

CANADA / JUDGMENT

Canadian Broadcasting Corp. v. Lessard

[1991] 3 SCR 421

COURT

Supreme Court of Canada

DECIDED

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Canadian Broadcasting Corp. v. Lessard

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Date

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Report

[1991] 3 SCR 421

Case number

21629

Judges

La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Stevenson, William

On appeal from

Quebec

Subjects

Constitutional law

Criminal law

Notes

SCC Case Information: 21629

Decision Content

Canadian Broadcasting Corp. v. Lessard, [1991] 3 S.C.R. 421

The Attorney General of Quebec Appellant

v.

Canadian Broadcasting Corporation Respondent

and

Canadian Association of Journalists Intervener

Indexed as: Canadian Broadcasting Corp. v. Lessard

File No.: 21629.

1991: May 31; 1991: November 14.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

on appeal from the court of appeal for quebec

Constitutional law -- Charter of Rights -- Freedom of the press -- Search warrants issued for premises of the press -- Seized videotapes already aired -- Affidavit supporting application not indicating other sources of information -- Whether or not search warrant valid -- Whether or not Charter right to freedom of the press infringed -- Canadian Charter of Rights and Freedoms, ss. 1, 2 (b).

Criminal law -- Search warrants -- Premises of the press -- Seized videotapes already aired -- Affidavit supporting application not indicating other sources of information available -- Whether or not search warrant valid -- Whether or not Charter right to freedom of the press infringed -- Criminal Code, R.S.C., 1985, c. C-46, ss. 487(1) (b), (d), (e) -- Canadian Charter of Rights and Freedoms, ss. 1, 2 (b).

A CBC camera crew videotaped a group of people occupying and damaging a post office building and both CBC's English and French language networks aired portions of the videotape. There is no indication that the police were at the scene or were aware of the incident at the time the tape was made. The police sought an authorization from a justice of the peace to search for the videotapes the day after the broadcast. The parties agreed that nothing in the affidavit would permit the justice of the peace to determine if there were an alternative source of information and, if there were such a source, whether reasonable steps had been taken to get the information from that source. Nonetheless, a warrant was granted to enter, search and seize the videotapes at the CBC's head office in Montreal on the basis of the information.

Several tapes were seized and, at the request of CBC officials, were placed in a sealed envelope while the validity of the warrant was contested. To that end, the CBC brought an application for certiorari to quash the search warrant. The Quebec Superior Court dismissed the application but a majority of the Court of Appeal allowed CBC's appeal.

Held (McLachlin J. dissenting): The appeal should be allowed.

Per Sopinka, Gonthier, Cory and Stevenson JJ.: Warrants for the search of any premises constitute a significant intrusion on the privacy of individuals and corporations alike. The privacy interests of individuals in a democratic society must be carefully weighed in a search warrant application against the interests of the state in investigating and prosecuting crimes. This weighing and balancing will vary with the facts on each application. Even after the requirements of s. 487 of the Criminal Code have been met, the process of determining if a search warrant should issue may still be a difficult and complex process. Among commercial premises, the media are entitled to particularly careful consideration, both as to the issuance of a search warrant and as to the conditions that may be attached to a warrant to ensure that any disruption of the gathering and dissemination of news is limited as much as possible. The media are entitled to this special consideration because of the importance of their role in a democratic society.

The following factors should be considered in issuing a search warrant for media premises. (1) The requirements of s. 487(1) (b) of the Criminal Code must be met. (2) The justice of the peace should then consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant and (3) ensure that a delicate 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. The press is truly an innocent third party; this factor is most important in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant. (4) The affidavit in support of the application must contain sufficient detail to enable a proper exercise of discretion as to whether or not to issue a search warrant. (5) Although not constitutionally required, the affidavit material should ordinarily disclose whether there are alternative sources, and if reasonable and alternative sources exist, whether those sources have been investigated and all reasonable efforts to obtain the information have been exhausted. (6) Dissemination of the information by the media in whole or in part will be a factor favouring the issuance of the search warrant. (7) If a justice of the peace determines that a warrant should be issued for the search of media premises, consideration should then be given to the imposition of some conditions on its implementation. (8) The search warrant may be found to be invalid if, after its issuance, it is found that pertinent information was not disclosed, or (9) if the search is unreasonably conducted.

The crucial factor here was that the media had broadcast portions of the videotape depicting the commission of a crime before the application for the warrant. The failure to set out that there was either no alternative source of information to the police or, if there were, that the information sought could not be obtained from that alternative source, is a basis upon which the justice of the peace could refuse to issue the search warrant. This information should in most cases be placed before the justice of the peace. It is not, however, a constitutionally required condition for the issuance of a search warrant.

The search here was conducted reasonably and did not affect the operations of the news media. There was no indication that the police were at the scene or even aware of the crime when the film was made. It is reasonable to infer that they learned the details of the crime from the broadcast.

All members of the community have an interest in seeing that crimes are investigated and prosecuted and the media might accordingly even consider voluntarily delivering their videotapes to the police. Once the news media have published the gathered information, that information then passes into the public domain. The publication of that information is a very important factor for the justice of the peace to consider. The publication or broadcasting of the information was a sufficiently important factor to enable the justice of the peace to issue the search warrant notwithstanding the failure of the police to explain that there was no alternative source available that would give them the information contained in the videotape.

The failure to set out the lack of alternative sources was simply another factor to be taken into account in assessing the reasonableness of the search. Here, the actual search was conducted reasonably and properly. There was no interference with the operation of the news media, nor was the freedom of the press threatened. The media had already completed their basic function of news gathering and news dissemination and the seizure of the tapes at this stage therefore could not be said to have a chilling effect on the media's sources of news.

Per La Forest J.: As long as they are strictly confined to situations similar to the present case, Cory J.'s reasons were generally agreed with.

Freedom of the press is vital to a free society and comprises the right to disseminate news, information and beliefs. The gathering of information could in many circumstances be seriously inhibited, if government had too ready access to information in the hands of the media. The press should not be turned into an investigative arm of the police. Thus, the fear that the police can easily gain access to a reporter's notes could well hamper the ability of the press to gather information. Barring exigent circumstances, the seizure of a reporter's handwritten notes and "contact book" and items of this nature should only be permitted when it is clear that all reasonable alternative sources have been exhausted.

A line should be drawn, however, between films and photographs of an event and items such as a reporter's personal notes, recordings of interviews and source "contact lists". The "'chilling effect' on newsgathering" argument was unpersuasive in so far as it pertained to films and photographs taken of an event because the chill is already there. Absent a promise of confidentiality, no one can reasonably believe that there is no danger of identification when he or she is being captured on film by the press. With respect to films and photographs, the exhaustion of alternative sources should not necessarily be required, unless there has been a guarantee of confidentiality.

