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Bad Ad(Vice): On the Supreme Court's Approach to Press Freedom, Source Protection and State Interests in *R. v. Vice Media Canada Inc.*

Justin Safayeni and Mannu Chowdhury*

I. INTRODUCTION

Does a journalist have to turn over records of online chats with a non-confidential source to the state, so that those records can be used to prosecute the source? That is the question at the heart of the Supreme Court of Canada's decision in *R. v. Vice Media Canada Inc.*¹ In *Vice*, the source allegedly left Canada to join the Islamic State of Iraq and Syria (ISIS); the journalist contacted him through an encrypted instant messaging application and published articles based on their conversations. After charging the source with terrorism-related offences, the RCMP obtained an *ex parte* production order requiring Vice Media Canada (Vice) and its journalist to hand over the chat records. All nine judges — the five-judge majority, led by Moldaver J., and the four-judge concurrence, led by Abella J. — concluded that this production order should be upheld.

In reaching this conclusion, the Court addressed broader questions about how media and state interests are to be balanced when determining whether to authorize search warrants or production orders targeting material in the hands of journalists or the media (media orders). The majority reaffirmed the basic elements of the governing framework

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¹ [2018] S.C.J. No. 53, 2018 SCC 53 (S.C.C.).

established in *Canadian Broadcasting Corp. v. Lessard*,² with some minor revisions. The majority also changed the process for media parties to challenge *ex parte* media orders, both by suggesting that the media should ordinarily receive notice, and by setting out the conditions under which *de novo* review is available when challenging an order.

The concurring judges endorsed significant conceptual changes in assessing media orders. Rather than adhere to the traditional *Lessard* balancing framework, rooted primarily in the media's privacy interests protected under section 8 of the *Canadian Charter of Rights of Freedoms*,³ Abella J. proposed a new "harmonized" approach that balances both the privacy interests and the unique constitutionalized protections afforded to "freedom of the press and other media" under section 2(b) of the Charter. In the end, however, the concurring judges' approach offers few practical differences from that of the majority.

We argue that the majority decision in *Vice* fails to adequately protect the media's constitutionally protected right of news-gathering. Although the majority improves the press's ability to challenge media orders, its application of those principles raises considerable doubt about the extent of their impact. When it comes to the *Lessard* approach, the majority neglects to recognize the presumptive "chilling effects" of media orders targeting journalist-source communications, giving them short shrift in the balancing analysis. On the other end of the balancing scale, by adopting a highly formalistic approach when characterizing the state's "investigative" interest, the majority tilts the analysis firmly in favour of law enforcement's interests.

We propose a revised balancing framework for media orders. Justice Abella's concurring opinion provides a useful starting point for rethinking the traditional approach to media orders, but falls short in establishing a framework that, at a practical level, affords the necessary degree of protection to the press. The logic of her opinion leads to the conclusion that most, if not all, media orders will result in a section 2(b) breach. Thus, we propose that justifying such orders requires more than just "balancing" interests; it requires a section 1 justification for *rights infringement* under the *Oakes* test.⁴ This closely mirrors the approach taken by McLachlin J. (as she then was) in her dissenting opinion in *Lessard* some 30 years ago.

² [1991] S.C.J. No. 87, [1991] 3 S.C.R. 421 (S.C.C.) [hereinafter "*Lessard*"].

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

⁴ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"].

Our analysis is divided into three sections. First, we summarize the background of *Vice*, the Supreme Court’s judgment, and its continued relevance in light of the *Journalistic Sources Protection Act*.⁵ Next, we examine weaknesses of the majority decision. Finally, we propose a revised framework built upon the constitutional arguments adopted in the concurring opinion.

II. THE *VICE* DECISION

1. Background

In 2014, Ben Makuch, a journalist for *Vice*, began corresponding with a Canadian citizen, Farah Mohamed Shiridon, who had allegedly joined ISIS.⁶ Makuch and Shiridon exchanged instant messages through an application called “Kik” messenger.⁷ Based on that correspondence, Makuch wrote and *Vice* published three stories related to Shiridon.⁸

In February 2015, the RCMP obtained an *ex parte* production order from the Ontario Court of Justice pursuant to section 487.014⁹ of the *Criminal Code*.¹⁰ The authorizing judge directed *Vice* and Makuch to provide the RCMP with all documents relating to their communications with Shiridon.¹¹

Vice determined that the only documents falling within the ambit of the order were screen captures of the Kik messages exchanged between Makuch and Shiridon.¹² Instead of providing these documents, *Vice* sought to quash the order, arguing that the *Lessard* analysis did not require disclosing Makuch’s communications with a source for use against that source.¹³

The reviewing judge rejected *Vice*’s argument, relying on the fact that Shiridon had neither sought, nor been granted, any promise of confidentiality from Makuch, and that most (if not all) of the content of

⁵ S.C. 2017, c. 22 [hereinafter “JSPA”].

⁶ *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 7 (S.C.C.).

⁷ *Id.*

⁸ *Id.*

⁹ R.S.C. 1985 c. C-46 [hereinafter “Code”].

¹⁰ *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 117 (S.C.C.).

¹¹ *Id.*

¹² *Id.*, at para. 118.

