

CANADA / JUDGMENT

R. v. Garofoli

[1990] 2 SCR 1421

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Supreme Court of Canada

DECIDED

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R. v. Garofoli

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Date

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Report

[1990] 2 SCR 1421

Case number

21099

Judges

Dickson, Robert George Brian; Lamer, Antonio; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; McLachlin, Beverley

On appeal from

Ontario

Subjects

Constitutional law

Criminal law

Notes

SCC Case Information: 21099

Decision Content

R. v. Garofoli, [1990] 2 S.C.R. 1421

Jean-Claude Garofoli Appellant

v.

Her Majesty The Queen Respondent

indexed as: r. v. garofoli

File No.: 21099.

1989: October 3, 4; 1990: November 22.

Present: Dickson C.J.* and Lamer C.J.** and La Forest, L'Heureux-Dubé, Sopinka, Gonthier and McLachlin JJ.

on appeal from the court of appeal for ontario

Criminal law -- Interception of private communications -- Access to sealed packet -- Validity of wiretap authorizations -- Grounds for challenging authorizations and appropriate remedies -- Protection of identity of informers -- Editing of affidavits -- Entitlement of accused to cross-examine on affidavits -- Criminal Code, R.S.C. 1970, c. C-34, Part IV.1.

Criminal law -- Interception of private communications -- Admissibility of evidence -- Relationship between s. 178.16 of Criminal Code and s. 24(2) of Canadian Charter of Rights and Freedoms .

Constitutional law -- Charter of Rights -- Unreasonable search and seizure -- Interception of private communications -- Judge failing to include minimization clause in wiretap authorizations -- Whether authorizations violate s. 8 of Canadian Charter of Rights and Freedoms .

Appellant was charged with conspiring to import a narcotic. The evidence against him was derived largely from private communications intercepted pursuant to wiretap authorizations. At the conclusion of a voir dire to determine the admissibility of the intercepted communications, the trial judge refused to order the opening of the sealed packets containing the affidavits upon which the authorizations were granted and found the wiretap evidence to be admissible. He convicted appellant. Relying on its decision in Playford, released after the trial judge's ruling, the Court of Appeal found that appellant was entitled to have access to the sealed packets. The affidavits were edited to protect confidential informants and then released to him. The court found that the editing did not impair counsel's ability to determine the facial validity of the affidavits, that the affidavits set out sufficient indicia of reliability of the informant involved, and that they set out ample facts to meet constitutional requirements for a reasonable search and seizure. Since appellant had not shown that the affiant had made a false statement knowingly and intentionally, or with reckless disregard for the truth, he was not entitled to cross-examine him. The court concluded that the trial judge's refusal to permit appellant to have access to the affidavits did not result in a miscarriage of justice and upheld the conviction. The main issues on this appeal are whether the accused is entitled to access to the material in the sealed packet; on

what terms an accused may challenge an authorization for wiretap; special requirements relating to informants; the procedure for editing affidavits in the sealed packet; whether the accused is entitled to cross-examine on the affidavits; and whether the authorizing judge's failure to include a minimization clause resulted in authorization of an unreasonable search and seizure in violation of s. 8 of the Canadian Charter of Rights and Freedoms .

Held (L'Heureux-Dubé and McLachlin JJ. dissenting): The appeal should be allowed.

Per Dickson C.J. and Lamer C.J. and La Forest, Sopinka and Gonthier JJ.: The Court of Appeal was right to open the sealed packets since the accused is entitled, subject to editing, to have their contents produced in order to enable him to make full answer and defence.

Since wiretaps constitute a search or seizure, the statutory provisions authorizing them must conform to the minimum constitutional requirements demanded by s. 8 of the Canadian Charter of Rights and Freedoms . The issuing judge must be satisfied that there are reasonable and probable grounds to believe that an offence has been or is being committed, and that the authorization sought will afford evidence of that offence.

The procedures available for challenging a wiretap authorization are: (1) a Parsons voir dire before the trial judge to determine whether the authorization is valid on its face, the remedy being exclusion under s. 178.16 of the Code; (2) a Wilson application before the issuing court to determine the substantive or subfacial validity of the affidavit, the remedy being the setting aside of the authorization; (3) a Garofoli hearing before the trial judge to determine whether the authorization complies with s. 8 of the Charter , the remedy being a determination of whether the evidence should be excluded under s. 24(2) of the Charter ; and (4) a Vanweenan hearing before the trial judge to determine whether the authorization names all "known" persons as required by ss. 178.12(1)(e) and 178.13(2)(c) of the Code, the remedy being exclusion under s. 178.16 .