The possibility that the police will uncover other confidential sources in the course of searching for the relevant material is too attenuated to add restrictions against searches of press organizations under all circumstances. This concern can probably best be addressed by limiting the warrant to specifically delineated items.

The search here was reasonable under s. 8 of the Charter . There was no violation of s. 2 (b) in the specific circumstances of this case, and it was not necessary to speculate about possible infringements resulting from a search in other circumstances. Even given an infringement, the search would be reasonable under s. 1 when the compelling requirements of law enforcement are weighed against the highly tenuous interference with the right. The question whether a search constitutes a reasonable limit under s. 1 is probably not different from the question whether a search is reasonable under s. 8 .

Per L'Heureux-Dubé J.: The sole issue in this case concerns the right of the police to obtain a warrant to search the premises of an innocent third party (the CBC) in order to obtain evidence of the commission of a crime. The freedom of the press was not at issue, the more so here since the material sought had already been broadcast on two occasions before the search warrant was issued. These reasons addressed only the specific facts of this case; other sets of circumstances could warrant different considerations. No notion of confidentiality was attached or implied to the object of the search warrant in this case.

Once the conditions set out in s. 487 are met, the justice of the peace has jurisdiction to issue a search warrant to retrieve evidence of the commission of a crime even absent a statement as to the availability of alternative sources. Neither the law nor jurisprudence mandate such a statement even when the premises searched are those of an innocent third party, here a member of the media. A balancing process is neither mandated by s. 487 nor is it practical with regard both to the functions of the justice of the peace and to the burden on those requesting the search warrant.

Notwithstanding its importance, the constitutional protection of the freedom of the press does not go as far as guaranteeing the press special privileges which ordinary citizens, also innocent third parties, would not enjoy in a search for evidence of a crime. The law does not make such a distinction and the Charter does not warrant it. In fact, the press generally does not request special privileges.

Conditions can be imposed by a justice of the peace as to the manner in which a warrant can be executed and, in that regard, particular considerations for the media are quite relevant. These conditions, however, have nothing to do with the jurisdiction of the justice of the peace to issue the warrant once the conditions of s. 487 are established, notwithstanding the fact that the premises to be searched belong to innocent third persons or members of the press. There is no justification to add distinctions or nuances to the text of the Criminal Code based on the nature of the premises to be searched.

Per McLachlin J. (dissenting): Freedom of the press under the Charter must be interpreted in a generous and liberal fashion having regard to the history of the guarantee and focusing on the purpose of the guarantee.

The Charter guarantee is to protect the values underlying freedom of the press, like freedom of expression, and includes the pursuit of truth. Freedom of the press, like freedom of expression, is important to the pursuit of truth, to participation in the community and to individual self-fulfillment. In achieving these means, an effective and free press is dependent on its ability to gather, analyze and disseminate information, independent from any state imposed restrictions on content, form or perspective except those justified under s. 1 of the Charter .

The ways in which police search and seizure may impinge on the values underlying freedom of the press are manifest and can adversely affect the role of the media in furthering the search for truth, community participation and self-fulfillment. It is not every state restriction on the press, however, which infringes s. 2 (b). Press activities which are not related to the values fundamental to freedom of the press may not merit Charter protection. The press activity at issue here - gathering and disseminating information about a labour demonstration - was directly related to the furtherance of the values underlying the guarantee of free expression. Such search and seizure accordingly infringes freedom of the press as guaranteed by s. 2 (b) of the Charter .

A search and/or seizure on press premises which infringes s. 2 (b) can be justified under s. 1 where:

- (1) The search/seizure is necessary because there are no alternative sources for the information required;
- (2) The importance of the search/seizure outweighs the damage to be caused by the infringement of freedom of the press; and
- (3) The warrant ensures that the search/seizure interferes with the press's freedom as little as possible.

Given the seriousness of any violation of freedom of the press, the justice of the peace must be satisfied that the special requirements for the issuance of a warrant of search and seizure against a press agency are clearly established and made out with some particularity.

Cases Cited

By Cory J.

Applied: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 000; distinguished: *Re Pacific Press Ltd. and the Queen* (1977), 37 C.C.C. (2d) 487; referred to: *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860.

By La Forest J.

Distinguished: *Re Pacific Press Ltd. and the Queen* (1977), 37 C.C.C. (2d) 487; referred to: *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 000; *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572.

By L'Heureux-Dubé J.

Considered: *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; distinguished: *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487.

By McLachlin J. (dissenting)

Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Senior v. Holdsworth, Ex parte Independent Television News Ltd.*, [1976] 1 Q.B. 23; *Reference Re Alberta Statutes*, [1938] S.C.R. 100; *Boucher v. The King*, [1951] S.C.R. 265; *Switzman v. Elbling*, [1957] S.C.R. 285; *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Re Pacific Press Ltd. and the Queen* (1977), 37 C.C.C. (2d) 487; *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671; *Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *R. v. Oakes*, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2 (b), 8.

Criminal Code, R.S.C. 1970, c. C-34, ss. 185(1)(h), 443(1)(b), (d), (e) [am. 1985, c. 19, s. 69].

Criminal Code, R.S.C., 1985, c. C-46, ss. 487(1) (b), (d), (e) [am. c. 27 (1st Supp.), s. 68], 488.1 [en. c. 27 (1st Supp.), s. 71].

Privacy Protection Act of 1980, 42 U.S.C. 2000aa, 1988 edition.

Authors Cited

Canada. Law Reform Commission. Working Paper 56. Public and Media Access to the Criminal Process. Ottawa: Law Reform Commission, 1987.

APPEAL from a judgment of the Quebec Court of Appeal, [1989] R.J.Q. 2043, 22 Q.A.C. 280, 50 C.C.C. (3d) 428, 72 C.R. (3d) 291, allowing an appeal from a judgment of Durand J., [1987] R.J.Q. 2543, dismissing an application to quash a search warrant. Appeal allowed, McLachlin J. dissenting.

Claude Provost, for the appellant.

Pierre Giroux, Marie-Philippe Bouchard and Michael Hughes, for the respondent.

Richard G. Dearden and Randall J. Hofley, for the intervener.