¹³ *R. v. Vice Media Canada Inc.*, [2016] O.J. No. 1597, 2016 ONSC 1961, at paras. 4 and 14 (Ont. S.C.J.) [hereinafter “*Vice* ONSC”].

the Kik messenger chats had been published in Makuch's articles.¹⁴ Applying the deferential standard of review that the Supreme Court outlined in *R. v. Garofoli*,¹⁵ the reviewing judge held that the authorizing judge "could have" issued the production order in these circumstances.¹⁶

The Court of Appeal for Ontario upheld the reviewing judge's decision concerning the production order,¹⁷ concluding that the *Garofoli* standard applied to media orders¹⁸ and that the reviewing judge had adequately considered the "chilling effect" of the impugned order on the media.¹⁹

2. Supreme Court Majority Decision

Before the Supreme Court, Vice sought to fundamentally reform the legal framework governing media orders. Established in 1991 in *Lessard*, the common law framework sets out nine factors to consider when deciding whether, and on what terms, a production order or search warrant should be issued against a media entity.

The heart of the *Lessard* framework is the "balancing" factor. It requires authorizing judges to

'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.²⁰

Vice argued that the balancing analysis from *Lessard* required recalibration. Courts must demonstrate greater sensitivity to the "chilling effect"²¹ of media orders on the press's ability to gather and disseminate news, including by presuming those effects occur whenever media orders

¹⁴ *Id.*, at paras. 43-44.

¹⁵ [1990] S.C.J. No. 115, [1990] 2 S.C.R. 1421, at 1452(S.C.C.) [hereinafter "*Garofoli*"]. The Supreme Court held that a reviewing judge examining an *ex parte* order should only assess whether there was "reliable evidence that might reasonably be believed on the basis of which the authorization could have issued": *Vice* ONSC, *id.*, at para. 12.

¹⁶ *Vice* ONSC, *id.*, at para. 47 (emphasis omitted).

¹⁷ *R. v. Vice Media Canada Inc.*, [2017] O.J. No. 1431, 2017 ONCA 231, at para. 6 (Ont. C.A.) [hereinafter "*Vice ONCA*"].

¹⁸ *Id.*, at paras. 21-27.

¹⁹ *Id.*, at paras. 36-38.

²⁰ *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 16.

²¹ *Id.*, at paras. 25-32.

are made. Vice also argued for a more rigorous assessment of law enforcement's interests.²² In this case, since Shiridon's whereabouts were unknown and a trial was unlikely to occur, Vice submitted that the State's interest in obtaining the Kik records for prosecuting Shiridon was negligible.²³

The Court unanimously upheld the production order. When it came to the exact legal framework to be applied, however, the Court was split 5-4. The majority offered modest tweaks to the prevailing *Lessard* framework. By contrast, the concurring judges, led by Abella J., articulated a significant conceptual shift in how these cases are to be viewed, concluding that they directly engage the protection for "freedom of the press and other media" enumerated in section 2(b) of the Charter.

In upholding the *Lessard* approach, the majority reorganized the framework's nine factors into a four-step process that focused on (i) notice to the media parties; (ii) whether the statutory preconditions for an order were satisfied; (iii) balancing; and (iv) the imposition of conditions on the order to minimize interference with the media's news gathering and dissemination functions.²⁴

At the balancing stage, the majority refused to establish a legal presumption that chilling effects flow from media orders.²⁵ The chilling effects considered by the majority included confidential sources refusing to come forward; journalists avoiding recording and preserving their notes; the media concealing the fact that they have information of interest to the police; and the public's perception that the media is not independent and impartial.²⁶ Although attuned to the dangers of such chilling effects and the difficulties associated with proving them,²⁷ the majority held that chilling effects are best analyzed on a case-by-case basis as there might be circumstances where there is little to no chilling effect.²⁸

On the other side of the balancing ledger, the majority held that "the prospect of a trial actually taking place is not a relevant factor" in considering whether to grant the order sought.²⁹ Production orders are issued at the "investigation and evidence-gathering" stage, where the

²² *Id.*, at paras. 46-58.

²³ *Id.*, at para. 52.

²⁴ *Id.*, at para. 82.

²⁵ *Id.*, at paras. 27-29.

²⁶ *Id.*, at para. 26.

²⁷ *Id.*, at para. 27.

²⁸ *Id.*, at paras. 30-31.

²⁹ *Id.*, at para. 51.

goal is “investigating and gathering evidence of potential criminality, not at proving allegations and securing a conviction in court.”³⁰ The prospect of a trial taking place may be “difficult — if not impossible — to gauge at this early stage”.³¹

The majority addressed the *Garofoli* issue together with the related question of whether the media ought to be given notice at first instance before the authorizing judge. Recognizing that the combination of proceeding *ex parte* and then leaving the media to overcome a highly deferential *Garofoli* standard of review “in some cases, works unfairness”,³² the majority held that the media should not be denied notice of proceedings before the authorizing judge “without good reason.”³³ “[B]are assertions” or “broad and unsupported claim[s]” by law enforcement of “urgency” or other concerns will not suffice.³⁴

Where the media does not receive notice, the majority held that there will be a *de novo* review before the reviewing judge “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”.³⁵ The sort of information that would trigger a *de novo* review is context-specific, but the majority offered examples of new information that would rise to this level, including “specific evidence ... concerning chilling effects.”³⁶

Applying the law to the facts at hand, Moldaver J. concluded that the production order ought to be upheld, chiefly because the alleged offence being investigated was serious in character,³⁷ the Kik screen captures were probative evidence that could not be secured from other sources,³⁸ the bulk of the information pertaining to Shirdon had been published,³⁹ and Shirdon was not a confidential source.⁴⁰ While the impugned media order sought “could arguably raise some concerns over potential chilling effects”, those concerns were outweighed in the balancing analysis by the State’s interest in investigating and prosecuting Shirdon for the alleged

³⁰ *Id.*, at para. 47.

