Case Name:

Dersch v. Canada (Attorney General)

Wilfred Wayne Dersch, Marianne Payne, Raymond John Waller, Grethe Elise Waller and Ralph Ross Harris, appellants;

v.

The Attorney General of Canada, respondent.

[1990] S.C.J. No. 113

[1990] A.C.S. no 113

[1990] 2 S.C.R. 1505

[1990] 2 R.C.S. 1505

77 D.L.R. (4th) 473

116 N.R. 340

[1991] 1 W.W.R. 231

51 B.C.L.R. (2d) 145

43 O.A.C. 256

36 Q.A.C. 258

60 C.C.C. (3d) 132

80 C.R. (3d) 299

50 C.R.R. 272

11 W.C.B. (2d) 354

File No.: 20580.

Supreme Court of Canada

1988: April 27.

Present: Beetz, McIntyre, Lamer, Wilson, Le Dain, La Forest and L'Heureux-Dubé JJ.
Re-hearing: 1989: October 2 / 1990: November 22.
Present: Dickson C.J.* and Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier and McLachlin JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (30 paras.)

* Chief Justice at the time of hearing. ** Chief Justice at the time of judgment.

Criminal law -- Interception of private communications -- Access to sealed packet -- Whether accused must show prima facie misconduct by applicant before being able to inspect affidavit filed in support of wiretap authorization -- Criminal Code, R.S.C. 1970, c. C-34, s. 178.14 -- Canadian Charter of Rights and Freedoms, ss. 7, 8.

Appellants were charged with various drug trafficking offences. The evidence against them was obtained partly from wiretaps. They were granted access to the sealed packets containing the affidavits used to obtain the wiretap authorizations, but the provincial superior court ruled that the packets should not have been released when the appellants had not shown prima facie misconduct by the applicants for the authorizations. The Court of Appeal affirmed this decision.

Held: The appeal should be allowed.

Per Dickson C.J. and Lamer C.J. and La Forest, Sopinka and Gonthier JJ.: Prima facie misconduct is not required to be shown by an accused who seeks access to the documents relating to an application for a wiretap authorization. The assertion that the admission of the evidence is challenged and that access is required in order to permit full answer and defence to be made is sufficient.

Under s. 178.14(1)(a)(ii) of the Criminal Code, the sealed packet is to be opened only on the order of a judge. The fact that Parliament relies on judicial discretion does not disclose an intention to deny the accused disclosure, but rather indicates that the judge must carefully and thoroughly exercise his discretion taking into account all the interests involved. A series of pre-Charter cases read in certain very restrictive criteria, but the right to make full answer and defence requires disclosure to an accused, since without the information contained in the packet he may not be able to establish that the interception was unlawfully made and thus inadmissible, or unreasonably made and thus in contravention of s. 8 of the Canadian Charter of Rights and Freedoms. The judge still has a discretion but, in the case of an accused, it would not be judicially exercised in conformity

with the Charter right unless the application is granted.

Here, the authorization is spent, and the concern with respect to disclosure of police informers and techniques will be addressed by the trial judge in determining the degree to which editing is required. If dissatisfied with the editing, the Crown always has the option of withdrawing tender of the evidence.

Per L'Heureux-Dubé and McLachlin JJ.: The question of whether the packet should be opened is a matter within the discretion of the judge hearing the application, who must balance the interests of the accused in the protection of privacy and a fair trial, including the right to make full answer and defence, with the public interest in the administration of justice. Given the importance of the accused's right to make full answer and defence, the balance will generally fall in favour of opening the packet, subject to editing and special concerns for the administration of justice which may arise in particular cases. Here there is nothing to suggest that the balance mandates any other conclusion than the issuing judge's decision to open the packet.

Cases Cited

By Sopinka J.

Referred to: Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Finlay and Grellette (1985), 23 C.C.C. (3d) 48; R. v. Rowbotham (1988), 41 C.C.C. (3d) 1; R. v. Thompson, [1990] 2 S.C.R. 1111; Lyons v. The Queen, [1984] 2 S.C.R. 633; R. v. Playford (1987), 40 C.C.C. (3d) 142; R. v. Parmar (1987), 34 C.C.C. (3d) 260; R. v. Williams (1985), 44 C.R. (3d) 351; R. v. Hunter (1987), 34 C.C.C. (3d) 14; R. v. Garofoli, [1990] 2 S.C.R. 1421; R. v. Lachance, [1990] 2 S.C.R. 1490; R. v. Zito, [1990] 2 S.C.R. 1520.

