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Vice, Universe, and Everything

Lisa Silver*

I. Introduction

R. v. Vice Media Canada Inc.,[1] is a notable decision despite the fact that the substantive issue, production orders in the journalistic source context, is now governed by a new statutory regime.[2] *Vice Media* bristles with legal energy and it is for this reason the decision is worth exploring. As readers of the law, through *Vice Media*, we become witnesses to the edgy unpredictable side of criminal law as the vagaries of street-level life intersects with the rule of law. This jumble of real-time issues is constrained in *Vice Media*, through an application of principled and balanced ideals. Yet, the overarching principle is surprisingly fluid and supple. Deep within the *Vice Media* decision lies the embedded mantra of the Supreme Court of Canada that context is everything. It is this conceptual perspective, more than any other legal principle, which propels legal decision-making beyond the confines of the courtroom. It is at that very vanishing point, the point of the unseen and unknown, where the case really shines.

In this article, we will explore the *Vice Media* universe and see that context, is indeed, everything, which in turn provides the purveyor of the law with so much more. The "more" will also be revealed in what issues *Vice Media* does not directly engage. *Vice Media*, although a Charter decision, does not engage in a traditional detailed Charter analysis. Rather, the Charter is akin to the devil in the details as the hidden force behind the contextual reasoning making the *Vice Media* decision complex and layered.

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* Assistant Professor, University of Calgary, Faculty of Law. This article is based on a blog case commentary posted on both the University of Calgary website ABlawg.ca and on my Ideablawg website entitled, "The *Vice* Squad: A Case Commentary on *R. v. Vice Media Inc*.".

[1] [2018] S.C.J. No. 53, 2018 SCC 53 (S.C.C.) [hereinafter "*Vice Media*"].

[2] *Id.*, at para. 6. See *Journalistic Sources Protection Act*, S.C. 2017, c. 22 [hereinafter "JSPA"]. See also, *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 39.1; *Criminal Code of Canada*, R.S.C. 1985, c. C-46, ss. 488.01, 488.02 [hereinafter "Code"].

The factual matrix of the case seems rather commonplace in today's standards where we are constantly expecting the unexpected. In fact, journalists regularly gather sensitive and volatile information from hidden human sources.[3] This is the stuff of smart investigative reporting and it offers insightful but sometimes explosive reveals. Such was the case in *Vice Media*. To be sure, 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, presents stories with the urban flair expected of an omnipresent media team. In this case, the journalistic prize came in the form of a source who was a suspected terrorist. They exchanged, as all sharp social media users do, a series of informative text messages. But these were messages with a difference. The journalist, by communicating with a suspected criminal, entered the rule-based confines of criminal law. More than merely conversational, these messages became potential evidence and as evidence, attracted legal meaning and weight. 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 was instantly 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 section 487.014 of the *Criminal Code*[4] 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. In *Vice Media*, 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

[3] *Vice Media*, *id.*, at para. 127, Abella J., concurring.

[4] *Criminal Code of Canada*, R.S.C. 1985, c. C-46, ss. 488.01, 488.02.

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 *Vice Media* legal landscape as two opinions on the issue emerge. The majority, hanging onto the creation of law by the slim agreement of five, is written by Moldaver J., the criminal law heavyweight on the Court. Justice Moldaver is an experienced criminal lawyer and approaches the decision with his usual hardboiled common sense. The concurring minority decision of four, is written by Abella J. with her innate sense of the human condition. The setting could not be better for a decision on the realities of the urban scene.

I have already identified the thematic presence of context in this decision. Contextualization as the foundational garment protecting the analytical layers of the case gives the decision cohesiveness and weight. However, over and above this foundation are three intersecting issues influencing the outcome of both the majority and minority positions. The first, involves the continuing utility of the *Lessard*[5] framework and the applicable standard of review. The second, engages Charter values as bundled into section 2(b)[6] as the unique signature of media societal purpose. The third and final matter, which creates the tension-filled atmosphere of this decision, is the overlay of journalistic confidential source privilege as it runs headlong into the public interest in maintaining a safe community.

If the contextual approach acts as a unifying concept for this decision, then the manifestation of Charter rights, not merely Charter values, provides the bright line between the majority and minority decisions. In Part V of the article, it is the intensely different perspectives between the majority and the minority on the value of the Charter in the contextual approach to the matter which matters. The final issue, then, is whether the Charter, as reflected in the purpose of media, is merely the backdrop to the *Lessard* application as found by the majority or, whether, as suggested by the concurring decision, Charter rights are the primary mover of what is at stake in *Vice Media*. The focus in this article will be the opening prospect of Abella J.'s position that time, social context, and

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[5] *Canadian Broadcasting Corp. (CBC) v. Lessard*, [1991] S.C.J. No. 87, [1991] 3 S.C.R. 421, 67 C.C.C. (3d) 517 (S.C.C.) [hereinafter "*Lessard*"].

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

need, demand the Court explicitly recognize the value of media Charter rights through a re-imagining of the *Lessard* test.[7]

It is the confluence of these issues, which create, in *Vice Media*, a game-changing case despite the façade of mootness resulting from the new legislation. *Vice Media* is a worthy decision to contemplate not only for its pure legalistic value but also as an exemplar of the Supreme Court of Canada's modern approach to criminal law. A modern contextual approach, which, when applied, provides multiple platforms for differing visions of how the Charter expresses itself, either as a backdrop to more muscular criminal law and evidentiary issues, or as the ultimate driver of the fundamental values of Canadian society.

