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The Vice Squad: A Case Commentary on R v Vice Media Canada Inc

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Criminal law, as observed in high-level Supreme Court of Canada decisions, is the legal version of urban life. Principles jostle and elbow through a crowd of issues and facts. This hum of urbanity gives this area of law an edgy unpredictable feeling. Conflict abounds and at times there is a winner take all attitude. Other times, the result in a criminal case is more nuanced as urban sprawl is contained and the chaos is smoothed over through the application of principled and balanced ideals. The decision in *R v Vice Media Canada Inc*, 2018 SCC 53, is one such case.

The premise is not very original. For years, journalists have gathered sensitive and volatile information from hidden human sources. This is the stuff of smart investigative reporting and it offers insightful but sometimes explosive reveals. Such was the case in *Vice*. Let's be clear, Vice Media is a go-getter media outlet: a newish kid on the block, who with equal doses of style and aplomb combined with grit and tenacity, present stories with the urban flair expected of a here and now media team. In this case, the journalist connected to a prize – a source who was the real McCoy – a suspected terrorist. They exchanged, as all sharp social media-ites do, a series of text messages. But these were text messages with a difference. The journalist, by communicating with a suspected criminal, entered the "it's complicated" world of criminal law. More than merely conversational, these messages were potential evidence and as evidence attracted legal meaning and weight. It was as if a school-yard scuffle was transformed into a Las Vegas prize fight. The journalist investigation was instantly transformed into a police investigation. With that transformation, the rules of the game changed. What was driven by the written word became transported through the portals of law.

The police moved quickly to secure and preserve the information, "under glass" so to speak, through the legal tools available. A production order under s. 487.014 was obtained quickly, silently and *ex parte*. Production orders are the *aide du camp* to the search warrant regime in the *Code*. When issued, they require the person so named in the order to hand over to the police the subject document that is in their possession or control. It is all about evidence, trial evidence, and what kind of information is needed to prove a criminal offence in court. With a stroke of a pen, the legal world encases the whirly-burly world of media in a glass case. Dynamic communication is crystallized, dryly, into documentary fact. However, this colourless coup still has some drama left to it. In this encasement, the formalistic legal rules must grapple with the equally formalistic journalistic rules. Here Vice meets Squad and legal principles run up against another as journalistic source privilege creates an impasse. It is up to the Supreme Court to reconsider the legal and journalistic landscape.

In the end, the Supreme Court agrees with the lower courts by upholding the presence of the law as the paramount concern in this media story. The production is properly issued and must be obeyed. But this story does not go out with a whimper but a bang as the Court, though in agreement in the result, does not agree in how they get there. This is truly the excitement and energy of the urban landscape as two opinions on the issue emerge. The majority, hanging onto the creation of law by the slim agreement of 5, is written by Justice Moldaver, the criminal law heavy-weight on the Court. Justice Moldaver is an experienced criminal lawyer and approaches the decision with his usual hardboiled common sense. The concurring minority decision is written by Justice Abella with her innate sense of the human condition. The setting could not be better for a decision on the realities of the urban scene.

Justice Moldaver opens with the obvious in paragraph 1 of the decision. There is an analytical framework, found in the 1991 *Lessard* decision, to decide the issue. As an aside, the framework, pulling no punches here, involves the balancing of "two competing concepts: the state's interest in the investigation and prosecution of crime, and the media's right to privacy in gathering and disseminating the news." The issue here however does surprise. It is not a "business as usual" question, involving the application of that long-standing framework, but involves a deeper question asking whether the framework is actually workable. The law can create but, so the argument goes, the law must be useable. Principles may be lofty and imbued with high-minded values, but they must work on the street-level as well. What is said in Ottawa must be later applied in small-town Dundas, Ontario or main street Nelson, BC. If it can't work there, it's of no use, legally or otherwise.

Does that balance work? The majority believes it does with some refinement. Tweaking has become the new tweeting at the Supreme Court level. If it ain't completely broke then don't entirely fix it. Renos are a less costly measure. Justice Moldaver suggests just such a quick fix by importing a case-by-case analysis that permits a less mechanical application of rules and by "reorganizing" the applicable *Lessard* factors. But then, and here is where a tweak looks more like a re-do, the majority offers a modified standard of review (SOR). This, in the words of Raymond Chandler's Phillip Marlowe in *The Big Sleep*, is like finding a "nice neighborhood to have bad habits in." The spectre of SOR runs deep in the Supreme Court decision-making psyche. Rearing its head here of all places gives this decision a decidedly bête noire flavour.