The following are the reasons delivered by

//La Forest J.//

La Forest J. -- I have had the advantage of reading the reasons of my colleagues, Justices L'Heureux-Dubé, Cory and McLachlin. The facts, judicial history and much of the antecedent jurisprudence are set forth in the reasons of Cory J., and I shall not repeat them. I would dispose of the case in the manner proposed by Cory J. I agree with much of what he has to say, but I would confine the reasons strictly to situations similar to the present case. I am particularly concerned with the extent to which reliance should be placed on the facts that the respondent (the CBC) had already placed the information sought to be obtained under the search warrant in the public domain, and that the search did not interfere with its broadcasting capabilities. I agree that these facts may properly be taken into account and that, in the circumstances of this case, they have great weight having regard to the nature of the information sought and the circumstances in which it was obtained, but reliance on such factors in other situations could, I fear, lead to serious infringements of the freedom of the press and other media of communications. I, therefore, think it right to set forth my own perspectives on the issues.

Like Cory J., I take it as a given that freedom of the press and other media is vital to a free society. There can be no doubt, of course, that it comprises the right to disseminate news, information and beliefs. This was the manner in which the right was originally expressed, in the first draft of s. 2 (b) of the Canadian Charter of Rights and Freedoms before its expansion to its present form. However, the freedom to disseminate information would be of little value if the freedom under s. 2 (b) did not also encompass the right to gather news and other information without undue governmental interference.

I have little doubt, too, that the gathering of information could in many circumstances be seriously inhibited if government had too ready access to information in the hands of the media. That someone might be deterred from providing information to a journalist because his or her identity could be revealed seems to me to be self-evident. As Stewart J. (dissenting) stated in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), at p. 572:

It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows that, despite the journalist's assurance, his identity may in fact be disclosed.

Concerns over the potential impact that unrestricted searches could have on freedom of the press have apparently led to the adoption in the United States of protective legislation by over half of the state legislatures as well as by the federal government. The Privacy Protection Act of 1980, 42 U.S.C. 2000aa (1988), for example, prohibits the seizure of media "work product materials" except where "there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate" or "there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being". A similar type of legislation, that would require that search warrants be issued only when no other reasonable alternative exists, was proposed by the Ducharme Committee, a Quebec government Task Force instituted to study the issue of

journalism and the law in the province of Quebec.

In my view, the threat to the freedom of the press that would result from unrestrained searches of certain journalistic material goes beyond the merely speculative. I would draw a line, however, between films and photographs of an event and items such as a reporter's personal notes, recordings of interviews and source "contact lists". In both this case and the companion New Brunswick case, *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 000, the only materials seized were videotapes and photographs of the demonstration.

I find the CBC's argument that there will be a "chilling effect" on newsgathering unpersuasive, in so far as that argument pertains to films and photographs taken of an event. I think the chill is already there. Absent a promise of confidentiality, no one can reasonably believe that there is no danger of identification when he is being captured on film by the press. When the press is covering an event under circumstances such as those in the present case, the very reason for the presence of cameramen is to take film and photographs for the purpose of broadcasting. While not all of the photographs will get published, there is a very real possibility that someone who commits a crime in front of the camera will find himself on the evening news or on the front page of a newspaper. The situation might be different if the press had made an undertaking to edit the film so that no identities would be revealed, or had promised confidentiality. Absent such a promise, however, it should be apparent that a photograph of a demonstrator "caught in the act" of vandalizing a post office or factory is precisely the sort of "newsworthy" item that is likely to make it into the paper.

As earlier mentioned, however, I do think that the "chilling effect" argument has merit in relation to other aspects of a reporter's work product. A distinguishing feature of the *Pacific Press* case (*Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C.S.C.)), discussed by Cory J., is that in that case reporters' handwritten notes and a reporter's "contact book" were also seized in the search. The press should not be turned into an investigative arm of the police. The fear that the police can easily gain access to a reporter's notes could well hamper the ability of the press to gather information. I would think that, barring exigent circumstances, the seizure of items of this nature should only be permitted when it is clear that all reasonable alternative sources have been exhausted.

With respect to films and photographs, the exhaustion of alternative sources should not, in my view, necessarily be required, unless there has been a guarantee of confidentiality. It can be argued that this distinction is not workable, since the police, and hence the justice of the peace, will in most cases not know in advance whether any information contained on a videotape is confidential or not. On the other hand, if the media organization claims that there is such confidential material, it would be a simple enough matter to seal the seized film in an envelope, as was done in this case, and subject it to an in camera hearing by the reviewing judge.

Another matter requiring consideration is the possibility that the police will uncover other confidential sources in the course of searching for the relevant material. This arguably would point towards adding restrictions against searches of press organizations under all

circumstances. While the CBC argues that the possibility of this occurring will also render people less likely to provide the press with information, I am, on the whole, of the opinion that this connection is simply too attenuated; see *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572, at p. 1581, where compulsion of testimony from a journalist was held not to violate s. 2 (b) in the absence of evidence that such compulsion would detrimentally affect the journalist's ability to gather information. Should there be evidence in a future case that this does indeed give rise to a real problem, the issue can be addressed at that time. In the meantime, this concern can probably best be addressed by limiting the warrant to specifically delineated items.

The foregoing remarks have been made on the basis that the search here was reasonable under s. 8 of the Charter, but I note that my colleague McLachlin J. approaches the matter from the perspective that there has been a violation of s. 2 (b), which would require justification under s. 1 of the Charter. I am clearly of the view for the considerations mentioned in discussing the reasonableness of the search that there was no violation of s. 2 (b) in the specific circumstances of this case, and I need not speculate about possible infringements resulting from a search in other circumstances, some of which I have postulated earlier. Even had I been disposed to hold there was an infringement, the compelling requirements of law enforcement, when weighed against the highly tenuous interference with the right, would lead me to the view that the search in this case would be justifiable under s. 1. I am not, in any event, certain that the question whether a search constitutes a reasonable limit under s. 1 is really different from the question whether a search is reasonable under s. 8.

Finally I should draw attention to two other matters. The first is that this appeal is solely concerned with search warrants issued upon the media as a third party, i.e., a party that is not a suspect in the investigation. This may give rise to different considerations and I have not considered it. Nor have I considered the standards that should apply to searches against third parties generally, irrespective of whether they are members of the media or not. It will be evident, however, that I do not think the rights of such a party would be infringed in a case like the present.

For these reasons, I would allow the appeal.

The following are the reasons delivered by

//L'Heureux-Dubé J.//

L'Heureux-Dubé J. -- I have had the benefit of my colleague Justice Cory's reasons. I agree with the result he reaches, for essentially the same reasons as Monet J.A. who dissented in the Quebec Court of Appeal.