II. The *Lessard* Framework

Justice Moldaver opens with the obvious in paragraph 1 of the decision. There is an analytical framework, found in the 1991 decision in *Canadian Broadcasting Corp. v. Lessard*,[8] 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."[9] 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, British Columbia. 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. 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

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7 *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at paras. 122-123 (S.C.C.).

8 *Canadian Broadcasting Corp. (CBC) v. Lessard*, [1991] S.C.J. No. 87, [1991] 3 S.C.R. 421, 67 CCC (3d) 517 (S.C.C.).

9 *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at paras. 1, 127 (S.C.C.).

here is where a tweak looks more like a redo, the majority offers a modified standard of review (SOR). The spectre of SOR runs deep in the Supreme Court of Canada decision-making psyche. Indeed, Twitter chatter has been incessant on the interminable SOR debacle residing in administrative law[10] as exemplified and amplified in the *Dunsmuir*[11] decision. The SOR-like debate rearing its head here, of all places, gives *Vice Media* a further sharpness of purpose. By engaging and thereby changing the standard of review applied to the issuance of media production in the *ex parte* context, the majority, under the steady helm of Moldaver J., is modifying an icon of warrant oversight and review, namely, the *Garofoli*[12] application.

First, however, Moldaver J., loosens the *Lessard* hold by making allowances for both the realities of the business of media and the exercise of judicial discretion. Both of these concessions are modern in aspect and approach. The first concession, to the realities of media operation, recognizes that in the modern age, media bits travel as fast as bytes. As quickly as the journalist in *Vice Media* gathered the information from the source, that same information can be pushed out into the media universe. To build into the *Lessard* inquiry the advent of the modern age is to create a more flexible response to media life. Thus, partial publication does not rule the *Lessard* rule but softens it into the *Vice Media* factors. However, to ensure the sharpness of what makes a rule of law, Moldaver J. places this partial publication factor into the application judge's hands as part of the overall "delicate"[13] balancing act. The primary position of the judge who sees and hears the application first hand is preserved. This muscling up or enhancement of the gatekeeper role of the trial judge is a recurrent theme in the Supreme Court. *Vice Media* is a continuation of this shoring up of the trial judge as the front line of justice.

The Supreme Court penchant for characterizing the role of the front-line judge as the protector of the integrity of the justice system through the gatekeeper function is realized, without a scintilla of doubt, through the majority's injection into the *Lessard* balancing a consideration of the

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[10] See, *e.g.*, Martin Olszynski, "For the admin law types, this post follows up on some thinking re: standard of review from a couple weeks back.", (December 13, 2017, at 14:05), online: *Twitter*, <https://twitter.com/molszyns/status/941066540417409027>.

[11] *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9 (S.C.C.). See also, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2018] S.C.J. No. 31, 2018 SCC 31 (S.C.C.).

[12] *R. v. Garofoli*, [1990] S.C.J. No. 115, [1990] 2 S.C.R. 1421, 60 C.C.C. (3d) 161 (S.C.C.) [hereinafter "*Garofoli*"].

[13] *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 13 (S.C.C.).

probative value of the information. This element involves the "informativeness"[14] of the information obtained by the informer. To consider and measure the cogency or strength of the information at issue is completely consistent with Moldaver J.'s view of the special place probative value has in a judge's discretionary decision-making. In previous re-fashioning of other tests, Moldaver J. has turned to the probative value of the evidence such as in the enhanced confession/abuse of process test created in *Hart*.[15]

Probative value is not, however, 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 of the whole case. This explains why Moldaver J. positions the probative value of the protected evidence as a consideration in determining whether the evidence should be accessed by the State.[16] Probative value is "a" consideration, not a stand-alone *Lessard* factor, as the production order is only part of the investigatory stage. It would be premature to place too much weight on probative value at such an anticipatory stage, before the entire case is yet to unfold.

Yet, considering the transient concept of probative value in light of the tentativeness of the information at issue in the production phase, any reliance on the informativeness of the information to be accessed is speculative at best. This is where the probative value must then be assessed in turn on its reliability. This injection of a threshold reliability factor draws from another contentious Supreme Court decision in *R. v. Bradshaw*.[17] In *Bradshaw*, the evidential version of the Clash of the Titans, the Court wrestled with the interplay of traditional and modern approaches to evidence with the majority leaning on threshold reliability as the mechanism to pin down the swirling principles in play. Reliability is also the banner of probative value and is used in *Vice Media* to similar effect as in *Bradshaw* to give the gatekeeper something concrete upon which to hang the issuance of the warrant.

This leads logically to Moldaver J.'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

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[14] David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed. (Toronto: Irwin Law Inc., 2015), at 36.

[15] *R. v. Hart*, [2014] S.C.J. No. 52, 2014 SCC 52 (S.C.C.).

[16] *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 56 (S.C.C.).

[17] [2017] S.C.J. No. 35, 2017 SCC 35 (S.C.C.) [hereinafter "*Bradshaw*"].

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, as earlier stated, anticipatory. Therefore, Moldaver J. declines to import reliability's partner in crime, Wigmore's necessity requirement, into the assessment.[18]

Still, 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 will also increase.

This then is perhaps the wild-card addition to the *Lessard* factors turning the *Lessard* balancing into something more familiar — the general exclusionary discretion permitting the judge as gatekeeper to exclude evidence on the basis that the prejudicial effect of admitting the evidence outweighs the probative value of excluding. In this warrant issuance matrix, the discretion becomes, not the exclusion of otherwise relevant and material evidence *per se* but becomes the issuance or non-issuance of a warrant which will potentially gather relevant and material evidence for trial. The balancing of "the state's interest in the investigation and prosecution of crime, and the media's right to privacy in gathering and disseminating the news"[19] is not done in a vacuum but in the context of the probative value of the information, which may enhance the state's interests or not.

Finally, the Supreme Court takes the newly improved *Lessard* balancing and finds the SOR to match. The ubiquitous *Garofoli* SOR runs like a refrain through search warrant review. It has held through the test of time and preserves the hierarchical judicial review process by rigidly maintaining the boundaries between in-time originating decision-making and the subsequent review-generated decisions duly imbued with hindsight. *Garofoli* focuses the reviewing judge on the range of reasonable outcomes or the end-game. Unlike the issuing court, the reviewing court does not have an eye to the unfolding of the evidence to which the legal principles are then applied. So why the modification to

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[18] *Id.*, paras. 52-58.

[19] *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 1 (S.C.C.).

the time-honoured standard? The answer can be found in that elusive media factor as discussed under Part III of this *Vice Media* discourse. As a hint to what is to come, the modification of the SOR is the concession the majority makes for Vice Media's section 2(b) Charter rights.

Before leaving how the Court manipulated the *Lessard* framework, there is a side-bar comment to make on this decision. It is the "headnote factor". Consistent with the way in which the Supreme Court of Canada cases are structured, the *Vice Media* decision creates under the authoring justice a list of cases found in their decision. Often, the cases are grouped in accordance with how the case is used in the decision. For instance, cases may be "applied" or merely "considered".[20] They can also be "distinguished" or simply "referred to".[21] Sometimes there are no labels attached to the line of cases mentioned.[22] In *Vice Media*, Moldaver J. "modified" *Lessard*. This label stands in stark relief to other Supreme Court decisions providing alternate views to long-held case principles. In *Bedford*,[23] for example, the *Reference*[24] decision is "referred to".[25] Even in *R. v. Canadian Broadcasting Corp.*,[26] where the Court clearly modifies the *RJR-MacDonald* test for interlocutory injunction, the Court "applied"[27] the *RJR-MacDonald*[28] decision. Similarly, in the re-imagining of unreasonable delay, *R. v. Jordan*[29] "overruled"[30] *R. v. Morin*.[31] It is difficult not to read too much into this innocuous labelling, but it seems the Court is signalling to the reader that *Lessard* is not the gold standard decision it once was and now there is the *Vice Media* framework in its place. Interestingly, *Garofoli* is merely "applied"[32] in *Vice Media* with no hint it was modified to capture the media factor.

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[20] See, *e.g.*, *R. v. Bird*, [2019] S.C.J. No. 7, 2019 SCC 7 (S.C.C.) (cases cited by Moldaver J.).

[21] *Id*.

[22] See, *e.g.*, *R. v. Calnen*, [2019] S.C.J. No. 6, 2019 SCC 6 (S.C.C.) (cases cited by Martin J.).

[23] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.) [hereinafter "*Bedford*"].

[24] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.).

[25] *R. v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.) (cases cited).

[26] *R. v. Canadian Broadcasting Corp.*, [2018] S.C.J. No. 5, 2018 SCC 5 (S.C.C.).

[27] *Id.* (case cited).

[28] *RJR–MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.).

[29] [2016] S.C.J. No. 27, 2016 SCC 27 (S.C.C.).

[30] *Id.* (case cited by Moldaver, Karakatsanis and Brown JJ.).

[31] [1992] S.C.J. No. 25, [1992] 1 S.C.R. 771, 71 C.C.C. (3d) 1 (S.C.C.).

[32] *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53 (case cited by Moldaver J.).

III. THE MEDIA FACTOR

Before we take on this part of the decision, we need a feel for the atmosphere. We are under the aegis of section 2(b) of the Charter and in the heightened environs of "the special status accorded to the media."[33] Freedom of expression, in the form of media expression quoting the dissent of McLachlin J., as she then was, in *Lessard*, is more than the pure "pursuit of truth."[34] Rather, it reflects the "values" of truth.[35] Freedom of the press is an expression of, and an act of, community. This dimension to media Charter rights particularly resonates in the Trump infused universe of parallel facts and fake news. It also resonates with Abella J.'s perspective as articulated in her concurring judgment. In her view, "a vigorous, rigorous, and independent press holds people and institutions to account, uncovers the truth, and informs the public."[36]

According to Abella J., 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."[37] But, spoiler alert, the *gravitas* of this sentiment differs as between the majority and the minority in *Vice Media*. It is this difference in contextual perspective, which I suggest drives the decisions in this case more than anything else. In any event, *Lessard*, impresses section 2(b) with the stamp of vitality promised by section 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-recorded, and the police needed the recording as evidence for a criminal prosecution. In contrast, the facts in *Vice Media*, touch upon democracy's innermost fear of terrorist activity.

Justice Moldaver's majority analysis appears to observe this atmosphere through the encased glass of the production order. Channelling Cory J. in *Lessard*'s companion case, *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*,[38] Moldaver J. sees the section 2(b) Charter rights as wallpaper or "backdrop", giving contextual meaning to the reasonableness of the search as authorized by

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33 *Id.*, at para. 14.

34 *Canadian Broadcasting Corp. (CBC) v. Lessard*, [1991] S.C.J. No. 87, [1991] 3 S.C.R 421, at 451, 67 C.C.C. (3d) 517 (S.C.C.).

35 *Id.*

36 *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 125 (S.C.C.).

37 *Id.*

38 [1991] S.C.J. No. 88, [1991] 3 S.C.R. 459, 85 D.L.R. (4th) 57 (S.C.C.) [hereinafter "*New Brunswick*"].

the warrants. This perspective turns Charter dialogue on its head by transforming the robust Charter rights that figure prominently in media expression under section 2(b) into the subtler cousin as described by Charter values. In doing so, the majority is not so much concerned with a well-defined section 2(b) Charter analysis as the informational content of that right. The majority contextualizes Charter content instead of applying Charter rights as the yardstick for measurement in assessing the viability of the search. Certainly, the search focus is Charter-oriented, but the section 8 perspective is not section 2(b) heavy. Returning to the balancing in *Vice Media* 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",[39] section 8's concern with privacy rights protection is coloured by the purpose of media expression. This dabbing of colour tints the section 8 analysis but does not overpower.

It is not only *Lessard* and *New Brunswick*, which suggest this Charter backdrop approach. Justice Binnie, in the majority for *National Post*,[40] continues this redecoration. The *National Post* decision figures prominently in the majority analysis as a decision facing a similar matrix of issues as in *Vice Media*.[41] Notably, Abella J. is the lone dissenter in *National Post*. In *National Post*, Binnie J. makes it perfectly clear where the line is drawn before the balancing occurs when he opens his judgment stating, that "The public has the right to every person's evidence."[42] Not just any evidence, mind, as this is "physical"[43] evidence. Physical evidence of a crime is the controlling issue. Although the court must "strive to uphold the special position of the media",[44] that specialness does not overcome the physicality and informativeness of the evidence being sought even if that information was given in the context of a confidential relationship. The specialness of physical evidence is, in traditional section 8 case law, an important factor in admitting evidence illegally obtained through a Charter breach. By the majority relying on *National Post*, there is no surprise that Abella J.'s decision in *Vice Media* sees and seizes an opportunity for a *National Post* redo. Indeed, the time

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39 *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 1 (S.C.C.).

40 *R. v. National Post*, [2010] S.C.J. No. 16, 2010 SCC 16 (S.C.C.) [hereinafter "*National Post*"].

41 *Id.*, at para. 19.

42 *Id.*, at para. 1.

43 *Id.*, at para. 3.

44 *Id.*

is ripe for a freshening up of the entire line of cases from the 1991 *Lessard* to now considering the paradigm shift of our conception of privacy and the aspirational dimension of section 24(2) found in recent Supreme Court cases. The effect of this shift will be discussed later in this article when section 8 privacy rights in the Charter receives the top by-line. For the time however, the Charter performs a mere contextual purpose, like the palette upon which the tints are mixed before application.

The actual dabbing of Charter colour takes place, as hinted at earlier, through the modification of *Garofoli* for this specific situation. Interestingly, the reasoning for the change is not really Charter rights or Charter values but the "highly deferential"[45] SOR envisioned by *Garofoli*. 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, Sopinka J. 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".[46]

Despite Moldaver J.'s view that *Garofoli* is a "highly deferential" test, 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,

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45 *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 72 (S.C.C.).

46 *Id.*, at para. 69.

Moldaver J. 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 Media* scenario is the inability for the media outlet to argue, at the time of authorization, against issuance on the basis of section 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*.

The review involves determining not what the issuing judge should have done but could have done. Permissive and not imperative in aspect. To keep state intrusions within the scope required by *Lessard*, the SOR must lay in the shades between the imperative and permissive. In other words, the review does not command one way but permits a range of perspectives. Justice Moldaver changes the soft focus of the *Garofoli* exercise into a well-defined re-trial of the issue depending on the context. This contextual approach recalibrates the *Garofoli* application and switches the reviewer's focus and permissive role to the starting point where, sitting in the place of the issuing judge, the reviewer morphs into the commanding voice as the hearer *ab initio* of a *de novo* review.[47] Here too, context is everything as a *de novo* review is conducted where a material change in circumstances, which was not before the issuing judge, "could reasonably have affected" the issuance order.

If the issuing hearing was *ex parte*, as they typically are, without the media presence, then the test for *de novo* review is similar to the test for a *de novo* bail review under sections 520 and 521 of the *Criminal Code*.[48] Otherwise, the traditional *Garofoli* review on the record as amplified will be the SOR. The modification is well-defined and confined through Moldaver J.'s test. But here too tradition gets the tint treatment. Justice Moldaver contextualizes the *Garofoli* review by insisting that reviewing judges should give "special consideration"[49] to the backdrop. That backdrop is not written in section 2(b) rights but is summed up as "the vital role of the media in a free and democratic society".[50] Context is an answer to Charter rights in the *Vice Media* backstory.

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

[48] R.S.C. 1985, c. C-46, ss. 488.01, 488.02.

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

[50] *Id*.

IV. THE CONFIDENTIAL SOURCE DIFFERENCE

Vice Media is not just about accessing media information to assist in the investigation of crime, it is also about the source of that information in the guise of a confidential informant or CI, 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 an edginess to the issue.

CIs are protected in their relationship with law enforcement but in divulging information to the media, CIs risk disclosure. Gone is the direct linkage between incentivizing information which assists in the detection of crime. Media outlets are not looking to protect the public in the strict meaning of that phrase. The police motto "to protect and serve" is not the media's slant "to serve by informing". This diminished capacity to incentivize informers to "do the right thing" and assist investigations results in the diminished protection afforded to CI-media relationships. Instead of a near absolute class privilege, CI-media relationships are not presumptively protected but considered on the basis of case-by-case privilege applying the Wigmore criteria. Justice Binnie in *National Post* founded his reasoning for case-by-case privilege on a different basis — the public right to know,[51] which, with perfect symmetry, circles back to the objective of media to inform. Justice Binnie's reasoning also involves a back-handed vision of section 2(b) expression rights composed of the right of media expression together with the right of readers of that expression.[52] The reader of media, in the *National Post* world, has a right to know who the journalistic source is particularly when that person is a suspected criminal.

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[51] *R. v. National Post*, [2010] S.C.J. No. 16, 2010 SCC 16, at para. 28 (S.C.C.); see also *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 125.

[52] *National Post*, *id.*

Before we leave the CI behind in the knowledge they may or may not be exposed when speaking to media, a word must be said on the potential "chilling effect" factor in this case-by-case, come as you are, possibly privileged scenario. The fact sources may "dry up", according to Moldaver J., does not lead to a presumption that there will be a chilling effect should the warrant issue. Again, such a possibility may, in the appropriate case, matter but such an effect will not be presumed by the issuing court. This position is very consistent with another Binnie J. decision in *R. v. Spence*.[53] In that case, judicial notice of racial partiality for purposes of a jury selection challenge for cause application was in issue. In explaining how the taking of judicial notice of a fact may vary depending on how close the fact is to the dispositive issue in the case, Binnie J. referenced judicial notice of the chilling effect on media should the confidential source be revealed.[54] In some circumstances, Binnie J. opined, such effect could be subject to judicial notice but where the chilling effect fact is bound up with a section 2(b) Charter violation argument, evidence of that fact should be called.[55] As Moldaver J. suggests in *Vice Media*, "context is crucial".[56]

V. THE MANIFESTATION OF CHARTER RIGHTS IN THE MINORITY DECISION

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 Media* decision goes beyond parliamentary intent. Indeed, the minority decision of Abella J. does just that. Her legal world view is not suggestive of the common sense approach of the majority decision. Instead, Abella J. 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. Tweaking won't do for the minority here, but action. The level of action is 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.

[53] [2005] S.C.J. No. 74, 2005 SCC 71 (S.C.C.).
[54] *Id.*, at para. 65.
[55] *Id.*, at para. 66.
[56] *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 31.

But all concurring decisions worth reading flow from a solid majority decision. In this case, it is the majority's reaction to the minority position, which creates the bright line between the two decisions. In effect, the majority decision creates a dissent-like feel to the concurring judgment. Justice Moldaver does this by responding to the minority in a few paragraphs at the end of his decision.[57] He nicely summarizes and thereby emphasizes the bright line drawn between the majority and the minority by describing "my colleague's approach, which treats this case as an opportunity to formally recognize that freedom of the press enjoys 'distinct and independent constitutional protection under section 2(*b*) of the *Charter*'."[58] Indeed. The minority draws the Charter out of the majority wrought backdrop and into the concurring judgment's forefront. The Charter, in the minority's hands, becomes the binding influence of the decision not just the delicate handiwork as envisioned by the majority and as suggested by tradition. This, in the minority's view, is a Charter case not criminal law. And there lies the division between the two views.

Justice Moldaver in the response makes this division clear and leans on another trope recently used to argue against opening the Charter door too wide; the issue has not been "fully argued by the parties or considered by the courts below."[59] This was also the concern in *Reeves*.[60] Yet, not having the benefit of a full argument or, for that matter, any argument, has not stopped the courts before. For instance, in *R. v. Mian*,[61] the Court emphatically recognized an appellate court's authority to "invite submissions on an issue neither party has raised."[62] Justice Moldaver is also loathe to enter into the section 2(b) realm without full argument considering the "proposed recognition may have unforeseen consequences" on other related areas such as "freedom of information requests," and "publication bans" to name a few.[63] This justification for not going where the minority, with eyes wide open, has clearly gone obscures the real concern. It is not, as suggested by Moldaver J., that the

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57 *Id.*, at paras. 102-105.

58 *Id.*, at paras. 102, 123.

59 *Id.*, at para. 103. In a similar vein, see also Lisa Silver, "The Supreme Court of Canada Leaves It 'For Another Day'" published June 8, 2019, online: <https://www.ideablawg.ca/blog/2019/6/8/the-supreme-court-of-canada-leaves-it-for-another-day> in which I discuss the Court's penchant for leaving issues for future consideration.

60 *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56, at para. 23 (S.C.C.) [hereinafter "*Reeves*"].

61 [2014] S.C.J. No. 54, 2014 SCC 54 (S.C.C.).

62 *Id.*, at para. 28.

63 *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 103 (S.C.C.).

courts have not previously considered media rights in light of the gathering of information as *National Post* clearly does so. Similarly, media section 2(b) rights have previously been considered by the Supreme Court in a number of publication ban cases,[64] all of which were specifically cited in Abella J.'s minority decision.[65]

The real reason for not "formally"[66] recognizing the "distinct and independent"[67] constitutional dimensions of press expression is based simply on precedent. The precedent relied on by Moldaver J. involves the self-same series of "established"[68] cases, in which the majority marginalizes Charter rights to the edges instead of using the Charter as the controlling issue. It is this perspective that labels the Charter as a non-starter. Precedent has a chilling effect as it both dismisses the Charter until it is fully argued and affirms the issue as essentially non-Charter. This effect on the *Vice Media* decision is perfectly clear as, in paragraph 104, Moldaver J. uses *Lessard* to firmly shut the door on the Charter as an unnecessary venture. The issue is decidedly within the *Lessard* universe and there too shall *Vice Media* remain.

The final comment made by Moldaver J. again reveals a decided preference for the Binnie J. approach in *National Post* from a decade earlier.[69] In an attempt to diffuse the Charter engagement issue, Moldaver J. uses Charter language to confirm the centrality of the media "in a free and democratic society."[70] Even so, according to Moldaver J., the philosophical underpinnings of media — the ultimate purpose and use of media as envisioned by the Charter — is merely the backdrop to what is, in essentials, a criminal law concern. The "distinct and independent"[71] Charter media rights under section 2(b) will need to wait in the wings until the right case comes around. The issue is not dismissed, it simply does not arise.

I pause to reflect on the heading for this part of the article. In the introduction I suggest that the interplay of three prominent issues arising

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[64] See *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 2, 2011 SCC 2 (S.C.C.); *R. v. Mentuck*, [2001] S.C.J. No. 73, 2001 SCC 76 (S.C.C.); *Globe and Mail v. Canada (Attorney General)*, [2010] S.C.J. No. 41, 2010 SCC 41 (S.C.C.).

[65] See *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at paras. 127, 128 and 130 (S.C.C.).

[66] *Id.*, at para. 102.

[67] *Id.*, at paras. 102, 105 and 123.

[68] *Id.*, at para. 103.

[69] *Id.*, at para. 105.

[70] *Id.*

[71] *Id.*

in the decision — the *Lessard* framework for issuing the warrant, the media factor, and the presence of confidential source principles — drive this decision toward a conclusion. I also suggest that the contextual approach to these three issues manifest in Charter rights. Yet, thus far under this heading, the discussion is firmly fixed in one right, the section 2(b) expression rights as expressive of the *raison d'etre* of media. But not so for the minority. There is a discernible movement or Charter flow detected there. A review of Abella J.'s decision, on behalf of the three other concurring justices, will explain how the Charter flow works. Section 2(b) rights become the bridge beneath the minority's feet, and that bridge leads to privacy rights.

For Abella J., the time is "ripe",[72] indeed long overdue, for a new world view that provides for a robust and independent freedom of the press in section 2(b) of the Charter. This requires filling in the phrase "freedom of the press" with "distinct constitutional content".[73] Justice Abella's "call to arms", so to speak, vibrates with action driving the minority to a collision course with the *status quo* found in *National Post* and as reiterated in Moldaver J.'s majority. The collision is in the direness of this recognition. Justice Abella, fully answerable to global concerns with media attacks and fake news claims, plants the minority firmly in the democratic ideals that provide the filler for the phrase "freedom of the press".[74] Democracy is the "distinct constitutional content" of freedom of the press. It provides meaning and context to the entire case and must be recognized as the life-blood of the decision.

Logically flowing from such recognition is the need to change the *Lessard* framework to fulfil this new world vision. Not only is this change required due to the enhanced delineation of media section 2(b) rights but is also required by the potential violation of the media's section 8 privacy rights. Privacy rights, through recent Supreme Court decisions, some before the release of *Vice Media*, as in *Marakah*[75] and *Jones*,[76] and some after, as in *Reeves*[77] and *Jarvis*,[78] have been enhanced and emboldened by the social landscape. They too matter in the application of *Lessard*.

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72 *Id.*, at para. 109.
73 *Id.*
74 *Id.*, at paras. 122-123.
75 *R. v. Marakah*, [2017] S.C.J. No. 59, 2017 SCC 59 (S.C.C.) [hereinafter "*Marakah*"].
76 *R. v. Jones*, [2017] S.C.J. No. 60, 2017 SCC 60 (S.C.C.) [hereinafter "*Jones*"].
77 *R. v. Reeves*, [2018] S.C.J. No. 56, 2018 SCC 56 (S.C.C.).
78 *R. v. Jarvis*, [2019] S.C.J. No. 10, 2019 SCC 10 (S.C.C.) [hereinafter "*Jarvis*"].

Notably, the majority and minority not only use the Charter to different effect in their judgments, but they also proffer differing interpretations of the phrase "protection of the public". Justice Moldaver sees a balanced contextual approach to ensure the investigation and detection of crime for a safe society. This concept of "protection of the public" is a familiar one. It runs thread-like through section 8 case law,[79] it runs through confidential informer case law,[80] and it runs through *Lessard* and *National Post*. Conversely, Abella J. takes an expansive view of "protection of the public" through a "vigorous protection"[81] of the press. The media is the public and the public is the media.[82] If the law cannot provide protection through "[s]trong constitutional safeguards",[83] then the media, and thus the public, cannot "perform its essential democratic role".[84] These two entirely different views of "protection of the public" is explicit in *Vice Media* but it is not a new dividing line. It acts as the counterpoint between the majority and dissent in *Fearon*[85] and in *Marakah*.[86]

The protection provided for by these Charter rights requires, according to Abella J., "... [a] rigorously protective harmonized analysis".[87] Part of that analysis involves a robust discussion on the scope of section 2(b) media rights, delineating between ethical journalism and "tabloid espionage".[88] Scope not only involves the type of journalism protected but also includes the extent of the right within those protected areas. For example, according to Abella J., "work product", where the source is either known or unknown, is typically protected.[89] The majority's confidential informer concern is delicately diminished by the minority to a non-starter when it comes to section 2(b) of the Charter.[90]

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79 See, *e.g.*, *R. v. Mann*, [2004] S.C.J. No. 49, 2004 SCC 52 (S.C.C.); *R. v. Fearon*, [2014] S.C.J. No. 77, 2014 SCC 77 (S.C.C.) [hereinafter "*Fearon*"].

80 See, *e.g.*, *R. v. Barros*, [2011] S.C.J. No. 51, 2011 SCC 51, at para. 28 (S.C.C.); *R. v. Durham Regional Crime Stoppers Inc.*, [2017] S.C.J. No. 45, 2017 SCC 45, at para. 1 (S.C.C.).

81 *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 111 (S.C.C.).

82 *Id.*, at para. 125.

83 *Id.*, at para. 112.

84 *Id.*

85 *R. v. Fearon*, [2014] S.C.J. No. 77, 2014 SCC 77 (S.C.C.).

86 *R. v. Marakah*, [2017] S.C.J. No. 59, 2017 SCC 59 (S.C.C.).

87 *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 112 (S.C.C.).

88 *Id.*, at paras. 130-131.

89 *Id.*, at paras. 131-132.

90 *Id.*

Having set out the section 2(b) parameters, Abella J. uses this bridge of rights to fill out the fallacy introduced by Binnie J. when he characterized the warrant issuance as a "right to everyone's evidence". Rights are Charter rights. There is no Charter right to evidence. The minority uses the Charter as the defining tool of the analysis while the majority's functional approach gazes at the Charter through the tools of the state. Justice Abella turns the majority's "protection of the public" into a manageable state "interest", whilst maintaining the protection of the public's right to know through the right to be secure from unreasonable search and seizure by the state. The bridge is complete as the privacy rights flow into the harmonized analysis. Here, the section 2(b) Charter right is not muted in the background but shines front and centre[91] necessitating that the section 8 Charter privacy right does not stand alone in the balance.[92]

In this Charter-rules context, the issuing judge still balances under this enhanced (not just tweaked) test but does so in the clear language of the gatekeeper.[93] For Abella J., 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."[94] Notably, Abella J. agrees with Moldaver J. on the issue of prior publication, probative value of the evidence[95] and on the standard of review.[96] Essentials remain the same, but it is the context which changes.

I suggested earlier in this article that Moldaver J. imported into the *Lessard* framework a gatekeeper-like function requiring consideration of the probative value of the information. This, in my view, creates layers of gatekeeping that might be used to the disadvantage of the media, the opponent to the issuance of the warrant, as an added threshold to cross. However, this is not the approach of the minority. They would not import this weighing into a factor to consider but would change the entire *Lessard* framework into a holistic Charter imbued engine, a harmonized

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[91] *Id.*, at paras. 14, 121 (Moldaver J. in the majority, at para. 14, suggests the "special status accorded to the media" was "front and centre" in *Canadian Broadcasting Corp. (CBC) v. Lessard*, [1991] S.C.J. No. 87, [1991] 3 S.C.R. 421 (S.C.C.), but Abella J. concurring, at para. 121, finds s. 2(b) of the Charter is "at the centre of the analysis of the appeal").

[92] *Vice Media*, *id.*, at para. 142.

[93] *Id.*, at paras. 137, 145.

[94] *Id.*, at para. 145.

[95] *Id.*, at para. 149.

[96] *Id.*, at paras. 157-160.

analysis, which in its entirety becomes a gatekeeper function.[97] Such a view as this, where the issuing judge is no longer merely the issuing judge, but the gatekeeper, is profound.

