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SC 3628

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the **Criminal Code**, Part IV.1;

AND IN THE MATTER OF the authorization to intercept private communications granted on the 20th day of December, 1984 and its renewal granted on the 27th day of February, 1985, numbered respectively A-5/84 and A-10/85;

BETWEEN:

LIEF EGON MADSEN

Applicant

\- and -

HER MAJESTY THE QUEEN

Respondent

AND BETWEEN:

FRASER SCOBEL

Applicant

\- and -

HER MAJESTY THE QUEEN

Respondent

Application to rescind a "wiretap" authorization and its renewal pursuant to **Wilson** v **The Queen**, adjourned. A conjoined application for an order to open the sealed packets pursuant to s.178.14(1)(a)(ii) of the **Criminal Code**, granted on terms.

Heard at Yellowknife on September 23rd and October 10th, 1986

Judgment filed: November 3rd, 1986

Counsel for the Applicant L.E. Madsen: R.H. Davidson, Esq.
" " " " F. Scobel: G. Gower, Esq.

Counsel for the Respondent: G.M. Bickert, Esq.

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REASONS FOR JUDGMENT

Two sealed packets, which contain the confidential materials that led to my granting the "wiretap" authorization and renewal now sought to be rescinded pursuant to **Wilson** v **The Queen**, [1983] 2 S.C.R. 594, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97, (1984) 1 W.W.R. 481, 4 D.L.R. (4th) 577, 51 N.R. 321,

26 Man. R. (2d) 194, shall be opened by me pursuant to s.178.14 (1)(a)(ii) of the **Criminal Code**, and their contents shall be made known by me to the accused applicants or their counsel, subject to such deletions or other editing as I may order.

I have reached that decision without making any finding of fraud or material error in the obtaining of either the authorization or its renewal. The authorities relied upon for the view that such a finding must precede an order for opening the sealed packets have given way, it seems to me, to the overriding requirements of the **Canadian Charter of Rights and Freedoms**, more particularly s.7, s.8, s.11(d) and s.24. And see s.52 of the **Constitution Act, 1982**. In consequence, in so far as they may indicate a contrary view, I have not felt it necessary or appropriate to follow **Re Miller and Thomas and The Queen** (1975), 23 C.C.C. (2d) 257, 59 D.L.R. (3d) 679, 32 C.R.N.S. 192 (B.C.S.C.); **Re Stewart and The Queen** (1976), 30 C.C.C. (2d) 391, 70 D.L.R. (3d) 592, 13 O.R. (2d) 260 (H.Ct.); **Re Royal Commission into Activities of Royal American Shows Inc. (No. 3)** (1978), 40 C.C.C. (2d) 212 (Alta. S.C.T.D.); or **R** v **Rowbotham** (1984), 42 C.R. (3d) 164, 11 C.R.R. 302 (Ont. H.Ct.).

Support for the decision taken here is to be found, generally, in **A.G.N.S.** v **MacIntyre**, [1982] 1 S.C.R. 175, 65 C.C.C. (2d) 129, 26 C.R. (3d) 193, 132 D.L.R. (3d) 185, 40 N.R. 181, 96 A.P.R. 609, 49 N.S.R. (2d) 609; and **Hunter** v **Southam Inc.**, [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641; as well as in **R** v **Finlay and Grellette** (1985), 23 C.C.C. (3d) 48, 48 C.R. (3d) 341, 23 D.L.R. (4th) 532, 52 O.R. (2d) 632 (C.A., leave to appeal to S.C.C. refused February 28th, 1986), where Martin, J.A. touched upon the question as follows:

In **Wilson** v **The Queen** ... Mr. Justice Dickson (now Chief Justice) said:

> It is not necessary to decide whether this restricted view of s.178.14 is correct. There is a broad consensus that **prima facie** evidence of fraud or non-disclosure is a valid reason for opening the packet. Misleading disclosure would be in the same category. The present case is one in which the trial judge made a **prima facie** finding of either misleading disclosure or non-disclosure.

Counsel for the appellants stated that in consequence of the restriction placed on an accused's access to the sealed packet, the accused finds himself in an impossible situation. To ascertain whether there has been fraud or non-disclosure he requires access to the sealed packet, but he cannot gain access to the sealed packet unless he proves fraud or non-disclosure. ...

