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Jounalistic Sources and the Searching of Media Outlets in Canada

Wayne K. Gorman

The searching of media outlets by the police in Canada is, as elsewhere, a controversial topic. For instance, a recent decision of the Supreme Court of Canada (*R. v. Vice Media Canada Inc*., 2018 SCC 53), which compelled a reporter to produce material to the police concerning an alleged crime, was described by one Canadian media outlet as a decision that will have a "damaging effect on investigative reporting across the country and weaken Canadian democracy" (see Global News, https://globalnews.ca).

In this column, I intend to review the Supreme Court of Canada's decision in *Vice Media* and recent legislation enacted by Parliament, which now governs the authority of the police to search media outlets for evidence. As will be seen, the concern about democracy being weakened in Canada because of the Supreme Curt's decision is somewhat overstated.

R. V. VICE MEDIA CANADA INC.

In *Vice Media*, the police applied on an *ex parte* basis and obtained a production order requiring Vice Media (a large Canadian media organization) to produce the screen captures of messages exchanged with a source, which the police alleged could afford evidence of terrorism offences.[1]

Vice Media brought an application in the Superior Court of Ontario seeking to have the production order quashed. The reviewing judge dismissed the application, holding that it was open to the authorizing judge to conclude that the media's interest was outweighed by the public interest in obtaining reliable evidence of very serious terrorism offences. An appeal by Vice Media to the Ontario Court of Appeal was dismissed. Vice Media appealed the Supreme Court of Canada.

THE SUPREME COURT OF CANADA

A majority of the Supreme Court held that the production order was properly issued. The Supreme Court noted that the "provision authorizing the type of production order issued in this case, s. 487.014(1), grants peace officers and public officers the ability to bring an "'*ex parte* application' for a production order." The Supreme Court rejected the proportion that media outlets must be given notice of such applications (at paragraph 61), but held that this is "subject to the authorizing judge's overriding discretion to require notice where he or she deems appropriate" (at paragraph 65). The Supreme Court also held that the police must "show some evidentiary basis for why there is 'urgency or other circumstances,'" in order to obtain a production order on an *ex parte* basis (at paragraph 69).

THE TEST FOR ISSUING

The Supreme Court held that when a judge is asked to issue a production order in relation to the media, the authorizing judge "should apply a four-part analysis" (at paragraph 82):

> (1) **Notice.** First, the authorizing judge must consider whether to exercise his or her discretion to require notice to the media. While the statutory *status quo* is an *ex parte* proceeding (see *Criminal Code*, s. 487.014(1)), the authorizing judge has discretion to require notice where he or she deems appropriate (see *National Post*, at para. 83; *CBC* (ONCA), at para. 50). Proceeding *ex parte* may be appropriate in "cases of urgency or other circumstances" (*National Post*, at para. 83). However, where, for example, the authorizing judge considers that he or she may not have all the information necessary to properly engage in the analysis described below, this may be an appropriate circumstance in which to require notice.
>
> (2) **Statutory Preconditions**. Second, all statutory preconditions must be met (*Lessard* factor 1).
>
> (3) **Balancing.** Third, the authorizing judge must balance the state's interest in the investigation and prosecution of crimes and the media's right to privacy in gathering and disseminating the news (*Lessard* factor 3). In performing this balancing exercise, which can be accomplished only if the affidavit supporting the application contains sufficient detail (*Lessard* factor 4), the authorizing judge should consider all of the circumstances (*Lessard* factor 2). These circumstances may include (but are not limited to):
>
> (a) the likelihood and extent of any potential chilling effects;
>
> (b) the scope of the materials sought and whether the order sought is narrowly tailored;

Footnotes

1. Section 487.014 of the *Criminal Code of Canada* authorizes a Canadian judge to issue an order requiring a person or corporation to produce a document in their possession to the police if the judge is satisfied the document "will afford evidence respecting the commission of [an] offence."

(c) the likely probative value of the materials;

(d) 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 (*Lessard* factor 5);

(e) the effect of prior partial publication, now assessed on a case-by-case basis (*Lessard* factor 6); and

(f) 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 (*Lessard* factor 3).

