SC CV 95 025

CV05323 1994

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

McGRADY, ASKEW & FIORILLO (the "Law Firm") and
GINA MARIA FIORILLO

PETITIONER

- and -

THE QUEEN IN RIGHT OF CANADA

RESPONDENT

AND:

THE LAW SOCIETY OF THE NORTHWEST TERRITORIES

INTERVENOR

AND:

CV05322 1994

AUSTIN F. MARSHALL

PETITIONER

- and -

THE QUEEN IN RIGHT OF CANADA

RESPONDENT

AND:

THE LAW SOCIETY OF THE NORTHWEST TERRITORIES

INTERVENOR

In the matter of an application under s. 187(1.3) of the *Criminal Code*

Heard at Yellowknife, Northwest Territories February 2 and 3, 1995

Judgment filed: June 29th, 1995

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE C.F. TALLIS

Counsel for the Applicants:	J.J. Camp, Q.C. Ian Schildt
Counsel for the Federal Crown: (Solicitor General and Minister of Justice for Canada)	R. Reimer
Counsel for the Intervenor (Written submission - May 5, 1995)	James D. Brydon

REASONS FOR JUDGMENT

The applicants, who are licensed to practise law in the Northwest Territories, seek an order allowing access to certain "sealed wiretap packets" which are in the custody of this Court under the statutory conditions prescribed by s. 187(1) of the *Criminal Code*. This provision directs that all documents relating to "wiretap" applications are to be sealed and retained in the custody of the Court. There is no general right of public access or inspection of this material. Although the applicants brought separate applications, they were heard together. I find it convenient to deliver one set of reasons.

I. ISSUES

This application concerns the right of access to such court records by non-accused solicitors when their professional communications have been intercepted under "wiretap" authorizations. The primary questions for consideration are:

1. Does a non-accused solicitor whose professional communications have been intercepted have sufficient standing to apply to open the packet?
2. If the answer to that question is yes, what guiding principles should be applied in determining whether the Court should exercise its discretion to open the "packet"?
3. If the Court exercises its discretion in favour of opening the "packet", what consequential directions should be given with respect to protective orders, editing and any other relevant matters?

As an initial matter the respondent contended that this application is procedurally flawed because it was commenced by petition rather than by statement of claim. I declined to give effect to this contention because the application focuses essentially on certain provisions of the *Criminal Code*. The position of either party is not prejudiced by any alleged procedural shortcoming. The issues are before the Court in a manageable fashion. Accordingly, I would, if necessary, invoke the curative provisions of the Rules of Court.[1]

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[1] Rules 515-518 provide:
515. Unless the court so directs non-compliance with these Rules does not render any act or proceeding void, but the act or proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with.

The respondent also contended that the issue of standing should be determined as a threshold issue without requiring the parties to put forward the full factual background. For reasons stated during the chambers hearing I declined to hear the application in a "piecemeal" fashion.

In my opinion, the primary question should be passed upon in a factual context. With the benefit of the evidence adduced following my ruling, the relevant facts and circumstances are now a matter of record.

II. PROCEDURAL HISTORY AND RELEVANT FACTS

The following are the facts and circumstances so far as necessary to show how the issues are presented. Following a bitter labour dispute at the Giant Mine in Yellowknife, the R.C.M.P. investigated various criminal matters including a homicide investigation which followed an underground blast that killed nine miners.

In the course of the investigation of this alleged homicide and other related matters, the Crown obtained approximately twelve wiretap authorizations.[2]

Throughout this labour dispute and homicide investigation, the applicant Austin Marshall, who is a practising lawyer in Yellowknife, acted in his professional capacity for a number of miners charged with criminal offences of varying degrees of seriousness.

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516. An application to set aside any process or proceedings for irregularity shall be made within a reasonable time and shall not be allowed if the party applying has taken a fresh step after acquiring knowledge of the irregularity.

517. Where an action or proceeding is improperly begun by statement of claim, originating notice, petition or other pleading, the said pleading may be treated as an irregularity and the action or proceeding may be continued upon such terms and subject to such conditions as the court may impose.

518. No pleading or other proceedings shall be defeated on the ground of an alleged defect of form.

[2]See Transcript of testimony of Inspector Shillaker at p. 29.

The nature of his professional communications are described in the following factual summary sworn by him:

2. In August 1992, the Petitioner was retained by the Canadian Association of Smelter and Allied Workers, Local 4 (the "Union") to act as counsel for several of its members in criminal matters arising out of the picketing in the labour dispute between Royal Oak Mines Inc. and the Union.

3. Since that date, the Petitioner has acted for members of the Union on a number of different criminal matters, including charges of assault, assault with a weapon and attempted murder.

4. In August 1992, the Petitioner met with Gina Fiorillo of the Vancouver firm of McGrady, Askew & Fiorillo who had also been retained by the Union. The Petitioner and McGrady, Askew & Fiorillo arranged to work together on various matters arising from the Giant Mine labour dispute.

5. In the course of this retainer, the Petitioner engaged in ongoing communications both with members of the Union and with other clients. The communications included, but were not limited to, the following:

   (a) interviews with the Union membership in relation to criminal matters arising from the labour dispute;

   (b) interviews with witnesses in relation to criminal matters arising from the labour dispute;

   (c) communications with members of the Royal Canadian Mounted Police, Yellowknife detachment; and

   (d) communications with other legal counsel in connection with the defence of Union members.

6. The communications referred to in paragraph 5 include communication by telephone, teleconference and facsimile transmission.

7. The communications referred to in paragraph 5 originated, took place in, or were received in the Petitioner's office or place of residence.