By McLachlin J.

Referred to: R. v. Garofoli, [1990] 2 S.C.R. 1421; R. v. Lachance, [1990] 2 S.C.R. 1490; R. v. Zito, [1990] 2 S.C.R. 1520.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 8.
Criminal Code, R.S.C. 1970, c. C-34, s. 178.14 [ad. 1973-74, c. 50, s. 2; am. 1985, c. 19, s. 24].
18 U.S.C. ss. 2510-20 (1988).

Authors Cited

Watt, David. Law of Electronic Surveillance in Canada. Toronto: Carswells, 1979.

APPEAL from a judgment of the British Columbia Court of Appeal (1987), 17 B.C.L.R. (2d) 145,

43 D.L.R. (4th) 562, [1987] 6 W.W.R. 700, 36 C.C.C. (3d) 435, 59 C.R. (3d) 289, affirming Murray J.'s order (1986), 32 C.C.C. (3d) 346, quashing Wetmore Co. Ct. J.'s decision granting the appellants access to sealed packets. Appeal allowed.

Thomas R. Berger and Howard Rubin, for the appellants. S. David Frankel, Q.C., for the respondent.

Solicitor for the appellants Dersch, Payne and Harris: K.S. Westlake, Vancouver.
Solicitors for the appellants Waller and Waller: Rubin & Associates, Vancouver.
Solicitor for the respondent: John C. Tait, Ottawa.

The judgment of Dickson C.J. and Lamer C.J. and La Forest, Sopinka and Gonthier JJ. was delivered by

1 **SOPINKA J.**:-- This appeal is one of a series of appeals which were heard together because they deal with various aspects of the law relating to the interception of private communications (hereinafter "wiretaps"). The statutory provisions which are engaged are contained in Part IV.1 of the Criminal Code, R.S.C. 1970, c. C-34. The other cases in the series are R. v. Garofoli, [1990] 2 S.C.R. 1421, R. v. Lachance, [1990] 2 S.C.R. 1490, and R. v. Zito, [1990] 2 S.C.R. 1520, judgments in which are delivered concurrently with the judgment in this case. The central issue in this case is the right of access by an accused person to the packet which, pursuant to s. 178.14(1) (now s. 187(1)), is required to be sealed.

Facts

2 The appellants were charged with various offences involving drug trafficking. They were given notice, in accordance with the statutory requirement, that evidence against them included wiretap evidence obtained under twenty-two authorizations under Part IV.1 of the Criminal Code. The appellants applied to the Vancouver County Court for an order pursuant to s. 178.14(1)(a)(ii) to have access to the contents of the sealed packets containing the affidavit filed in support of the wiretap authorizations. The application for access was in each case supported by an affidavit stating that access to the statements by the police officers was necessary to properly conduct a preliminary hearing and in order for the accused to make full answer and defence.

3 Wetmore Co. Ct. J. granted access in an oral judgment, following the cases of Wilson v. The Queen, [1983] 2 S.C.R. 594 (presumably the minority judgment), and R. v. Finlay and Grellette (1985), 23 C.C.C. (3d) 48 (Ont. C.A.). The Crown applied to the Supreme Court of British Columbia for an order of certiorari to quash the County Court order, and prohibition to prevent

Wetmore Co. Ct. J. from making available to the accused copies of the affidavits sealed in the packets. Murray J., in reasons reported at (1986), 32 C.C.C. (3d) 346 (sub nom. Re Regina and Dersch), granted the Crown's applications, holding that the issuing court acted without jurisdiction in releasing the sealed packet when the accused provided no evidence of a prima facie case of misconduct on the part of the applicant for the authorization. An appeal to the British Columbia Court of Appeal was unanimously dismissed with reasons written by Esson J.A. which are reported as Dersch v. Canada (Attorney General) (1987), 17 B.C.L.R. (2d) 145. Leave to appeal to this Court was granted on December 3, 1987, [1987] 2 S.C.R. vi, on the following ground:

> Whether the British Columbia Court of Appeal erred in construing s. 178.14 of the Criminal Code of Canada as imposing a burden on an accused to show prima facie misconduct by the applicant, before the accused may inspect the affidavit filed to obtain an electronic search order.

