved by tightening the tests that they have to apply. Thus, I do not think there is any persuasive argument for not allowing judges to consider as much of the factual matrix of a situation as possible.

Therefore, I believe that the test and reasoning of the majority in *Vice Media* was entirely appropriate. It allows judges the freedom to consider as many factors as possible in attempting to strike the proper balance between the state's interest in investigating potential criminal acts and the media's interest in collecting and disseminating the news. It also prevents and removes presumptions that could hamper judges in assessing facts in their proper context. Far from denying the media much needed protections against the predation of the state on its independence, this decision allows for the fair consideration of the interests of both sides, which are both fundamentally interests of the public.

This leads me to the issue that I take with Abella J's reasoning: it potentially disrupts this delicate balance. I say potentially because it is hard to tell what the dissent is actually suggesting in practical terms.[13] The dissent asserts that "s. 2(*b*) contains a distinct constitutional press right which protects the press' core expressive functions — its right to gather and disseminate information for the public benefit without undue interference"[14], and that "The words are clear, the concerns are real, and the issue is ripe."[15]

The first problem is that "the words", meaning the text of s 2(b) of the constitution, do not clearly suggest that freedom of the press should be a distinct right. Section 2(b) of the constitution reads:

> **2**. Everyone has the following fundamental freedoms:
>
> . . . . .

[13] Quigly, *supra* note 1.
[14] *Vice*, *supra* note 2 at para 112.
[15] *Ibid* at para 109.

> (*b*) freedom of thought, belief, opinion and expression, *including* freedom of the press and other media of communication;
>
> . . . . .[16]

(emphasis added). The use of the word "including" very clearly delineates freedom of the press and other media as a subset of freedom of expression, not as its own, distinct right. It means that s 2(b) protects freedom of expression, and included within freedom of expression is freedom of the press. In other words, freedom of expression is not restricted to individuals; it can be relied upon by persons such as media companies. At most, this provision indicates that judges ought to give special consideration to the important role of the media in our society when considering s 2(b) claims made by media claimants. However, I see no reasonable way of reading s 2(b) that suggests that freedom of the press is more than a derivative of freedom of expression, as Abella J suggests.

Though Abella J states, repeatedly that a distinct press right under s 2(b) should be considered alongside s 8 rights when a production order regarding media is sought, at no point does in the dissenting reasons is it explained what this would actually entail and how it would function.[17] It is equally concerning that many paragraphs are spent espousing the need for media protection, and Abella J comments strongly on the dangers that follow production orders, yet she relies on very little evidence in advancing these views. No evidence is provided regarding the extent to which media is actually threatened; how often are production orders like this one sought or granted? Has there been a drop off in the number of informants coming to media members with information? To what extent do media outlets rely on informants implicated in crimes? These are all important questions to address in determining the extent to which media

[16] *Canadian Charter of Rights and Freedoms,* s 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[17] Quigly, *supra* note 1.

outlets actually need protection. It should not be forgotten that many media outlets are powerful actors in their own right, with extensive resources. They are generally much less vulnerable to state predation that individuals are.

The only support forwarded regarding the negative consequences of production orders is a quotation of McLachlin J from the *Lessard* case.[18] This type of second-hand support is hardly sufficient for grounding what is, essentially, the granting of new constitutional protection to an entire industry. As Moldaver J said when addressing the opinions of his dissenting colleagues in the majority's reasons:

> Neither the proper contours of this proposed understanding of s. 2(b) nor its implications — whether in this case or beyond the scope of the appeal — was fully argued by the parties or considered by the courts below. This proposed recognition may have unforeseen consequences, for example, on the law relating to freedom of information requests, publication bans, and other areas implicating freedom of the press.[19]

There simply was not enough evidence put forward to come to the conclusions that Abella J did in the dissenting reasons. Rather, the dissent appears to be grounded more in personal views on what the law ought to be and outside research that was not on the record before the Court.

Even if I am wrong about the dissent, I am not convinced that the media requires constitutional protection. As noted above, media outlets are powerful actors in their own right, with ample resources that can be brought to bear against the state if necessary. It is also somewhat misleading to portray situations such as the one in *Vice Media* as one which pits the interests of the state against those of the media. On both sides, the interests at stake are fundamentally those of the public. The state's interest reflects the public's interest in having alleged crimes investigated and justice done. The media's interest in free expression is only

[18] *Vice*, *supra* note 2 at para 146.
[19] *Ibid* at para 103.

considered "special" by the dissent because it is linked to the public's interest in being informed. The more that one interest is favoured through protections, rightly or wrongly, the harder it becomes to pursue the other.

The core reason that is recognised for the protection of media by both the majority and dissent in this case is that media provides a crucial public good: it keeps the public informed. In a sense, the roll of the media in a healthy democracy is to play watchdog over the state. However, the question that is not addressed in *Vice Media* is who watches the watchers? The public relies on the media to keep them informed, yet the media has discretion over what information is published. It should not be forgotten that many media outlets are businesses, with only limited accountability to the people. It ought to be considered that one of the unintended consequences of granting the media additional constitutional protection could be that they become harder to rein them if they ever run amuck. It seems imprudent to me to further entrench media protections without installing mechanisms for media accountability. At the very least, this is not something that should be done haphazardly, as the dissent attempted to, without careful research and abundant evidence to inform the decision.

While I am not sure that it adds much to the law, given new legislation and its peculiar facts, *Vice Media* remains an interesting, thought provoking case. While it is portrayed as a clash between the interests of the state and the media, it might be better understood as a clash between two public interests: the interest in addressing potential crimes and the interest in being informed. I am of the view that the majority made the correct decision. The reasons presented by Moldaver J are reasonable, and enable judges deciding on production orders to make contextual, factually driven decisions. The majority approach creates a good framework for maintaining the delicate balance between these competing interests. The dissent, though passionately argued,

does not sit well with the text of the constitution, nor does it draw on enough evidence to support its conclusions. It is not clear to me that the media is in need of additional constitutional protection, nor that such protection would necessarily be in the best interest of the public.

Caution should be taken when further constitutional entrenchment is considered. I am not suggesting that media is, in fact, not in need of further protection. I simply point out that there was nothing like enough information before the Court in *Vice Media* to make such a decision. Freedom of the press is one of those issues that just sounds good, that is difficult to argue with. In a way, it is a buzz-phrase. However, these issues ought to be considered carefully, objectively, and without making assumptions, because there is a balance to be struck, and a too-powerful media is equally bad for democracy as a too-powerful state. How this balance will be maintained going forward remains an open question.