8. Much of the information communicated as described in paragraphs 5 to 7 consisted of confidential and privileged information. The information so communicated was directly related to legal matters pertaining to the Union and its members, as well as to other clients of the Petitioner.

The applicant, Gina Fiorillo, is a practising member of the Law Society of British Columbia who also practises on a limited basis in the Northwest Territories. Her undisputed testimony as to the nature of her professional work in connection with the Giant Mine dispute is summarized in the following passages of the summary of facts sworn by her:

1. Gina Maria Fiorillo (the "Petitioner Fiorillo") is a partner in the law firm of McGrady, Askew and Fiorillo (the "Petitioner Law Firm"). Petitioner Fiorillo

practices law in Vancouver, British Columbia, and also in the Northwest Territories on a restricted appearance basis.

2. In June 1992, the Petitioner Law Firm was retained to act as counsel for the Canadian Association of Smelter and Allied Workers, Local 4 (the "Union"), and several of its members, in matters arising out of the labour dispute between Royal Oak Mines Inc. and the Union. The dispute is commonly referred to as the Giant Mine labour dispute.

3. During the period June 1992 to November 1993, members of the Petitioner Law Firm attended in Yellowknife, in the Northwest Territories, on a number of occasions.

4. In the period referred to in paragraph 3 above, the Petitioner Fiorillo travelled to Yellowknife on at least twelve occasions in order to attend to legal matters on behalf of the Union and its members. The dates of the Petitioner Fiorillo's attendance in Yellowknife include the following:

   (a) August 25 to 29, 1992;
   (b) September 17 to 25, 1992;
   (c) October 5 to 10, 1992;
   (d) October 28 to November 16, 1992;
   (e) January 17 to 23, 1993;
   (f) March 6 to 13, 1993;
   (g) April 17 to 21, 1993;
   (h) August 6 to 8, 1993;
   (i) September 17 to 19, 1993;
   (j) September 27 to 28, 1993;
   (k) October 17 to 18, 1993; and
   (l) October 31 to November 12, 1993.

5. On the dates referred to in paragraph 4 above, the Petitioner Fiorillo engaged in ongoing communications in her capacity as legal counsel for the Union and its members. The communications included, but were not limited to, the following:

   (a) interviews with the Union executive and membership in relation to a number of legal proceedings arising from the labour dispute;
   (b) interviews with Union members and witnesses in connection with various contempt applications commenced in the Supreme Court of the Northwest Territories;
   (c) communications with members of the Royal Canadian Mounted Police, Yellowknife detachment;
   (d) communications with members of the Royal Canadian Mounted Police, Homicide Task Force;
   (e) communications with legal counsel for Royal Oak Mines Inc.;
   (f) communications with members of the Department of Justice, Yellowknife Regional Office;
   (g) communications with the investigating officers of the Royal Canadian Mounted Police Public Complaints Commission in respect of a comprehensive complaint filed on behalf of the Union against the Royal Canadian Mounted Police; and
   (h) communications with other legal counsel in connection with the defence of Union members and/or members of their families.

6. The communications referred to in paragraph 5 above took place at some or all of the following locations in Yellowknife:

   (a) the Northern Lites Motel;
   (b) the Explorer Hotel;
   (c) the Discovery Inn;
   (d) the Union hall;
   (e) the private residences of several Union members;
   (f) the Yellowknife Detachment of the Royal Canadian Mounted Police;
   (g) the Courthouse; and
   (h) various restaurants.

7. The communications referred to in paragraphs 5 and 6 above include communication by telephone, teleconference and facsimile transmission.

8. Much of the information communicated as described in paragraphs 4 to 7 consisted of confidential and privileged information. The information so communicated was directly related to legal matters pertaining to the Union and its members.

. . .

10. While in Yellowknife, the Petitioner Fiorillo and Mr. McGrady also engaged in almost daily telephone communications with other lawyers in the office of the Petitioner Law Firm in Vancouver, British Columbia. Those communications consisted of confidential and privileged information. The confidential and privileged information communicated in this fashion concerned legal matters relating to the Union, its members, and the legal affairs of other clients of the Petitioner Law Firm.

11. In addition to the exchange of confidential and privileged information described in paragraph 10 above, and while in Yellowknife, Petitioner Fiorillo and Mr. McGrady also communicated directly, by telephone, with a number of their other clients who reside in various cities in British Columbia. These communications also included both confidential and privileged information concerning legal matters relating to those clients.

There is no suggestion that any of the applicants were acting in an unprofessional manner. Accordingly the provisions of s. 186(2) which allows interception of a solicitor's communication in very limited circumstances are of no application.[3]

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[3]This provision reads:

186.(2) No authorization may be given to intercept a private communication at the office or residence of a solicitor, or at any other place ordinarily used by a solicitor and by other solicitors for the purpose of consultation with clients, unless the judge to whom the application is made is satisfied that there are reasonable grounds to believe that the solicitor, any other solicitor practising with him, any person employed by him or any other such solicitor or a member of the solicitor's household has been or is about to become a party to an offence.

Inspector Alistair MacIntyre and Inspector George Shillaker of the R.C.M.P. gave evidence before me. I found each of them to be credible and reliable. Their attitude during examination and cross-examination displayed candour and co-operation.

Inspector MacIntyre performed a supervisory role in the wiretap investigation under consideration. He testified that no wiretaps were placed on any telephone at the office or any residence, including a motel room, of any of the applicants. He also made it very clear that the applicants were not "targets" or suspects. In his testimony, Inspector MacIntyre related the following particulars with respect to the formal notice mailed to the applicants under s. 196(1) of the *Criminal Code*.[4]

Q Now I take it Inspector that you're aware, through your involvement, that at the conclusion of the investigation, as required by the Criminal Code, a number of people were notified as to the fact that a wiretap investigation had occurred and they had been intercepted?