We need a feel for the atmosphere before we take on this part of the decision. We are in the heightened atmosphere of "the special status accorded to the media" (para 14) as envisioned under the aegis of the *Charter* pursuant to s. 2(b). Freedom of expression in the form of media expression is, as I quote the dissent of Justice McLachlin in *Lessard*, more than the vitalness of the "pursuit of truth." It is an expression and act of community. The press is society's agent, not the government's agent. Their actions give meaning to "expression" but also to "freedom." As such, the press is "vital to the functioning of our democracy." But, spoiler alert, the *gravitas* of this sentiment differs as between the majority and the dissent in *Vice.* It is this difference, which I suggest drives the decisions in this case more than anything else. In any event, *Lessard*, impresses s. 2(b) with the stamp of vitality promised by s. 2(b). It involves a boisterous labour action at a post office, the bread and butter of on the ground media reporting. The crowd was video-taped and the police wanted the recording as evidence for a criminal prosecution. Incidentally, my most

recent Ideablawg podcast on the *Criminal Code*, discusses the sections on unlawful assembly and riots. In contrast, the facts in *Vice*, touch upon democracy's innermost fear of terrorist activity.

I should add that an additional difference in *Vice* is the presence of a confidential informant, who also happens to be the potential suspect. The law of privilege is an evidential oddity as it serves to exclude evidence which would otherwise be relevant and admissible in a criminal case. Through the protections afforded by privilege, the identity of a CI is confidential. This in turn promotes relationships in which vital information is exchanged. A CI is more apt to divulge information to a journalist with the knowledge there will be no adverse repercussions as a result. The kind of adverse repercussions as in *Vice*, where the information is used against the CI in a criminal investigation. This kind of privileged communication within a journalist relationship is not absolute and is subject to judicial discretion. Even so, the CI/journalist relationship adds a sharpness to the issue. For a fuller discussion on the vagaries of CI privilege, read my blog posting on the issue here.

In this media infused atmosphere, context is everything. That should be no surprise to anyone who has read a Supreme Court case in the last decade. In fact, we might say that context is not just everything, it is royalty, as principles seem to bend to it. Case in point is the majority's view of the *Lessard* factor of prior partial publication. Under the unrefined *Lessard* framework, if the information of the criminal activity sought by the state has been disclosed publicly then seizure of that information is warranted. Indeed, those circumstances may heighten the importance of that factor, which "will favour" the issuance of the order or search warrant. Justice Moldaver finds the *Lessard* approach turns a factor into a "decisive" one (para 39). Although it is arguable whether Justice Cory in *Lessard* would agree with that characterization of his comments, Moldaver J's approach, to allow for context in assessing prior publication by favouring a case-by-case analysis, is defensible. Again, smoothing out the complexities through a good dose of common-sense driven principles.

Another area for revision involves whether the probative value of the information should be considered in the balancing and assessment of the *Lessard* factors. Probative value is connected to that basic rule of evidence I earlier referenced; that all relevant and material evidence is admissible. Facts, which make another fact more or less likely, are admitted into evidence as such facts have value or weight. The basic rule is subject to other rules that may render evidence inadmissible, such as bad character evidence. It is also subject to the discretionary exclusion or gatekeeper function of the trial judge to exclude relevant and material evidence where the prejudicial effect of admitting the evidence outweighs its probative value. Probative value is a measurement of the strength or cogency of that evidence. Probative value is not an absolute concept but involves relationships or connections between evidence. In fact, the probative value or weight given to evidence must be viewed in the context (there's that word again) of the whole case. This explains Justice Moldaver's position, at paragraph 56, that the probative value of the protected evidence is a consideration in whether the evidence should be accessed by the State. It is "a" consideration, not a stand-alone *Lessard* factor, as the production order proves is part only of the investigatory stage. It would be premature to place too much weight on probative value before the entire case is yet to unfold.

This leads logically to Justice Moldaver's further caution that probative value should not be dictated by hard evidential rules. Again, contextually and functionally this would be contrary to common sense. A production order or a search warrant is at the infancy of a case. These are investigatory tools albeit tools which may lead to trial. The information to be accessed are facts not evidence. They have not been filtered through the legal rules engaged at trial. They are anticipatory. Therefore, Justice Moldaver declines to import the Wigmore criteria of necessity to the assessment (paras 52 to 58). However, by permitting probative value as an overarching factor, the Court is scaffolding evidential concepts onto the investigatory assessment. Probative value is considered in issuing an investigatory tool, probative value is weighed against prejudicial effect in determining admissibility of evidence at trial, and, finally, probative value is weighed in light of the whole of the evidence to determine whether the State has proven the accused person's guilt beyond a reasonable doubt. As the standard of proof increases, how much that probative value matters also will increase.

