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Vice Media pleads in vain for press freedom, facing order to produce messages with ISIS combatant

The Ontario Court of Appeal recently heard and resolved a conflict between two competing components of a free and democratic society. As the Court put it, the dispute involved a conflict between a free and vigorous press, on the one hand, and the protection of society from serious criminal activity on the other.

In *R v Vice Media Canada Inc*, the RCMP obtained an *ex parte* production order requiring the appellants, Vice Media Canada Inc. and one of its reporters, Mr. Ben Makuch, to produce private communications between Mr. Makuch and a Calgary man involved with the Islamic State.

A production order under s. 487.014 of the *Criminal Code* is a means by which the police can obtain documents, including electronic documents, from individuals who are not under investigation. The section empowers the justice or judge to make a production order if satisfied, by the information placed before her, that there are reasonable grounds to believe that: (i) an offence has been or will be committed; (ii) the document or data is in the person's possession or control; and (iii) it will afford evidence of the commission of the named offence.

Mr. Farah Shirdon was a 22 year-old man who had lived in Calgary and was believed to have left Canada in March 2014 to join the Islamic State of Iraq and Syria in the Middle East. Between June and October 2014, Vice published three articles authored by Mr. Makuch about the involvement of Mr. Shirdon with the Islamic State of Iraq and Syria in the Middle East. In the articles, Mr. Shirdon purported to confirm that he was a combatant with ISIS, and made specific threats against Canada. The articles were based in large measure on text messages between Mr. Makuch and Mr. Shirdon. Mr. Shirdon was charged in absentia with six terrorism-related offences and remained at large.

Without notice to the appellants, the RCMP sought and obtained an order directing production among other things of:

> Paper printouts, screen captures or any other computer records of all communications between Makuch or any

> employee of Vice Media Canada Inc., Vice Studio Canada Inc., and Shirdon, aka Abu Usamah over Kik [M]essenger.

Vice and Mr. Makuch refused to produce the material covered by the production order, and instead brought an application for *certiorari* to quash or set aside that order, among other relief. The application judge refused to quash the production order, and the appellants appealed to the Court of Appeal.

On appeal, the appellants stressed the importance of press freedom, arguing that police seizure of any journalist's records would violate press freedoms and set a dangerous precedent for journalism in Canada. The appellants characterized the production order as undermining their role as the eyes and ears of the community by effectively conscripting them into the ranks of law enforcement. The RCMP responded that the information was needed as evidence to prove their charges against Mr. Shirdon.

The Ontario Court of Appeal accepted the RCMP's submissions and dismissed the appeal. Justice Doherty, speaking for a unanimous panel of the Court of Appeal held that it was reasonable to find the balancing of the competing interests favoured making the production order.

Justice Doherty was not persuaded that the production order in this case would have a "chilling effect" on the media's ability to perform its role given the particular circumstances of this case. Specifically, not only was there no request from Mr. Shirdon that the information remain confidential, but, to the contrary, the Court noted that Mr. Shirdon was anxious to tell the world about his beliefs and conduct. It was also found that the appellants had already published much of the material sought in the three articles that predated the RCMP's request for the production order.