A Yes, I'm aware of that, sir.

. . .

Q I take it you're aware of the fact that Gina Fiorillo and Austin Marshall received such letters?

A I know them personally. I had met them from a couple, three days into the investigation, and I recognized their name on the list as being people receiving letters such as that.

Q In terms of their having been named in the authorizations and notified, can you advise the Court as to why that occurred?

A They were people -- there were two locations that it became apparent that they were contacting our suspects at, and with that until around January of 1993, as a result of a situation, the orders then changed. In fact, the order was dated the 8th of February, 1993, to reflect a special handling of calls to -- sorry not to -- but two suspects from lawyers incidental to our homicide investigation.

So what was happening was there was a labour dispute ongoing here. There was many many other issues attached to that and I understand that's why these particular lawyers were involved to some degree, and that they were contacting others that we were interested in on the homicide and property damage matters -- the other bombings that we were interested in -- and when

[4]This provisions reads:

196.(1) The Attorney General of the province in which an application under subsection 185(1) was made or the Solicitor General of Canada if the application was made by or on behalf of the Solicitor General of Canada shall, within ninety days after the period for which the authorization was given or renewed or within such other period as is fixed pursuant to subsection 185(3) or subsection (3) of this section, notify in writing the person who was the object of the interception pursuant to the authorization and shall, in a manner prescribed by regulations made by the Governor in Council, certify to the court that gave the authorization that the person has been so notified.

that became apparent that this was occurring, we then changed the orders on the 8th of February, 1993, to reflect a clause for dealing with that issue.

Q Did those persons become named in the authorizations at that point in time?

A Yes, they did.

. . .

Q Now with respect to that issue were there, during the course of the wiretap investigation, communications involving those lawyers or lawyers which were intercepted?

A I don't know the exact date, but I assume probably in the month of January, 1993, there were two phone calls from Gina Fiorillo into one of our targets.

. . .

Q All right. Now, you've indicated that to the best of your knowledge, these civilian monitors have some instructions with respect to how they're to deal with privileged communications?

A That's correct.

Q In general terms, are they to make available to investigators privileged communications?

A Absolutely not. They have to go to the one authority that's not part of the investigation, but that's dealt with only that, and if there is a matter requiring that clarification they'll go to him with it. It is not released to the investigators.

Q Now, are you aware of any conversations involving lawyers during the investigation which were made available to the investigators?

A Well, I am not aware of that conversation, but I believe it was one or both of those conversations were made available to the investigators in dealing with Gina Fiorillo.

Q Can you advise the Court as to your knowledge as to how that was handled in terms of advising the Court about it?

A Okay, what happened was on the 8th of February, if I can back it up a few days -- five or six days -- prior to that the Crown prosecutor, upon reviewing the matter, identified that this disclosure had been made to the investigators on those two conversations. At that time, the whole detail of that disclosure was put into that next affidavit dated the 8th of February, 1993, the details of the disclosure and the fact that it had been done, apparently in good faith by the police officer in that they thought the conversations were not privileged; however, it was decided they may very well have been privileged. In any event, it was disclosed in the affidavit to the judge completely and forthright, and with that that was why I was saying on the 8th of February the corresponding order or authorization that came with that affidavit had a clause in it; and from that time forward from eight o'clock in the morning until twelve midnight live monitoring on two specific locations where that could have been a problem had to be done, and live monitoring means the monitors will only activate on hearing the audio -- you hear an audio beam going through as the phone comes through as the phone number is being dialled, only to the point where it's determined that it's not a privileged communication will the recording start, as opposed to the others where the recording would start and you would shut it off. So, it had to be live monitoring on two specific locations -- and I might add these specific locations are of our suspects, not the other people on the other side of the list but our suspects -- that these incoming calls were quite prevalent, and as a result, this special handling feature was added to the order.

Q So just to clarify that last point, the two locations that you're talking about that were treated specially in the February 8th order and subsequent orders were locations connected with suspects not locations connected with any lawyers?[5]

This testimony was not undermined in cross-examination. Inspector MacIntyre reiterated that the applicants were not primary targets for interception "but their otherwise private communications were intercepted as an incident to the interception of the primary targets." In re-examination, Inspector MacIntyre testified that the authorization obtained after such interceptions each contained specific conditions for monitoring. This is made clear in the following extract from his testimony on re-examination:[6]

Q Just to clarify that, was it not in fact the case that the authorizations which were obtained after that date, each contained a specific provision in specifying monitoring conditions for those two locations?
A Yes, sir. It was right in the actual order itself or the authorization itself that only at these two locations there was a specific monitoring clause in there that it had to be live monitoring in the manner which I've described earlier in cross.

Inspector George Shillaker also performed a supervisory role with respect to the wiretap investigation in issue. He described his role in the following extracts from his testimony:[7]

Q Am I correct, sir, that you were asked to perform certain supervisory functions in that regard?
A Yes, I was.
Q Was this a role you'd ever performed before?
A No, it was not.
Q With respect to your role, could you describe to the Court what your role entailed; that is, in very general terms what your supervisory duties were in relation to the wiretap?
A Basically I was asked to review what may have been potentially privileged conversations between counsel and their clients.

. . .

[5]Transcript of evidence, pp. 9-16.

[6]Transcript of evidence, p. 27.

[7]Transcript of evidence, p. 28, lines 15-27, p. 30, lines 22-.