Counsel for the appellants contended that the denial to the accused of access to the application and accompanying material leading to the authorization precludes the accused from making full answer and defence and hence Part IV.1 is unconstitutional. Mr. Hubbard for the Attorney General of Canada responded to this argument by pointing out, 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** person access to that material where it is essential for 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 revelation of their names.

In **Re Ross and The Queen**, digested in (1985) W.C.B. 265, otherwise unreported, November 26th, 1985 (Ont. Co.Ct.), Vannini, C.C.J. held:

> 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.
>
> And because the interception of a private communication constitutes a search and seizure it must now meet the constitutional standard of reasonableness. How is this standard to be determined except by access to the documents in the sealed packet?
>
> 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 therein made available to the accused before this 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.
>
> Accordingly, there will be an order for the opening of the packet by me in the presence of counsel, subject to such deletions and editing as I may make and subject to any appeal from my order.

In **R** v **Wood** (1986), 26 C.C.C. (3d) 77 (Ont. H.Ct.), Osborne, J. reached a similar conclusion, likewise relying on **Wilson** and **Finlay and Grellette**, as follows:

> In my view, the sealed packets should be opened. I will review the contents of it (sic) and, in particular, the contents of the affidavits contained within the sealed packets. I will seek counsel's guidance as to where we proceed from there.

Mitchell, J. in **Martel** v **The Queen**, unreported April 2nd, 1986 (P.E.I. S.C.), also ordered the opening of the sealed packet as contemplated by s.178.14 (1)(a)(ii) of the Code, without any requirement to prove fraud or material error as to disclosure to the judge who granted the "wiretap" authorization. And a decision to the same effect was rendered later in the same month by the Prince

Edward Island Supreme Court (Appeal Division) in **Martel** v **R** (1986), 51 C.R. (3d) 282.

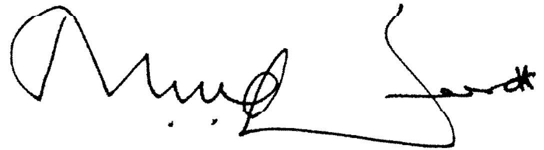
Differences of view exist as to whether the opening of the packet should be ordered before trial, as held in **Gill** v **The Queen**, unreported, June 18th, 1986 (Alta. C.A.), or at trial as held in **Re Stacey and The Queen**, digested in (1986), 16 W.C.B. 422, otherwise unreported, May 20th, 1986 (Ont. H.Ct.). In the case at bar, no significance has been attached to this question by either party. That being so, and no compelling reason appearing for deferment of it to the trial, I have taken my decision on it now.

The **Ross**, **Wood** and **Martel** cases do not stand alone. In **R** v **Marsh**, unreported, June 24th, 1986 (Ont. H.Ct.), Bowlby, J. ordered the opening of the sealed packet pursuant to s.178.14(1)(a)(ii) of the Code, citing these three decisions. In **R** v **Blunk**, unreported, July 8th, 1986 (B.C. Co. Ct.), Millward, C.C.J. applied the earlier decision by Rowles, C.C.J. in **R** v **Young** (1986), 26 C.C.C. (3d) 96 (B.C. Co.Ct.), in which she had directed that certain logs of intercepted private communications be made available to an accused on the basis of **Finlay and Grellette**. These decisions were then applied by McMorran, C.C.J. in **R** v **Braker**, unreported, October 8th, 1986 (B.C. Co.Ct.), once again authorising the opening of a sealed packet pursuant to s.178.14 (1)(a)(ii) of the Code. Power, J. in **R** v **Birt and Anderson**, unreported, October 15th, 1986 (Alta. Q.B.) followed **Wood** and **Marsh** in making a similar order.

A broad consensus, it therefore appears, has been recently established for the view that an accused person may be granted an order to open the sealed packet without showing fraud or material error as to disclosure to the authorizing judge. This is not to be construed as a change in the requirements to

be met before an authorization or its renewal is rescinded as invalid for reasons of fraud or material error as to such disclosure. The application for such rescission now before me remains to be decided, following the opening of the sealed packets. That application is adjourned accordingly, to be further heard by me when a date can be arranged.

Counsel may also by arrangement speak to the detailed terms of the order under s.178.14(1)(a)(ii) of the Code which I now make.



M.M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
November 3rd, 1986

Counsel for the Applicant L.E. Madsen: R.H. Davidson, Esq.

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REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT