

# SEARCH AND SEIZURE OF JOURNALISTIC MATERIAL: THE SING TAO DAILY CASE

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■  
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The constitutional guarantee of a free press has been almost taken for granted by all in Hong Kong. In safeguarding press freedom, the protection of journalistic sources is of particular importance to ensure that the press can properly perform its role as society's watchdog. However, in *So Wing Keung v Sing Tao Limited and Hsu Hiu Yee*, the Hong Kong Court of Appeal has taken quite a different view on the matter. This could have a long-term impact on the development of press freedom and the use of journalistic material in Hong Kong. This article seeks to look at the subtle, but significant change in the landscape on press freedom resulting from the Court's decision.

## Introduction

"In short, in Hong Kong a free press is a constitutional guarantee. It is a guarantee of the greatest importance for it is the function of the press to act as the eyes and ears of all concerned citizens. It was Thomas Jefferson, the third president of the United States of America, who said, 'No government ought to be without censors, and where the press is free none ever will': per Hartmann J in the Court of First Instance in *So Wing Keung v Sing Tao Ltd and Hsu Hiu Yee* (hereinafter "Sing Tao Daily").<sup>1</sup>

On 24 July 2004, the Independent Commission Against Corruption (ICAC) executed 14 search warrants against seven newspapers and the offices or homes of several journalists. These search and seizure operations created a storm of controversy, and many were of the view that such operations constituted an infringement of press freedom in Hong Kong.<sup>2</sup> One of the newspapers concerned, *Sing Tao Daily*, decided to challenge the validity of

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<sup>1</sup> unrep., Miscellaneous Proceedings No 1833 of 2004 (Court of First Instance, 10 Aug 2004), para 47.

<sup>2</sup> Hong Kong Journalist Association (HKJA), *Law on Search and Seizure Needs Urgent Overhaul*, submitted to Legislative Council (LegCo) Panel on Security for discussion on 2 Nov 2004, LC Paper No CB(2)111/04-05(06), p 1. The newspapers concerned were *Sing Tao Daily*, *Apple Daily*, *Oriental Daily News*, *The Sun*, *South China Morning Post*, *Hong Kong Economic Journal* and *Ta Kung Pao*.

these search warrants.<sup>3</sup> In the Court of First Instance (CFI), Hartmann J ruled in favour of *Sing Tao Daily*. He placed much emphasis on the need to protect the confidentiality of journalistic sources and the importance of safeguarding freedom of the press, so as to enable the press to effectively carry out its function as “watchdogs” in society.<sup>4</sup> The ICAC appealed against the decision. In the Court of Appeal (CA), Ma CJHC affirmed the decision of the CFI, but only on a technical ground. In a lengthy *obiter*, however, Ma CJHC opined that he would have upheld the validity of the search warrants were he required to rule on the merits of the case.<sup>5</sup>

It has been commented by at least one scholar who is familiar with this jurisdiction that in litigation involving substantive human rights issues in Hong Kong, very often cases from other jurisdictions are invoked to support the views of the court. Sometimes, however, they are dismissed as being irrelevant when they do not support the court’s propositions.<sup>6</sup> This was the situation prior to the handover of sovereignty in 1997. However, it seems that the same attitude prevails even after 1997. While this is perhaps understandable given the fact that we are still in the infancy of the “One Country Two Systems”, it is only beneficial to the development of our own jurisprudence in public law cases to have a consistent and rational application of cases from other jurisdictions. The objective of this article is to compare the judgments delivered by Hartmann J in the CFI and Ma CJHC in the CA in *Sing Tao Daily* – in particular their different approaches and how they have both made use of authorities from other jurisdictions to support their decisions. It is interesting to note that both judges claimed that they were engaged in the same balancing exercise, namely weighing the interests of the Government in its power of investigation of crimes against the interests of the press in gathering news and in disseminating information to the public. While Hartmann J adopted a “constitutional approach” in that he was willing to recognize the primacy of the constitutional guarantee of press freedom, Ma CJHC adopted a “common law approach” in that he restricted his interpretation of the relevant legislation by considering mainly, if not solely, the text of the statutory provisions and case law.

The first part of this article will set the stage for the discussion which consists of: (a) the background to *Sing Tao Daily*; (b) the legislative framework

<sup>3</sup> See n 1 above, aff’d, unrep., Civil Appeal No 245 of 2004 (Court of Appeal, 11 Oct 2004). The Applicant, So Wing Keung, is an investigator of the ICAC while the second Defendant, Hsu Hiu Yee, is a journalist employed by *Sing Tao Daily* whose home was searched by the ICAC.

<sup>4</sup> See n 1 above.

<sup>5</sup> *Ibid.*, unrep., Civil Appeal No 245 of 2004 (Court of Appeal, 11 Oct 2004).

<sup>6</sup> Yash Ghai, “Sentinels of Liberty or Sheep in Woolf’s Clothing? Judicial Politics and the Hong Kong Bill of Rights,” (1997) 60 *Modern Law Review* 459, 479. Ghai comes to this conclusion by an analysis of case law in Hong Kong prior to its sovereignty retrocession to the People’s Republic of China in 1997.

for the search and seizure of journalistic material in Hong Kong and other jurisdictions; and (c) the rationale behind protecting the confidentiality of journalistic sources. The second part of this article compares the judgments given by Hartmann J and Ma CJHC, in particular their application of case law from courts in the UK, the European Court of Human Rights (ECHR) and the Supreme Court of Canada.

## Search and Seizure of Journalistic Material

### *Background to Sing Tao Daily*

On 9 July 2004, a number of persons were arrested by the ICAC for alleged offences of corruption. Subsequently, one of the arrested persons ("the Participant") agreed to assist the ICAC in their investigations and was placed in a witness protection programme,<sup>7</sup> pursuant to the Witness Protection Ordinance (WPO).<sup>8</sup> Section 3 of the WPO provides that such witness protection programmes are intended to provide "protection and other assistance for witnesses whose personal safety or well-being may be at risk as a result of being witnesses". The WPO even encompasses the possibility that a witness in such a programme may have to be provided with a new identity.<sup>9</sup> It is said to be "paramount" that the identity of a person in such a programme is not allowed to pass into the public domain.<sup>10</sup> Hence, heavy penalties exist against any person who, without lawful authority or reasonable excuse, discloses information: (a) about the identity or location of a person who is or has been a participant or who has been considered for inclusion in the witness protection programme; or (b) that compromises the security of such a person.<sup>11</sup>

On 13 July 2004, several lawyers, acting under the instructions of persons purporting to have communicated with the Participant, alleged that they had reason to believe that the Participant was being detained by the ICAC against her will. The lawyers sought access to the Participant, but the ICAC refused to grant such access. The following day, an application for a writ of *habeas corpus* was filed in the CFI seeking the release of the Participant from the alleged unlawful detention.<sup>12</sup>

<sup>7</sup> See n 1 above, paras 8 and 11.