Q Now sir, in terms of the role that you performed in relation to reviewing suspected privileged communications, could you advise the Court as to what that entailed?
A It entailed reviewing intercepted communications that were potentially privileged.
Q Who would bring these to your attention?
A The intercept monitors in what we referred to as the "special I room".
Q Did you have an expectation as to what would occur if, following a review, you made a determination that a communication was a privileged lawyer communication?
A It was my understanding that it would go nowhere. It would not be disseminated to investigators or anyone else.
Q What about if you made a determination that in fact the conversation was not privileged?
A Then it would be reviewed by investigators.
Q Would it be disseminated publicly?
A No, only to R.C.M.P. investigators on the task force.
Q Do you recall sir, or are you able to tell the Court on how many occasions you were asked to perform this function?
A I believe it was three times. I did not keep notes on the number of times but I believe it was three.
Q Now, as I understand it, you had occasion to do so some time in January of 1993?
A Yes, I did.
Q Could you advise the Court as to what dates in fact?
A The first one would have been the 19th of January, 1993, and the second the 20th of January, 1993.
Q What did you actually do; that is, what steps did you take to review the communications in question?
A I listened to a taped communication with a set of earphones while inside the monitoring room.
Q I understand that those two communications involved the petitioner Gina Fiorillo and a suspect?
A That's correct.
Q What did you do following your review by listening on the earphones?
A I advised the intercept monitors of what my decision or opinion was relative to whether it was privileged or not.
Q What was your opinion at that time?
A That they were not privileged.
Q Did you subsequently come to a different conclusion?
A Yes, I did.
Q When did that occur?
A It would have been within a relatively short period of time; possibly a week or 10 days.
Q Was that as a result of discussion with Crown counsel?
A Yes, it was.
Q After that point in time, how did that affect you in terms of your review of such material?
A Well, I was much more cautious and nothing further was ever released.

In cross-examination he further dealt with the specifics of conversation between Ms. Fiorillo and a target or suspect:[8]

Q Now, dealing with these two conversations which you initially thought were not privileged conversations, I take it these were conversations between Gina Fiorillo and a target or a suspect, sir?
A That's correct.
Q Is it also correct to say that you knew or you came to know that that person was also a client of Gina Fiorillo's?
A I don't know if I knew that, sir, but the conversation was with Gina.
A I knew she was a lawyer.
Q All right. I don't want to get too far afield in this, but something must have made you question your own judgment, or how is it that you came to seek the advise [sic] of Crown counsel as to whether or not your preliminary view was a correct view?
A Crown counsel brought it to my attention that my view was not correct.
Q This would be about a week or 10 days after you had formulated your original view and had permitted material to go to the investigating team?
A It was fairly soon thereafter. It's my estimation approximately a week.
Q I take it the investigating team was composed of a number of R.C.M.Police and others?
A Yes, a number of R.C.M.Police.
Q And advisors, legal advisors, et cetera?
A Yes, we had a crown attorney with us continuously in relation to the wiretap.
Q They would be the ones who would have reviewed the two communications which you initially thought were not privileged?
A Yes, I believe so.
Q Now, you were here a few minutes ago when I asked inspector McIntyre a few questions and he suggested you might better be able to answer them. These communications that you were later advised were privileged, the gist of those -- well I better not leap to that conclusion -- what, if any, of those communications found themselves in affidavit material that was laid before a judge?
A I have subsequently learned that two of them did.
Q So, the two conversations which you were later advised were privileged, those conversations were laid before a judge in the form of an affidavit?
A Yes.

Ms. Fiorillo and Mr. Marshall first learned in a general way that their private communications had been intercepted under a judicial authorization when each of them received the following letter from the Solicitor General of Canada:

> On various dates between September 27th, 1992 and September 2nd, 1993, pursuant to applications made by Agents designated in writing by the Solicitor General of Canada, pursuant to Section 185 of the Criminal Code, Justices of the Supreme Court of the Northwest Territories, the Court of Queen's Bench of Alberta and the Court

[8]Transcript pp. 35-37.

> of Queen's Bench of Saskatchewan, issued authorizations permitting the interception of your private communications on various dates between September 27th, 1992 and October 31st, 1993.
>
> Pursuant to orders made pursuant to Section 196(3) of the Criminal Code by Justices of the Supreme Court of the Northwest Territories, the Court of Queen's Bench of Alberta and the Court of Queen's Bench of Saskatchewan, the period of time for notifying you of the said authorizations was extended to December 31st, 1993, in the case of the Alberta authorizations and December 2nd, 1993, in the case of the authorizations in the Northwest Territories and Saskatchewan.
>
> This letter is for the purpose of notifying you of the said authorizations pursuant to Section 196(1) of the Criminal Code and of the extension of time for notification pursuant to Section 196(3) of the Criminal Code.

Following receipt of this letter, counsel instructed by each of the applicants wrote to the Solicitor General in the following terms:

> We are solicitors acting on behalf of Gina Fiorillo of the law firm of McGrady, Askew & Fiorillo, Barristers & Solicitors.
>
> Our client has received a letter, dated November 29, 1993, advising her that interceptions of her private communications were made on various dates between September 27, 1992 and October 31, 1993, pursuant to the authority of certain court authorizations. A copy of this letter is attached for your reference.
>
> On behalf of our client, we request that you provide to us the following documents:
>
> (a) the authorizations issued by the Supreme Court of the Northwest Territories, the Court of Queen's Bench of Alberta and the Court of Queen's Bench of Saskatchewan pursuant to sections 185 and 186 of the Criminal Code, relating to the interception of our client's private communications;
>
> (b) any and all documentation, including the affidavit specifically required by sections 185 and 186(6), offered in support of the application under sections 185 and 186(6);
>
> (c) the orders made by the Supreme Court of the Northwest Territories, the Court of Queen's Bench of Alberta and the Court of Queen's Bench of Saskatchewan pursuant to section 196(3) of the Criminal Code, relating to the extension of the period of time for notification;
>
> (d) any and all documentation, including the affidavit specifically required by section 196, offered in support of the application, relating to the court order made under section 196(3); and
>
> (e) Copies of any tapes and/or transcripts of the communications that were intercepted pursuant to the various authorizations.
>
> Please note that all of the Criminal Code provisions listed above reflect the state of the law before Bill C-109.

In addition, we request that you provide us with information regarding the steps taken by the intercepting parties to protect solicitor/client privilege for all of the clients of McGrady, Askew & Fiorillo.

Please give this matter your immediate attention. We request that you provide us with your response within seven days.[9]

The Solicitor General responded in the following terms to each request:

This is further to your letter of December 23, 1993 requesting documentation relating to interceptions of Gina Fiorillo's private communications between September 27, 1992 and October 31, 1993.

We take the position that as agents designated by the Solicitor General of Canada, we have complied with the notification requirements as set out in the Criminal Code. As such, we are not prepared to provide any additional information beyond that set out in the letter of notification forwarded to your client on November 29, 1993.

Should you wish to do so, you may make a formal request for information pursuant to the Access to Information Act by directing your correspondence to Yvan Roy, Coordinator, Access to Information and Privacy, Department of Justice, Room 302, Department of Justice Building, 239 Wellington Street, Ottawa, Ontario, K1A 0H8.

With that, the applicants brought these proceedings. The applicants' reasons for seeking access to information in the "sealed packet" were as follows:

(a) to determine the steps that were taken, if any, pursuant to s. 186(3) of the *Criminal Code* to protect the privileged communications between the applicants and their respective clients;

(b) to determine whether the applicants' constitutional rights under the *Charter* were violated;

(c) to determine whether or not to bring action under s. 17 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. 50; 1990 c. 8 s. 21 for interception of private communications;

(d) to determine whether or not to bring action under s. 18 of the *Crown Liability and Proceedings Act* for disclosure of either of the contents of or the existence of private communications; and

(e) to determine whether or not the interceptions were lawfully made so that the applicants can take appropriate steps to protect the interests of their clients.

[9]For the purposes of these reasons, the letters with respect to the applicant Fiorillo are quoted.

III. STATUTORY PROVISIONS

The statutory provisions in the *Criminal Code* which govern electronic surveillance have recently been amended by *Act to Amend the Criminal Code, the Crown Liability and Proceedings Act and the Radio Communication Act*, S.C. 1993, c. 40 (the "*Act*"). These amendments were proclaimed in force on August 1, 1993. Since the respondent Crown emphasized the text of these amendments, I find it convenient to reproduce the provisions dealing with opening the "sealed packet".

Before the recent amendments, applications to open a "sealed packet" were governed by s. 187 of the *Criminal Code*, R.S.C. 1985, c. 27, 1st suppl., s. 24, read:

> **187.** (1) All documents relating to an application made pursuant to section 185 or subsection 186(6) or 196(2) 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 on determination of the application, and that 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 552; and
> [emphasis supplied]
>
> (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.

This section is identical to s. 178.14, S.C. 1973-74, c. 50, which was considered in earlier case law.

Section 187, as amended, now provides:

> **187. [178.14]** (1) All documents relating to an application made pursuant to any provision of this Part are confidential and, subject to subsection (1.1), shall be placed in a packet and sealed by the judge to whom the application is made immediately on determination of the application, and that 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 dealt with except in accordance with subsections (1.2) to (1.5).

(1.1) An authorization given under this Part need not be placed in the packet except where, pursuant to subsection 184.3(7) or (8), the original authorization is in the hands of the judge, in which case that judge must place it in the packet and the facsimile remains with the applicant.

(1.2) The sealed packet may be opened and its contents removed for the purpose of dealing with an application for a further authorization or with an application for renewal of an authorization.

(1.3) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet. [emphasis supplied]

(1.4) A judge or provincial court judge before whom a trial is to be held and who has jurisdiction in the province in which an authorization was given may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet if

(a) any matter relevant to the authorization or any evidence obtained pursuant to the authorization is in issue in the trial; and
(b) the accused applies for such an order for the purpose of consulting the documents to prepare for trial.

(1.5) Where a sealed packet is opened, its contents shall not be destroyed except pursuant to an order of a judge of the same court as the judge who gave the authorization.

(2) An order under subsection (1.2), (1.3), (1.4) or (1.5) made with respect to documents relating to an application made pursuant to section 185 or subsection 186(6) or 196(2) may only be made after the Attorney General or the Solicitor General by whom or on whose authority the application for the authorization to which the order relates was made has been given an opportunity to be heard.

(3) An order under subsection (1.2), (1.3), (1.4) or (1.5) made with respect to documents relating to an application made pursuant to subsection 184.2(2) or section 184.3 may only be made after the Attorney General has been given an opportunity to be heard.

(4) Where a prosecution has been commenced and an accused applies for an order for the copying and examination of documents pursuant to subsection (1.3) or (1.4), the judge shall not, notwithstanding those subsections, provide any copy of any document to the accused until the prosecutor has deleted any part of the copy of the document that the prosecutor believes would be prejudicial to the public interest, including any part that the prosecutor believes could

(a) compromise the identity of any confidential informant;
(b) compromise the nature and extent of ongoing investigations;
(c) endanger persons engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used; or
(d) prejudice the interests of innocent persons.

(5) After the prosecutor has deleted the parts of the copy of the document to be given to the accused under subsection (4), the accused shall be provided with an edited copy of the document.