Although the issue on which leave to appeal was granted does not refer to the Canadian Charter of Rights and Freedoms, counsel were permitted to raise arguments on the interpretation of s. 178.14 in light of the Charter.

Access to Sealed Packet

4 Section 178.14 reads as follows:

> 178.14 (1) All documents relating to an application made pursuant to section 178.12 or subsection 178.13(3) or 178.23(3) are confidential and, with the exception of the authorization, shall be placed in a packet and sealed by the judge to whom the application is made immediately upon determination of such application, and such packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be
>
> (a) opened or the content thereof removed except
>
> (i) for the purpose of dealing with an application for renewal of the authorization, or
> (ii) pursuant to an order of a judge of a superior court of criminal jurisdiction or a judge as defined in section 482; and
>
> (b) destroyed except pursuant to an order of a judge referred to in subparagraph (a)(ii).

> (2) An order under subsection (1) may only be made after the Attorney General or the Solicitor General by whom or on whose authority the application was made for the authorization to which the order relates has been given an opportunity to be heard.

5 Pursuant to s. 178.14, the documents relating to an application for an authorization are confidential. They are to be placed in a packet and sealed. The packet is to be opened only on the order of a judge of a superior court of criminal jurisdiction or a judge as defined in s. 482 (now s. 552). This provision extends the definition of a judge beyond that of a judge of a superior court to include a judge of a district or county court and a judge of the Court of Quebec. The power granted to a judge to open the packet is not limited by any provisions in Part IV.1 of the Criminal Code. Parliament, therefore, intended to confer on the judge an unlimited discretion.

6 The purpose of the confidentiality provision of this section is apparently to ensure that the investigation is kept secret during the currency of the authorization and to protect informers, police techniques and procedures once the authorization is spent. Different considerations would apply in the exercise of the discretion of the judge depending on whether the authorization is current or spent. Similarly, different factors would come into play if the applicant is an accused person, a target of an intercepted communication, or simply an interested citizen. The section does not distinguish, leaving it to the judge. Apparently, Parliament was content to leave it to the courts to decide what special considerations were applicable to protect the rights of accused persons in the exercise of the power to open.

7 What these special considerations should be is the source of considerable disagreement among judges in the provinces. The series of appeals of which this is one illustrates the extent of the disagreement. The following is a summary of the dispositions made with respect to this issue:

(1) Dersch: The trial judge ordered the packet opened but was reversed by Murray J. and the British Columbia Court of Appeal.
(2) Garofoli: The trial judge refused to open but the Ontario Court of Appeal did.
(3) Lachance: No application was made to open because counsel thought this was foreclosed by binding authority. The Ontario Court of Appeal opened the packet.
(4) Zito: The trial judge refused to open the packet. The Court of Appeal of Quebec directed the opening of the packet at a new trial which it directed.

8 Pre-Charter cases saw in s. 178.14 a legislative intention to subordinate the rights of the accused to the needs of law enforcement. In addition to features of the section such as the sealed packet and limiting the power to open to specific kinds of judges, some cases emphasized the absence from Part IV.1 of a provision similar to that contained in Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. ss. 2510-20 (1988). That Act specifically provides that the contents of the packet are to be delivered to the accused ten days before the commencement of trial. In reviewing these cases, Martin J.A., in R. v. Rowbotham (1988), 41 C.C.C. (3d) 1, commented, at

p. 40:

> It was determined that, since there is a specific provision for production in the United States legislation and there is no such provision in the Canadian legislation, Parliament intended to deny access to the sealed packet by the accused.

9 This led to the conclusion that exceptional circumstances were required to be shown by the applicant before an order for opening the packet was justified. The effect of these cases is summarized by Watt (now Justice Watt of the Ontario Court (General Division) in Law of Electronic Surveillance in Canada (1979), at pp. 251-52:

> ... applications for orders pursuant to section 178.14(1)(a)(ii) to open the sealed packet and reveal its contents to the applicant have a limited chance of success whether the purpose therefor is to discover the period or reasons for court-ordered electronic surveillance or to enable either an accused or the Crown to develop arguments as to the admissibility of evidence at a forthcoming trial. Fraud and material non-disclosure in the supporting material have frequently been referred to as the "exceptional circumstances" which justify the granting of such an order but the difficulty in obtaining extrinsic evidence of either negates their utility as a means of obtaining the relief sought.