³¹ *Id.*, at para. 49.

³² *Id.*, at para. 72.

³³ *Id.*, at paras. 67 and 154.

³⁴ *Id.*, at para. 67.

³⁵ *Id.*, at para. 73.

³⁶ *Id.*, at para. 74.

³⁷ *Id.*, at para. 95.

³⁸ *Id.*, at paras. 96-97.

³⁹ *Id.*, at para. 98.

⁴⁰ *Id.*, at para. 92.

offences.⁴¹ In addition, the majority found that the absence of notice to Vice was justified, and that it was appropriate for the reviewing judge to apply the *Garofoli* standard of review.⁴²

3. Supreme Court Concurring Decision

Writing for herself and three other judges of the Court, Abella J. reached the same result as the majority. But her reasoning reflects a significant conceptual shift in how to approach the constitutional concerns engaged by media orders. Rather than viewing these cases predominantly through the lens of section 8 privacy interests protected under the Charter — as was done in cases like *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*⁴³ and *R. v. National Post*⁴⁴ — the concurring judges concluded that courts must also weigh the discrete constitutionalized protection afforded to “freedom of the press and other media” under section 2(b) of the Charter.

The concurring judges described the Court as long having “flirted” with acknowledging an independent right of press freedom under section 2(b).⁴⁵ For these judges, the time had come to recognize what is “clear” in the words of that provision: the press has a distinct constitutionalized freedom under section 2(b).⁴⁶

The concurring judges proposed a new “harmonized” framework where sections 8 and 2(b) would both be relied upon to assess the reasonableness of issuing a media order.⁴⁷ This harmonized framework requires a “proportionality inquiry showing essentially that the salutary effects of the production order outweigh the deleterious effects”⁴⁸ by considering factors such as “the media’s reasonable expectation of privacy; whether there is a need to target the press ...; whether the evidence is available from any other source, and if so, whether

⁴¹ *Id.*, at paras. 92 and 99.

⁴² *Id.*, at paras. 85-86.

⁴³ [1991] S.C.J. No. 88, [1991] 3 S.C.R. 459, at para. 69 (S.C.C.) [hereinafter “*New Brunswick*”]. The Court, said (at para. 32): “[t]he constitutional protection of freedom of expression afforded by s. 2(b) of the Charter does not, however, import any new or additional requirements for the issuance of search warrants. What it does is provide a backdrop against which the reasonableness of the search may be evaluated.”

⁴⁴ [2010] S.C.J. No. 16, [2010] 1 S.C.R. 477 (S.C.C.) [hereinafter “*National Post*”].

⁴⁵ *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at paras. 109, 121-125, and 127-128 (S.C.C.).

⁴⁶ *Id.*, at paras. 109 and 124-128.

⁴⁷ *Id.*, at paras. 141-142.

⁴⁸ *Id.*, at para. 142.

reasonable steps were taken to obtain it ...; and whether the proposed order is ... tailored”.⁴⁹

Unlike the majority, the concurring judges accepted that “an obvious collateral impact on the press of being required to comply with a production order is a chilling effect not only on the particular press being targeted, but on the press generally”,⁵⁰ adding that this presumptive chilling effect could be amplified or diminished depending on the circumstances.⁵¹

Regarding the issues of notice to the media and *Garofoli* review, Abella J. concluded that notice should be provided to the media except in “rare cases where the Crown can show that there are exigent circumstances or that there is a real risk of destruction of the evidence”.⁵² The “possibility that the press may not ‘cooperate with police’” is insufficient to meet this threshold.⁵³ Where notice has not been provided, the reviewing judge should proceed with a *de novo* balancing analysis in all cases.⁵⁴

In the result, however, the concurring judges reach the same decision as the majority, and for largely the same reasons.⁵⁵

4. The Continued Relevance of *Vice*

After the authorizing judge granted the impugned order but before the Supreme Court heard *Vice*, the JSPA took effect, establishing a new statutory framework for media orders granted under the Code.⁵⁶ The JSPA, and not *Lessard*, now governs media orders sought under the Code.⁵⁷

Nevertheless, *Vice* remains relevant and important for three key reasons.

First, *Vice* will continue to inform whether, and under what conditions, a state entity can seek media orders, pursuant to statutes other than the Code. This would include, for example, provincial regulators and agencies with a statutory power to compel the production of

⁴⁹ *Id.*, at para. 144.

⁵⁰ *Id.*, at para. 147.

⁵¹ *Id.*, at para. 167.

⁵² *Id.*, at para. 154.

⁵³ *Id.*

⁵⁴ *Id.*, at para. 160.

⁵⁵ *Id.*, at paras. 162-170.

⁵⁶ *Journalistic Sources Protection Act*, S.C. 2017, c. 22.