At the end of the day, the decision as to whether to grant the order sought is discretionary (*Lessard* factor 2), and the relative importance of the various factors guiding that discretion will vary from case to case (see *New Brunswick*, at p. 478).

(4) **Conditions**. Fourth, if the authorizing judge decides to exercise his or her discretion to issue the order, he or she 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 (*Lessard* factor 7). The authorizing judge may also see fit to order that the materials be sealed for a period pending review.

REVIEW

The Supreme Court held that when a media outlet seeks to challenge a production order issued on an *ex parte* basis, the reviewing judge may only set aside the order "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." However, "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" (at paragraph 4).

CONCLUSION

The Supreme Court concluded that in this case the production order was properly issued (at paragraph 5):

> …the state's interest in investigating and prosecuting the alleged crimes outweighs the appellants' right to privacy in gathering and disseminating the news. Importantly, 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 and broadcast its extremist views as a sort of spokesperson on its behalf; and the state's interest in investigating and prosecuting the alleged crimes — which include serious terrorism offences — weighs heavily in the balance. Accordingly, I would dismiss the appeal.

At the end of the day, the decision as to whether to grant the order sought is discretionary.

The Supreme Court noted that its decision did "not engage the new *Journalistic Sources Protection Act*, S.C. 2017, c. 22" (at paragraph 6). The *Journalistic Sources Protection Act* was enacted on October 18, 2017.[2]

THE JOURNALISTIC SOURCES PROTECTION ACT

The *Journalistic Sources Protection Act* amended the *Criminal Code of Canada*, R.S.C. 1985, by adding section 488.01. This new provision allows the police to apply for a search warrant in relation to a "journalist's communications or an object, document or data relating to or in the possession of a journalist" (see section 488.01(2)). Interestingly, it requires that the application be made to a Superior Court Judge. This is interesting because almost all criminal cases in Canada are heard in the Provincial Court and almost all search warrant applications must be made to the Provincial Court Judges.[3]

WHO IS A JOURNALIST?

The *Journalistic Sources Protection Act* also amended the *Canada Evidence Act*, R.S.C. 1985, by defining what constitutes

2. In *R. v. Canadian Broadcasting Corporation*, 2018 ONSC 5856 it was noted that "[d]espite its name, the *Act* addresses more than the protection of journalistic sources. It also gives a measure of protection to the right of journalists to privacy in their gathering or dissemination of information" (at paragraph 1). Justice Drambot summarized the essence of the new legislation in the following manner (at paragraphs 2 and 3):

> The *JSPA* accomplishes the first of these objectives by amending the *Canada Evidence Act*, R.S.C. 1985, c.C-5 to protect the confidentiality of journalistic sources. It allows journalists to refuse to disclose information or a document that identifies or is likely to identify a journalistic source unless the information or document cannot be obtained by any other reasonable means and the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source.
>
> The JSPA further advances the first objective and accomplishes the second objective by adding restrictions to the provisions of the *Criminal Code of Canada*, R.S.C. 1985, c.C-46 ("the *Criminal Code*" or "the *Code*") that authorize search warrants, orders to intercept private communications and production orders when they relate to journalists.

3. The amendments to the *Criminal Code* also set out the procedure to be followed when information is claimed to be "privileged" (see section 488.1 of the *Criminal Code of Canada*).

What if the journalistic source search warrant is executed and evidence is seized?

a "journalist." The definition now contained in section 39.1 of the *Canada Evidence Act* defines what constitutes a journalist in very broad terms:

> Journalist means a person whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person.

The *Canada Evidence Act* also defines "journalistic sources" in broad terms:

> Journalistic source means a source that confidentially transmits information to a journalist on the journalist's undertaking not to divulge the identity of the source, whose anonymity is essential to the relationship between the journalist and the source.