So far, the tweaking seems more of an oil change and lube: something to make the engine work better. But now comes the overhaul as Justice Moldaver announces a change in the standard of review (paras 68 to 81). For the Supreme Court, the standard of review is to the reviewing court like provenance is to art museums. No one can really rely on the reviewing court's decision unless there is agreement on the standard by which that original decision is assessed. The standard of reviewing the issuance of an investigatory order was determined almost 30 years ago in *Garofoli*. There, Justice Sopinka clarified the review was not a *de novo* assessment in which the reviewing court simply substituted their opinion. Rather, it is an assessment as seen through the eyes of the issuing judge, looking at the information before the judge at the time but with the benefit of any acceptable amplification on review. This test has parallels with the air of reality test, a threshold test used to determine whether a defence is "in play" and can be considered by the trier of fact. The air of reality test requires a consideration of whether a jury properly instructed and acting reasonably could acquit on the evidence. With a review of an issuing judge's decision, the review court asks whether "there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued" (para 69).

This test is a deferential one, albeit not completely so. Although, the issuing judge is best placed to decide, there is wriggle room for the reviewing court through amplification on review. Additionally, the view through the eyes of the issuing judge is, here it is again, contextualized by the evidence before the reviewing judge. For instance, the reviewing judge can consider an application to cross-examine the affiant of the Information To Obtain as part of its review. If permitted, the evidence may provide further context to the original basis for the authorization. The difficulty with this approach, Justice Moldaver notes, is where the authorizing judge issues process *ex parte* with only the State providing the grounds for such authorization. Warrants and investigatory orders are typically issued in an *ex parte* manner. The real difference in the *Vice* scenario is the inability for the media outlet to argue, at the time of authorization, against issuance on the basis of s. 2(b) of the *Charter*. They can argue this upon review, but then the standard of review is no longer *de novo* but on the basis of *Garofoli*.

Deference is the true standard here. By permitting a more contextual permissive approach, Moldaver opens the door to a moveable feast of standards for review that is appears tailor-made to the situation or facts (para 74 to 81). Moving away from deference may be fairer but it also

creates a non-linear hierarchy within the issuance of such orders. It also replaces deference with the other "d" word – discretion. But with that discretion comes responsibility. I have written previously of the enhancement by the Supreme Court of the Gatekeepers function in the last decade. To me, this modified *Garofoli* is a further indication that the trial judge carries the integrity of the criminal justice system on their shoulders. So much so, that just as Newton has "seen further ... by standing on the shoulders of giants," trial judges raise the public confidence in the criminal justice system to the highest level. They are foundational to our justice system.

All of this tweaking may be meaningless considering the revisions to the *Code* itself now providing for the special case scenario of journalistic sources and specifically those sources arising in a national security context. Yet, the *Vice* decision goes beyond parliamentary intent. Indeed, the minority decision of Justice Abella does just that. Her legal world view is not suggestive of the hard-boiled common-sense of the majority decision. Instead, Justice Abella calls out the majority by emphasizing the invisible undercurrent of the majority decision which resides in the *Charter* and the sanctity of the freedom of the press. If the majority can be stylized as a Raymond Chandler novel, then the minority is Clark Kent in the newsroom. Tweaking won't do here but action. The level of action is not shoulder height but up in the blue sky. The minority decision reminds us of what is at risk when we diminish the freedom of the press to the margins. It also reflects the current conflicts we see in the world today.

For Justice Abella, the time is "ripe" (para 109) for a new world view that provides for a distinct and robust freedom of the press in s. 2(b) of the *Charter*. Logically flowing from such recognition is the need to change the *Lessard* framework to fulfill this new world vision. Not only is this change required due to the enhanced delineation of media s. 2 (b) rights but is also required by the potential violation of the media's s.8 privacy rights. Privacy rights, through previous Supreme Court decisions in *Marakah* and in *Jones*, have also been enhanced and emboldened by the social landscape. They too matter in the application of *Lessard*. The issuing judge still balances under this enhanced (not just tweaked) test but does so in the clear language of the gatekeeper (para 145). For Justice Abella, the vividness of *Charter* rights must be viewed with eyes wide open as the judge may issue the order only when "satisfied that the state's beneficial interest outweighs the harmful impact on the press should a production order be made" (para 145). Notably, Justice Abella agrees with Justice Moldaver on the issue of prior publication, probative value of the evidence (para 149) and on standard of review (157 to 160). Essentials remain the same, but it is the context which changes.

Context appears to rule in the rule of law. Context is important as rules should not be created in a vacuum. In the end, law cannot be wholly theoretical, or it fails to provide guidance. However, contextual analyses beget different world views and serve to underline the differences as opposed to the similarities. True, the *Vice* decision is unanimous in the result but worlds apart in the manner in which the decision-makers arrived there. Maybe this is another new reality we must accept as we jangle and jostle our way through the everchanging urban legal landscape. Maybe we need to embrace context and loosen our grip on the hard edges of legal principles. Or maybe we won't. And that is the beauty of context – it truly is in the eye of the beholder.

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