

CANADA / JUDGMENT

Chambers v. The Queen

[1986] 2 SCR 29

COURT

Supreme Court of Canada

DECIDED

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Chambers v. The Queen

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Date

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Report

[1986] 2 SCR 29

Case number

18177

Judges

Dickson, Robert George Brian; Beetz, Jean; McIntyre, William Rogers; Chouinard, Julien; Lamer, Antonio; Wilson, Bertha; La Forest, Gérard V.

On appeal from

British Columbia

Subjects

Evidence

Notes

SCC Case Information: 18177

Decision Content

Chambers v. The Queen, [1986] 2 S.C.R. 29

Martin Chambers Appellant

v.

Her Majesty The Queen Respondent

indexed as: r. v. chambers

File No.: 18177.

1985: October 2; 1986: July 31.

Present: Dickson C.J. and Beetz, McIntyre, Chouinard, Lamer, Wilson and La Forest JJ.

on appeal from the court of appeal for british columbia

Evidence -- Admissibility -- Intercepted private communications -- Authorizations to wiretap in drug investigation relating to conspiracy to import cocaine -- Authorizing judge not informed of on-going income tax investigation and agreement to pass on information to tax investigators -- Evidence excluded at trial and appellant acquitted -- Whether or not material non-disclosure invalidating authorization-- Criminal Code, R.S.C. 1970, c. C-34, ss. 178.1, 178.13(1.1), (1.2), (2)(d).

Appellant and two others were charged with conspiracy to import cocaine. Evidence of appellant's telephone conversations, intercepted pursuant to a series of authorizations, was excluded because the authorizations were found invalid on voir dire because of material non-disclosure. The police had not informed the authorizing judge that an income tax investigation concerning a co-conspirator was also in progress and that, even though authorizations were not available for tax investigations, an arrangement existed between the Solicitor General and Revenue Canada for passing on information gathered by the police to the tax department. The wiretap evidence was excluded and appellant was acquitted but the Court of Appeal allowed the Crown's appeal, set aside the acquittal and ordered a new trial.

Held (Wilson and La Forest JJ. dissenting): The appeal should be dismissed.

Per Dickson C.J. and Beetz, McIntyre, Chouinard and Lamer JJ.: The question of the continuing tax investigation was wholly irrelevant to the issue of the validity of the authorizations and the admissibility of the drug investigation evidence.

Per Wilson J. (dissenting): Part IV.1 of the Criminal Code is offence-specific and does not authorize broadly-based inquiries into a citizen's private affairs. Where the applicants for a wiretap authorization know that two investigations are being held concurrently and that one of them is of a type for which investigations cannot be authorized, the authorizing judge should be informed. Disclosure is particularly important where the police are obliged by a pre-existing agreement to make information gleaned through interceptions available to those pursuing the investigation for which no authorization can be obtained. Only if the authorizing judge has this information can he decide whether or not to attach terms and conditions to the authorization.

The imposition of terms and conditions necessary to protect solicitor-client privilege is mandatory in the grant of an authorization under s. 178.13(1.2), but the terms and conditions imposed are in the judge's discretion. The absence of any terms and conditions could not protect solicitor-client privilege and would totally defeat the purpose of the section.

Per La Forest J. (dissenting): The disposition proposed as well as the reasons given by Wilson J. were concurred in, except those with respect to the second ground of appeal. In that regard, there may be no terms and conditions that an authorizing judge might consider advisable for the protection of privileged communications. It is only those terms and conditions he is required to include under s. 178.13(1.2). The authorizing judge is entitled, however, to receive facts known to the applicants for an authorization that are necessary to his making a decision.

Cases Cited

By Wilson J. (dissenting)

R. v. Wilson, [1983] 2 S.C.R. 594.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, ss. 178.1, 178.13(1.1), (1.2), (2)(d).

APPEAL from a judgment of the British Columbia Court of Appeal (1983), 9 C.C.C. (3d) 132, 37 C.R. (3d) 128, allowing the Crown's appeal from an acquittal granted the accused by Spencer J. and ordering a new trial. Appeal dismissed (Wilson and La Forest JJ. dissenting).

Howard Rubin and Kenneth S. Westlake, for the appellant.