⁵⁷ *Criminal Code*, R.S.C. 1985, c. C-46, ss. 488.01 and 488.02.

documents in the course of investigations, or to obtain search warrants outside the Code's processes.⁵⁸

Second, although the Court in *Vice* emphasized that it was not interpreting or applying the JSPA,⁵⁹ it seems inevitable that the key components of *Vice* will find their way into the JSPA analysis. That is because the JSPA is an attempt to codify the existing common law protections set out in cases like *Lessard*.⁶⁰ Given this legislative purpose, one can reasonably expect that courts will take guidance from *Vice* when interpreting the JSPA.

Finally, recognizing and applying a distinct constitutional protection for "freedom of the press" in section 2(b) may be where a majority of the Court ultimately lands in the years ahead. The majority was careful not to close the door on this approach. Instead, it held that the concurring judges' approach was not "necessary" to dispose of the appeal, and was an issue that neither the parties, nor the courts below, had fully argued or addressed.⁶¹

III. WHAT WENT WRONG: THREE MAJOR SHORTCOMINGS OF *VICE*

Three aspects of the majority's decision in *Vice* undermine the protection of the media's interests in the context of media orders. First, while the Court bolsters notice requirements and allows for *de novo* review in certain media order cases, the way the Court applies these concepts in *Vice* raises doubts about their practical impact. Second, the Court fails to recognize a presumption of chilling effects when media orders of any kind are sought. Third, the Court's formalistic approach to weighing the state's interests tilts the analysis in favour of the state,

⁵⁸ See *Securities Act*, R.S.O. 1990, c. S.5, s. 13; *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, ss. 108 and 112.0.2; *Regulated Health Professions Code*, being Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, ss. 75-77. This is not purely hypothetical: see, e.g., *Mulgrew v. Law Society of British Columbia*, [2016] B.C.J. No. 1468, 2016 BCSC 1279 (B.C.S.C.); *Moyisa v. Alberta (Labour Relations Board)*, [1989] S.C.J. No. 54, [1989] 1 S.C.R. 1572, 60 D.L.R. (4th) 1 (S.C.C.).

⁵⁹ *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at paras. 6 and 161 (S.C.C.).

⁶⁰ "Bill S-231, *Journalistic Sources Protection Act, An Act to amend the Canada Evidence Act and the Criminal Code (protection of journalistic sources)*, 2nd reading, House of Commons Debates, 42-1, No. 175 (May 11, 2017), at 1734 (Hon. Joël Lightbound).

⁶¹ *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at paras. 104-105 (S.C.C.).

including by refusing to consider the likelihood of a trial taking place in determining whether media orders should be issued.

1. Notice and Review Process for Media Orders: Genuine Improvement or Paper Tiger?

The majority decision in *Vice* improves the fairness of the process for challenging media by encouraging authorizing judges to provide the media with notice, and by providing for *de novo* review in certain cases. However, the application of these principles in *Vice* raises significant concerns about the extent to which they will improve the media's ability to effectively respond in these types of cases.

The majority found that the absence of notice in *Vice* was justified because the material before the authorizing judge “identifies a risk that once alerted to the police’s interest in the material, the appellants could move the materials beyond the reach of Canadian courts”⁶² and “states that there was no basis on which to be assured that the appellants [Vice and Makuch] would cooperate with the police”.⁶³ These speculative concerns epitomize the “bare assertions” that the majority explained would be insufficient to justify *ex parte* proceedings. Nevertheless, Moldaver J. goes no further than to acknowledge the explanation “could have been stronger and better supported,” while upholding the authorizing judge’s decision not to require notice.⁶⁴

Equally concerning is the majority’s approach to whether there was information that “could reasonably have affected” the authorizing judge’s decision, so as to attract *de novo* review. Before the reviewing judge, Vice filed affidavit evidence from Makuch addressing how turning over material to the RCMP would harm Makuch’s ability to do his job, including his view that sources like Shirdon would not speak to him if they knew the resulting records would be provided to police.⁶⁵ This sworn testimony was new to the reviewing judge and goes directly to how the impugned order impacts the media’s ability to gather and report news, which is a key consideration under the *Lessard* balancing analysis. Remarkably, however, the majority concluded that the statements could not reasonably have affected the authorizing judge’s decision because

⁶² *Id.*, at para. 85.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*, at para. 86.

they were “too general” in nature.⁶⁶ As such, the majority concluded that the reviewing court was correct to apply the traditional *Garofoli* standard in this case.

The contrast between the sparse evidence the majority requires to justify dispensing with notice, and what the heightened standard required to warrant *de novo* review, is striking in this case. Despite articulating an improved process for challenging media orders, the application of that process in *Vice* reflects a troubling willingness to entertain vague concerns by law enforcement to justify proceeding *ex parte*, while holding the media to an almost impossible standard of specificity for the type of “chilling effect” evidence that will warrant departing from the *Garofoli* standard of review.

2. Chilling Effects of Media Orders: One Step Forward, Two Steps Back

At the heart of the *Vice* appeal was the issue of whether the law should recognize a presumption that media orders create chilling effects, impairing the media’s ability to gather and report the news.

The majority takes commendable steps in articulating nuanced views on the chilling effects of media orders, including acknowledging that measuring such effects with precision can be a “difficult” if not an “impossible” task, and confirming that the harmful consequences of such effects can be “considerable”.⁶⁷ What the majority fails to do, however, is recognize that these considerations demand *presuming* a harmful chill on the media’s ability to gather and report news from the issuance of media orders — or at least certain types of media orders. Rarely, if ever, will the media be able to “prove” that chilling effects flow from a particular media order. But just as the law takes judicial notice of “libel chill” in defamation law,⁶⁸ so too should it presume a degree of chill from media orders like the one sought in *Vice*. By refusing to recognize such a presumption, the majority left the media without the benefit of any presumed harm, in a situation where the nature of that harm may make it impossible to prove with any exactitude, and the harm itself is both insidious and significant.