<sup>8</sup> Cap 564, Laws of Hong Kong.

<sup>9</sup> Section 8(2) of the WPO.

<sup>10</sup> See n 1 above, para 10.

<sup>11</sup> Section 17(1) of the WPO. Under s 17(4), a person who contravenes this section is liable on conviction on indictment to a maximum term of imprisonment of 10 years.

<sup>12</sup> *Ibid.*, para 12.

The proceedings for the *habeas corpus* application were heard on 15 and 16 July 2004, either in chambers or in camera. Hartmann J dismissed the application, being satisfied that the Participant was not in any form of custody, nor was she being in any way held against her will.<sup>13</sup> As the hearings were all heard behind closed doors, it is somewhat surprising that the events spanning the evening of 13 July 2004 through to the dismissal of the *habeas corpus* application were reported by seven local newspapers, disclosing details in relation to the Participant's identity.<sup>14</sup>

Against this background, the ICAC made an *ex parte* application before Stone J seeking the issue of 14 search warrants to enable their officers to enter the premises of the seven newspapers concerned and the offices or homes of a number of journalists.

The ICAC was concerned that two offences might be involved: (a) disclosure of the identity of the Participant, in contravention of section 17(1) of the WPO; and (b) conspiracy to pervert the course of public justice, as certain persons might have pursued the *habeas corpus* application not for the *bona fide* purpose of seeking the release of the Participant, but for intimidating her and thereby dissuading her from acting as a prosecution witness. The ICAC justified their application by explaining that the search and seizure operations would enable them to discover the source that had leaked the confidential information and would be of assistance in the furtherance of their investigation.

Stone J granted the search warrants pursuant to section 85 of the Interpretation and General Clauses Ordinance (IGCO),<sup>15</sup> ordering that all material seized under the warrants be sealed so that the owners of the material could have a period of three days to apply to the Court for the return of the material.<sup>16</sup> The legislative framework that provides for the search and seizure of journalistic material will be examined more closely in the following section.

### *The Legislative Framework*

#### **Search and seizure of journalistic material in Hong Kong**

Part XII of the IGCO, which contains provisions regarding the search and seizure of journalistic material, was enacted in 1995 with a view to providing

<sup>13</sup> See *In re W (Application for a writ of habeas corpus)*, unrep., Constitutional and Administrative Law List No 89 of 2004 (Court of First Instance, 16 July 2004), included in LC Paper No CB(2)192/04-05(01).

<sup>14</sup> See n 1 above, para 13.

<sup>15</sup> Cap 1, Laws of Hong Kong.

<sup>16</sup> See n 1 above, paras 2–4.

additional safeguards for such material.<sup>17</sup> During the second reading of the Interpretation and General Clauses (Amendment) Bill 1995 in the Legislative Council (LegCo) for the enactment of Part XII, one LegCo member remarked that "this Bill is of great significance in that it is the first time in our legislative history that journalistic material is given protection against unfair or unnecessary search and seizure by law enforcement agencies". It was believed "that [these] proposals strike the balance between the need to protect press freedom and the need of our law enforcement agencies in their performance of duties."<sup>18</sup>

"Journalistic material" is defined in section 82(1) of the IGCO to mean, subject to subsection (2), "any material acquired or created for the purposes of journalism". Section 82(2) provides that "[m]aterial is only journalistic material for the purposes of this Part if it is in the possession of a person who acquired it or created it for the purposes of journalism". Section 82(3) further provides that "[a] person who receives material from someone who intends that the recipient should use it for the purposes of journalism is to be taken to have acquired it for those purposes."<sup>19</sup>

The statutory scheme laid down in Part XII of the IGCO provides for a three-tier approach on the access to journalistic material by law enforcement agencies:

- (i) *First tier.* An *inter partes* application for a production order may be made, requiring the person who possesses the journalistic material to produce it or to give the officer access to it. The conditions that must be satisfied before such an order will be granted include, among others, that the material is likely to be of substantial value to the

<sup>17</sup> LegCo, *Official Record of Proceedings*, 28 July 1995, pp 6453–6472. Previously, search and seizure of journalistic material was regulated under s 50(7) of the Police Force Ordinance (PFO, Cap 232). This provision empowered the police, upon the issue of a warrant by a magistrate, to enter any place and take possession of any newspaper, book or document that is reasonably required if the police has reasonable cause to suspect there is material of value to the investigation of any offence. In Oct 1989, police officers, in exercise of the powers conferred under the PFO, entered and searched the offices of two local television stations, seizing a number of videotapes that contained footages of a clash between the police and pro-democracy demonstrators. Much controversy was raised over this incident. In the end, the LegCo decided to amend the IGCO rather than the PFO to reform the legislative framework for the search and seizure of journalistic material by law enforcement agencies. See also LegCo Panel on Security, *The Interpretation and General Clauses (Amendment) Bill 1995: Protection of Journalistic Material*, a paper submitted for discussion at a LegCo Panel on Security special meeting on 29 Nov 2004, LC Paper No CB(2)111/04-05(04).

<sup>18</sup> See the speech of the Honourable Andrew Wong, *Official Record of Proceedings* (n 17 above), p 6456.

<sup>19</sup> It should be noted that "it was a conscious decision on the part of the Administration not to define the expression [journalistic material] in specific terms because it may have the undesirable effect of reducing the scope of protection for journalistic material. Similarly, 'journalism' should be construed according to its ordinary and natural meaning; the scope of protection might be reduced by defining it." See the speech of the Honourable Andrew Wong, *Official Record of Proceedings* (n 17 above), p 6455.

investigation of an arrestable offence;<sup>20</sup> and that it is in the public interest to grant the order, having regard to both the likely benefit to the investigation and the circumstances under which the journalistic material is held.<sup>21</sup>

- (ii) *Second tier.* An *ex parte* application for a warrant may be made to enter premises and to search for or seize journalistic material. The judge must be satisfied that: the production order is not complied with; or in addition to fulfilling the requirements under the first tier, it is not practicable to apply for a production order, or the service of a notice to the other party for an *inter partes* hearing may seriously prejudice the investigation (because the other party may destroy the material in their possession). Such an *ex parte* application should not be made unless approved personally by a directorate disciplined officer. Any material seized must be sealed pending the outcome of an application for the return of the material through an *inter partes* hearing.<sup>22</sup>
- (iii) *Third tier.* In exceptional circumstances, an *ex parte* application for a warrant may be made for a warrant and for the *immediate* use of the journalistic material seized, without having to seal the material. In addition to having to fulfill the requirements under the second tier, the judge must be satisfied that there may be serious prejudice to the investigation if the applicant is not permitted to have immediate access to the material.<sup>23</sup>

In *Sing Tao Daily*, Stone J, after a “robust and lengthy” hearing, granted the warrants to the ICAC under the second tier.<sup>24</sup>

#### **Search and seizure of journalistic material in other jurisdictions**

In *Sing Tao Daily*, apart from local case law, Hartmann J in the CFI relied on decisions from the UK courts and the ECHR, while Ma CJHC in the CA on decisions from the UK and Canada. Thus, an understanding of the legal framework on the search and seizure of journalistic material in those jurisdictions will facilitate the analysis of the application of these foreign cases by the two judges. While a detailed analysis of the law on search and seizure in these different jurisdictions is beyond the scope of this article, an outline of the

<sup>20</sup> “Arrestable offence” is defined in s 3 of the IGCO to mean “an offence for which the sentence is fixed by law or for which a person may under or by virtue of any law be sentenced to imprisonment for a term exceeding 12 months, and an attempt to commit any such offence”

<sup>21</sup> Section 84 of the IGCO.

<sup>22</sup> *Ibid.*, s 85.

<sup>23</sup> *Ibid.*

<sup>24</sup> See n 1 above, para 3, per Hartmann J.

relevant law in this area in the UK, several European countries and Canada may be helpful.

*The UK.* In the UK, the scheme in force in relation to the search and seizure of journalistic material, provided for in the Police and Criminal Evidence Act 1984 (PACE),<sup>25</sup> is quite similar to the one in force in Hong Kong.<sup>26</sup> Section 9 of the PACE excludes the application of any pre-existing Act authorizing the issue of search warrant insofar as it relates to the authorization of searches of “excluded material” or “special procedural material”. Journalistic material held in confidence falls within the former, whereas journalistic material not so held is covered by the latter. These two kinds of material are to be accessible to investigators only in the limited circumstances and subject to the special procedures laid down under Schedule 1 of the PACE.<sup>27</sup>

A two-tier approach on the access to journalistic material by law enforcement agencies is adopted in the PACE. The first tier provides that a constable may apply to a circuit judge in an *inter partes* hearing for a production order, while the second tier provides that a constable may make an *ex parte* application to a circuit judge for a warrant authorizing him to enter premises and to search for journalistic materials.<sup>28</sup> The main difference between the two-tier approach adopted in the UK and the three-tier approach adopted in Hong Kong is that in the UK under the PACE, there is no requirement that the journalistic material seized pursuant to the warrant has to be sealed, nor is there any specific provision for an *inter partes* application for the return of the material.

*Countries in the European Union.*<sup>29</sup> In France, Article 56.2 of the Code of Criminal Procedure provides that in relation to search and seizure in media premises, the investigating judge or State prosecutor must be present to ensure that the investigations “do not encroach on the free exercise of the journalist’s profession”. While not all European countries have legislation directly in relation to the search and seizure of journalistic material, many of them have legislated a press law to protect journalists from being coerced

<sup>25</sup> C 60, Laws of England.

<sup>26</sup> Part XII of the ICGO was, to a certain extent, modeled upon the relevant UK provisions. For example, the definition of “journalistic material” was taken from the PACE. See *Official Record of Proceedings* (n 17 above).

<sup>27</sup> LegCo Panel on Security, *Comparative Study on the Power of Search and Seizure of Journalistic Material*, LC Paper No CB(2)111/04-05(05), pp 6–7.

<sup>28</sup> For a more detailed account of the procedure under s 9 of the PACE, see Richard Stone, *Entry, Search and Seizure: a Guide to Civil and Criminal Powers of Entry* (London: Sweet & Maxwell, 3<sup>rd</sup> edn, 1997), pp 83–90.

<sup>29</sup> For a comprehensive analysis of Strasbourg jurisprudence in relation to protection of journalistic sources, see Dirk Voorhoof, “The Protection of Journalistic Sources Under Fire?” presented at the European Federation of Journalists’ conference on protection of journalistic sources, Prague, 23 May 2003, available at <http://www.ifj-europe.org/default.asp?Issue=EFJsources&Language=EN>.

into disclosing their confidential sources of information. In France, Article 109(2) of the Code of Criminal Procedure provides that "any journalist who appears as a witness concerning information gathered by him in the course of his journalistic activity is free not to disclose its source". There are provisions to the same effect in Austria,<sup>30</sup> Germany,<sup>31</sup> Sweden,<sup>32</sup> and Luxembourg.<sup>33</sup> Belgium has recently drafted legislation for the protection of journalistic sources.<sup>34</sup>

*Canada.* In Canada, there is no specific legislation on the search and seizure of journalistic material.<sup>35</sup> The power to issue a warrant for entry and search of premises generally in the course of criminal investigation is set out in section 487 of the Criminal Code.<sup>36</sup> Journalistic premises and material are subject to such general search and seizure powers conferred on law enforcement agencies.<sup>37</sup> However, the application of the general search power under section 487 of the Criminal Code to journalistic material has been considered judicially.<sup>38</sup>

#### *Rationale Behind Protecting Confidentiality of Journalistic Sources*

In Hong Kong, freedom of expression is protected under Article 19 of the International Covenant on Civil and Political Rights (ICCPR).<sup>39</sup> In addition, press freedom is explicitly protected under Article 27 of the Basic Law, Hong Kong's "mini constitution". However, it would be futile to merely empower journalists with such rights in the abstract, if they are barred from exercising the same in a concrete way. Furthermore, it is well known that such rights are not absolute; under the ICCPR the restrictions which may be imposed upon

<sup>30</sup> Art 31 of the Media Act 1981.

<sup>31</sup> Section 383 of the Civil Procedure Code; s 53 of the Criminal Procedure Code.

<sup>32</sup> Ch 3, Art 1 of the Freedom of the Press Act.

<sup>33</sup> Ch IV, Art 7 and 8 of Law of 8 June 2004 on the freedom of expression in the media ("Loi du 8 juin sur la liberté d'expression dans les médias").

<sup>34</sup> Draft law on the protection of journalists' sources adopted by the Chamber of Representatives of Belgium on 6 May 2004 and sent for review in the Senate (Doc 51 0024/017), available at <http://www.lachambre.be>.

<sup>35</sup> For a more detailed account of the law in relation to search of media premises in Canada, see James Fontana, *The Law of Search and Seizure in Canada* (Canada: Butterworths, 5<sup>th</sup> edn, 2002), pp 258–262.

<sup>36</sup> RSC 1985, c C-46. The provision empowers a justice of peace to issue a search warrant if he is satisfied by information on oath that there are reasonable grounds to believe that there is in the premises: (a) anything on or in respect of which any offence against the Criminal Code or any other Act of Parliament has been or is suspected to have been committed; or (b) certain offence-related material as specified in s 487(1).

<sup>37</sup> In comparison, under the schemes implemented in Hong Kong and in the UK, journalistic material is excluded from the application of general search and seizure powers conferred on law enforcement agencies.

<sup>38</sup> See the Supreme Court of Canada's companion decisions in *Canadian Broadcasting Corp v Lessard* 67 CCC (3<sup>rd</sup>) 517 (1991) and *Canadian Broadcasting Corp v AG for New Brunswick et al* 67 CCC (3<sup>rd</sup>) 544 (1991). The latter was referred to by Ma CJHC in So Wing Keung (n 5 above), para 43(4).

<sup>39</sup> As incorporated into the laws of Hong Kong through Art 39 of the Basic Law.

the exercise of the right are limited by Article 19(3). Thus, the duty to balance competing interests, as well as the power to concretely instill in the press the rights guaranteed by our constitutional documents, rest largely with the judiciary.

The core problem that “plagues” the legitimisation of press freedom in Hong Kong turns out to be the judiciary’s inability to formulate and recognize the philosophical justification underlying the protection of press freedom.<sup>40</sup> Before analyzing the decisions in *Sing Tao Daily*, at the outset we should discern the rationale behind protecting journalists’ confidential sources and the relationship between this and press freedom.

In relation to the protection of journalistic sources on the basis of Article 10 of the European Convention on Human Rights,<sup>41</sup> the ECHR in *Goodwin v United Kingdom* (hereinafter “Goodwin”) authoritatively stated the rationale behind the protection of journalistic sources:

“Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”<sup>42</sup>

Enough emphasis cannot be placed on the “vital public watchdog role” played by the press. Stewart J of the US Supreme Court stated this in another way by explaining that “[t]he primary purpose of the constitutional guarantee of a free press was to create a fourth institution outside the Government as an additional check on the three official branches”.<sup>43</sup> Given the fact that Hong Kong is supposed to be a predominantly executive-led society, where public officials are not directly accountable to the legislature, and that Hong Kong

<sup>40</sup> Anne S.Y. Cheung, “One Step Forward Two Steps Back: A Study of Press Law in Post-Colonial Hong Kong”, (2002) 3(4) *Journalism and Communication Monographs* 189, 193.

<sup>41</sup> The freedom of expression clause.

<sup>42</sup> *Goodwin v UK* (1996) 22 EHRR 123, para 39 (hereinafter “Goodwin”).

<sup>43</sup> Potter Stewart, “Or of the Press”, (Jan 1975) 26 *Hastings Law Journal* 631, 634.

is not yet a full democracy, the press has an especially important role to play as the “fourth estate” or the “watchdog” over the government.

In the light of such justification for the protection of journalistic sources, we will now turn to analyze the judgments of Hartmann J and Ma CJHC in *Sing Tao Daily*.

### **Analysis of the CFI and CA Judgments**

#### *Court of First Instance*

##### **Jurisdiction**

The first issue that Hartmann J dealt with was one of jurisdiction. He held that he did have the necessary jurisdiction under Order 32, rule 6 of the Rules of the High Court to hear and determine the summons to set aside the search warrants granted by Stone J. He explained that the decision of Stone J to issue the warrants was an “order” in civil proceedings to which Order 32, rule 6 applied.<sup>44</sup>

##### **Justification for the issue of search warrants**

Moving on to the substantive issue of whether the requirements under section 85 of the IGCO had been met in this case, Hartmann J reached the conclusion that on the material before him, the ICAC had not made out a sufficient case for search warrants to be issued. After considering a series of English authorities, he set out seven principles in relation to applications made under section 85 of the IGCO:<sup>45</sup>

1. An application for a search warrant constitutes a serious intrusion upon the freedom of the press. The responsibility for ensuring that the procedure is not abused lies with the courts and it is of cardinal importance that judges should be scrupulous in discharging that responsibility.
2. The fact that an officer, who has been investigating the matter, states in his affidavit that he considers that there are reasonable grounds for the search warrants to be issued is not enough; the judge himself must be satisfied.
3. An application for a search warrant should not be a matter of common form – the preferred method should be by way of giving notice to seek a production order.

<sup>44</sup> See n 1 above, paras 30–44.

<sup>45</sup> *Ibid.*, para 65.

4. The fact that the staff of a newspaper or journalists believed to be in possession of journalistic material may themselves be under investigation for the commission of criminal offences is not of itself necessarily a sufficient reason for a judge issuing a warrant.
5. A judge should not issue a warrant unless material is placed before him demonstrating that in the particular case, if notice is given, there is a real risk, as opposed to a mere possibility, that the journalistic material will be hidden or destroyed.
6. In determining an application made under section 85 of the ICGO, a judge should give reasons for his decision even though they need not be elaborate.
7. An applicant who seeks the issue of a warrant under section 85 of the ICGO must act in the utmost good faith and give full and frank disclosure in making the *ex parte* application.

Hartmann J was of the opinion that Stone J made the orders without the benefit of the jurisprudence and guidance he had. He believed that had the judge's attention been drawn to the legal authorities containing these seven principles, it was highly unlikely that the warrants would have been granted.<sup>46</sup>

On the facts of the case, Hartmann J was not convinced by the ICAC that there was a real risk of *Sing Tao Daily* destroying the journalistic material sought in the investigation.<sup>47</sup> Moreover, the ICAC did not seek voluntary disclosure, nor did it seek the delivery of the material under the first tier – the “production order route”. By making an *ex parte* application for search warrants, it went directly to measure of the last resort.<sup>48</sup> He ruled that the ICAC was wrong in fact and in law in seeking the issue of search warrants when, in terms of the statutory scheme contained within Part XII of the ICGO, it could equally have achieved its legitimate aim by less intrusive measures. Accordingly, the search warrants were set aside in terms of Order 32, rule 6.<sup>49</sup>

#### Article 27 of the Basic Law

In interpreting the relevant statutory provisions in this case, Hartmann J remarked that Part XII of the ICGO “must be viewed through the prism of Art 27 of the Basic Law”.<sup>50</sup> The constitutional guarantee for a free press is “of the greatest importance for it is the function of the press to act as the eyes and ears of all concerned citizens”.<sup>51</sup> Furthermore, he emphasized:

<sup>46</sup> *Ibid.*, para 70.

<sup>47</sup> *Ibid.*, para 67.

<sup>48</sup> *Ibid.*, para 63.

<sup>49</sup> *Ibid.*, para 71.

<sup>50</sup> *Ibid.*, para 46.

<sup>51</sup> *Ibid.*, para 47.

"a free press must be an effective press, not moribund or compliant ... it must be able, when necessary, to obtain information which would otherwise not be revealed to the light of the day and to protect the identity of those willing to pass on such information."<sup>52</sup>

#### *Court of Appeal*

When the ICAC appealed to the CA, there were four issues identified in the appeal: (1) whether the CA had the jurisdiction to hear the appeal; (2) whether the appeal was academic; (3) whether Hartmann J had jurisdiction to set aside the warrants under Order 32, rule 6 or the Court's inherent jurisdiction; and (4) the merits of the case – whether there was justification to issue the search warrants in the present case. As previously noted, the judgment was given by Ma CJHC, with Stuart-Moore V-P and Stock JA in concurrence.

#### **Issue 1: Jurisdiction of the Court of Appeal**

In relation to the first issue, although this appeal was marked as a civil appeal, Ma CJHC ruled that the proceedings underlying Hartmann J's decision were not a civil cause or matter. As such, the CA had no jurisdiction to hear the appeal and the appeal of the ICAC must inevitably be dismissed.<sup>53</sup> The only means of appeal would be an appeal to the Court of Final Appeal (CFA), pursuant to section 31(b) of the Hong Kong Court of Final Appeal Ordinance.<sup>54</sup>

However, despite having decided that the CA had no jurisdiction to hear this appeal, Ma CJHC continued. Citing the Privy Council's decision of *George Tan Soon-gin v His Honour Judge Cameron and Another*,<sup>55</sup> he said he was aware that "any observations concerning the merits of an appeal which should not be before the court must necessarily be extra-judicial". Nevertheless, he was of the view that since: (1) his conclusions on jurisdiction could be wrong; and (2) the other issues identified had been fully argued, he should state his views on these issues as well out of completeness.<sup>56</sup> Accordingly, as *obiter*, Ma CJHC gave his views on the three remaining issues.

#### **Issue 2: Whether the appeal was purely academic**

In relation to the second issue, counsel for the Respondents in the appeal submitted that as all the material that were seized during the searches made by the ICAC under the search warrants had then been made available to

<sup>52</sup> *Ibid.*, para 48.

<sup>53</sup> *Ibid.*, paras 28–33.

<sup>54</sup> Cap 484, Laws of Hong Kong.

<sup>55</sup> [1992] 2 AC 205, p 221 E–F.

<sup>56</sup> See n 5 above, para 33.

them, there was nothing to be gained whichever way this appeal was decided.<sup>57</sup> Ma CJHC, however, was of the view that this case was not purely academic and should be heard. He explained that apart from having to resolve the issue of costs, this appeal was of considerable public interest as it involved the examination of provisions that affected one of the basic freedoms enshrined in the Basic Law. Furthermore, a number of other newspapers were in a similar position and were awaiting the outcome of the appeal.<sup>58</sup>

#### Issue 3: Jurisdiction to set aside search warrants

In relation to the third issue, Ma CJHC decided that the only means for an affected party to challenge a section 85 decision is by way of an application for an order to return the seized journalistic material pursuant to section 87 of the IGCO. Accordingly, Hartmann J was wrong to assume jurisdiction under Order 32, rule 6 to set aside the *ex parte* Order. According to Ma CJHC, he should instead have determined the issue in the light of section 87 of the IGCO, which he failed to do.<sup>59</sup>

#### Issue 4: Justification for the issue of search warrants

Finally, in relation to the fourth issue, Ma CJHC made it clear that had the CA possessed the necessary jurisdiction, the appeal would have been decided in favour of the ICAC on the merits.

In an analysis of whether the search warrants should have been issued in the first place, Ma CJHC dealt briefly with the seven principles put forward by Hartmann J in the CFI. He was of the opinion that the seven principles were obvious ones, having regard to the express provisions of Part XII of the IGCO or as a matter of good judicial practice. He had “no doubt” that Stone J already had most of these principles in mind when granting the search warrants. He failed to see how these principles could have affected the decision of Stone J one way or the other, had the judge been provided with the relevant authorities containing these principles.<sup>60</sup> There are two points made by Ma CJHC that should be highlighted: (1) Part XII of the IGCO does not require an application for a production order to be made before a search warrant can be sought from the court, nor does the legislation suggest that this is the preferred procedure;<sup>61</sup> and (2) section 85(5)(c) of the IGCO only requires it be shown that an application for a production order “may seriously

<sup>57</sup> *Ibid.*, para 26.

<sup>58</sup> *Ibid.*, paras 34–35.

<sup>59</sup> *Ibid.*, paras 36–40.

<sup>60</sup> *Ibid.*, paras 44–46.

<sup>61</sup> *Ibid.*, with reference to Principle 3, suggested by Hartmann J.

prejudice the investigation", not a "real risk" or "substantial probability" that the journalistic material sought will be destructed or concealed.<sup>62</sup>

Ma CJHC held that, on the facts of the case, the issue of the search warrants was justified, as the service of notice of application for a production order under section 84 of the IGCO might have seriously prejudiced the investigations. The facts revealed a very disturbing state of affairs, as the motive behind the leaking of information concerning the identity of the Participant to the press might have been to undermine her willingness to continue to assist the ICAC. There was the possibility of very serious offences having been committed. Indeed, there was even *prima facie* evidence that the Respondents themselves were in contravention of section 17 of the WPO.

#### Article 27 of the Basic Law

Most interesting is how Ma CJHC's view on Article 27 of the Basic Law contrasts with that of Hartmann J's. Although Hartmann J boldly put forward that the scheme contained in Part XII of the IGCO had to be viewed "through the prism" of Article 27 of the Basic Law,<sup>63</sup> Ma CJHC was of the view that "this is apt to confuse":<sup>64</sup>

"If all that was meant was that Part XII deals with the permissible limits to the freedom of the press, then I would have no quarrel with this as a proposition. If, however, what was meant was that in approaching Part XII applications, there should be a bias in favour of this basic freedom as some sort of paramount consideration, I would disagree."<sup>65</sup>

Ma CJHC remarked that the balancing exercise that Part XII focuses on is "the freedom of the press seen against the need effectively to investigate and deal with crime".<sup>66</sup> There is "no bias or predisposition towards any particular factor".<sup>67</sup>

In addition, he explained that if there is any paramount consideration at all, it is the public interest which is mentioned in section 84(3)(d)<sup>68</sup>

<sup>62</sup> *Ibid.*, Principle 5.

<sup>63</sup> See n 50 above.

<sup>64</sup> See n 5 above, para 43.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> Section 84 of the IGCO provides for the procedure for an application for production order in respect of journalistic material.

(imported by sections 85(3)(a)(i)),<sup>69</sup> 87(2),<sup>70</sup> and 89(2),<sup>71</sup> of the IGCO). In particular, in determining whether it would be in the public interest for a production order or a search warrant to be granted, the “public interest” that the judge is to have regard to is expressly limited to the matters there stipulated in the provision – “the benefit likely to accrue to the investigation” and “the circumstances under which a person in possession of the material holds it”. The legislation does not provide for an “open-ended public interest condition.”<sup>72</sup>

To sum up Ma CJHC’s ruling, the appeal was dismissed as a result of the CA’s conclusion on its jurisdiction, not on the merits. As mentioned, Ma CJHC’s views on the substantive issues of this case were stated as *obiter*, as the CA lacked jurisdiction to rule directly on the issues before it. Courts in Hong Kong will not be legally bound by such statements, but in general the *obiter* of an appellate court is still of highly persuasive value. There has been some controversy as to whether Ma CJHC’s approach in stating his views in favour of upholding the validity of the search warrants as *obiter* was appropriate. As commentators have pointed out, Ma CJHC has in effect overruled the decision of Hartmann J at first instance, and has given the green light for law enforcement agencies to apply for search warrants in similar circumstances in the future. Unfortunately, the opportunity for *Sing Tao Daily* to appeal to the CFA was also curbed as they were, *prima facie*, the “winner” of the case.<sup>73</sup>

The judgments of Hartmann J and Ma CJHC could be said to be in juxtaposition to one another. However, what is more important than the final outcome of this case is the process by which the outcome was arrived at. While we have no doubt that both levels of the court were able to appreciate the crucial role of a free press in society, it is the way the CA reached its conclusion which has caused the concern of many.

#### *Judicial “Cherry Picking”?*

It is now commonplace in many jurisdictions for judges to refer to the decisions of the courts of foreign jurisdictions when interpreting domestic human rights guarantees. There is usually a list of factors that a judge will consider

<sup>69</sup> Section 85 of the IGCO provides for the procedure for an application for warrant to seize journalistic material.

<sup>70</sup> Section 87 of the IGCO provides for the procedure in relation to sealed material.

<sup>71</sup> Section 89(2) of IGCO provides that: “For the avoidance of doubt, it is declared that nothing in this Part [Part XII] shall be construed as requiring a judge to make an order under this Part where he considers that, in all the circumstances of the case, it would not be in the public interest to make that order.”

<sup>72</sup> See n 5 above, para 43.

<sup>73</sup> See Margaret Ng and Benny Tai in “The Legal Profession Questions the Appropriateness of the Approach Adopted by the Court of Appeal”, *Hong Kong Economic Journal*, 12 Oct 2004 (in Chinese, translation of headline by authors).

before applying foreign judicial decisions, such as the differences in constitutional structure between the two jurisdictions, and the perceived judicial competence of the foreign court in the area of law in issue. Ultimately, however, the decision whether to use foreign judicial decisions is largely in the realm of judicial discretion.

As a result, very often there is substantial “cherry picking” of which jurisdiction (and cases) to cite, and those jurisdictions chosen will be those which are likely to support the conclusion sought.<sup>74</sup> As Tripathi remarks:

“When a judge looks to foreign legal systems for analogies that shed light on any of the new cases before him, he is looking to legal material which he is absolutely free to reject unless it appeals to his reason. Appeal to one’s reason, more often than not, amount to a confirmation and a strengthening of one’s own opinion rather than a shaping of that opinion.”<sup>75</sup>

In Hong Kong, references to foreign law have become a touchstone in debates between liberal and conservative members of the judiciary.<sup>76</sup> In the judgments of Hartmann J and Ma CJHC, the foreign authorities that they cited were vastly different even if they did not contradict each other. To explain this in the light of Tripathi’s remarks, this can be attributed to the very different preconceptions which the two judges brought to the case. Both were trying to “cherry pick” foreign cases that confirmed and strengthened their contrasting views on this matter. Hartmann J relied on cases which supported his constitutional approach to the interpretation of Part XII of the IGCO, while Ma CJHC relied on a common law approach.

The main problem with this “cherry picking” approach is that it may lead to arbitrary instead of legitimate decision making.<sup>77</sup> We are in no way suggesting that arbitrary decision making was demonstrated in this case. However, as Cheung points out, a detailed analysis of the judicial decisions in relation to press freedom in Hong Kong in the past decade shows that Hong Kong courts have often been unable to articulate the basis for their decisions.<sup>78</sup> As illustrated below, the judge’s choices of foreign cases relied upon can have a strong bearing as to how the rationale behind a decision is articulated.

