Indexed as:

R. v. Young

In the Matter of an application pursuant to Part IV.1 of the Criminal Code and the Canadian Charter of Rights and Freedoms
Between
Her Majesty the Queen, Respondent, and
Kenneth Young, Janet Allsop and Shelia Allsop, Applicants

[1986] B.C.J. No. 1769

29 C.C.C. (3d) 141

Vancouver Registry No. CC860033

British Columbia County Court
Vancouver, British Columbia

Rowles Co. Ct. J.

Heard: February 2, 1986
Judgment: May 21, 1986

Fundamental justice -- Admission of intercepted private communications as evidence allowed if interception lawful -- Accused must be able to test lawfulness of interception -- Access to sealed packet containing application for interception authorization allowed -- Canadian Charter of Rights and Freedoms, ss. 7, 8 -- Criminal Code, ss. 178.11(1), (2)(b), 178.13(1)(a), 178.14, 178.16.

This was an application for access to an affidavit sworn in support of an application for an authorization to intercept private telephone communications. The authorization dealt with communications of the accused, who was charged with conspiracy to import cocaine.

HELD: The application was granted. Section 178.16 of the Cr. Code provided that private communication was inadmissible evidence unless the interception was lawful. Since the decision in Wilson v. R. [1983] 2 S.C.R. 594, no collateral attack could be made upon the order authorizing the interception at trial. The trial judge, therefore, must be able to grant access to the material on which the order was based, in order to ensure that the accused could determine if the order were lawfully made. Without such access, the accused would be denied the right to make a full answer and

defence, contrary to ss. 7 and 8 of the Canadian Charter of Rights and Freedoms. The trial judge would edit the material to preserve confidentiality.

S.D. Frankel, counsel for the Crown.
Kenneth Westlake, counsel for Kenneth Young.
David Martin, counsel for Janet and Shelia Allsop.

ROWLES Co. Ct. J.:-- Kenneth Young, together with Janet Allsop and Shelia Allsop have been charged in Ontario with conspiracy to import cocaine. Before me is an application for access to an affidavit sworn in support of an application brought under Part IV.1 of the Criminal Code to intercept private communications of, among others, Kenneth Young. The authorization order was granted by me on March 14, 1985 on the basis of the affidavit of Richard Gordon Herman. The present application comes before me because of the decision in the Supreme Court of Canada in Wilson v. The Queen, (1983), 9 C.C.C. (3d) 97.

In Wilson, McIntyre J., speaking for the majority,

(a) reiterated the fundamental rule that "a court order made by a court having jurisdiction to make it stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed"; (p. 117)
(b) "That such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment"; (p. 117)
(c) "Since no right of appeal is given from the granting of an authorization and since prerogative relief by certiorari would not appear to be applicable (there being no question of jurisdiction) any application for review of an authorization must ... be made to the court that made it"; (p. 123)
(d) If another judge of the same court hears the application, the "reviewing judge must not substitute his discretion for that of the authorizing judge. Only if the facts upon which the authorization was granted are found to be different from the facts proved on the ex parte review should the authorization be disturbed"; (p. 124).

At the time Wilson was decided, applications to open a sealed packet had not been granted unless the person applying showed prima facie evidence of fraud or non-disclosure. See, for example, R. v. Johnny and Billy, (1981), 62 C.C.C. (2d) 23 (B.C.S.C.).

The majority decision in Wilson does not give guidance as to whether a less restrictive view should be taken of applications to open sealed packets. In the dissenting judgment, Dickson C.J. assumed that a trial judge had a right to go behind an apparently valid authorization and that "it must be possible to ask questions on cross-examination to find out if there is any basis upon which to argue invalidity. It is of little avail to defence counsel to have a statement of law that an authorization can be held to be invalid if obtained, for example, by material non-disclosure and then preclude counsel from asking questions tending to show that there has in fact been non-disclosure". (p. 113)

Counsel for the applicants have argued that the case law which restricts an accused's access to the material sealed in a packet pursuant to S. 178.14 of the Code must be re-examined in light of ss. 7 and 8 of the Charter and the recent case law relating to those sections.