⁶⁶ *Id.*

⁶⁷ *Id.*, at paras. 27-28 and 31.

⁶⁸ *Grant v. Torstar Corp.*, [2009] S.C.J. No. 61, 2009 SCC 61, at para. 2 (S.C.C.). See M.D. Lepofsky, “Making Sense of the Libel Chill Debate: Do Libel Laws ‘Chill’ the Exercise of Freedom of Expression?” (1994) 4 N.J.C.L. 169.

If the presumption sought by *Vice* — that *any* media order would result in chilling effects — was too broad for the majority,⁶⁹ then the majority still ought to have recognized a presumption of chilling effects in *some* situations where production orders or search warrants target the media. At minimum, a presumption of chilling effects should be recognized where media orders target material that forms part of a journalist’s private work product (recordings, notes, *etc.*) and/or where it would reveal the identity of a journalist’s confidential sources.

The jurisprudential seeds for recognizing a presumption of chilling effects in both of these circumstances were planted years earlier. In La Forest J.’s concurring opinion in *Lessard*, he accepted that chilling effects would flow from orders targeting a “reporter’s work product” such as “personal notes, recordings of interviews and source ‘contact lists’.”⁷⁰ (The majority does not address this issue.) Thus, while Moldaver J. is correct that *Lessard*, and its companion case *New Brunswick*, provide “ample support” for the proposition that chilling effects “should not be presumed” in *all* cases,⁷¹ those cases do not reject the proposition that chilling effects ought to be presumed in *some* cases. To the extent that proposition is addressed at all, it is expressly endorsed by La Forest J. for media orders targeting a journalist’s work product.

The jurisprudential foundation for a presumption of chilling effects is even stronger where the material sought would identify confidential sources. In *National Post*, a majority of the Supreme Court found that the media made a

convincing case that unless the media can offer anonymity in situations where sources would otherwise dry-up, freedom of expression in debate on matters of public interest would be badly compromised. Important stories will be left untold...⁷²

Not only did the majority in *Vice* fail to follow in the footsteps of *National Post*, it took steps in the opposite direction by interpreting *National Post* as a case where the Court saw no reason to recognize presumed chilling effects.⁷³ Technically, this is correct: the Court’s comments in *National Post* are not styled or framed as a legal presumption, as the

⁶⁹ *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, at para. 28 (S.C.C.).

⁷⁰ *Canadian Broadcasting Corp. v. Lessard*, [1991] S.C.J. No. 87, [1991] 3 S.C.R. 421, at 431-32 (S.C.C.).

⁷¹ *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 29 (S.C.C.).

⁷² *R. v. National Post*, [2010] S.C.J. No. 16, [2010] 1 S.C.R. 477, at para. 33 (S.C.C.).

⁷³ *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 29 (S.C.C.).

focus of that case was elsewhere. But *National Post* is premised on the need to offer confidential sources an extra degree of protection because of the recognized harm revealing their identity can detrimentally affect the media's ability to report the news.

One consequence of the majority's failure to adopt a presumption of chilling effects is uncertainty over what type of evidence will be required to establish chilling effects in future cases. Will it be sufficient to show evidence of *circumstances* related to the material sought, such as the identity of sources, material that was not meant for publication, or a journalist's work product? Or does the majority expect media parties to marshal an evidentiary record attempting to *directly link* compelled disclosure of such material to chilling effects? If the former is required, then the majority ought to have clarified that the law will presume chilling effects in some, but not all, circumstances — and outlined what circumstances will attract the presumption. If the latter is what the majority intended, then that imposes what the majority tacitly acknowledges is an unrealistic burden.

3. An Unduly Formalistic View of the State's Investigative Interests

While the majority and concurring judges differ on the issues of notice, *Garofoli* review, and chilling effects, they agree that the prospects for trial should not be taken into account when weighing the state's interests.

This is one of the most troubling aspects of the Court's reasoning. It ignores the reality of why the RCMP is seeking to compel production of the Kik screen captures. These records have minimal value in terms of investigating who committed the alleged offence or the details of that alleged offence. Indeed, the RCMP identified and charged Shirdon before seeking a production order, and the substantive contents of the Kik screen shots had already been published. This is the key distinguishing feature between the nature of the law enforcement's interests in a case like *Vice* as compared to cases like *Lessard* or *New Brunswick* (where police sought videotapes to identify those said to have engaged in criminal activity⁷⁴) or *National Post* (where police wanted the media to

⁷⁴ *Canadian Broadcasting Corp. v. Lessard*, [1991] S.C.J. No. 87, [1991] 3 S.C.R. 421, at 440-41 (S.C.C.).

produce documents to determine if they could identify the sender through forensic testing⁷⁵).