S. David Frankel and Anne W. MacKenzie, for the respondent.

The judgment of Dickson C.J. and Beetz, McIntyre, Chouinard and Lamer JJ. was delivered by

1. McIntyre J.--The appellant and two others were charged with conspiracy to import cocaine. The Crown tendered evidence of telephone conversations of the appellant which had been intercepted pursuant to a series of authorizations. The validity of the authorizations was attacked on a voir dire, on the basis that in applying for the authorizations the Crown had not disclosed that an income tax investigation concerning a co-conspirator was in progress at the same time as the drug investigation for which the authorizations were sought. It was argued that this was a material fact not disclosed to the authorizing judge and that such non-disclosure should vitiate the authorizations. It was also contended that the police had agreed to turn over to the Minister of National Revenue information relating to the tax investigation procured as a result of their investigation. The trial judge on the voir dire to determine the admissibility of the intercepts held that there had been a material non-disclosure which invalidated the authorizations, and he excluded the evidence and acquitted the appellant. The Court of Appeal (Craig, Anderson and Esson JJ.A.) were unanimous in allowing the Crown appeal setting aside the acquittal and directing a new

trial.

2. The trial judge found that the police in applying for the authorizations had done so only for the purpose of the drug investigation, that there was no fraud on the part of the police, and that the authorities had not, in applying for the authorizations, deliberately concealed the tax investigation. (Parenthetically, it may be noted here that the only evidence tendered by the Crown was evidence of the drug investigation.) He nevertheless concluded that the existence of the tax investigation ought to have been disclosed, because in his view "It was material to whether the authorizations should be granted when they might provide evidence for tax prosecutions for which authorizations were not available under Section 178.1 [of the Criminal Code] and it was material to the imposition of the terms under Section 178.13 sub-section (2) sub-sub-section (d) with respect to the protection of tax information".
3. The Court of Appeal was of the view that on the facts of this case the question of the continuing tax investigation was wholly irrelevant to the issue of the validity of the authorizations or the admissibility of the drug investigation evidence. It allowed the appeal. I am in substantial agreement with the three concurring judgments in the Court of Appeal and I would dismiss the appeal. In doing so, I make it clear that I am making no comment on the situation which could arise if the Crown tendered the evidence of the tax investigation as part of the Crown's case at a different trial.
4. Other issues raised in this Court relating to the validity of the authorizations need not be dealt with, since they turn on questions relating to the tax investigation which are not relevant to the case at bar.
5. I would dismiss the appeal.

The following are the reasons delivered by

6. Wilson J. (dissenting)--I must respectfully dissent from the judgment of my colleague, McIntyre J., whose reasons I have had the benefit of reading.
7. An income tax investigation was being conducted by the tax department into the tax position of one of the appellant's co-conspirators concurrently with the drug investigation in respect of which the authorizations were sought. The Solicitor General of Canada representing the Royal Canadian Mounted Police had an agreement with the Minister of National Revenue that any intelligence gathered by the police about persons suspected of organized crime would be passed on to the Minister. The police did not tell the judge to whom they had applied for the authorizations about either the tax investigation or the arrangement with the tax department although they knew that they could not get an authorization in respect of the tax investigation under s. 178.1 of the Code. Spencer J. found that they should have done so, that it was material information that he should have had, not so much because he might not have granted the authorization had he had it, but because he might well have imposed terms under s. 178.13(2)(d). He made a specific finding, however, that there was no fraud.