SEARCH WARRANTS-SECTION 488.01(2) OF THE CRIMINAL CODE OF CANADA

Section 488.01(2) of the *Criminal Code* indicates that if the police know that an application for a search warrant "relates to a journalist's communications or an object, document or data relating to or in the possession of a journalist, they shall make an application to a judge of a superior court of criminal jurisdiction or to a judge as defined in section 552."[4]

The *Criminal Code of Canada* indicates (see section 488.01(3)) that a judge may only issue a search warrant that "relates to a journalist's communications or an object, document or data relating to or in the possession of a journalist" if:

- the information cannot otherwise be reasonably obtained; and
- the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information.

The new amendments also allow for the judge to whom the search warrant application has been made to order that "a special advocate present observations in the interests of freedom of the press concerning the conditions set out in subsection (3)" (see section 488.01(4)).

In addition, the new provision deals with those situations in which the police become aware that a search has uncovered information that "relates to a journalist's communications or an object, document or data relating to or in the possession of a journalist" (see section 488.01(9)). In such cases, the police must now "as soon as possible, make an *ex parte* application to a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 and, until the judge disposes of the application":

> (a) refrain from examining or reproducing, in whole or in part, any document obtained pursuant to the warrant, authorization or order; and
>
> (b) place any document obtained pursuant to the warrant, authorization or order in a sealed packet and keep it in a place to which the public has no access.

The judge to whom such an application is made can "confirm the warrant, vary the warrant...to protect the confidentiality of journalistic sources and to limit the disruption of journalistic activities"; or "revoke the warrant, authorization or order if the judge is of the opinion that the applicant knew or ought reasonably to have known that the application for the warrant, authorization or order related to a journalist's communications or an object, document or data relating to or in the possession of a journalist" (see section 488.01(9)).

What if the journalistic source search warrant is executed and evidence is seized?

EXECUTION OF THE JOURNALISTIC SEARCH WARRANT

In such a situation the new *Criminal Code* provisions requires that the information seized be "sealed by the court that issued the warrant" (see section 488.02(1)) and that the police refrain from examining the information unless they have given "the journalist and relevant media outlet notice of [their] intention to examine or reproduce the document" (see section 488.02(2)). Upon receiving such a notice, The journalist or relevant media outlet may, within ten days of receiving the notice, "apply to a judge of the court that issued the warrant, authorization or order to issue an order that the document is not to be disclosed to an officer on the grounds that the document identifies or is likely to identity a journalistic source" (see section 488.02(3)).

If such an application is made, a judge may, pursuant to section 488.02(5) of the *Criminal Code*, order that the information seized be disclosed to the police if "satisfied" that "there is no other way by which the information can reasonably be obtained; and the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information." If the judge concludes that the information should not be disclosed to the police, the judge must order that it be returned to the journalist or the media outlet (see section 488.02(7)).

What if the Crown seeks to introduce the information seized at a trial?

OBJECTION TO THE INTRODUCTION OF EVIDENCE

The *Journalistic Sources Protection Act* amended the *Canada Evidence Act* by adding section 39.1 ("Journalistic Sources"). Section 39.1(2) of the *Canada Evidence Act* indicates that "a

4. Section 552 of the *Criminal Code of Canada* defines what constitutes a superior court judge in the various provinces. In some they are referred to as Supreme Court Judges. In others, as judges of the Queen's Bench.

journalist may object to the disclosure of information or a document before a court, person or body with the authority to compel the disclosure of information on the grounds that the information or document identifies or is likely to identify a journalistic source." In addition, judges may raise the issue "on their own initiative" (see section 39.1(4)).

As a result of these amendments to the *Canada Evidence Act*, a journalist has been given standing at a criminal trial to object to the introduction of evidence. This is extraordinary because Canadian criminal law does not generally allow for third-party participation in criminal prosecutions.

Section 39.1(6) of the *Canada Evidence Act* indicates that before "determining the question, the court...must give the parties...a reasonable opportunity to present observations." The *Canada Evidence Act* does not define what the word "observations" means.

THE TEST

Section 39.1(7) of the *Canada Evidence Act* sets out a specific test to be applied in determining when such information may be ordered to be disclosed:

> The court may authorize disclosure of the information if
>
> - the information cannot otherwise be produced; and
> - the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source.