In *Vice*, the true value of the Kik screen shots was, as the reviewing judge put it, that they “provided the best and most reliable evidence of what Shirdon said.”⁷⁶ While that may be true, this kind of evidence-gathering-for-trial purpose is very different from the true investigative purpose being served by the orders at issue in *Lessard*, *New Brunswick* and *National Post*. Once it is recognized that the purpose of the order is to gather and preserve evidence for trial rather than investigate the occurrence or perpetrators of a crime, then the prospect of that trial actually occurring becomes a significant consideration in the *Lessard* balancing analysis.

This is not to say that courts should attempt to limit the odds of a trial in every case where police seek a media order. However, where the prospect of a trial is highly unlikely — for example, because the suspect is believed to be dead⁷⁷ — then courts ought to find that an early attempt to force the media to turn over records is unjustified. In those circumstances, an order requiring the media to *preserve* the records, and providing law enforcement with an opportunity to apply for a media order closer to trial, would strike a more appropriate balance between these competing interests. Having declared the prospect of a trial occurring “not relevant” to the analysis, the Court has all but eliminated this pragmatic solution from the toolkit of authorizing and reviewing courts.

IV. BACK TO THE FUTURE: A NEW FRAMEWORK FOR MEDIA ORDERS

The majority’s revised *Lessard* approach to assessing media orders affords inadequate protections to the press, both procedurally and substantively.

Our point of departure for a new proposed framework is Abella J.’s recognition that media orders engage the distinct and independent

⁷⁵ *R. v. National Post*, [2010] S.C.J. No. 16, [2010] 1 S.C.R. 477, at para. 21 (S.C.C.).

⁷⁶ *R. v. Vice Media Canada Inc.*, [2017] O.J. No. 1431, 137 O.R. (3d) 263, at para. 33 (Ont. C.A.).

⁷⁷ While this information was not before the Court, the U.S. Central Command confirmed that Shirdon was likely killed in 2015. See Stewart Bell and Andrew Russell, “Canadian jihadi Farah Mohamed Shirdon killed in Iraq airstrike in 2015: U.S. military” (2017) *Global News*, online: <<https://globalnews.ca/news/3722685/canadian-jihadi-farah-mohamed-shirdon-killed-in-iraq-airstrike-in-2015-u-s-military>>.

constitutional protection afforded to “freedom of the press” under section 2(b) of the Charter. As others have noted, this recognition is long overdue.⁷⁸

Yet when it comes to translating this bold conceptual shift into a practical framework that offers robust protection for freedom of the press, the concurring opinion falls short. Justice Abella’s proposed “proportionality inquiry” — together with the list of factors she articulates as relevant considerations in that inquiry — are virtually indistinguishable from the existing *Lessard* balancing factor.⁷⁹ Considered in this light, it is less surprising that the concurring judges reach the same result as the majority.

Taking the Charter’s protection for press freedom seriously requires more than a stand-alone balancing or “proportionality” inquiry when determining whether media orders should be issued. Instead, in most cases, such orders will trigger a section 2(b) violation, and thus they should only be granted if the applicant can meet the *Oakes* test under section 1 of the Charter — an approach similar to the one taken nearly 30 years ago by McLachlin J. in her dissenting opinion in *Lessard*.

1. Most Media Orders Violate Section 2(b)

Before examining the *Oakes* test, the threshold question to be asked is whether media orders constitute a section 2(b) violation. While Abella J. does not expressly reach this conclusion, the logical consequence of her analysis and the approach taken in existing freedom of expression jurisprudence indicate that media orders will normally violate section 2(b).

In determining whether media orders violate section 2(b)’s press freedom protection, guidance can be taken from freedom of expression cases where courts ask whether the activity in question “falls within the sphere of conduct protected by freedom of expression” and, if so, whether the impugned state conduct restricts expression in its purpose or effect.⁸⁰

⁷⁸ Jamie Cameron, “Section 2(b)’s Other Fundamental Freedom: The Press Guarantee, 1982-2012” (2013) Comparative Research in Law & Political Economy Research Paper, at 3-4 and 20-21; Benjamin Oliphant, “Freedom of the Press as a Discrete Constitutional Guarantee” (2013) 59:2 McGill L.J. 283-336, at 286-87.

⁷⁹ *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at paras. 142-144 (S.C.C.).

⁸⁰ *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 967 and 971 (S.C.C.) [hereinafter “*Irwin Toy*”]; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 2, 2011 SCC 2, at para. 33 (S.C.C.).

The ambit of protected press freedom activity under section 2(b) will not be as wide as under the freedom of expression clause (which protects virtually all expressive activity, short of violence or threats of violence⁸¹). Still, it ought to be generously construed given its underlying purpose, which Abella J. describes as the dissemination of news to the public or “the public’s right to know”.⁸² The concurring justices stress that section 2(b)’s press protection would extend to a broad swath of material including La Forest J.’s conception of journalistic “work product”,⁸³ communications with confidential sources, material that includes “off the record” or “not for attribution” commentary, and a journalist’s documentation of their investigative work.⁸⁴ The concurring judges conclude that “the more the activity accords with standards of professional journalistic ethics,” the more amenable it will be for inclusion under section 2(b)’s sphere of press protection.⁸⁵ This suggests that records of discussions between journalists and their non-confidential sources would also fall under the ambit of press protection, given that journalism standards stress a preference for having “on the record” discussion with named sources, as opposed to relying on confidential ones.⁸⁶

Where the impugned conduct restricts section 2(b) rights, then an infringement is made out provided the activity promotes one of the values underlying section 2(b).⁸⁷ Most news-gathering activities will promote the purpose of the press protection guarantee. An infringement is made out where there is interference with, or restriction of, the section 2(b) right.⁸⁸ This would include the kind of chilling effects that Abella J. recognizes as presumptively present where the media are innocent third parties and compelled to adhere to media orders. By creating

⁸¹ *Irwin Toy, id.*, at 969-70.