<sup>74</sup> Christopher McCrudden, “A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights”, (2000) 20 *Oxford Journal of Legal Studies* 499, 507.

<sup>75</sup> Pradyumna K. Tripathi, “Foreign Precedents and Constitutional Law”, (1957) 57 *Columbia Law Review* 319, 346; see also n 74 above, p 516.

<sup>76</sup> See n 6 above.

<sup>77</sup> See n 74 above.

<sup>78</sup> See n 40 above, p 214.

### UK authorities

Given that the Hong Kong legal system was largely transplanted from the UK, and the high degree of similarity between the scheme for the search and seizure of journalistic material under the PACE and that under the IGCO, it is not surprising that both Hartmann J and Ma CJHC cited English cases extensively in their judgments. In fact, Hartmann J relied solely on English cases in formulating his seven principles. However, as most of these cases are not directly related to the search and seizure of journalistic material per se,<sup>79</sup> our focus will primarily be on *R v Central Criminal Court, ex parte Bright* (hereinafter "Bright"),<sup>80</sup> which was cited by Ma CJHC,<sup>81</sup> but not by Hartmann J; and *Ashworth Hospital Authority v MGN Ltd* (hereinafter "Ashworth"),<sup>82</sup> which was cited by Hartmann J, but not by Ma CJHC. These two cases deal with search and seizure matters.

In the UK, until more recently when the Human Rights Act 1998 (HRA) came into force in 2000, press freedom was only protected by unwritten convention; there was no positive guarantee by constitution.<sup>83</sup> The HRA provides that English courts in interpreting European Convention rights must take the jurisprudence of the ECHR into account.<sup>84</sup> This different constitutional context should be borne in mind when applying English human rights cases in Hong Kong.

*Bright* was decided just shortly before the enactment of the HRA. An English newspaper, *The Guardian*, published the text of a letter from David Shayler, an ex-MI5 employee who was at that stage living in Paris and resisting extradition to the UK on charges under the Official Secrets Act 1989. Shayler had made various allegations of misdeeds by MI5, including the involvement in a plot to assassinate Colonel Gaddafi, the head of state of Libya. Another newspaper, *The Observer*, published an article commenting on a letter which Shayler had previously sent to the Home Secretary, again in connection with the alleged plot. The UK Divisional Court largely set aside the orders granted for the search and seizure of the newspapers' premises.

Ma CJHC relied on this case as proposition for the argument that the "public interest" in section 84(3)(d)(i) is not an open-ended public interest.<sup>85</sup> In *Bright*, it was, indeed, held that "public interest" in the equivalent section

<sup>79</sup> *R v Southampton Crown Court, ex parte J and P* [1993] Crim LR 962; and *R v Leeds Crown Court, ex parte Switalski* [1991] Crim LR 559, both cited in n 1 above, para 65, concern warrants to search solicitors' premises.

<sup>80</sup> [2001] 2 All ER 244 (hereinafter "Bright").

<sup>81</sup> See n 5 above, para 43.

<sup>82</sup> [2001] 1 WLR 515, aff'd by the House of Lords [2002] 1 WLR 2033 (hereinafter "Ashworth").

<sup>83</sup> Geoffrey Robertson and Andrew Nicol, *Media Law* (London: Sweet & Maxwell, 2002), p xii.

<sup>84</sup> Section 2 of the HRA, C 42, Laws of the United Kingdom.

<sup>85</sup> See n 5 above, para 43.

of the PACE was limited to the potential benefit to the investigation and the circumstances in which the person against whom the order is sought "holds" the material. What is more interesting is that the court in *Bright* demonstrated how it showed deference to Parliamentary sovereignty, and hence adopted the common law approach as opposed to the constitutional approach in its interpretation of the PACE. In relation to considerations of press freedom and protection against self-incrimination,<sup>86</sup> Lord Justice Judge remarked:

"It seems improbable that the European Convention for the Protection of Human Rights and Fundamental Freedoms was foremost in the mind of Parliament when this special procedure was enacted ... [G]enerally the vast and increasingly lengthy number of citations in numerous skeleton and oral arguments of the decisions of the European Court [are] simply repeating in different language long standing and well understood principles of the common law."<sup>87</sup>

By choosing to rely on *Bright*, an inference can be drawn that Ma CJHC, influenced by the English tradition, also supports the proposition that the common law is sufficient to protect fundamental rights and freedoms. He hardly made any further reference to Article 27 of the Basic Law after stating that it does not grant a presumption in favour of the press in the interpretation of the relevant provisions of the IGCO. His judgment clearly demonstrated that he adhered to the common law rules of interpretation with its concentration on the text of the statutory provisions, rather than resorting to a broad and purposive approach of interpretation based on the Basic Law. One commentator has referred to this attitude, shared among many judges in Hong Kong since the pre-1997 colonial era, as the "common law superiority syndrome".<sup>88</sup>

In contrast, the judicial attitude in the English Court of Appeal's decision in *Ashworth* was vastly different from that in *Bright*. The decision in *Ashworth* was subsequently affirmed by the House of Lords, although it was the Court of Appeal's judgment which Hartmann J relied on to point out that the "chilling effect" of court orders requiring source disclosure is not affected by the importance of the information or the mercenary motives of the source.<sup>89</sup>

<sup>86</sup> Judge LJ decided that these were valid factors to take into account when the judge is exercising his discretion to determine whether the warrants should indeed be granted, once the prerequisites have been satisfied.

<sup>87</sup> See *Bright* (n 80 above), p 261.

<sup>88</sup> Johannes M. M. Chan, "Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence", (1998) 47 *International and Comparative Law Quarterly* 306, 312.

<sup>89</sup> See *Ashworth* (n 82 above), p 537.

In *Ashworth*, the statutory provision under consideration was not the PACE, but section 10 of the Contempt of Court Act 1981 ("the 1981 Act"),<sup>90</sup> which provides:

"No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

The case involved the corrupt behaviour of an employee of a mental hospital, who in breach of the Prevention of Corruption Acts as well as in breach of contract, was supplying confidential documents about inmates to the tabloids. In the need to protect the privacy of the inmates, and to detect and punish serious criminal conduct, the court made an order to unmask the source. In coming to this conclusion, the court interpreted section 10 of the 1981 Act in the light of Article 10 of the European Convention for the Protection of Human Rights.<sup>91</sup> Laws LJ also emphasized the court's duty under the HRA to take Strasbourg jurisprudence into account. This reflects the approach adopted by Hartmann J as well in his audacious attempt to grant greater protection to the press by basing the rationale of his judgment explicitly on Article 27 of the Basic Law.

After the implementation of the HRA, the trend in the UK is for the courts to give force to constitutional protection for the freedom of expression.<sup>92</sup> We would argue that it is high time for the judiciary in Hong Kong to be more consistent in applying cases which recognize constitutional guarantees of fundamental human rights. Hong Kong courts should be strong to maintain international standards of human rights protection.

#### ECHR authorities

There is a perception that different jurisdictions take differing ideological positions on human rights issues, and choosing to emulate a particular country or region's approach to human rights may be regarded as a sign of a particular orientation towards human rights.<sup>93</sup>

The importance of the protection of journalistic sources is explicitly recognized in many European jurisdictions. Apart from the fact that many

<sup>90</sup> C 49, Laws of England.

<sup>91</sup> The freedom of expression clause.

<sup>92</sup> See n 83 above, pp 65–70.

<sup>93</sup> See n 74 above, pp 500–501.

countries in the European Union have legislated to protect confidential sources,<sup>94</sup> the Council of Europe has also adopted Recommendation (2000) 7 “on the right of journalists not to disclose their source of information”.<sup>95</sup> In the English Court of Appeal decision of *Ashworth*, Lord Philips accepted a submission from counsel that “the decisions of the European Court demonstrate that the freedom of the press has in the past carried greater weight in Strasbourg than it has in the courts of this country”.<sup>96</sup> Thus, it would appear natural for a court to look to ECHR authorities if it is committed to protecting journalistic sources and upholding press freedom.

Hartmann J cited the landmark case of *Goodwin* in explaining the importance behind the protection of confidential sources.<sup>97</sup> Interestingly, Ma CJHC made no mentioning of *Goodwin*, nor did he cite any ECHR cases. As such, he did not attempt to venture further to explain the justification for the protection of journalistic sources, or to elaborate upon the crucial role which the press has to play as the fourth estate in society.

We would venture to submit that the judiciary in Hong Kong should seriously take ECHR cases into account if it is to develop any coherent analytical structure in dealing with cases where press freedom is at stake.<sup>98</sup>

#### Canadian authorities

While Hartmann J did not cite any Canadian authorities in his judgment, Ma CJHC referred to *Canadian Broadcasting Corporation v Attorney General for New Brunswick*,<sup>99</sup> where the Supreme Court of Canada was of the view that “the constitutional protection of freedom of expression afforded by section 2(b) of the Charter does not ... import any new or additional requirements for the issuance of search warrants. What it does is provide a backdrop against which the reasonableness of the search may be evaluated.”<sup>100</sup>

At first glance, it is understandable why Ma CJHC chose to “cherry pick” this case to support his proposition that even in light of Article 27 of the Basic Law, there is no presumption in favour of the press in the interpretation of the relevant provisions in the ICGO. However, in comparison to Canada

<sup>94</sup> See discussion above.

<sup>95</sup> Committee of Ministers, Recommendation (2000) 7 on the right of journalists not to disclose their sources of information, 8 Mar 2000, DH-MM (2000) 2, pp 125–128 (Explanatory Memorandum).

<sup>96</sup> See *Ashworth* (n 82 above), pp 536–537.

<sup>97</sup> See *Goodwin* (n 42 above).

<sup>98</sup> It should be noted that no reference was made in *Sing Tao Daily* to the ECHR decision of *Roemen and Schmit v Luxemborg*, Appl. No 51772/99, ECHR (12 Mar 2002), where the Court clearly expressed the opinion that the searches carried out in the journalist's home and place of work was an even greater threat to freedom of expression than a production order for the journalist to reveal his sources.

<sup>99</sup> (1991) 67 CCC (3rd edn), p 544.

<sup>100</sup> *Ibid.*, pp 556–557, cited in n 5 above, para 43.

where there is no specific provision for the search and seizure of journalistic material, we would argue that the legislative intent of the enactment of Part XII of the IGCO was clearly to grant greater protection to the press,<sup>101</sup> and Part XII of the IGCO ought to be interpreted together with Article 27 of the Basic Law to give effect to this.<sup>102</sup>

## Conclusion

"The guarantee of freedom of the press in law is not self-defining. Its content depends on how much life the judiciary is willing to breathe into it."<sup>103</sup> In another case in relation to the issue of warrants for the search and seizure of journalistic material, *Apple Daily v Commissioner of Independent Commission Against Corruption*,<sup>104</sup> arguments based on Article 27 of the Basic Law were not even raised by the defence counsel. As a result, the CFA shied away from giving full consideration to the function of the press in society. *Sing Tao Daily* provided a valuable opportunity for the CA to reconsider this issue and give validation to Article 27 of the Basic Law. Lamentably, despite the attempt by the CFI to boldly defend our constitutional free press clause, the CA paid nothing more than lip service to the same. One cannot help but wonder whether the same result would be seen had this case been given the chance to be heard before the CFA. However, this will have to wait for another occasion.

It is not denied that the government has a legitimate interest in its investigation of crimes. However, in balancing this public interest against another public interest, namely, the press' function in gathering information, a strong and independent judiciary with a genuine conviction towards the protection of a free press must look into and articulate the rationale behind the protection of press freedom. Enshrining press freedom in our constitution can at most empower the press in the abstract; the decision of the CA, juxtaposed against the decision of the CFI, demonstrates that press freedom is being dispossessed in the real world.

<sup>101</sup> See discussion above.

<sup>102</sup> It should be noted that in a more recent decision of *R v National Post* 69 OR (3rd) 427, the constitutional issues in relation to the search of a newspaper's premises in the light of s 2(b) of the Canadian Charter of Rights and Freedoms were fully analyzed. At 427, Benotto J of the Ontario Superior Court of Justice decided, at 427, that "[i]t is because of the fundamental importance of a free press in a democratic society that special considerations arise in applications to search media premises or to seize material from journalists ... the effect of the search and seizure on the ability of the press to fulfill its function must be considered by the justice of peace before granting the order."

<sup>103</sup> See n 40 above, p 214.

<sup>104</sup> [2000] 1 HKC 295; aff'd by Court of Final Appeal, consolidated in the same judgment.