10 In Wilson v. The Queen, supra, this Court discussed the terms on which an authorization could be set aside. Neither the majority nor the minority reasons explicitly deal with the question of the prerequisites for access to the sealed packet. Furthermore, it was a case to which the Charter did not apply.

11 The restrictive approach to the interpretation of these provisions, as summarized by Watt, fails to take account of a fundamental difference between Title III in the United States and Part IV.1. While Title III contains specific provisions designed to protect various interests affected, Parliament was content to leave such protection in the hands of the judiciary. This applies not only in relation to production of the contents of the packet, but to minimization provisions. In my reasons in R. v. Thompson, [1990] 2 S.C.R. 1111, I pointed out that the Canadian equivalent of s. 2518(5) of Title III is the discretion in s. 178.13(2)(d) vested in a judge. In Lyons v. The Queen, [1984] 2 S.C.R. 633, Estey J. summed up this feature of Part IV.1, at pp. 669-70 and 695 as follows:

> The courts, therefore, must perform carefully and thoroughly their duty under s. 178.13(2)(d) and prescribe terms and conditions which may be advisable in the public interest under which these invasive devices may be installed. This judicial function is the essential safeguard of the public interest in the bilateral operations of Part IV.1 which must at once be both a shield against, and an instrument for, the invasion of privacy. It is for the court to ensure the balancing of these interests within the plan prescribed by Parliament.

. . .

> My observation is intended to give emphasis to the importance of the judicial role in the program of privacy regulation as prescribed by Parliament in these provisions.

The fact that Parliament similarly relies on judicial discretion in s. 178.14(1)(a)(ii) does not disclose an intention to deny the accused disclosure of the sealed packet, but rather evinces an intention that a judge must "carefully and thoroughly" exercise his or her discretion taking into account all the interests involved.

12 The Court of Appeal in this case followed the line of reasoning of the pre-Charter cases. For the reasons outlined above, it is my view that, quite apart from the effects of the Charter, that reasoning is suspect. It is unnecessary to come to a final conclusion on that subject because Part IV.1 must now be considered in light of the Charter. The Court of Appeal (per Esson J.A.) recognized this, but concluded that "the Charter has not affected, in any general way, the statutory and case law which restricts access to the packet" (p. 183). This conclusion was based in large measure on the interpretation placed by Esson J.A. on the judgment of Martin J.A. in Finlay and Grellette, supra, at pp. 76-77, which, in his opinion, did not intend to question the cases which restricted access to the sealed packet. In his opinion, the restrictions imposed by these cases simply meant that there might be cases in which these restrictions deprived an accused of access to material essential to the defence. Such a deprivation could be relevant to the question whether there had been a fair trial.

13 Since the decision of the Court of Appeal in this case, we have had the benefit of the judgment of the Court of Appeal of Ontario in Rowbotham, supra. The court, consisting of Martin J.A., Cory J.A. (as he then was) and Grange J.A., explained the effect of the Charter on the views expressed in the restricted access cases. The court stated: "If these views were originally correct, they are no longer the rule in this province since the enactment of the Charter" (at p. 41). The court went on to explain, at p. 42:

> To deny an accused access to the sealed packet puts him in an impossible position. Without the information contained in the packet, he may not be able to establish that the interception was unlawfully made and thus inadmissible, or unreasonably made and thus in contravention of s. 8 of the Charter. An accused would, in that way, be deprived of the right to make full answer and defence. In such circumstances, it could not be said that he had had the benefit of a fair trial, and the rights provided to him by ss. 7 and 11(d) of the Charter would, as a consequence, be infringed.

14 In R. v. Playford (1987), 40 C.C.C. (3d) 142, Goodman J.A., speaking for himself, Blair and Cory JJ.A., expressed the dilemma in which the accused is placed by the restricted access cases in these words, at p. 178:

> ... he cannot gain access to the affidavit unless he can prove on a prima facie basis the grounds for such access and he cannot prove such grounds unless he has access.