(6) After the accused has received an edited copy of a document, the prosecutor shall keep a copy of the original document, and an edited copy of the document and the original document shall be returned to the packet and the packet resealed.

(7) An accused to whom an edited copy of a document has been provided pursuant to subsection (5) may request that the judge before whom the trial is to be held order that any part of the document deleted by the prosecutor be made available to the accused, and the judge shall order that a copy of any part that, in the opinion of the judge, is required in order for the accused to make full answer and defence and for which the provision of a judicial summary would not be sufficient, be made available to the accused.

The Crown argues that the language of s. 187 forecloses a non-accused person from seeking access to a "sealed packet" for any purpose, whether limited or otherwise: see *Re Zaduk and The Queen* (1979), 46 C.C.C. (2d) 327 (Ont. C.A.). Learned Crown counsel submits there is no room for judicial discretion because a textual reading of the relevant provisions limits any such right to an accused person who requires access to make full answer and defence to a pending criminal charge.

I disagree and reject the submission that s. 187, as amended, was passed for the purpose of diluting the power of the Court under former s. 187(1)(a)(ii). In my opinion, s. 187(1.3) should not be so narrowly interpreted.

Prior to enactment of s. 187, as amended, Courts struggled with the threshold requirements of access to the "sealed packet" where an accused applied for access in order to make full answer and defence to a charge before the Court. Speaking generally, these issues were resolved by the Supreme Court of Canada in a number of decisions. In my opinion, the amendments are essentially a codification of the existing case law as it developed in the Supreme Court of Canada. The point is succinctly summed up in Tremeear's Annotated *Criminal Code* 1995 at p. 306 where the learned authors in commenting on s. 187, as amended, state:

> . . . in many respects it gives statutory effect to the decisions in *R. v. Garofoli* (1990), 80 C.R. (3d) 317; 60 C.C.C. (3d) 161 (S.C.C.) and *Dersch v. Canada (Attorney General)* (1990), 80 C.R. (3d) 299, 60 C.C.C. (3d) 132 (S.C.C.).

This statement finds general support in *R. v. Durette*, [1994] 1 S.C.R. 469 where Sopinka J., speaking for the majority at 491-95 states:

> Under s. 187, the material filed in support of an application for a wiretap authorization is placed in a sealed packet to which the public normally has no access. That section, however, also permits the packet to be opened and the contents removed pursuant to an order of a judge. The judge hearing an application under this section has a broad discretion to decide whether or not to provide access to the packet. However, in the case of an accused, that discretion would not be exercised judicially or in conformity with the right under the *Canadian Charter of Rights and Freedoms* to make full answer and defence unless access was provided: *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505. This is explicitly recognized in s. 187(5) which now states that the accused 'shall' be given a copy of the material in the packet once it has been edited by the prosecutor. [my emphasis]
>
> . . .
>
> In *Garofoli*, I indicated that, in order to protect the public interest in law enforcement, and in particular the interest in protecting the identity of informers and the confidentiality of investigative techniques, a judge may edit a wiretap affidavit before providing it to the accused. The interests of law enforcement are adequately served if a judge considers the factors set out in *Parmar, supra*, at pp. 281-82, and approved of in *Garofoli, supra*, at p. 1460, before disclosing the contents of an affidavit to the accused. ... This aspect of the decision in *Garofoli* is now codified in s. 187(4) of the *Criminal Code*.
>
> In *Garofoli, supra*, at p. 1461, I also suggested that the following procedure ought to be followed when disclosing the contents of wiretap affidavits to the accused: . . .
>
> Two of the essential features of the above procedure have now been codified in s. 187 of the *Criminal Code*. First, s. 187(4) now makes it clear that editing wiretap affidavits is primarily the responsibility of the prosecutor. . . . Second, s. 187(7) recognizes the right of the defence to have an opportunity to make submissions regarding the appropriateness of any proposed deletions.

Accordingly, these amendments were enacted for the purpose of ensuring that an accused person who requires access to the "sealed packet" to conduct his defence is entitled to it, subject to necessary editing. During argument, learned counsel for the Crown submitted that Parliament in passing these amendments intended to limit the right of access to accused persons only. There are no provisions in the legislation to evidence or support an intent to restrict such right to an accused person. Furthermore, the House of Commons Debates which surrounded the passage of Bill C-109 raise no such question.[10] The debate essentially focused on various Supreme Court decisions

[10]See *Hansard*, March 8, 1993, pp. 16650-53.

including *Garofoli* and *Duarte* and the need to have legislation that comports with the *Charter*.

A wiretap is a search and seizure, and the statutory provisions which authorize it and the actions which spring from them, are subject to *Charter* scrutiny under s. 8. This was emphasized by the Supreme Court of Canada in *R. v. Duarte*, [1990] 1 S.C.R. 30 where La Forest J. stated at 42-45:

> I begin by stating what seems to me to be obvious: that, as a general proposition, surreptitious electronic surveillance of the individual by an agency of the state constitutes an unreasonable search or seizure under s. 8 of the *Charter*.
>
> . . .
>
> It should come as no surprise that these parties shied away from engaging in such an unequal contest. *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, instructs us that the primary value served by s. 8 is privacy, and, as I noted in *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 426, the spirit of s. 8 must not be constrained by narrow legalistic classifications. If one is to give s. 8 the purposive meaning attributed to it by *Hunter v. Southam Inc.*, one can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance and to which, in consequence, the protection accorded by s. 8 should be more directly aimed, an issue I shall more fully develop as I go along.
>
> . . .
>
> The reason for this [statutory] protection is the realization that if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning. As Douglas J., dissenting in *United States v. White, supra*, put it at p. 756: "Electronic surveillance is the greatest leveler of human privacy ever known." If the state may arbitrarily record and transmit our private communications, it is no longer possible to strike an appropriate balance between the right of the individual to be left alone and the right of the state to intrude on privacy in the furtherance of its goals, notably the need to investigate and combat crime.
>
> This is not to deny that it is of vital importance that law enforcement agencies be able to employ electronic surveillance in their investigation of crime. Electronic surveillance plays an indispensable role in the detection of sophisticated criminal enterprises. Its utility in the investigation of drug related crimes, for example, has been proven time and again. But, for the reasons I have touched on, it is unacceptable in a free society that the agencies of the state be free to use this technology at their sole discretion. The threat this would pose to privacy is wholly unacceptable.