⁸² *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 146 (S.C.C.).

⁸³ *Id.*, at para. 131.

⁸⁴ *Id.*, at para. 132.

⁸⁵ *Id.*, at para. 130.

⁸⁶ The CBC states that “[w]herever possible, our stories use first-hand, identifiable sources — participants in an event or authenticated documents.” See CBC’s “Journalistic Standard and Practice”, online: <<https://cbc.radio-canada.ca/en/vision/governance/journalistic-standards-and-practices>>. One of Canadian Press’s editorial values provide as follows: “[t]he public interest is best served when someone with facts or opinions to make public is identified by the press by name and qualifications.” See online: <<https://www.thecanadianpress.com/about/our-team-values/our-news-principles>>.

⁸⁷ *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] S.C.J. No. 63, 2005 SCC 62, at para. 83 (S.C.C.).

⁸⁸ *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 2, [2011] 1 S.C.R. 19, 2011 SCC 2 at para. 46 (S.C.C.).

such chilling effects, typical media orders will restrict the press's ability to gather and report the news and result in a section 2(b) violation.

There is some tension between this conclusion and the holding in *National Post* that protecting the identity of confidential sources does not fall within the ambit of section 2(b).⁸⁹ However, the constitutional argument in *National Post* was framed as a “freedom of expression” issue, and not under section 2(b)’s “freedom of the press” clause. This led the majority to warn that extending a constitutional immunity to “‘everyone’ ... who chooses to exercise his or her freedom of expression on matters of public interest whether by blogging, tweeting, standing on a street corner and shouting the ‘news’ at passing pedestrians ...” and “‘whichever sources they deem worthy of a promise of confidentiality’” would “blow a giant hole in law enforcement”.⁹⁰ In our section 2(b) press freedom analysis, these concerns are mitigated: although courts will have to grapple with the precise contours of press protection, it is much more tightly confined than the general right to free expression found in section 2(b).

In any event, the Court’s willingness to entertain section 2(b) protections for confidential sources and other journalistic material has evolved since *National Post*. For the concurring justices in *Vice*, a more likely source of inspiration was McLachlin J.’s dissent in *Lessard*, which articulates the myriad of ways that media orders interfere with the ability of the media to perform their news-gathering function, and contemplates narrow circumstances where state restrictions on the press would *not* violate section 2(b) (*e.g.*, documents relating to an alleged offence by the press itself).⁹¹

2. Applying the *Oakes* Test to Media Orders

Once a section 2(b) press protection violation has been established, the focus shifts to the *Oakes* test under section 1.⁹² Unlike the balancing or free-standing proportionality inquiry adopted by the majority and the concurring judges in *Vice* — and the original balancing framework established in *Lessard* — under *Oakes* it is the state that bears the onus

⁸⁹ *R. v. National Post*, [2010] S.C.J. No. 16, [2010] 1 S.C.R. 477, at paras. 37-41 (S.C.C.).

⁹⁰ *Id.*, at para. 40.

⁹¹ *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 146 (S.C.C.).

⁹² Richard Moon, “Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights” (2002) 40 *Osgoode Hall L.J.* 337-368, at 339.

of establishing, on proper evidence, that the interference with the section 2(b) right is justified.

At the first stage of *Oakes*, the state must demonstrate the impugned measure serves a “pressing and substantial objective”.⁹³ This is a relatively low bar. As McLachlin J. noted in *Lessard*, “... [i]t goes without saying that the pressing objective required by *Oakes* — the effective prosecution and prevention of crime — will normally be established where the police seek evidence relevant to the commission of an offence.”⁹⁴ Although it will rarely be dispositive, requiring the state to demonstrate a pressing and substantial objective is a necessary safeguard for press protection, particularly with media orders sought outside the Code context.

The second part of *Oakes* comprises of three questions:⁹⁵

- (i) Is there a rational connection between the right restriction and the government objective at stake?
- (ii) Does the limit infringe the right or freedom no more than is reasonably necessary to accomplish the objective?
- (iii) Do the salutary effects of the restriction outweigh its deleterious effects, especially “in terms of the greater public good”?⁹⁶

As McLachlin J. observed in *Lessard*, the state will fail to meet the rational connection requirement for a media order if there are reasonable alternative sources for the information being sought, because in that case “the necessary link between the infringement and the state goal justifying it is absent.”⁹⁷ This approach affords a clearer and more robust level of press protection than the *Lessard* balancing analysis or Abella J.’s proportionality inquiry. Under both of those approaches, the existence of alternative sources of information is a factor to be taken into account, but not necessarily an impediment to obtaining the order sought.⁹⁸

⁹³ *R. v. Morrison*, [2019] S.C.J. No. 15, 2019 SCC 15, at para. 63 (S.C.C.).

⁹⁴ *Canadian Broadcasting Corp. v. Lessard*, [1991] S.C.J. No. 87, [1991] 3 S.C.R. 421, at 455 (S.C.C.).

⁹⁵ *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1, at para. 38 (S.C.C.).

⁹⁶ *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5, at para. 122 (S.C.C.).

⁹⁷ *Canadian Broadcasting Corp. v. Lessard*, [1991] S.C.J. No. 87, [1991] 3 S.C.R. 421, at 455 (S.C.C.).

⁹⁸ *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at paras. 82 and 144 (S.C.C.).

The state will also fail to meet the rational connection requirement if it cannot establish a “causal connection ... on the basis of reason or logic” between the impugned measure and the stated objective.⁹⁹ Thus, where a media order is being sought for the purpose of assisting in a prosecution, the rational connection inquiry calls for some consideration of whether the trial of the alleged offender will take place. If the individual is not going to stand trial, then the media order cannot be rationally connected to the purpose of assisting to prosecute that individual.

The minimal impairment stage focuses on whether “the measure at issue impairs the right as little as reasonably possible in furthering the legislative objective”.¹⁰⁰ Under this prong, courts will focus on the scope of the media order sought (to ensure it does not go further than what is required) and the terms upon which it may be granted (to ensure it does not disrupt or interfere with the media any more than is required).¹⁰¹

Even if a trial is likely to occur, where the material sought is for use as evidence at trial rather than to investigate the alleged offences, a premature request for records from the media could fail at this stage of the analysis. The objective of gathering the best evidence for trial could be served by preserving the records and bringing the application at a later date, recognizing that such an application may be unnecessary if the trial does not occur.

The last phase of the *Oakes* test is where courts must balance the salutary and deleterious effects of the order being sought. This requires examining and calibrating the extent of the chilling effects against the state’s interests. Given the difficulties of adducing reliable, direct and specific evidence about chilling effects, the deleterious effects of the order being sought should be determined by reference to the nature of, and circumstances surrounding, the material itself. Here, the factors outlined by the concurring judges in *Vice* are relevant, including: whether the material would identify confidential sources; whether it includes information not meant for publication; and whether it includes a journalist’s work product. The overarching question is the extent to which the material can be expected to interfere with the media’s ability to perform its protected function of gathering news for the public.

⁹⁹ *Frank v. Canada (Attorney General)*, [2019] S.C.J. No. 1, 2019 SCC 1, at para. 59 (S.C.C.).

¹⁰⁰ *Id.*, at para. 66.

¹⁰¹ *Canadian Broadcasting Corp. v. Lessard*, [1991] S.C.J. No. 87, [1991] 3 S.C.R. 421 at 455-57 (S.C.C.).

Beyond maintaining the justification onus on the state and imposing a more rigorous framework grounded in section 2(b)'s protection for freedom of the press, the *Oakes* approach also dispenses with the frailties in the *Vice* majority's approach to notice and the standard of review. There can be no real question that the media is entitled to *de novo* review (if not notice at first instance) where its constitutional rights are engaged by a media order.

Applying this new framework in *Vice* ought to have led to a different result.

Given the true purpose for which the Kik records were sought and the remote prospects of Shirdon standing trial at all, the media order ought to have failed at the rational connection or minimal impairment stages.

In the final balancing analysis, a more nuanced examination on the extent of the presumed chilling effects on the particular facts in *Vice* — driven by the nature of and circumstances surrounding the Kik screen shots — also ought to have tilted in favour of denying the order sought. The Kik records are 21st century equivalent of a journalist's "interview recordings", which form a key part of a journalist's work product. Perhaps even more fundamentally, to paraphrase U.S. Supreme Court Justice Potter Stewart's observation on the impact of disclosing the identity of confidential sources, it "requires no blind leap of faith to understand"¹⁰² that if the media is forced to turn over its communications with sources *for use against those sources* — regardless of whether their identities or communications have been published — then that will make it harder for sources to come forward in the future. At the very least, it would motivate sources to offer information on a strictly confidential or "off the record" basis. Neither result promotes the objective of a free and transparent press.

V. CONCLUSION

Vice was a missed opportunity to modify the *Lessard* balancing framework in ways that afford stronger protection to the media's interests. A juridical overhaul was needed, not a tinker. The majority's refusal to recognize the presumed chilling effects of media orders in *any* circumstance, together with its formalistic approach to evaluating the "investigative" interests of law enforcement, stacks the balancing deck against the press in these types of cases. These problems are further

¹⁰² *Zurcher v. Stanford Daily*, 436 US 547, at 572 (1978).

exacerbated by the fact that, in practice, the majority decision risks setting a relatively low bar for when media orders may be obtained *ex parte*, and when *Garofoli* review will continue to apply.

The silver lining of *Vice* lies in Abella J.'s concurring opinion. It may mark the beginning of a longer jurisprudential arc that ushers in a new way of conceptualizing and protecting press freedom under the Charter — as a distinct species of section 2(b) rights enjoyed by “the press and other media”, rather than through the lens of freedom of expression or section 8 of the Charter.

The consequences of this shift for media orders are profound. They demand more than the modified *Lessard* balancing framework endorsed by the majority, or the virtually identical proportionality inquiry proposed by the concurring judges. Recognizing that most media orders will have chilling effects that infringe of section 2(b)'s freedom of press protection, the requesting party ought to be required to justify such orders under the *Oakes* test. In this way, the concurring opinion gives renewed life to the possibility of courts adopting the section 1-based approach to justifying media orders adopted by McLachlin J. nearly 30 years ago in her dissenting opinion in *Lessard*.