The application before me is made on the following grounds:

(a) Pursuant to Section 7 of the Canadian Charter of Rights and Freedoms as of right in order that the Petitioners may make full answer and defence in accordance with the principles of fundamental justice.
(b) Pursuant to Sections 7 and 8 of the Charter in order that the Petitioners may make submissions with respect to ground 1 of the Petition dated January 21, 1986.

Ground 1 in the petition filed January 21, 1986 reads as follows:

> "The authorization was obtained in violation of S. 178.13(1)(a) without probable cause contrary to S. 8 of the Charter of Rights and Freedoms."

In respect to the first ground, the applicant's counsel have submitted the accused should be entitled as of right to access to the material sworn in support of the ex parte application for the authorization order.

The applicants' argument on the first ground may be summarized as follows. Evidence obtained pursuant to an authorization order, which order is subsequently set aside, would be inadmissible by S. 178.16 of the Code. After the decision in Wilson, collateral attacks either at the preliminary inquiry or trial have not been permitted, and an accused has effectively been denied any means of ascertaining the basis for the authorization order. By S. 7 of the Charter, everyone has the right to liberty, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. If an accused is unable to ascertain whether the authorization order was lawfully made, the result may be that evidence which could be found inadmissible by S. 178.16 is admitted at the trial of the accused. Such evidence, if admitted, may lead to the conviction of the accused, and the loss of liberty. An accused cannot be deprived of the right to liberty except in accordance with the principles of fundamental justice. An accused person must therefore, have access to the material in the sealed packet to ascertain if there is any basis to argue invalidity of the authorization order.

The Crown has submitted that there is not, on this application, a constitutional attack being made on S. 178.14 and that that section protects the confidentiality of the material in the sealed packet. Mr. Frankel has argued that the case law which requires the accused to show at least prima facie evidence of fraud or non-disclosure before the packet will be opened, are supported by public policy considerations which have been articulated in a number of cases including Re Miller and Thomas and The Queen, 23 C.C.C. (2d) 257 at 292.

Mr. Frankel referred extensively to R. v. Rowbotham, 42 C.R. (3d) 164, a decision of Ewaschuk J. of the Ontario Supreme Court in support of his submissions.

Part IV.1 of the Code, specifically S. 178(11(1) provides that "every one who, by means of an electromagnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence. Section 178.11(2)(b) provides that subsection 1 does not apply to a person who intercepts a private communication in accordance with an authorization.

Section 178.16(1)(a) provides that "A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless (a) the interception was lawfully made;".

If an authorization order is set aside, the interception cannot be said to have been lawfully made, and evidence of intercepted communication would be inadmissible at the trial of the accused, unless S. 178.16(1)(b) applied.

Since Wilson, an application to set aside an authorization order must go before the judge, or a judge of the Court, which made the ex parte order. Collateral attacks, that is, attacks going to the basis or grounds for the making of the authorization, may not be made at the preliminary inquiry or at trial.

Section 178.14(1) provides:

(1) All documents relating to an application made pursuant to S. 178.12 or subsection 178.13(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 was 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 contents 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;

In Regina v. Finlay & Grellette, 52 O.R. (2d) 632, a decision of the Ontario Court of Appeal, it was argued that the denial to the accused of access to the application and accompanying material leading to the authorization precluded the accused from making full answer and defence, and that accordingly Part IV.1 of the Code was unconstitutional. At p. 661 Martin, J.A. giving the decision in Court said:

> "Mr. Hubbard for the Attorney General of Canada responded to this argument by pointing out, quite correctly in my view, that no provision in Part IV.1 and, in particular, no provision in S. 178.14 providing for the confidentiality of the material leading to the authorization denies an accused access to that material where it is essential to his defence. Rather, he said such denial results from the way in which the provisions have been interpreted by the courts.
>
> It may be that the interests protected by the policy underlying the restriction of an accused's access to the sealed packet can in many cases be effectively protected in other ways, e.g. by deleting in the copy supplied to the accused the names of informers and innocent persons who might be injured by the revelation of their names.
>
> In Wilson v. The Queen, supra, Mr. Justice Dickson said at p. 621 S.C.R., p. 109 C.C.C., p. 589 D.L.R.:
>
>> The affidavit would not need to be made public in order to rule evidence inadmissible; selected aspects only could be made public. As Stanley A. Cohen suggests in his work Invasion of Privacy: Police and Electronic Surveillance in Canada (1983), the integrity of the packet might be preserved "through judicial screening and, if access is necessary, judicial editing" (p. 155).'
>
> In any event, I do not consider that the case-law restricting the accused's access to the sealed packet renders Part IV.1 unconstitutional. The restriction may be relevant to the issue of whether the accused in a particular case has been denied a fair trial, secured by s. 7 of the Charter, but it does not render Part IV.1 unconstitutional as contravening s. 8 of the Charter."

The policy considerations which underlies the restriction of an accused's access to the sealed

packet is to safeguard information, such as the identity of informers, undercover agents and innocent persons, as well as police investigation techniques and ongoing investigations.

It does seem possible to ensure that the confidentiality of such information is protected in another way, specifically by judicial editing of the material to be supplied to an accused. The protection afforded police informers has been recently affirmed by the Supreme Court of Canada in Bisaillon v. Keable (1983), 7 C.C.C. (3d) 385. The extent to which the material must be edited, and the reasons for such editing, may require submissions to be made to the Court by the designated agent who brought the application, or Crown Counsel, ex parte and in camera prior to the release of material to the accused.

A policy consideration which favours the accused having access to the material in the sealed packet is public accountability, which was expressed by Chief Justice Dickson in relation to search warrants in Attorney General of Nova Scotia v. MacIntyre (1982), 65 C.C.C. (2d) 129. Although there are differences between a search warrant and an intercept authorization, the fact that Part IV.1 of the Criminal Code makes it an offence to wilfully intercept a private communication except under defined circumstances, reflects an intention that an individual's reasonable expectation of privacy is to be protected.

At page 144-5, Chief Justice Dickson noted:

> "The question before us is limited to search warrants and informations. The response to that question, it seems to me, should be guided by several broad policy considerations, namely, respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime, and finally, a strong public policy in favour of openness' in respect of judicial acts ...
>
> . . . . .
>
> "The concern for accountability is not diminished by the fact that the search warrants might be issued by a Justice in camera. On the contrary, this fact increases the policy argument in favour of accessibility. Initial secrecy surrounding the issuance of warrants may lead to abuse, and publicity is a strong deterrent to potential malversation.
>
> In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime."

In the Matter of Her Majesty the Queen v. Ross (Unreported) November 29, 1985, No. SC

455/85 (Sault St. Marie), the Honourable Judge Vannini referred to the passages of Attorney General of Nova Scotia v. MacIntyre just quoted and said that they applied "with equal force to the ex parte application and the in camera hearing thereof for an authorization to intercept a private communication, to the need for assuring the confidentiality and non-disclosure of the document, for restricting the accused's access to the sealed packet and for ensuring maximum accessibility to the packet and maximum judicial accountability in the granting of the authorization."

Judge Vannini further noted that:

> "Once the authorization has been spent, i.e. executed, and evidence obtained of the commission of a criminal offence for use at the trial of the accused, the public interest in the enforcement of law by means of this investigatory aid has been served. Therefore the right of an accused to the information contained in the packet should not be limited to prima facie evidence of fraud, non-disclosure or misleading disclosure. In Wilson, Dickson J. questioned whether this restricted view of S. 178.14 was correct.
>
> . . . . .
>
> Once the authorization has been executed the Court must concern itself with ensuring that the accused can make full answer and defence and have a fair trial. This can best be achieved by requiring that the packet be opened and the information contained therein made available to the accused before his trial with all necessary precautions being taken to ensure the confidentiality of informers and of innocent persons who might be injured by the revelation of their names."

In Wilson, McIntyre J. stated that an application to challenge an authorization should be brought as soon as possible, preferably before trial. Bringing such an application prior to trial seems clearly desirable in terms of trial efficiency.