This requires a consideration of (see section 39.1(7)):

- the importance of the information or to central issue in the trial;
- freedom of the press, and
- the impact of disclosure on the journalistic source and the journalist.

APPEALS

Finally, the amendments to the *Canada Evidence Act* allows for an appeal of any decision made concerning information seized in relation to a journalist or a journalistic source (see sections 39.1(10) and (11).

Such an appeal must be filed within ten under days of the decision being appealed (the normal appeal period in Canada is thirty days). The amendments appear to allow for third-party and interlocutory appeals and, interestingly, indicate that such an appeal must be "heard and determined without delay and in a summary way" (see section 39.1(12)). Canadian appeal courts have generally discouraged interlocutory appeals in criminal matters. It will be interesting to see what Canadian Courts of Appeal make of this provision.

JUDICIAL CONSIDERATION

The new legislation has not very received much judicial consideration. However, there are two decisions that can be referred to.

In *Côté c. R.*, 2018 QCCQ 547, the accused were charged with a number of offences involving breach of trust and fraud. Some of the information discovered during a police investigation came into the possession of journalists. They published the information.

The journalists sought to have the subpoenas struck so as to protect their sources.

The accused issued subpoenas to a number of journalists to discover how they came into possession of the information and to support an application for a stay of proceedings. The journalists sought to have the subpoenas struck so as to protect their sources.

The application judge, Perreault, J.C.Q., suggested that the *Journalistic Sources Protection Act*, has changed the test adopted by the Supreme Court of Canada (the *Wigmore* test) for the disclosure of such information (see *R. v. National Post*, 2010 SCC 16) in the following manner (at paragraphs 189 to 193):

> First, s. 39.1(9) has reversed the burden that previously fell on the journalist.
>
> The first two elements of the Wigmore test have been incorporated into the definition of "journalistic source".
>
> The third element of the Wigmore test, requiring that the relationship be sedulously fostered, has been abandoned.
>
> The fourth element of the Wigmore test has been modified significantly. The public interest in getting at the truth gives way to the public interest in the administration of justice. The person seeking disclosure will have to show that the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source.
>
> Parliament has also set out a non-exhaustive list of three factors that the court, person, or body carrying out this balancing exercise must consider:
>
> - the importance of the information or document to a central issue in the proceeding,
> - freedom of the press, and
> - the impact of disclosure on the journalistic source and the journalist.

The application judge concluded that the subpoenas should not be struck (at paragraphs 227 and 228):

> In this case, the information and documents concerned several aspects in addition to those of interest to the applicants. Significant information was being provided to the public that could help them better understand issues of general public interest, such as political

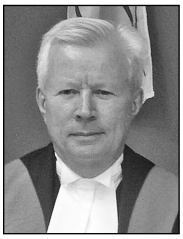
financing and the efforts made to stop the leaks at UPAC concerning the versions provided during parliamentary committees. The news was published by journalists, but the information revealed did not identify the State employees at the source of the leak, with the result that this information is still not in the public domain.

The Court therefore finds that the applicants have not discharged their burden of establishing that the public interest in the administration of justice outweighs the public interest in preserving the journalistic sources of Marie-Maude Denis and Louis Lacroix.

In *R. v. Canadian Broadcasting Corporation*, a section 488.01 search warrant was issued allowing the police to seize from the Canadian Broadcasting Corporation a video- and audio-recorded interview of a complainant in a sexual assault investigation. In issuing the warrant the application judge considered whether the public interest in the investigation and prosecution of the criminal offence outweighed the journalist's right to privacy in gathering and disseminating information. He concluded that in "light of the significant public interest in the investigation and prosecution of sexual offences in general and this one in particular, and the minimal interference that the production order sought will have on journalistic privacy, I readily conclude that the former outweighs the latter" (at paragraph 37).

CONCLUSION

Because of the very recent nature of the *Journalistic Sources Protection Act*, it is difficult to reach any conclusions as to its effect on the Canadian criminal justice system. Because of its broad nature and extraordinary third-party application, its effect may be astounding. At the very least, it sets out a process for the difficult weighing of the search for truth versus the importance of a free press.



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