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Criminal Law: Wiretap Authorization

The Newfoundland and Labrador Supreme Court (Trial Division) has delivered its ruling in *R v. Buckingham* – hyperlink not available. In that case, the Royal Newfoundland Constabulary received complaints from several patients of the applicant, a medical doctor. They alleged that he provided them with prescription medications, notably Oxycontin and Lorazepam in exchange for sexual favours. In its investigation, the police gathered series of informant tips, sworn and unsworn statements from a number of complainants. The police also gathered undercover surveillance intelligence as well as electronic interceptions of related telephone conversations culminating in a 124 page of 200 paragraphs sworn to by a Constable Thorne. On the basis of the affidavit the police applied and obtained an authorization to conduct electronic surveillance on the applicant. The latter has now challenged the granting of the authorization on a number of grounds, alleging in particular that it did not comply with the statutory requirement of section 186(1) of the Criminal Code and that it violated his section 8 charter rights which protect him from unlawful search and seizure.

After an extensive review of leading Canadian authorities on wiretap and related *ex parte* authorizations under section 186(1) of the Criminal Code particularly *R v. Garofoli, Hunter v. Southam, R v. Araujo*, etc. the court held that the minimum legal obligation on a party seeking ex parte authorization (in this case for wire tapping) is full and frank disclosure of material facts in a clear and concise language in a manner that is devoid of a boilerplate approach or fishing expedition. According to the court, the role of the court is to ensure that the competing constitutional rights of the applicant and the dictates of investigative necessity are balanced. The court has to weigh the disclosures in the supporting affidavit in the context of the particular investigation and must take into account the totality of the circumstances and not scrutinize such disclosures as piece meal information. It must recognize that wiretapping as an option applies only in the investigation of serious offences and only where there is no other reasonable alternative method of investigation. Also, wiretapping as an option should not be an easy recourse for the police which the court encourages. Before it can authorize the procedure, the court must be satisfied that alternative methods of investigation are practically unviable and that wiretap is an imperative for investigative necessity in the given circumstance.

In rejecting the application to set aside the *ex parte* authorization for police wiretap, the court found that some aspects of the language of the application implicate a boilerplate approach. It held, however, that "[w]hile the use of boilerplate language should be avoided, where possible, it is only offensive where it could mislead the authorizing judge" (¶ 32) The court further held that even though the police had received some complaints against the applicant, it was acceptable for the police to seek section 186 authorization "to bolster a case based in part on the evidence of a complainant who may lack credibility but whose allegations are otherwise believed by the police" (¶39). Despite the weaknesses, real or perceived in the police affidavit in support of the application for wiretap authorization, the court held that the authorizing court had reasonable grounds on which it authorized the wiretap or electronic surveillance of the applicant.

Election Fraud – Special Ballots Requested Over Internet

The first Calgary Municipal election in which voters

were able to request special ballots over the internet rather than vote in person on voting day has resulted in an election fraud conviction against the husband of a winning candidate for Alderman. Legislation used for the first time in the 2004 municipal election allowed three specific groups of people to request special ballots. These ballots could be filled out by a voter and mailed to the City Election Office in advance, rather than the voter being required to attend at a polling station on election day. However, the ballots could only be used by a voter who: (a) suffered a physical incapacity; (b) would be absent from the local jurisdiction on election day, or; (c) was a returning officer, deputy returning officer, constable, candidate or agent who might be located on election day at a voting station other than that for the voter's place of residence. A voter who did not fall into one of these three categories was not entitled to use a special ballot.

The Chief Returning Officer for Calgary became suspicious over requests for special ballots in one Ward. A few weeks prior to the election one of her staff members informed her that several requests had been made for special ballots to be mailed to the same location. The location was a commercial address, specifically a large rented mail box. The Chief Returning Officer investigated some of the special ballot requests, and found that the names did correspond to people on the voters' list. However, she then tried calling twelve of those people, reaching only two: neither of them had requested a special ballot. Acting on advice from counsel, she then monitored all requests for special ballots to be sent to the rented mail box.

Eventually over 1200 special ballots were delivered to the same rented corporate mail box. Ultimately over 800 of these ballots were returned in person, at night, to the Election Office, by a single person. The Chief Returning Officer contacted a random sample of 30 of the voters in whose names special ballots had been requested and returned, to see whether they had requested the ballots. Of those she contacted, 28 did not know about special or mail-in ballots, while two did. The Chief Returning Officer then contacted the police, who commenced an investigation.