15 I agree that this is an accurate statement as to the position in which the accused is placed by the restricted access cases. As pointed out by Watt J., extrinsic evidence is seldom available to establish the requisite prima facie grounds. The accused is placed in this dilemma in virtually every case. If placing him or her in this dilemma is a denial of the right to make full answer and defence, then in every case in which access is denied, the accused is denied the right to make full answer and defence. Consequently, there would be in every such case a breach of s. 7 of the Charter, which includes among its principles of fundamental justice the right to make full answer and defence. If the restricted access cases are right in their interpretation of the section, then Parliament has authorized a procedure which uniformly results in a breach of the Charter. It follows that either the section is unconstitutional or the interpretation of the restrictive access cases cannot stand. With respect, I agree with the Ontario Court of Appeal that the section is constitutional and that the previous interpretation can no longer apply. It is fundamental to this view that denial of access constitutes a denial to make full answer and defence.

16 Esson J.A. was of the opinion that it did not. He reasoned that the accused was simply deprived of an opportunity to exclude evidence on a technical ground. He put the position this way, at p. 151:

> It follows, in my view, that refusal of the opportunity to demonstrate a defect in the proceedings leading to the authorization does not affect the right to make full answer and defence or the right to fair trial. It merely deprives the accused of an opportunity to have relevant evidence excluded on a technical ground. That opportunity is not a constitutionally protected right.

17 The presumption of innocence requires the prosecution to prove that the accused is guilty beyond a reasonable doubt. This must be done by admissible evidence. Part IV.1 provides that evidence of intercepted private communication is admissible only if lawfully obtained. To be admissible, the evidence must be obtained pursuant to an authorization that complies with the dictates of the provisions of Part IV.1. Under s. 8 of the Charter, the accused has acquired a constitutional right to be secure against unreasonable search or seizure. Because an unlawful search will be an unreasonable one, s. 8 also confers on the accused the right to challenge the lawfulness of a search or seizure of which the accused is the target. That right would be hollow if it did not permit access to the sealed packet. The absence of reasonable and probable grounds for the authorization is a basis for challenge under both the Code and the Charter.

18 Goodman J.A. in Playford, supra, summed it up as follows, at p. 187:

> If, indeed, the authorization had been obtained on the basis of some substantive defect which made the authorization invalid, then the private communication is

> unlawfully intercepted and is inadmissible as evidence and the interception constitutes an unreasonable search contrary to s. 8 of the Charter.

19 Withholding information which enables the accused to assert the inadmissibility of evidence not only on statutory but constitutional grounds strikes me as going beyond depriving the accused of a technical ground. I prefer to characterize it in the language of Watt J. in R. v. Parmar (1987), 34 C.C.C. (3d) 260, at p. 273:

> It is said that a critical aspect of the right to make full answer and defence, an incident of the constitutional right of fundamental justice guaranteed by s. 7 of the Charter, is the right to challenge the receivability of that portion of the prosecution's proof which is the primary evidence said to have been obtained by interceptions ...

20 The right to full answer and defence does not imply that an accused can have, under the rubric of the Charter, an overhaul of the whole law of evidence such that a statement inadmissible under, for instance, the hearsay exclusion, would be admissible if it tended to prove his or her innocence. (See R. v. Williams (1985), 44 C.R. (3d) 351 (Ont. C.A.).) But it does provide, in my view, that the accused be given the opportunity to test the admissibility of a piece of evidence according to the ordinary rules that govern the admissibility of the evidence. I am therefore of the view that s. 178.14(1)(a)(ii) ought to be interpreted so that an opportunity is provided to do so.

21 The same view of the right to full answer and defence was taken with respect to documents relating to search warrants. In R. v. Hunter (1987), 34 C.C.C. (3d) 14, Cory J.A., in delivering the judgment of the Court of Appeal, held that the material upon which the warrant was obtained should be produced to enable the accused to make full answer and defence. He added that the identity of police informers could be protected by careful editing.

22 We are dealing here with production of material in respect of an authorization that is spent. The concern with respect to disclosure of police informers and techniques will be addressed by the trial judge in determining the degree to which editing is required. This issue is discussed in my reasons in Garofoli, but two observations are appropriate. In the final analysis, the non-disclosure of informers and techniques is fully in control of the Crown. If dissatisfied with the degree of editing, the Crown always has the option of withdrawing tender of the evidence. Furthermore, as observed by the Court of Appeal in Rowbotham, supra, once disclosure becomes the rule, affidavits will be drawn in such a way that the police interest will be protected with a minimum of editing.