An authorization order once made must be assumed to be valid. There is no onus on the Crown to establish again the basis for the authorization order. If the authorization is not set aside, the evidence of the intercepted communications would be admissible, assuming that the evidence was obtained in compliance with the provisions of the order.

The provisions of Part IV.1 of the Code, specifically S. 178.16 make clear that private communications are inadmissible as evidence unless the interception was lawfully made. The accused, in order to make full answer and defence, must be able to ascertain whether the intercepted communications the Crown proposes to introduce are admissible. How is the accused to ascertain whether there is some basis for setting aside the authorization order if he is denied access to the material on which the order was based?

In Regina v. Rowbotham, supra, Ewaschuk J. of the Ontario Supreme Court considered the

constitutional validity of Part IV.1 of the Code, taking into account Sections 7 and 8 of the Charter. Ewaschuk J. proceeded on the basis that authorization orders granted under Part IV.1 of the Code authorized a search and seizure. He concluded that Part IV.1 of the Code was not unconstitutional under S. 8 of the Charter as Part IV.1 constituted such reasonable limits to one's right against search and seizure as was demonstrably justifiable. In respect to S. 178.14, Ewaschuk J. concluded that the section did not violate S. 7 of the Charter because of the policy reasons stated by Anderson J. in Miller, supra, and the implicit reasoning in the Ontario Court of Appeal in Regina v. Diotte (1983), 42 O.R. (2d) 159 and that S. 178.14 of the Code constituted a reasonable exception to the "audi alteram partem" rule and was demonstrably justifiable.

In Regina v. Finlay & Grellette, Martin, J.A. accepted that private communications were protected by S. 8 of the Charter. In Finlay, in which the constitutional validity of Part IV.1 of the Code was at issue, Martin J.A. commented at page 663 on the conclusion in Rowbotham as follows:

> "In my view the provisions of Part IV.1 considered as a whole do not legislatively authorize an unreasonable search or seizure. If I had concluded that Part IV.1 authorized an unreasonable search or seizure, I would have some difficulty in concluding that it was nevertheless a reasonable limitation on the right to be secure against unreasonable search or seizure.

The conclusion in Rowbotham that S. 178.14 of the Code constituted a reasonable exception to the "audi alteram partem" rule and was demonstrably justifiable appears also to have been put in question in Finlay. In Finlay, Martin J.A. considered that S. 178.14 did not, by its wording, restrict an accused's access to the material in the packet when it was necessary for the accused's defence. Ewaschuk J. came to the same conclusion in Rowbotham, but Martin J.A. in Finlay said, in obiter that the restriction placed on an accused's access to the sealed packet may be relevant to the issue of whether the accused in a particular case has been denied a fair trial, as secured by S. 7 of the Charter.

In my view it is inconsistent with S. 7 of the Charter to deny the accused the opportunity to test the admissibility of evidence which may be used against him at trial, which evidence may lead to his conviction and loss of his liberty.

Confidentiality of some of the material, such as the identity of informers, may be preserved through judicial editing, which is what I propose to do.

In view of my conclusion in respect to the first ground advanced under S. 7 of the Charter, it is not necessary to consider the second ground put forth by counsel for the applicants. I note however that the Ontario cases referred to by counsel have proceeded on the basis that private communications are protected by S. 8 of the Charter. That assumption cannot necessarily be taken to be the law in British Columbia. See R. v. Rooke, 29853 Victoria Registry, November 6, 1984 (B.C.S.C.) and R. v. Andrews et al., CC841643 Vancouver Registry, March 20, 1986 (B.C.S.C.). Since the decision in Finlay, there have been two cases in Ontario in which accused persons have

been given access to material in a sealed packet, without showing prima facie evidence of fraud non-disclosure or misdisclosure; R. v. Ross, to which I earlier referred, and R. v. Wood (1986), 54 O.R. (2d) 681, a decision of Mr. Justice Osborne, February 17, 1986.

Crown counsel may arrange through the Registry to appear before me ex parte and in camera to make submissions on any deletion of material and the reasons therefore, prior to the release of the material to the accused's counsel.

ROWLES Co. Ct. J.