The police contacted the relevant Internet Service Provider in Calgary and identified two IP addresses through which over 1000 special ballot requests had been made. The police then executed a search warrant at a single family dwelling where computers, hard drives, and documents were seized. Examination of those computers established that they came from the address which was the service location for the IP addresses which had requested special ballots online from the City of Calgary website. The evidence also showed that two of the computers had been used to make hundreds of unique online requests for a special ballot. All of these requests had asked for special ballots to be sent to the rented corporate mail box.

The two specific charges against the accused were that he did, without authority, supply a special ballot to another person, and that he requested a special ballot in the name of another person. The computers seized did not belong to the accused and were not seized from his residence. Rather, the evidence against him was primarily that he had rented the corporate mailbox, picked up the special ballots delivered to it on a daily basis, and delivered them to the aldermanic candidate's campaign manager (who was also the accused's brother). The accused acknowledged that this was so, but testified that he did not know anything about special ballots, did not request any special ballots, and did not know that what he was picking up and delivering were special ballots. Ultimately on the evidence the trial judge found the accused guilty of supplying a special ballot to another person, but not guilty of requesting a special ballot in the name of another person.

The trial judge found that the two offences were not strict liability offences, and therefore that the Crown was required to prove mens rea on the part of the accused: specifically that the accused had the intention to corruptly influence the outcome of an election. In the particular circumstances of this case, the trial judge held, the Crown was required to prove that the accused knew, ought to have known, was reckless or was wilfully blind to the fact that some or all of the voters on whose behalf the special ballots were requested were not eligible to use them, and that by requesting and/or supplying them the accused would be corruptly influencing the outcome of the election.

The case was largely determined on the credibility of the accused: the trial judge did not believe the

accused's evidence that he was unaware of the nature of the envelopes he was delivering to his brother, and also found that that testimony did not leave him with any reasonable doubt. The accused was evasive on cross-examination by the Crown and only conceded matters when he was pressed by the Crown. He refused to acknowledge that at various times he was doing things that a political organizer would do, and tried to portray himself as a mere volunteer in his wife's campaign. However, there was overwhelming evidence that he had vast experience in politics and had been involved in the electoral process at all levels for 20-25 years and would have known the ins and outs of the electoral process. Further, the evidence was overwhelming that his company used the internet extensively and therefore it was not believable to suggest that he would not know that the City had internet access to information for both candidates and electors during the election.

Further, various aspects of the evidence gave the trial judge great concern about the accused's credibility. The accused acknowledged giving the 1266 special ballots to his brother after he picked them up from the mail box that he rented. Based on the evidence the trial judge concluded that the accused was at least reckless or wilfully blind to the fact that some of the voters who were to receive these special ballots were not eligible to use them, and therefore that in supplying the ballots to his brother, he would be aiding him in corruptly influencing the electoral process. Accordingly the accused was guilty on the first count. On the other hand there was no evidence showing that the accused was involved in any way in requesting the special ballots, and so he was not guilty on the second count.

Family Law: Custody

The Ontario Superior Court of Justice has delivered it ruling in *Attar v. Attar*. In this case the applicant and respondent who were married according to Jewish tradition have been separated for over three years. The marriage produced three young children, two of whom had special needs in one form or another. After separation, the children lived with their mother who remained their custodial parent and primary caregiver while their father, an electronics technician, remained an access parent. Generally, the separation provided for an access regime of shared parenting that enabled the respondent and his parents to have access to children on regular basis. At the early stage of the separation, the respondent's commitment to his responsibility as a father was less than satisfactory. But over time, this improved, particularly after he entered into a stable relationship with Ms. Denise March whom he met through internet dating. The respondent maintained an internet dating profile on one or a couple of websites under the name of Joe Cool. The respondent later started living together with Ms. March. He introduced her to the children and over time, the latter developed a healthy relationship with Ms. March whom the court acknowledged was a stabilizing factor in the respondent's improved relationship and commitment to the children's wellbeing. In the meantime, the applicant has completed arrangement to relocate from Toronto (where both parties lived) to Montreal with the support of her parents who have promised to provide her and the children with free accommodation as well as to avail her business contacts for potential employment. The applicant now seeks sole custody of the children and to relocate with them to Montreal. The respondent opposes that application. In consequence, both parties now seek exclusive custody of the children.

In conducting the present litigation, both parties have attempted to use their computer skills and other aspect of information technology to discredit each other. (As noted, the respondent was is an electronics technician. The applicant worked from home on a business she jointly ran with her father which supplied Japanese animated videos and DVDs). For, example, [t]he respondent used his computer skills to disrupt the applicant's business as one dealing extensively in pornographic materials. On her part, the applicant denied the respondent access to the children, and had him spied upon by retaining the services of a private investigator. She hacked into the respondent's computer and thereby procured personal and compromising evidence of his internet dating profile. The latter action was aimed at sabotaging the respondent's new relationship with Ms March since the former's internet sleuthing shows that he still retains the Cool Joe internet dating profile even after his relationship with Ms March. The court found from evidence that the since the separation the applicant is "consumed by hatred

of and resentment towards the respondent. Her life has focused to a large extent on what she perceives to be a contest between them over the control of the children…these emotions have clouded her judgment with respect to the children". Further, she has tried, albeit unsuccessfully, to poison the children's mind against their father (¶ 48). For these reasons, the children do not seem to get the special attention they require while under the applicant's care and custody. The court found that "¶[t]he children spend more time in front of the television set because the applicant is preoccupied with computer" (¶56).

In its judgment, the court noted that the Office of Children's Lawyer has sided with the respondent's claim of custody as being in the best interest of the children. The children on their part expressed desire to have access to both parents. The court ruled that the relocation to Montreal is not in the best interest of the children all things considered. It also held that the respondent's home provides the best and suitable environment for the children. It, however, granted the applicant and respondent joint custody of the children. But it vested the daily care and control, including important decision regarding educational institutions of the children, in the respondent. Overall, the court reversed the pre-existing custodial and access regime in favour of the respondent against the applicant.

Shared Costs for Electronic Production of Documents

A judge of the Ontario Superior Court of Justice has ordered a plaintiff to pay, on a provisional basis, one third of the costs to be incurred by the defendant in scanning, coding and making searchable the documents the defendant was required to produce.

The suit was brought by a group of 37 former and present patients of the Oak Ridge maximum security division of the Mental Health Centre at Penetanguishene. The claims related to the treatment received by the plaintiffs between 1965 and 1983, alleging battery, breach of fiduciary duty and negligence.

The documents to be disclosed primarily consisted of the patients' medical records, with the addition of documents relating to the administration at Oak Ridge and the reasons for each plaintiff's admission to the facility. The medical records had been bound in 381 three-inch volumes containing between 50,000 and 100,000 documents, most of them double-sided. Most of the documents were between 20 and 40 years old and were worn and discoloured. Approximately 90 per cent of them were handwritten and faded, and photocopying them manually would have been difficult. The defendants proposed to computerize and code them, and provide the electronic documents and coding to the plaintiffs. This form of disclosure would extend beyond what was necessary to comply with the Civil Procedure Rules, but was estimated to cost between $160,000 and $383,000.

The defendants sought an order requiring the plaintiffs to pay one-third of the cost of scanning and coding the documents. They argued that the litigation was likely to be document intensive and therefore that converting the documents into an electronic format would reduce the cost of trial preparation and the cost of conducting the trial for all parties. The documents would be searchable, allowing all parties to preserve, find, access, review, link and refer to the documentation in a quick and efficient manner throughout the proceedings. In contrast, the defendant argued, the production of thousands of documents in paper form in this case would not constitute meaningful access.

The defendant also argued that producing the documents in this electronic format would save the plaintiff costs it would otherwise have to incur in photocopying documents. It was therefore reasonable, the defendant argued, to require the plaintiff to contribute to the cost.

The applications judge concluded that it was within his jurisdiction under the Rules to make such an order. He also concluded that no prior precedent had really dealt with this situation, particularly given that the most relevant other cases had dealt with final orders. On the whole he accepted the defendants' argument that the benefits would extend beyond the process of discovery, and that those benefits justified an order for one-third of the costs of scanning and coding to be paid by the plaintiffs on a provisional basis.

Comment on the issues raised by this case at the IT.Can Blog

This newsletter is intended to keep members of IT.Can informed about Canadian legal developments as well as about international developments that may have an impact on Canada. It will also be a vehicle for the Executive and Board of Directors of the Association to keep you informed of Association news such as upcoming conferences.

If you have comments or suggestions about this newsletter, please contact Professors Teresa Scassa, Chidi Oguamanam and Stephen Coughlan at it.law@dal.ca.

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Le présent bulletin se veut un outil d'information à l'intention des membres d'IT.Can qui souhaitent être renseignés sur les développements du droit canadien et du droit international qui pourraient avoir une incidence sur le Canada. Le comité exécutif et le conseil d'administration de l'Association s'en serviront également pour vous tenir au courant des nouvelles concernant l'Association, telles que les conférences à venir.

Pour tous commentaires ou toutes suggestions concernant le présent bulletin, veuillez communiquer avec les professeurs Teresa Scassa, Chidi Oguamanam et Stephen Coughlan à l'adresse suivante : it.law@dal.ca

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