When it is asserted by an accused that a wiretap infringes s. 8 of the Charter , the application for review should be made to the trial judge, even though applications to open the sealed packed must be made to a judge designated in s. 178.14(1)(a)(ii) of the Code, who in some cases will not be the trial judge. In determining whether a search is reasonable under s. 8 of the Charter , the reviewing judge must determine whether the Code requirements have been satisfied, since the statutory conditions are identical to the requirements of s. 8 . Whereas Wilson precluded a review of the authorizing judge's decision that the statutory conditions had been complied with, unless some ground such as fraud or new evidence was established, the application of s. 8 requires review as a step in determining the reasonableness of the search and seizure. If, based on the record, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he should not interfere. A finding that the interception is unlawful attracts the peremptory language of s. 178.16 and the evidence is inadmissible. Section 24(2) of the Charter cannot have the effect of making the evidence admissible even if its admission would not bring the administration of justice into disrepute. Accordingly, an accused who has invoked s. 24 and established that an interception was unlawfully obtained is entitled to have the evidence

excluded under s. 178.16 .

Hearsay statements of an informant can provide reasonable and probable grounds to justify a search, but evidence of an informer's tip, by itself, is insufficient to establish reasonable and probable grounds. The reliability of a tip is to be assessed by having regard to the totality of the circumstances. The results of the search cannot, ex post facto, provide evidence of the reliability of the information.

The courts clearly have a power to edit derived from the supervising and protecting power they have over their own records. In determining what to edit, the judge will have regard for the rule against disclosure of police informers, subject to the "innocence at stake" exception. The determination in each case will require a balancing of the relevance of the identity of the informer to the accused's case against the prejudice to the informer and to the public interest in law enforcement which disclosure would occasion.

The preconditions for cross-examination of the affiant imposed by the Court of Appeal, based largely on the American case of *Franks v. Delaware*, are too restrictive. This Court has consistently protected the right to cross-examine. The concerns regarding protection of the identity of informers and prolongation of proceedings can be accommodated without such a drastic curtailment of the right. There is no right to cross-examine informers, since they are not witnesses and cannot be identified unless the accused brings himself within the "innocence at stake" exception. Leave to cross-examine should be granted at the discretion of the trial judge, who may impose limitations on its scope, when he is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. The accused must establish a basis for the view that cross-examination will impugn the existence of one of the preconditions for the authorization.

Appellant has shown a basis for cross-examination here. In view of the degree of reliance by the police on the informer in this case, if the informer is discredited then the factual basis for the authorization is undermined. Since appellant was not permitted to cross-examine the affiant, there should be a new trial.

The failure of the authorizing judge to impose conditions minimizing the interception of irrelevant communications does not result in the authorization of an unreasonable search and seizure in violation of s. 8 of the Charter . An absolute requirement of live monitoring in all cases would impose too heavy a burden on Canadian law enforcement officials. While a requirement of live monitoring or visual confirmation would generally be appropriate when telephone calls are to be intercepted at public pay telephones, the same considerations do not apply with respect to the private residence of a person named in an authorization unless there are special circumstances calling for live monitoring, and appellant has not satisfied the Court that any special considerations are involved here.

Per L'Heureux-Dubé and McLachlin JJ. (dissenting): Since the power of a judge to grant a wiretap authorization subject to the preconditions set out in s. 178.13(1) of the Code must be exercised in conformity with the Charter , the section should be read so as to require that the judge be

satisfied that there are reasonable grounds to believe that the specified offence has been or is being committed, and that evidence of the offence will be obtained by the interception sought. Apart from this limitation on a judge's ability to authorize a wiretap, the direct protection for individuals comes from two sources: s. 178.16(1)(a) of the Code, which states that to be admissible in evidence an electronic interception must have been "lawfully made", and s. 24(2) of the Charter, which provides for the exclusion of evidence where the evidence was obtained in a manner that infringed a Charter right and it is established that its admission would bring the administration of justice into disrepute. An accused seeking to exclude evidence of an interception has two remedies: (1) a Wilson application to a superior court to set aside the authorization, thereby rendering the interception not "lawfully made" within the terms of s. 178.16(1) (a); and (2) a Garofoli application before the trial judge (often a provincial court judge) for exclusion of the intercepted evidence on the ground that it constitutes an unreasonable search and seizure under s. 8 of the Charter and its admission would tend to bring the administration of justice into disrepute under s. 24(2) .

The question of whether the packet should be opened is a matter within the discretion of the judge hearing the application, who must balance the interests of the accused in the protection of privacy and a fair trial, including the right to make full answer and defence, with the public interest in the administration of justice. Given the importance of the accused's right to make full answer and defence, the balance will generally fall in favour of opening the packet, subject to editing and special concerns for the administration of justice which may arise in particular cases. Here the Court of Appeal held that the packet should have been opened, subject to editing, and the balance in this case mandates that conclusion.

In deciding whether the accused may cross-examine on the affidavit, the judge must again balance the interests of the accused with the public interest in the administration of justice. Given that cross-examination may present greater problems for the administration of justice and less importance, from the point of view of ensuring a fair trial, than does access to the packet, the balance will generally favour denial unless the accused is able to make a preliminary showing establishing the special relevance of the cross-examination. In this case appellant has not established that cross-examination was likely to assist him in presenting a full answer and defence, and it posed risks of disclosure of confidential police information and of lengthening the proceedings to no purpose. In these circumstances the balance clearly favours rejection of the right to cross-examine.

Cases Cited

By Sopinka J.

Considered: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Greffe*, [1990] 1 S.C.R. 755; not followed: *Franks v. Delaware*, 438 U.S. 154 (1978); referred to: *R. v. Playford* (1987), 40 C.C.C. (3d) 142; *United States v. Tufaro*, 593 F. Supp. 476 (1983); *People v. Baris*, 500 N.Y.S. 2d 572; *R. v. Duarte*, [1990] 1 S.C.R. 30; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Finlay and Grellette* (1985), 23 C.C.C. (3d) 48; *R. v. Parsons* (1977), 37 C.C.C. (2d) 497, aff'd [1980] 1 S.C.R. 785 (sub nom. *Charette*

v. The Queen); R. v. Chesson, [1988] 2 S.C.R. 148; R. v. Meltzer, [1989] 1 S.C.R. 1764; Mills v. The Queen, [1986] 1 S.C.R. 863; R. v. Bailey (1983), 4 C.C.C. (3d) 21; R. v. Banas and Haverkamp (1982), 65 C.C.C. (2d) 224; R. v. Collins, [1987] 1 S.C.R. 265; Illinois v. Gates, 462 U.S. 213 (1983); R. v. Debot (1986), 30 C.C.C. (3d) 207, aff'd [1989] 2 S.C.R. 1140; Attorney General of Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175; Bisailon v. Keable, [1983] 2 S.C.R. 60; Re Rideout and The Queen (1986), 31 C.C.C. (3d) 211; Roviato v. United States, 353 U.S. 53 (1957); Re Chambers and The Queen (1985), 20 C.C.C. (3d) 440; R. v. Parmar (1987), 34 C.C.C. (3d) 260; R. v. Rowbotham (1988), 41 C.C.C. (3d) 1; Re Church of Scientology and The Queen (No. 6) (1987), 31 C.C.C. (3d) 449; R. v. Parmar (1987), 37 C.C.C. (3d) 300; Innisfil (Corporation of the Township of) v. Corporation of the Township of Vespra, [1981] 2 S.C.R. 145; R. v. Potvin, [1989] 1 S.C.R. 525; Gulf Islands Navigation Ltd. v. Seafarers' International Union of North America (Canadian District) (1959), 18 D.L.R. (2d) 625; R. v. Thompson, [1990] 2 S.C.R. 000; Dersch v. Canada (Attorney General), [1990] 2 S.C.R. 000, rev'g (1987), 17 B.C.L.R. (2d) 145; R. v. Lachance, [1990] 2 S.C.R. 000; R. v. Zito, [1990] 2 S.C.R. 000.

By McLachlin J. (dissenting)

Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Finlay and Grellette (1985), 23 C.C.C. (3d) 48; R. v. Meltzer, [1989] 1 S.C.R. 1764; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; R. v. Wray, [1971] S.C.R. 272; Mills v. The Queen, [1986] 1 S.C.R. 863; Franks v. Delaware, 438 U.S. 154 (1978); Dersch v. Canada (Attorney General), [1990] 2 S.C.R. 000, rev'g (1987), 17 B.C.L.R. (2d) 145; R. v. Lachance, [1990] 2 S.C.R. 000; R. v. Zito, [1990] 2 S.C.R. 000.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 8, 24(1), (2).

Criminal Code, R.S.C. 1970, c. C-34 [am. 1973-74, c. 50, s. 2], ss. 178.1 [am. 1976-77, c. 53, s. 7; 1980-81-82-83, s. 125, s. 10; 1984, c. 21, s. 76], 178.2, 178.11, 178.12 [am. 1976-77, c. 53, s. 8], 178.13 [am. idem, s. 9], 178.14 [am. 1985, c. 19, s. 24], 178.16 [am. 1976-77, c. 53, s. 10], 178.17, 178.18, 178.19, 178.2, 178.21, 178.22 [am. 1976-77, c. 53, s. 11.1; 1985, c. 19, s. 27], 178.23 [am. 1976-77, c. 53, s. 12], 431.1 [ad. 1974-75-76, c. 93, s. 39], 577(3), 610(1)(a), (b).

18 U.S.C. {SS} {SS} 2510-20 (1988).

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McCormick on Evidence, 3rd ed., St. Paul, Minn.: West Publishing Co., 1984.

APPEAL from a judgment of the Ontario Court of Appeal (1988), 27 O.A.C. 1, 41 C.C.C. (3d) 97, 64 C.R. (3d) 193, 43 C.R.R. 252, dismissing appellant's appeal from his conviction on a charge of conspiring to import a narcotic. Appeal allowed, L'Heureux-Dubé and McLachlin JJ. dissenting.

Keith E. Wright and Marc Rosenberg, for the appellant.

J. E. Thompson and R. W. