SUPREME COURT OF CANADA

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Case in Brief: *R. v. Vice Media Canada Inc.*

Judgment of November 30, 2018 | On appeal from the Court of Appeal for Ontario
Neutral citation: 2018 SCC 53

The Supreme Court has unanimously upheld an order for a journalist to give police copies of conversations with a person who said he belonged to a terrorist group.

In 2014, Vice Media Canada published three stories about a Canadian man who said he was a member of the so-called "Islamic State" terrorist group in Syria. The stories were based on conversations one of Vice's journalists had with the man through an instant messaging application. Police read the stories and thought the man was committing serious crimes (participating in terrorist activities and making death threats).

Police wanted to investigate, but the news stories weren't enough. Even though the man was identified by name and wanted people to know what he was doing, they needed hard evidence—like copies of the actual conversations. But the messaging application the journalist used to talk to the man didn't store them. The only way police could get them was from one of the participants. They asked a judge to order Vice and the journalist to give them copies of the messages so they could build their case. This kind of order is called a "production order," because it forces someone to produce (in the sense of "provide") something for someone else.

For most legal issues, judges will hear both sides in court before making a decision. There are some exceptions where a judge will hear only one side, such as if the issue is urgent or there is a danger the evidence could be lost. This happens in an "*ex parte*" hearing. *Ex parte* means without the other party being there (and without them knowing about it). In this case, the police didn't want Vice to know they were trying to get the information. They were afraid that Vice might move it somewhere Canadian courts couldn't touch it. The judge granted the order in an *ex parte* hearing. Later, when Vice received the order, it said it only had screenshots of the messages. It didn't think it should have to give those to police and went to court to fight it.

At the time Vice went to court, the law said the order could be canceled only if no other reasonable judge would have allowed it. Judges can't look at all details of all issues from the start and re-analyze them every time. This would take too long and cost too much. These are some of the reasons higher-court judges "defer to," or rely on, lower-court judges' decisions. They look at what a reasonable judge might have done, not what decision they might personally have made.

The reviewing judge heard Vice's arguments but said it still had to share the screenshots. This was because the original judge's decision had a reasonable basis. The Court of Appeal agreed.

All of the judges at the Supreme Court agreed that Vice had to give police the screenshots. They looked at all the factors and said the original judge's decision was reasonable. They noted it was important for media to be able to gather and share news with the public without government interference, and that it had a special role in society. But, in this case, society's interest in investigating and prosecuting crimes outweighed it.

The majority said that while this wasn't an appropriate case to make major changes to the rules on media search warrants and production orders, they had to be tweaked. According to the rules, a judge first has to think about whether it is best to let the media know about a police request for a warrant or production order, or to hold a hearing *ex parte*. The majority added a slightly modified rule. It said that if a warrant or order is granted *ex parte*, the media should be able to go to court to argue points the original judge didn't know about. If these points could reasonably have affected the original judge's decision, another judge has to review the whole decision from the beginning (not just looking at whether it had a reasonable basis). Second, the judge has to make sure all the conditions listed in the *Criminal Code* are met. Specifically, that there is a good chance a crime has been or will be committed, that the person has the information the police are looking for, and that the information will provide evidence of the crime. Third, the judge has to look at all the facts and circumstances. S/he has to balance society's interest in investigating and prosecuting crimes against the media's right to privacy in gathering and sharing news. Finally, the judge has to think about ways to make sure the media wouldn't be overly restricted in carrying out its work. Applying these updated rules to this case, the majority said the lower courts were right.

The new *Journalistic Sources Protection Act* became law in 2017. It didn't apply to this case because the events happened before it came into force.

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Breakdown of the Decision: ***Majority:*** Justice Michael Moldaver dismissed the appeal (Justices Gascon, Côté, Brown, and Rowe agreed) | ***Concurring:*** Justice Rosalie Silberman Abella also would have dismissed the appeal, but would have set out a new test for production orders recognizing independent *Charter* rights for the press (Chief Justice Wagner and Justices Karakatsanis and Martin agreed)

More information (case # 37574): Decision | Case information | Webcast of hearing

Lower court rulings: decision on application (Ontario Superior Court of Justice) | appeal (Court of Appeal for Ontario)