The sole issue in this case concerns the right of the police to obtain a warrant to search the premises of an innocent third party, here the Canadian Broadcasting Corporation (the CBC), in order to obtain evidence of the commission of a crime.

The CBC challenges the jurisdiction of the justice of the peace to issue such a warrant. By way of certiorari it seeks to quash the warrant on the basis that the affidavit in support of the application for its issuance did not disclose efforts made to canvass alternative sources of evidence.

Section 487 of the Criminal Code, R.S.C., 1985, c. C-46 (formerly s. 443) sets out the conditions upon which a justice of the peace has jurisdiction to issue a search warrant:

487. (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

...

(b) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act or any other Act of Parliament,

...

may at any time issue a warrant under his hand authorizing a person named therein or a peace officer

(d) to search the building, receptacle or place for any such thing and to seize it, and

(e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

As my colleague Cory J. points out, the constitutionality of the section is not at issue here and it is not disputed that the justice of the peace has discretion to determine whether to issue the warrant. The debate centres rather on the extent of that discretion as it bears on his or her jurisdiction.

I wish to make clear at the outset that my reasons address only the specific facts of this case since other sets of circumstances may warrant different considerations. Here, the material which was the object of the search warrant consisted of films and photographs of a particular event to which no notion of confidentiality was attached or implied. The situation differed fundamentally from that in *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C.S.C.).

According to Durand J. of the Quebec Superior Court, once the conditions set out in s. 487 are met, the justice of the peace is justified in issuing the search warrant. Monet J.A., in dissent, agreed with this position. However, the majority of the Court of Appeal held that, before issuing a warrant for the search of the premises of innocent third persons (members of the press because of the constitutional protection afforded by s. 2 (b) of the Canadian Charter of Rights and Freedoms , according to Jacques J.A.), the justice of the peace must be satisfied that no alternative sources of the information sought are available. I disagree. I also disagree with Cory J.'s enumeration of the factors that must be taken into account by the justice of the peace in determining whether a search warrant should be issued. In my view, such a balancing process at that stage is neither mandated by s. 487 of the Code nor is it practical with regard both to the

functions of the justice of the peace and the burden on those requesting the search warrant, often as a matter of urgency.

The search for alternative sources may involve a lengthy and costly process apart from the difficult determination of what constitutes an "alternative source" and the possibility of losing the benefit of the evidence requested should the alternative sources be, for one reason or another, lost, declared inadmissible, etc. One can readily see the complexity of the task with which a justice of the peace may be burdened should he or she be held to such a standard each time the issuance of a search warrant is requested against an innocent third party. The respondent, however, has restricted its argument to the press, based on s. 2 (b) of the Charter .

While I agree with my colleague Cory J. (at p. 000) that "the media play a vital role in the functioning of a democratic society", as Vallerand J.A. pointed out ((1989), 50 C.C.C. (3d) 428, at p. 441), [translation] "the freedom of the press is not in issue here" and the more so here since the material sought had already been broadcast on two occasions before the search warrant was issued. Moreover, presented with the warrant, the CBC simply provided the police with the material in question, the whole without any disturbance. The CBC rather argues on behalf of the principle involved.

Important as the constitutional protection of the freedom of the press is, it does not go as far as guaranteeing the press special privileges which ordinary citizens, also innocent third parties, would not enjoy in a search for evidence of a crime. The law does not make such a distinction and the Charter does not warrant it. In fact, the press itself does not generally request special privileges.

The respondent invokes the fear of a "chilling effect". In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), a case involving a similar question, the United States Supreme Court had the following response when seized with this argument:

The general submission is that searches of newspaper offices for evidence of crime reasonably believed to be on the premises will seriously threaten the ability of the press to gather, analyze, and disseminate news. [p. 563]

...

Properly administered, the preconditions for a warrant -- probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness -- should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices. [p. 565]

...

Nor are we convinced, any more than we were in *Branzburg v. Hayes*, 408 U.S. 665 (1972), that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. [p. 566]

...

The fact is that respondents and amici have pointed to only a very few instances in the entire United States since 1971 involving the issuance of warrants for searching newspaper premises. This reality hardly suggests abuse; and if abuse occurs, there will be time enough to deal with it. Furthermore, the press is not only an important, critical, and valuable asset to society, but it is not easily intimidated -- nor should it be. [p. 566]

...

And surely a warrant to search newspaper premises for criminal evidence such as the one issued here for news photographs taken in a public place carries no realistic threat of prior restraint or of any direct restraint whatsoever on the publication of the Daily or on its communication of ideas. The hazards of such warrants can be avoided by a neutral magistrate carrying out his responsibilities under the Fourth Amendment, for he has ample tools at his disposal to confine warrants to search within reasonable limits. [p. 567] [Emphasis added.]

For the same reasons, I would dismiss the argument of the respondent.

As regards the two decisions relied upon by the respondent, I will make the following comments.

In *Descôteaux v. Mierzewski*, [1982] 1 S.C.R. 860, this Court was concerned with the extent of the power of the justice of the peace to authorize a search and seizure of documents protected by the solicitor-client privilege. Lamer J. (now Chief Justice) writing for a unanimous Supreme Court, recognized that the jurisdiction of the justice of the peace centered not on the nature of the premises searched but on the reasonable belief that objects covered by para. (b) of s. 443(1) (now s. 487(1)) of the Code were to be found on the premises (at p. 883). He pointed out, however, that the nature of the premises to be searched is relevant to ascertain the manner in which the search is to be conducted (at p. 889):

One does not enter a church in the same way as a lion's den, or a warehouse in the same way as a lawyer's office. One does not search the premises of a third party who is not alleged to have participated in the commission of a crime in the same way as those of someone who is the subject of such an allegation.

The comments on the search of premises of the media are purely obiter. I entirely agree, however, with the remarks of Lamer J. that conditions can be imposed by a justice of the peace as to the manner in which a warrant can be executed and, in that regard, particular considerations for the media are quite relevant, such as the hours during which the normal media operations would be less disturbed, the areas of the search and so on. But such conditions in the execution of the warrant have nothing to do with the jurisdiction of the justice of the peace to issue the warrant once the conditions of s. 487 of the Code are established, notwithstanding that the premises to be searched belong to innocent third persons or members of the press.

As for *Re Pacific Press*, supra, the very special circumstances of that case do not warrant that this case be regarded as a precedent binding on the courts when dealing with the press. There is no justification, in my view, to add distinctions or nuances to the text of the Code based on the nature of the premises to be searched. As Monet J.A. pointed out, at p. 435, this could easily have been done in s. 487 as was the case in s. 185(1)(h): [translation] "When Parliament intends to create a rule of subsidiarity, it does so in clear terms."

