Indexed as:

R. v. Pascoe

Between
Her Majesty The Queen, Plaintiff (Respondent)
and
Robert John Pascoe, John Kennedy Hankey,
Harry Leopold Nickel, David Norman Goulet,
John Donald MacKenzie and John Perry Irwin,
Respondents (Applicants)

[1987] S.J. No. 64

57 Sask.R. 54

32 C.C.C. (3d) 61

1 W.C.B. (2d) 99

Q.B.M. No. 1035 of 1986 J.C.R.

Saskatchewan Court of Queen's Bench
Judicial Centre of Regina

MacLeod J.

January 21, 1987

Interception of private communications -- Opening sealed packet upon which authorization granted -- Requirements for application to review -- Criminal Code, s. 178.14(1).

This was an application to set aside wiretap authorizations in which the applicants sought to have the sealed packet opened and disclosed. The threshold tests were that the accused had been committed to stand trial and the Crown intended to use evidence obtained as a result of the wiretap authorization; the admissibility of some or all of the evidence depended on the validity of the authorizations.

HELD: The application was allowed on terms as to the opening and editing of the material. There

are good reasons for having the information upon which authorizations are given sealed. There are procedures for the Crown to request that certain material be edited and for a judge to edit the material before disclosing it to the applicant. Where threshold tests have been met the accused should be granted an order to open the packet.

Cases considered:

Kumar v. R., Dec. 30, 1986, Matheson J. noted.

Statutes and Regulations considered:

Criminal Code; s. 178.14.

David J. Martin, for the Applicants.
Ralph K. Ottenbreit, for the Crown.

MACLEOD J.:-- The applicants Pascoe and Hankey apply for an order setting aside privacy intercept authorizations granted by me on November 30, 1985 and December 4, 1985. A preliminary application is made under s. 178.14(1)(a)(ii) of The Criminal Code.

The only question before me at this stage is whether an order should be granted to open the sealed packet and disclose the contents thereof to the applicants. Subsequent proceedings must await events and an assessment of the information which might be revealed on such opening.

For this application I accept the following simplified version of the facts:

1. Two authorizations were granted by me in Saskatchewan in late 1985.
2. The accused were charged in British Columbia with conspiracy to import a narcotic into Canada and with conspiracy to traffic in a narcotic.
3. Following a preliminary inquiry in Kelowna, British Columbia, the applicants were committed to stand trial.
4. The Crown's case at the preliminary inquiry rested, and at trial is expected to rest, substantially, on intercepted private communications pursuant to wire tap authorizations granted in British Columbia, Alberta and Saskatchewan, including the authorizations granted by me.
5. The Crown gave notice of its intention to use such communications.
6. The applicants have no evidence to suggest that the authorizations granted by me were defective.

The Code gives no guidance as to the foundation which must be laid for an application to open the packet.

If the following are threshold requirements, they have been met, namely:

1. That an accused is charged and, following his preliminary inquiry, is committed to stand trial. See Vincent Deo Kumar v. Her Majesty the Queen, Sask. Q.B., December 30, 1986, Matheson J. (unreported).
2. Crown intends to use evidence obtained as a result of a wiretap authorization.
3. The admissibility of some or all of that evidence may depend on the validity of the authorizations.

The cases in this area are in numbers considerable and of an inconsistency remarkable. They are of assistance, however, as to the editing of the material if the packet is opened.

The applicants, as I noted above, are not aware of any basis on which the authorizations may be invalid but by virtue of s. 178.16 the validity of the authorization is directly relevant.

It is reasonably possible that in many cases no external evidence exists as to the validity of the authorizations, and this is probably one of those instances.

In every ex parte order there is a risk that (a) the judge might not have made the order had he been afforded argument from all interest parties, or (b) the order is unlawful.

Parliament has extended its protection to the first of these possibilities. For obvious reasons it determined that an authorization may be granted ex parte. It is not unlawful, and thus is not to be impugned, merely because full argument might have persuaded the judge to grant an authorization in modified form, or perhaps not to grant it at all.

These comments do not apply to an authorization which is unlawful - that is, an authorization which in law ought not to have been granted. Such an authorization cannot stand.

I would not want an unlawful authorization of mine to continue to exist serenely impervious to attack by the device of shielding its unhappy foundation in a sealed packet.

There are, of course, good reasons for sealing the packet and in this regard I adopt the remarks of Anderson J. in Re Miller and Thomas and The Queen (1975), 23 C.C.C. (2d) pp. 257 at 292:

> Keeping the above principles in mind, it would seem that Parliament was keenly aware of the necessity for complete secrecy, in so far as the material contained in the sealed packet is concerned. If the secret material were revealed to the general public, the following results might occur:

(1) The lives and safety of informers would be in jeopardy.
(2) The identity of "undercover" agents would be revealed. This would be so even if the names of the informants or the "undercover" agents were not made known, because the revealing of the information would, in most cases, in itself make known the identity of the informer or the "undercover" agent.
(3) The information relating to incomplete investigations would be revealed.
(4) The modus operandi of the police would be revealed.
(5) Information relating to innocent persons would be revealed.

It is for the Crown to address such of these as it may be advised, with the material before the judge's eyes only. The Crown's submissions on these points may be in writing or in such other manner permitted by the judge as will protect their confidentiality. Directions as to the editing procedure will be given as appear necessary.

The judge may then edit the material before disclosing it to the applicant.

Were it not for the safeguards of editing, I might be less willing to grant an order to open the packet.

It may be that a good deal of the material will be excised. At worst the material may be edited to oblivion. The applicants may receive an affidavit virtually intact, or one which has been rendered virtually useless. This will depend on the facts of each case.

So be it. A judge is expected to make judgments. In a proper case the Crown might persuade me that the life of an informant is so much at risk that his protection is more significant than the risk of diminishing the accused's right to make full answer and defence, and that the secrecy under s. 178.14 might be sustained and justified by s. 1 of the Charter.

Nevertheless, it is far better to make the effort to reveal, even if the result is not very satisfactory, than to conceal everything unless the defence is able through its own effort and expense to show in advance that the authorization may be unlawful.

Expecting, as I do, to enforce appropriate safeguards for the purposes of the Crown, I see no reason to deny the order sought by the applicants.

The threshold tests having been met, nothing further needs to be established by the applicants and specifically I hold that the applicants are now entitled to the order without prima facie evidence that the authorizations might be invalid.

There will therefore be an order:

(a) That the packet will be opened and the material disclosed to my eyes only until

further directions;

(b) I will consider making a copy for Crown counsel, if necessary, but subject to such safeguards as I may consider appropriate.

(c) The material will be edited by me and shall thereafter be delivered to the applicants unless it becomes apparent to me that the material should not be edited or delivered.

(d) Following the opening of the packet I shall make such other orders, procedural or otherwise, as may then appear necessary.

(e) The parties have leave to make such further or other applications thereafter as may be appropriate.

(f) The packet shall not be opened until the expiration of 15 days from the date of this order, unless there is an appeal, and then not until the expiration of the disposition of the appeal.

I conclude by expressing a hope for the future that, once the threshold tests are met, an accused will obtain an order to open the packet without being put to any expense to seek or present evidence as a pre-condition of such an order, and thereafter that the court will move promptly to a consideration of the material.

MACLEOD J.