The gatekeeper guardian of Charter rights and state interests must, when weighing whether the "salutary effects of the production order outweigh the deleterious effects",[98] treat the media as the very public whom they serve. This analysis places media, with its heightened section 2(b) rights, in the streets of urban life as the gatekeeper considers peoplehood issues like reasonable expectation of privacy, proportionality, harmful effects, minimal impairment, due diligence.[99] The list of factors sounds like an amalgam of search warrant requirements, general evidentiary exclusionary discretion, and the *Oakes* test,[100] all wrapped up in a Charter package. The salutary effects of the order as seen through the state interest is tied to the seriousness of the offence in question, the immediacy of it and the strength of the evidence sought.[101] This recitation of factors suggests a test with a high standard befitting the Charter rights at risk.

Essentially, the concurring judgment requires the issuing judge to consider whether issuing the order is in the interests of justice and, in the section 24(2) of the Charter sense, whether issuance would bring the administration of justice into disrepute. Section 24(2) balancing is aspirational, forward-looking and engages societal standards.[102] It is an apt context to view the minority's position.

VI. The *Vice* Universe Where Context is Everything

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

[97] *Id.*, at paras. 142-145.
[98] *Id.*, at para. 142.
[99] *Id.*, at paras. 142-147.
[100] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 (S.C.C.).
[101] *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 148 (S.C.C.).
[102] See *R. v. Grant*, [2009] S.C.J. No. 32, 2009 SCC 32, at paras. 67-71 (S.C.C.).

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.[103] Although it is arguable whether Cory J. 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.

Context is confirmed by Moldaver J.'s finding that Deference, in the large sense of the term, is the true standard here. By permitting a more contextual permissive approach, Moldaver J. opens the door to a moveable feast of standards for review that appear tailor-made to the situation or facts.[104] 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 referenced earlier in this article the enhancement by the Supreme Court of the gatekeeper's 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",[105] trial judges raise the public confidence in the criminal justice system to the highest level. They are foundational to our justice system.

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 Media* 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 ever-changing 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.

[103] *R. v. Vice Media Canada Inc.*, [2018] S.C.J. No. 53, 2018 SCC 53, at para. 39 (S.C.C.).

[104] *Id.*, at paras. 74-81.

[105] Isaac Newton, "Letter from Sir Isaac Newton to Robert Hooke" (February 15, 1676). See *Vice Media*, *id.*, at para. 149.

VII. THE FINAL WORD

Although the Charter does not have the primary position in this *Vice Media* narrative, it is present and accounted for, engaging the Court in a dialogue on what is, in essence, the primary goal of the Charter, which is to help create a normative vision of Canadian society. The Court in *Vice Media* is divided between these visions but that may be in and of itself an accurate reflection of Canadian society. Regardless, the true impact of *Vice Media* may not be fully realized until the changes brought in by the *Journalistic Sources Protection Act*[106] are finally tested in court. Despite Moldaver J.'s view that this legislation "enhances"[107] journalistic source protections, the question still remains whether these new amendments will change our Charter relationship with the media.

A plain reading of the new amendments suggests we are indeed changing our perception of media as journalists become the New Age embodiment of the quintessential hunter-gatherer by pushing out information to the hungry Internet-based masses. Accordingly, the judge issuing a production order must now weigh the public interest in investigating and prosecuting an offence against "the journalist's right to privacy in gathering and disseminating information" under section 488.01(3)(b) of the *Criminal Code*, promoting section 8 Charter rights to a more prominent position. The law provides a further safeguard or "safety valve", through section 39.1 of the *Canada Evidence Act*, protecting journalistic material when potentially used in court. There, the judge weighs the public interest in the administration of justice against the public interest in preserving the confidentiality in light of a number of factors including "freedom of the press". The new amendments on a certain level do reflect the concerns distilled from the *Vice Media* decision. Yet, the changes provide only incremental change. The pressing issue still raised and not erased by *Vice Media* is the normative value of these changes as discussed in this article. We can tolerate competing visions, but we cannot live by them. In the end, the Court will need to decide on which side of the bright line the media resides.[108]

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[106] S.C. 2017, c. 22.

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

[108] Since the writing of this article, the Supreme Court of Canada reviewed the new journalistic source amendments in *Denis v. Côté*, [2019] S.C.J. No. 44, 2019 SCC 44 (S.C.C.). Chief Justice Wagner, in paras. 45 to 49 of the decision, reiterates the importance of the freedom of the press as a factor in assessing disclosure under s. 39.1 of the *CEA*. Justice Abella, in a brief dissent, makes no further comments on this aspect. The decision clarifies the test under the new amendments

The *Vice Media* analysis has taken us through the deepness of criminal law by way of the back-door of the noisy newsroom. The decision, far from moot, provides a revealing glimpse into the future of criminal law and the Supreme Court's willingness to take a broad view of those legal principles, which run, like a thread, through criminal law. Principles engaging criminal procedure, evidence and the Charter may not appear to be uniquely engaged in Supreme Court jurisprudence but, as with all decisions, it is not in the making of the case but in the reading of it that marks this decision from other ones. It is the manner in which the Court arrives at the majority and concurring decisions, which suggests more than it maintains. *Vice Media* is a game-changer as the decision appears at a watershed moment when the Charter appears to ebb and flow in the background of a case based in everyday issues of information and how we access it. If context is everything then information is the commodity upon which everything is based. It is this visionary aspect of *Vice Media* which will live on in further decisions.

but does not expand on the normative quality required of the freedom of the press in assessing disclosure under s. 39.1.