8. I think that where the applicants for a wiretap authorization know that two investigations are being conducted concurrently and that one of them is of a type for which interceptions cannot be authorized, they should disclose this to the authorizing judge. It is particularly important that they disclose it where the police are obliged by virtue of a pre-existing agreement to that effect to make any information they glean through the interceptions available to those pursuing the investigation for which no authorization can be obtained.
9. I think it is significant in this connection that Part IV.1 of the Code is offence-specific, i.e., it contemplates interceptions in relation to a particular offence which has been identified in the application and is specified in the authorization. Part IV.1 does not, in my view, authorize broadly-based inquiries into citizens' private affairs. I find it helpful to remind myself that the persons whose telephones are being tapped are suspects, not criminals.
10. Craig J.A. in the Court of Appeal concluded that the fact that a tax investigation was going on at the same time as the drug investigation was irrelevant because it would have no bearing on whether the authorization should be granted or not. He seems to have applied a test of relevance based on the answer to the question: would the undisclosed evidence have caused the judge to deny the authorization? and concluded that, short of fraud, only an affirmative answer to that question would vitiate the authorization. I think he was in error in this. It would, in my opinion, be equally relevant to ask: would the undisclosed evidence have caused the judge to include terms in the authorization? I think with respect that the learned trial judge was correct in the test he applied.
11. Craig J.A. also found it hard to accept that a condition which the trial judge might have imposed for the protection of information relevant to a tax investigation could possibly be "in the public interest". With respect, I think this misses the point. The public interest involved here is the one implicit in the statute which does not permit interceptions for purposes of tax investigations. That public interest could have been served by a term in the authorization restraining the police from passing on the intelligence they gleaned to the tax authorities. The authorizing judge may or may not have imposed such a term; that would be up to him or her. But to withhold from the judge the facts he needed on which to make his decision seems to me to be to withhold relevant information. Anderson and Esson J.J.A. agreed with Craig J.A. that the information was irrelevant. This seems to have been the basis of the Court's decision.
12. There was considerable argument before us as to who had the onus of proving whether or not the wiretap evidence was being used in the tax investigation. It would be my view on this issue that to require the appellant to prove how the authorities were using the wiretap information would be to impose an unreasonable, if not impossible, burden on him. This is something peculiarly within the knowledge of the respondent. The appellant acknowledges that under *R. v. Wilson*, [1983] 2 S.C.R. 594, he has to satisfy the trial judge of the existence of the on-going tax investigation and of the agreement for the transmittal of the acquired intelligence to the tax authorities. I think he did so and that the burden then shifts to the respondent to establish that these facts need not be disclosed to the authorizing judge. This

is really the issue in this case, not how the wiretap evidence was in fact used or who has to prove it. I do not believe that the respondent discharged that burden.

13. I do not read the judgment of this Court in *Wilson* as precluding the attack made on the validity of the authorizations in this case. I believe it was open to Spencer J. as a judge of the same court as the authorizing judge to review the authorizations on the basis of proof that the facts before the authorizing judge were different from the facts as found by him.
14. The second ground of appeal advanced by the appellant is that the authorizations were invalid on their face for failure to include terms to protect solicitor-client privilege. The learned trial judge did not deal with this because he did not have to in light of his conclusion on the first issue. However, the Court of Appeal did deal with it and, in my view, on the basis of a wrong interpretation of s. 178.13(1.2). The provision reads:

178.13 ...

(1.2) Where an authorization is given in relation to the interception of private communications at a place described in subsection (1.1), the judge by whom the authorization is given shall include therein such terms and conditions as he considers advisable to protect privileged communications between solicitors and clients.

The "place described in subs. (1.1)" is "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...."

15. The Court of Appeal construed the provision as giving the judge a discretion whether to impose conditions or not. I must respectfully disagree. I believe that the terms and conditions he imposes are in his discretion, but that the imposition of terms and conditions is mandatory. I say this because of the combination of the use of the word "shall" and the identification in the section of the purpose for which the terms and conditions are to be imposed. If the subsection simply stated that the judge was to impose such conditions as he considered advisable, then it would be arguable, in my view, that he need not impose any. But I fail to see how an absence of any terms and conditions could possibly be considered advisable in order to protect solicitor-client privilege.
16. Part IV.1 of the Code authorizes a carefully controlled and restricted form of invasion of the privacy of individual citizens. Parliament was obviously conscious of the fact that solicitors were a very special category of citizen for this purpose because of the importance attributed to solicitor-client privilege by our law. It specifically alerted the authorizing judge in s. 178.13(1.2) to the need for special terms where the telephone of a solicitor is being tapped. He is directed to include in the authorization "such terms and conditions as he considers advisable to protect privileged communications between solicitors and clients". I think that to read the section as permitting no provision at all to be made for the protection of solicitor-client privilege totally defeats the whole aim and object of the section. The authorizations were therefore, in my view, invalid on their face.

17. For these reasons I would allow the appeal.

The following are the reasons delivered by

18. La Forest J. (dissenting)--I agree with my colleague Wilson J. that the appeal should be allowed. I also agree with her reasons for judgment except in relation to the second ground of appeal. As to that ground, it seems to me there may be no terms and conditions that a judge who gives an authorization considers advisable to protect privileged communications. It is only such terms and conditions that he is required to include under s. 178.13(1.2). However, as my colleague points out, the judge is entitled to receive from the applicants for an authorization facts known to them that he obviously needs in making a decision.

Appeal dismissed Wilson and La Forest JJ. dissenting.

Solicitor for the appellant: Howard Rubin, Vancouver.

Solicitor for the respondent: R. Tassé, Ottawa.

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