He also states (at pp. 431-32):

[translation] Parliament did not create exceptions. Bankers . . . lawyers . . . (subject to nuances, for example s. 444.1 of the Criminal Code), political parties . . . public service businesses . . . hospitals . . . in principle, are treated in the same manner as all others.

Common sense, none the less, requires that the judge of s. 443 not derogate from it but temper or modify it depending on the circumstances. One author, James A. Fontana, expressed this in the following manner . . .

Where the owner or occupier of the premises is an innocent third party, however, or where the person is in lawful possession of the goods to be searched for, the standards applicable to the search warrant process are, accordingly, much higher, requiring greater accuracy of documentation and fairness of enforcement. [Emphasis in original.]

I share that view.

Finally, Monet J.A., after observing that "[h]ard facts make bad law", cites the opinion of the Law Reform Commission of Canada (Working Paper 30, *Police Powers: Search and Seizure in Criminal Law Enforcement*, 1983) which criticizes the rule set by *Pacific Press* and does not recommend its general application for reasons which I fully endorse.

In summary, considering the text of s. 487 of the Code, the constitutionality of which is not attacked, once the conditions set out in that section are met, the justice of the peace has jurisdiction to issue a search warrant to retrieve evidence of the commission of a crime even in the absence of a statement as to the availability of alternative sources, which neither the law nor jurisprudence mandate even when the premises searched are those of an innocent third party, in this instance, a member of the media. Besides, the freedom of the press is not involved here.

Consequently, I would allow the appeal and dispose of this appeal as my colleague Cory J. suggests.

The judgment of Sopinka, Gonthier, Cory and Stevenson JJ. was delivered by

//Cory J.//

Cory J. -- This appeal was heard on the same day as *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 000, and raises similar issues. Here too, consideration must be given to the validity of a warrant issued for the search of premises occupied by a media organization. In this case, the material sought had already been broadcast

on two occasions by the respondent when the search warrant was sought. However, the affidavit in support of the application for the warrant did not refer to any efforts made by the police to obtain the evidence from alternative sources.

The Factual Background

On June 17, 1987, a camera crew from the Canadian Broadcasting Corporation (the "CBC") filmed a group of people occupying and damaging a post office building in Pointe-Claire, Quebec. Portions of the videotape were broadcast twice on both the English and French networks of the CBC. There is no indication that the police were at the scene or were aware of the incident at the time the film was made.

The day following the broadcast of the footage, Ludger Cyr, an officer of the Montreal Urban Community police force, sought an authorization from a justice of the peace to search for the videotapes on which the acts of vandalism were recorded. The specific information sought and the basis for requesting it were described in this way:

[translation] 1 - Videotape on which persons were filmed while causing damage to the interior of the Post Office at 15 Donegani Street in Pointe-Claire.

...

Police investigation.

In addition, part of this tape was shown on the 6:00 p.m. and 10:30 p.m. news on 17/6/87 on CBC TV Channels 2 and 6.

The parties are in agreement that there was nothing in the information which would permit the justice of the peace to determine if there were an alternative source of information and, if there were such a source, whether reasonable steps had been taken to get the information from that source. Nonetheless, on the basis of Cyr's information, a warrant was granted to enter, search and seize the videotapes at the CBC's head office in Montreal.

Later that day, Cyr and another officer seized five videotapes. Four of these tapes contained raw footage of the incidents filmed while the fifth tape was that of a news report in the form in which it had been broadcast. At the request of CBC officials, the tapes were placed in a sealed envelope while the validity of the warrant was contested. To that end, CBC brought an application for certiorari to quash the search warrant.

Judgments Below

Quebec Superior Court, [1987] R.J.Q. 2543

Durand J. dismissed the CBC's application to quash the warrant. He found the information provided to the justice of the peace sufficient to support the issuance of the warrant. He wrote (at p. 2545):

[translation] This text, added to the one mentioned above, explains the offence in question, the manner in which it was committed and the item to be seized, as well as its probative value. Nothing more is required for an ordinary seizure.

CBC contended that, where the police seek a warrant to seize items from a press organization which is not implicated in the crime under investigation, the police must demonstrate that either no alternative source of the information exists or that the police had attempted and failed to elicit the information from those sources. Durand J. held that no reasonable alternative source existed. He stated (at p. 2549):

[translation] The mis-en-cause did not witness the incidents of June 17, 1987 in Pointe-Claire. It must be concluded that the tape described in the information will enable them to identify the wrongdoer or wrongdoers and that they learned of it only by having watched the television news the day before the warrant application. The crime had just been committed, they were beginning their investigation and they had reason to believe that this tape would help them pursue it.

There was no reasonable alternative to this seizure and there was no need to mention this in the information.

Quebec Court of Appeal, [1989] R.J.Q. 2043, 50 C.C.C. (3d) 428

The majority of the Court of Appeal allowed the appeal brought by CBC. Relying on the decision of the British Columbia Supreme Court in *Re Pacific Press Ltd. and the Queen* (1977), 37 C.C.C. (2d) 487 and the decision of this Court in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, Jacques J.A. held that the constitutional protection of freedom of the press required that searches only be conducted in the offices of a media organization when no other source of information was available. Therefore, because the supporting information did not address the issue of alternative sources, he held that the warrant ought to be quashed.

Vallerand J.A. also concluded that no search could be conducted when alternative sources of the information sought were available. He concluded that there is no distinction between a press organization and any other entity in this regard. He expressed the view that search warrants, because of their intrusive nature, should always be issued with reticence. As a result, a justice of the peace should only issue a warrant upon being satisfied that there was either no reasonable alternative source available or, if there were, that all reasonable steps had been taken to get the information from the alternative source and they were unsuccessful. As the justice of the peace did not have any information upon which to make those findings, Vallerand J.A. held, he was without jurisdiction to issue the warrant.

Monet J.A., in dissent, would have dismissed the appeal. It was his position that since Parliament had not specifically required proof of the lack of alternative sources of information for the issuance of a search warrant, it was not required. By way of comparison, he referred to s. 185(1) (h) of the Criminal Code, R.S.C., 1985, c. C-46, dealing with wiretaps. There, Parliament had specifically added the requirement that a police officer depose that all alternative sources had been solicited but that no information had been forthcoming. He was therefore of the view that,

had Parliament intended to impose the same requirement on those seeking a search warrant, it would have done so.

Relevant Legislation

Section 487 (formerly s. 443) of the Criminal Code provides:

487. (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

...

(b) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act or any other Act of Parliament,

...

may at any time issue a warrant under his hand authorizing a person named therein or a peace officer

(d) to search the building, receptacle or place for any such thing and to seize it, and

(e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

Canadian Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

8. Everyone has the right to be secure against unreasonable search or seizure.

The Requirements for the Issuance of a Search Warrant

Like Vallerand J.A., I am of the view that warrants for the search of any premises constitute a significant intrusion on the privacy of individuals and corporations alike. Family and business confidences which are irrelevant to the crime under investigation may be reviewed by the unsympathetic eyes of a stranger. A search is always intrusive, upsetting and to some degree disruptive of the life or business of the individual subjected to the search. It is for this reason that a justice of the peace considering a search warrant application must undertake a careful weighing of the privacy interests of individuals in a democratic society against the interests of the state in investigating and prosecuting crimes.

The weighing and balancing which must be undertaken will vary with the facts presented on each application. Certainly in every case the requirements of s. 487 of the Code must be met. However, this is not the end of the matter. Even after the statutory conditions have been met it may still be a difficult and complex process to determine whether a search warrant should be issued. For example, a greater degree of privacy may be expected in a home than in commercial premises which may be subject to statutory regulation and inspection. At the same time, among commercial premises, the media are entitled to particularly careful consideration, both as to the issuance of a search warrant and as to the conditions that may be attached to a warrant to ensure that any disruption of the gathering and dissemination of news is limited as much as possible. The media are entitled to this special consideration because of the importance of their role in a democratic society.

In the companion appeal *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, I attempted to summarize the factors that must be taken into account in the balancing process in determining whether a search warrant should be issued. They are as follows (at p. 000):

- 1) It is essential that all the requirements set out in s. 487(1) (b) of the Criminal Code for the issuance of a search warrant be met.
- 2) Once the statutory conditions have been met, the justice of the peace should consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant.
- 3) The justice of the peace should 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. It must be borne in mind that the media play a vital role in the functioning of a democratic society. Generally speaking, the news media will not be implicated in the crime under investigation. They are truly an innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant.
- 4) The affidavit in support of the application must contain sufficient detail to enable the justice of the peace to properly exercise his or her discretion as to the issuance of a search warrant.
- 5) Although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted.
- 6) If the information sought has been disseminated by the media in whole or in part, this will be a factor which will favour the issuing of the search warrant.

- 7) If a justice of the peace determines that a warrant should be issued for the search of media premises, consideration should then be given to the imposition of some conditions on its implementation, so that the media organization will not be unduly impeded in the publishing or dissemination of the news.
- 8) If, subsequent to the issuing of a search warrant, it comes to light the authorities failed to disclose pertinent information that could well have affected the decision to issue the warrant, this may result in a finding that the warrant was invalid.
- 9) Similarly, if the search itself is unreasonably conducted, this may render the search invalid.

In this case the crucial factor is that, prior to the application for the warrant, the media had broadcast portions of the videotape depicting the commission of a crime on two occasions, both in French and English.

There can be no doubt it would have been preferable if the affidavit material had indicated that there was either no alternative source of information to the police or, if there was, that the information sought could not be obtained from that alternative source. The failure to set that out is certainly a basis upon which the justice of the peace could refuse to issue the search warrant. As a result, I would expect that in the future, this information would in most cases be placed before the justice of the peace.

However, this is not a constitutionally required condition for the issuance of a search warrant. It is to be noted that factually, this case is far different from *Pacific Press*, *supra*. There, the search interfered with the operations of the media and delayed the publication of the newspaper. Here the search was conducted reasonably and did not affect the operations of the news media. Further, there is no indication that the police were at the scene or even aware of the crime when the film was made. It is reasonable to infer that they, like other members of the public, learned the details of the crime from the broadcast.

It must be remembered that all members of the community have an interest in seeing that crimes are investigated and prosecuted. In a situation such as this, the media might even consider voluntarily delivering their videotapes to the police. For example, if the tapes depicted a murder being committed and means of identifying the killer, would the media seek to withhold the tapes on the grounds that to release them would have a chilling effect on their sources and thus interfere with freedom of the press? I trust that such a position would not be taken.

In any event, once the news media have published the gathered information, that information then passes into the public domain. The publication of that information is a very important factor for the justice of the peace to consider. This is something that favours the issuing of a search warrant. When a crime has been committed and evidence of that crime has been published, society has every right to expect that it will be investigated and, if appropriate, prosecuted. Here, the publication or broadcasting of the information was a factor of sufficient importance to enable the justice of the peace to exercise his discretion and issue the search warrant notwithstanding the failure of the police to explain that there was no alternative source

available that would give them the information contained in the videotape.

The failure to set out the lack of alternative sources was simply another factor to be taken into account in assessing the reasonableness of the search. Here, the actual search was conducted reasonably and properly. There was no interference with the operation of the news media, nor was the freedom of the press threatened. The media had already completed their basic function of news gathering and news dissemination; thus, in my view, the seizure of the tapes at this stage could not be said to have a chilling effect on the media's sources of news. It was therefore appropriate for the justice of the peace to issue the search warrant in this case.

Disposition

I would allow the appeal and restore the order of Durand J.

The following are the reasons delivered by

//McLachlin J.//

McLachlin J. (dissenting) -- Having concluded that the search and seizure by the police in this case infringed the freedom of the press and media guaranteed by s. 2 (b) of the Canadian Charter of Rights and Freedoms , I must respectfully disagree with the reasons of my colleagues, Justices Cory and L'Heureux-Dubé.

The central issue on this appeal is the scope of the constitutional guarantee of freedom of the press and how it is to be reconciled to the public interest in permitting the police to have access to information relevant to the commission of offences. Unlike my colleagues, I hold the view that this issue requires the court to confront squarely two questions: (1) whether search and seizure of the press offends s. 2 (b) of the Charter , and (2) if so, the conditions, if any, on which such search and seizure can be justified under s. 1 . Analyzing s. 2(b) in the light of principles laid down in other cases, it is my conclusion that the search here in question violates s. 2 (b) of the Charter and that the violation was not shown to be justified under s. 1 of the Charter .

The Issue

Section 487 of the Criminal Code, R.S.C., 1985, c. C-46 , permits a justice of the peace to issue a warrant for the search of premises and seizure of things found on the premises where the justice is satisfied that there are reasonable grounds to believe that items relevant to the commission of an offence may be found on the premises. The section applies to all premises, including those of the press.

The section does not expressly confer on a justice of the peace a discretion to consider any factor other than whether evidence relevant to the commission of a crime might be found on the premises. However, the phrase "may . . . issue a warrant" has permitted the courts to take the view that there may be some circumstances where other countervailing factors can and ought to be considered in the exercise of the justice's "judicial discretion". It is not necessary for the purposes of this case to assume a general discretion in every case to consider factors such as a

householder's privacy in determining whether a warrant should issue. I content myself with the interpretation of s. 487 adopted by this Court in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at pp. 889-90, where Lamer J. (as he then was) said that the justice has a right to refuse to issue a warrant in "special circumstances", such as "where the search would interfere with rights as fundamental as freedom of the press".

The general constitutionality of s. 487 is not challenged. Rather, what is at issue is the exercise by the justices of the peace of their discretion to refuse a warrant in special circumstances: *Descôteaux*, supra. It is submitted that searches and seizures on press premises can be permitted only in special circumstances where it is established that the state's interest in the administration of justice outweighs the interest in freedom of the press. Our task is to determine whether search and/or seizure on press premises infringes freedom of the press under s. 2 (b) of the Charter, and if so, to define those circumstances, if any, in which the limitation on freedom of the press imposed by a search or seizure on press premises can be justified under s. 1 of the Charter. It will then be for justices of the peace hearing applications for search warrants to conduct themselves in accordance with the Charter: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1080 per Lamer J. (as he then was), and at p. 1048 per Dickson C.J. The result in this appeal will depend on whether the justice acted within the constraints imposed by the Charter.

Freedom of the Press: s. 2 (b) of the Charter

The Constitution of Canada guarantees freedom of the press and media:

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

By specifically referring to freedom of the press, s. 2 (b) affirms the special position of the press and other media in our society. It affirms that the press and the media have the constitutional right to pursue their legitimate functions in our society. Freedom of the press under the Charter must be interpreted in a generous and liberal fashion having regard to the history of the guarantee and focusing on the purpose of the guarantee: see *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (per Cory J.); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (per Dickson J.); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 (per Dickson J.) at pp. 156 et seq.

The history of freedom of the press in Canada belies the notion the press can be treated like other citizens or legal entities when its activities come into conflict with the state. Long before the enactment of the Charter, the courts recognized the special place of the press in a free and democratic society. In England the matter was succinctly summarized by Denning M.R. in *Senior v. Holdsworth*, *Ex parte Independent Television News Ltd.*, [1976] 1 Q.B. 23 (C.A.), at p. 34 :

...there is the special position of the journalist or reporter who gathers news of public concern. The courts respect his work and will not hamper it more than is necessary.

Canadian courts prior to the Charter recognized the fundamental importance of freedom of expression and the press and gave it quasi-constitutional status, striking down laws which violated it:

Reference Re Alberta Statutes, [1938] S.C.R. 100.

Boucher v. The King, [1951] S.C.R. 265.

Switzman v. Elbling, [1957] S.C.R. 285.

Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455.

This tradition was aptly summarized by McIntyre J. in RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, at pp. 583-84:

Freedom of expression is not, however, a creature of the Charter . It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

...

Prior to the adoption of the Charter , freedom of speech and expression had been recognized as an essential feature of Canadian parliamentary democracy. Indeed, this Court may be said to have given it constitutional status.

Even prior to the Charter , the special position of the press was recognized as sufficient to oust the usual rights of the police to gather information by search and seizure: *Re Pacific Press Ltd. and the Queen* (1977), 37 C.C.C. (2d) 487 (B.C.S.C.); *Descôteaux v. Mierzwinski*, supra. The position of the press can be no less privileged under the Charter .

I pass from the history of the freedom of expression in Canada to the purpose of the guarantee. The values underlying freedom of the press, like freedom of expression, include the pursuit of truth. The press furthers that pursuit by reporting on facts and opinions and offering its comment on events and ideas - activities vital to the functioning of our democracy, which is premised on the free reporting and interchange of ideas. The press acts as the agent of the public in monitoring and reporting on governmental, legal and social institutions: *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671, per Cory J.; *Edmonton Journal v. Alberta (Attorney General)*, supra, per Cory J; *Law Reform Commission of Canada: Public and Media Access to the Criminal Process (Working Paper 56, 1987)*, chap. 1 at pp. 9-11. Freedom of the press is also important to participation in the community and individual self-fulfillment. One need only think of the role of a community newspaper in facilitating community participation, or the role of arts, sports and policy publications to see the importance of freedom of the press to

these goals. We thus see that the values identified in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, as central to free expression, also underlie the guarantee of freedom of the press and media. As to the means by which these purposes are to be achieved, it may be ventured that an effective and free press is dependent on its ability to gather, analyze and disseminate information, independent from any state imposed restrictions on content, form or perspective except those justified under s. 1 of the Charter .

The ways in which police search and seizure may impinge on the values underlying freedom of the press are manifest. First, searches may be physically disruptive and impede efficient and timely publication. Second, retention of seized material by the police may delay or forestall completing the dissemination of the news. Third, confidential sources of information may be fearful of speaking to the press, and the press may lose opportunities to cover various events because of fears on the part of participants that press files will be readily available to the authorities. Fourth, reporters may be deterred from recording and preserving their recollections for future use. Fifth, the processing of news and its dissemination may be chilled by the prospect that searches will disclose internal editorial deliberations. Finally, the press may resort to self-censorship to conceal the fact that it possesses information that may be of interest to the police in an effort to protect its sources and its ability to gather news in the future. All this may adversely impact on the role of the media in furthering the search for truth, community participation and self-fulfillment.

With deference to Cory J., I cannot accept that the fact that a portion of the material seized may have been published negates the chilling effect seizure might have on informants and the press itself. The fact that a portion of the material has been published does not negate the fact that other portions adversely affecting the privacy of press informants may be disclosed as a consequence of the search. But more fundamentally, it is the prospect of seizure of press material in future cases without the imposition of conditions to protect press freedom and the identity of informants which creates the chilling effect. The fact that some of the material may have been published in no way diminishes such fears.

I add that it is not every state restriction on the press which infringes s. 2 (b). Press activities which are not related to the values fundamental to freedom of the press may not merit Charter protection: see *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*. For example, the press might not be entitled to Charter protection with respect to documents relating to an alleged offence by the press itself.

The press activity at issue in this case -- gathering and disseminating information about a labour demonstration -- is directly related to the furtherance of the values of truth, community participation and self-fulfillment that underlie the guarantee of free expression. It follows that such search and seizure infringes freedom of the press as guaranteed by s. 2 (b) of the Charter .

This, however, is not the end of the analysis. The more difficult question is how freedom of the press is to be reconciled with society's interest in the administration of justice and the conviction of the guilty. Under the Canadian Charter of Rights and Freedoms, that analysis takes place under the rubric of s. 1 of the Charter.

Justification Under s. 1 of the Charter

Section 1 of the Charter provides:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The first question is whether there may ever be circumstances in which a search and/or seizure on press premises infringing s. 2 (b) can be justified under s. 1. Pre-Charter jurisprudence suggests that search and seizure of press material may be justified in appropriate circumstances, as in the case where there is no alternative source of the relevant evidence: *Pacific Press*, supra. The same view has been taken in the United States: *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). Denying the police the power ever to search press offices or seize press documents would have the advantage of eliminating ex parte hearings and the spectre of police in a newsroom rifling through press files. But, since a subpoena cannot be issued for purely investigatory processes, such a policy would effectively preclude police access to information in the hands of the press at the investigation stage. Access to information in the hands of the press at an investigatory stage may be extremely important -- sufficiently important in fact to outweigh the negative impact on freedom of the press of an ex parte application and subsequent search and seizure. Accordingly, the argument that a warrant for search and seizure of an organ of the press can never be made out must fail.

What we are faced with then is the delicate task of finding the proper balance between the public interest in the right of the press to conduct its activities free from state interference, and the public interest in seeing that those guilty of offences are charged and convicted. To quote Lord Denning in *Senior v. Holdsworth*, supra, at p. 34:

... there is the special position of the journalist or reporter who gathers news of public concern. The courts respect his work and will not hamper it more than is necessary. They will seek to achieve a balance between these two matters. On the one hand there is the public interest which demands that the course of justice should not be impeded by the withholding of evidence. ... On the other hand, there is the public interest in seeing that confidences are respected and that newsmen are not hampered by fear of being compelled to disclose all the information which comes their way. ...

In my opinion, the issuance of a warrant for search and for seizure of press information may be justified provided the following conditions are met:

- (1) The search/seizure is necessary because there are no alternative sources for the information required;
- (2) The importance of the search/seizure outweighs the damage to be caused by the infringement of freedom of the press; and
- (3) The warrant ensures that the search/seizure interferes with the press's freedom as little as possible.

These requirements mirror the concerns central to a s. 1 analysis as set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. It 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. The requirement that the search be necessary (first enunciated in Canada by Nemetz C.J. in *Pacific Press*, supra), is in reality an insistence that there be a rational connection between the infringing measure and the state objective; if there are other sources of information, the necessary link between the infringement and the state goal justifying it is absent. The second and third elements of my proposed test echo the remaining two branches of the proportionality test proposed in *Oakes*.

Given the seriousness of any violation of freedom of the press, the justice of the peace must be satisfied that the special requirements for the issuance of a warrant of search and seizure against a press agency are clearly established. Bald assertions of necessity or proportionality will not suffice. They must be backed up by more specific assertions.

For example, a justice enquiring whether the warrant is made necessary by the absence of alternative sources might well expect answers to questions like the following: Are there other sources known to the police? Have the police made reasonable efforts to find and utilize alternative sources? Mere administrative convenience will not suffice.

Similarly, in weighing the seriousness of the invasion of press freedom against the importance of the suspected evidence and the investigation, the justice might ask questions like the following: How serious is the alleged violation of the law? Is the search likely to disrupt the operations of the press organ? What is the likelihood of revealing the identity of informants in a way that may inhibit future communications with the press? Has the material already been substantially published? Can the search be conducted or the information obtained in a way that will do little harm to the operations of the press now and in the future?

The requirement that the infringement go no further than is necessary to achieve the desired object demands like particularity. The justice should cast the warrant in terms which reduce as far as possible the effects of the infringement. Matters such as timing, specificity of the items to be seized, and conditions protecting the identity of informants may fall to be considered, as may the manner in which the warrant is to be executed. For example, where there is no reason to believe the press will destroy the material or refuse to surrender it, it might be reasonable for the warrant to require that the information be surrendered rather than allowing the police to search the premises and seize the materials. (This appears to be a common practice at present.)

In some cases a justice concerned to minimize impact or concerned as to whether the warrant should issue at all may wish to receive representations from the press organ in question, especially in circumstances where the need for the suspected evidence is not particularly urgent and there is no reason to suspect that the evidence in question will be concealed or destroyed.

In summary, the justice of the peace to whom an application for a warrant against the press is made possesses jurisdiction to refuse the warrant or impose conditions on its execution, so as to ensure that the limit on press freedom it represents is justified under s. 1 of the Charter . This is essential to ensure that the action of the police in searching for and seizing press materials does not violate the Charter . Should more precision be deemed necessary it is open to Parliament to enact legislation setting out special procedures governing search and seizure on press premises, as it did in enacting s. 488.1 of the Criminal Code , dealing with seizure of privileged documents, after Descôteaux, supra.

Application of the Principles to this Case

The warrant in the case at bar does not comply with the requirements of the Charter .

The search of the premises to obtain the video recordings of the vandalism which the police were investigating and the subsequent seizure of a number of recordings violate the freedom of the press guaranteed by s. 2 (b). While the aim of the search and seizure was not to limit freedom of the press, that was the effect. The press activities represented by the tapes seized were directly related to the legitimate pursuit of the values underlying the guarantee of press freedom and were worthy of Charter protection. The search and seizure impinged on the press's liberty. The broadcaster's private offices were searched. The means by which it communicated the news to the public were seized and detained. The fact that a portion of the material had already been published does not detract from the fact that the broadcaster's legitimate press activities were interfered with. It follows that a breach of s. 2 (b) is established.

The search and seizure are not shown to have been justified under s. 1 of the Charter . The warrant was issued notwithstanding the absence of any evidence that the information could not be obtained elsewhere. Nor was there any material to permit the justice to weigh the importance of the search against the press infringement and to ensure that it did not intrude on press freedom further than necessary. While it is not alleged that the police interfered with the broadcaster's operations unduly, the absence of material enabling the justice to conclude that the search and seizure were necessary and proportionate is fatal. Without such information, the Crown cannot justify its infringement of press freedom under s. 1 of the Charter .

Disposition

I would dismiss the appeal.

Appeal allowed, McLachlin J. dissenting.

Solicitor for the appellant: Claude Provost, Montreal.

Solicitors for the respondent: Tremblay, Bois, Mignault, Duperrey & Lemay, Ste-Foy.

Solicitors for the intervener: Gowling, Strathy & Henderson, Ottawa.

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