23 I do not agree with Esson J.A. that the view expressed above is an amendment to the statute. Section 178.14, as I have pointed out above, confers on a judge a wide-open discretion to order the packet to be opened. A series of cases has filled the gap in the legislation by reading in certain criteria for the exercise of that discretion in the case of an application for access by an accused person. Those criteria are very restrictive. A series of cases since the Charter has questioned those restrictions in light of the Charter guarantee of full answer and defence. They hold that this right

requires disclosure to an accused. The judge still has a discretion but, in the case of an accused, it would not be judicially exercised and in conformity with the Charter right unless the application is granted. This does not affect the discretion in respect of a request by a target or a member of the public who is not an accused person, to which different considerations would apply. This is not an amendment to the section, but rather an alteration of the judicial interpretation placed on it in light of the Charter.

24 Accordingly, the question posed in the ground of appeal upon which leave was granted must be answered in the affirmative. Prima facie misconduct is not required to be shown by the accused applicant who seeks access to the sealed packet. The assertion, as in this case, that the admission of the evidence is challenged and that access is required in order to permit full answer and defence to be made is sufficient.

25 The application to open the sealed packet must be made in accordance with s. 178.14(1)(a)(ii). In some cases, the designated judge will not be the trial judge. It would be preferable to have the application before the trial judge and when the trial is before a judge referred to in s. 178.14(1)(a)(ii), the application should be to the trial judge. If not, the motion judge should simply make the order and refer the matter for editing (if necessary) and further disposition to the trial judge. The propriety of so doing is discussed in my reasons in Garofoli. It is to be hoped that this additional proceeding, which adds to the cost of litigation and serves no important purpose, will be eliminated by legislative amendment to enable the application in all cases to be made to the trial judge. No problem is presented in this case as the trial judge is a judge referred to in the section.

Disposition

26 The appeal is allowed and the order of Wetmore Co. Ct. J. is restored. Other matters consequent on the opening of the sealed packet are not in issue here. They will be dealt with in Garofoli and Lachance in the context of their specific facts.

The reasons of L'Heureux-Dubé and McLachlin JJ. were delivered by

27 McLACHLIN J.:-- This is one of a series of appeals relating to the electronic interception of private communications; the others in the series are R. v. Garofoli, [1990] 2 S.C.R. 1421; R. v. Lachance, [1990] 2 S.C.R. 1490; and R. v. Zito, [1990] 2 S.C.R. 1520. I have read the reasons of Justice Sopinka in each of these appeals, and I explained in Garofoli how my approach to the interpretation of Part IV.1 of the Criminal Code, R.S.C. 1970, c. C-34, leads me to a different conclusion with respect to a number of the questions that these appeals present. I now address the issue on this appeal in light of the approach I adopt in Garofoli.

28 The issue in this case is whether an accused is entitled to have access to the sealed packet, the contents of which provide the basis for the granting of an authorization to wiretap private communications. The appellants applied pursuant to s. 178.14(1)(a)(ii) of the Criminal Code for an order entitling them to access. Wetmore Co. Ct. J. granted access, but the order was overturned by

Murray J., of the Supreme Court of British Columbia (1986), 32 C.C.C. (3d) 346, who held that the issuing court acted without jurisdiction in providing access to the sealed packet when the appellants had provided no evidence of a prima facie case of misconduct on the part of the applicant for the authorization. The British Columbia Court of Appeal unanimously dismissed an appeal from the judgment of Murray J. (1987), 17 B.C.L.R. (2d) 145.

29 As I explained in my reasons in Garofoli, the question of whether or not the packet should be opened is a matter within the discretion of the judge hearing the application. The fundamental considerations are the interests of the accused in the protection of privacy and a fair trial, including the right to make full answer and defence, on the one hand; and the public interest in the administration of justice on the other. The judge in exercising his or her discretion must balance these considerations. Given the importance of the accused's right to make full answer and defence, the balance will generally fall in favour of opening the packet, subject to editing and special concerns for the administration of justice which may arise in particular cases.

30 In this case, Wetmore Co. Ct. J. heard the application to open the packet and he granted access. This was a matter within his discretion, and there is nothing here to suggest that the balance between the interests of the accused and the public interest in the administration of justice mandates any other conclusion. I would therefore allow the appeal and restore the order of Wetmore Co. Ct. J.

qp/i/qlcvd