> It thus becomes necessary to strike a reasonable balance between the right of individuals to be left alone and the right of the state to intrude on privacy in the furtherance of its responsibilities for law enforcement. Parliament has attempted to do this by enacting Part IV.1 of the *Code* . . . [my emphasis]

Section 186(1)[178.13] which is a starting point for any wiretap authorization, provides:

> **186.**(1) An authorization under this section may be given if the judge to whom the application is made is satisfied
>
> (a) that it would be in the best interests of the administration of justice to do so; and
>
> (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

This provision is seen as embodying the minimum constitutional standard established in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145. In *Duarte* and again in *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1443-44, the Supreme Court established that *Hunter* continues to guide consideration of wiretap provisions. In order to found an authorization, it is up to the Crown to establish "reasonable and probable grounds, established upon oath, to believe an offence has been committed and that there is evidence to be found at the place of the search" (at 168). *Garofoli* (at 1444) makes clear that there is to be no dilution of the constitutional standard when dealing with wiretaps.

R. v. Dersch, [1990] 2 S.C.R. 1505 established that the same principles would govern interpretation of s. 187. In *Dersch*, the Court decided that previous cases which restricted the accused's access to the sealed packet could not stand in the face of the *Charter*. This conclusion followed logically from considering what was necessary to challenge the wiretap under the *Criminal Code* or under s. 8 of the *Charter*. Sopinka J. outlined the progression at 1515:

> 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*.

However, he recognized that the rights of an accused, who required access to the packet to prove his innocence, might exceed that of a citizen who needed the contents for other purposes. Sopinka J. notes at 1510:

> 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. [my emphasis]

In *Zaduk* the Court held that no further disclosure of details was required following a notice under s. 178.23(1) [now s. 196] of the *Criminal Code*. Since *Zaduk* involved a pre-*Charter* situation I am of the opinion that it must be read in the light of post-*Charter* jurisprudence in the Supreme Court of Canada.

In *Dersch* the Supreme Court of Canada articulated the criteria to be applied on an application by an accused to open the "sealed packet". But Sopinka J. (Dickson C.J.[11], Lamer C.J.C[12], La Forest and Gonthier JJ. concurring) impliedly recognized that in appropriate circumstances a non-accused might bring such an application when referring to the "discretion in respect of a request by a target or a member of the public who is not an accused person."

Although such statement was not necessary to the decision, it was a considered statement in the context of the legislation under review. In the circumstances, I am of the opinion that sitting as a judge at first instance, I should respect and adopt it as binding

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[11]Chief Justice at the time of the hearing.

[12]Chief Justice at the time of judgment.

on me. This approach comports with the principles reaffirmed by the Supreme Court of Canada in *Sellars v. The Queen*, [1980] 1 S.C.R. 527 at 530:

> In *Attorney General for the Province of Quebec v. Cohen*, [[1979] 2 S.C.R. 305] the Court affirmed the authority of a statement of principle contained in one of its decisions. Pigeon J., speaking for the Court, wrote at p. 308:
>
> > I cannot accept that what was said in *Patterson* by the two judges who disagreed with Judson J. on what he said in the last quoted paragraph, although one of them agreed on the conclusion, in any way detracts from the authority of this statement of principle approved by a majority of this Court.
>
> The *Patterson* [*Patterson v. The Queen*, [1970] S.C.R. 409] decision, was also followed by the Court of Appeal of Alberta in *Re Depagie and The Queen* [(1976), 32 C.C.C. (2d) 89], in which McDermid J., citing the same passage as Pigeon J. in *Cohen*, wrote on behalf of the majority, at p. 92:
>
> > ... However, even if the last paragraph of the judgment I have quoted is *obiter*, as stated by Bouck, J., in *R. v. Hubbard et al.*, [1976] 3 W.W.R. 152, I would not feel justified in not following it even if I thought it was not in accord with the previous authorities.
>
> In *Ottawa v. Nepean Township et al.* [[1943] 3 D.L.R. 802], Robertson C.J. wrote for the Court of Appeal of Ontario, at p. 804:
>
> > ... What was there said may be *obiter*, but it was the considered opinion of the Supreme Court of Canada, and we should respect it and follow it even if we are not strictly bound by it.

It would be premature for me to pass upon the validity of any claim that the applicants may have for other *Charter* relief or other remedies. As well, the issue of damages for any tort is not before me. The principal question is whether, in the circumstances of this case, the applicants should be granted access to the "sealed packet". I conclude that a textual reading of s. 187(1.3), as well as authorities such as *Dersch* permit this type of application to be made by a non-accused person, particularly where that person has much more than a general interest that any citizen might have in the administration of justice.

IV. EXERCISE OF DISCRETION

I now turn to a consideration of whether discretion should be exercised in favour of the applicants.

As a starting point, I find it convenient to refer to the following passage from the decision of Goodman J.A. in *R. v. Playford* (1987), 61 C.R. (3d) 101 at 145:

> In my opinion it must be emphasized that the provisions of s. 178.14(1) do not indicate that Parliament intended that the contents of the packet should be kept secret forever. It gave to the judges designated in s. 178.14(1)(a)(ii) the right to order that the packet may be opened or the contents removed. Such orders call for the judicial exercise of discretion. No additional legislation is required to enable a judge to exercise such discretion. As previously indicated, it would be extremely difficult to justify a refusal by a judge to order the opening of a packet and the production of the contents where such order would not interfere with the investigation of a crime and the alleged perpetration thereof and where, if necessary, appropriate safeguards are taken to protect informers, undercover agents and secret police methods.
>
> Every person is entitled to be free from unreasonable search or seizure under s. 8 of the Charter. It follows logically that he is entitled to all information which can be made available without infringing upon some other person's right, in order to determine whether such a search or seizure is unreasonable. A judge's refusal to give such information in the circumstances outlined above would amount to a failure to exercise his discretion judicially. It could not be supported on any logical or policy basis.

Although *Playford* involved an application by an accused person, I find the principles articulated to be of assistance in this case. There is now no suggestion that an ongoing investigation would be prejudiced or that an authorization is still in place. Any earlier need for secrecy is spent so long as appropriate safeguards are built into any order granting access. At this stage I need not focus on the editing that may be required.

The applicants are practising solicitors whose conversations with clients are confidential. Information collected can impact prejudicially on the investigation or prosecution of any clients who are referred to in the course of an intercepted conversation. This may include accused persons who do not have status in relation to the intercept under consideration.

The evidence adduced before me indicates the applicants were not primary targets of the investigation under which the wiretaps were authorized; however, the information provided in the notice, and claimed by the Solicitor General to be the limit of their entitlement, gives no such reassurance. The notices are bereft of any detail which would allow the applicants to determine if they were targets or whether or not s. 186(2) and (3)

had been invoked. Without access to the packet, a solicitor is caught in the catch-22 situation described in *Dersch* - she has no way of proving the need for access without getting it.

The applicants have two major concerns. In the larger sense, they believe their role in the administration of justice has been undermined. As persons who protect the interests of an accused person and who provide a balance to the powers the state brings to bear on any investigation or prosecution, they depend on the ability to communicate confidentially with their clients. This confidentiality is a matter of vital concern to any practising solicitor: *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860. Learned counsel for the intervenor also emphasized this point in his written submission.

The second concern is a more particular one related to the facts of this case. The applicants seek further information which will permit them to assess what possible action may be available to them in the circumstances of this case. The question of a remedy is not the issue before me at this stage, but I am satisfied the applicants have sincere and serious concerns. Learned counsel for the applicants canvassed these concerns and their reasons for seeking access. In the circumstances I see no need to say more about their reasons at this stage.

Given the written and oral testimony before me concerning the interception of private communications, I find that each of the applicants has demonstrated a sufficient interest and grounds for exercise of my discretion in favour of access to the "sealed packet" for the purpose of reviewing relevant information filed in support of the authorizations "permitting the interception of [their] private communications on various dates between September 27, 1992 and October 31, 1993."

In my opinion, this conclusion comports with the general principles articulated by Dickson J. (as he then was) in *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175 at 186-87:

> At every stage the rule should be one of public accessibility and concomitant judicial accountability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law. A decision by the Crown not to prosecute, notwithstanding the finding of evidence appearing to establish the commission of a crime may, in some circumstances, raise issues of public importance.
>
> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

However, the right of access to judicial records has never been considered absolute: see *Vickery v. Nugent*, [1991] 1 S.C.R. 671. Given the legislative scheme for wiretap authorizations, one must be careful to maintain the integrity of the legislation and at the same time balance other significant interests. Certain proceedings must be closed for obvious reasons. But in this case, an order for access on terms will not impair or undermine the integrity of the system.

Since the records in question are sealed court records, I find that the value of openness outweighs the other competing considerations. The legal system rests precariously on the confidence of the public and that confidence is crucial to court house credibility. People in an open society do not demand infallibility from their institutions, but in these circumstances the applicants find it difficult to accept what they are prohibited from seeing. If access is permitted for a limited purpose and under prescribed conditions, the rights of the applicants will be vindicated and the interests of society will still be protected.

At this stage I decline to give specific consequential directions because counsel should have an opportunity to consider necessary safeguards and then make either oral or written submissions. If oral submissions are to be made, counsel should contact the Clerk of the Court to make the necessary arrangements. On the other hand, if counsel wish to make written submissions, I am prepared to give the necessary directions for an exchange of such submissions.

In considering and formulating consequential directions for "protective" orders, editing and other relevant matters, I recognize that no specific rules have been

formulated. Each such application must be dealt with on a "case by case" basis. Accordingly in the circumstances before me, leave is granted to make further submissions on this important aspect of the case.

DATED at Yellowknife, in the Northwest Territories, this 29th day of June, A.D. 1995.

C. F. Tallis

TALLIS J.
Deputy Judge of the Supreme Court of the
Northwest Territories

CV 05323 1994

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

McGRADY, ASKEW & FIORILLO (the "Law Firm") and GINA MARIA FIORILLO

Petitioner

- and -

THE QUEEN IN RIGHT OF CANADA

Respondent

AND:

THE LAW SOCIETY OF THE
NORTHWEST TERRITORIES

Intervenor

AND: CV 05322 1994

AUSTIN F. MARSHALL

Petitioner

- and -

THE QUEEN IN RIGHT OF CANADA

Respondent

AND:

THE LAW SOCIETY OF THE
NORTHWEST TERRITORIES

Intervenor

REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE C. F. TALLIS
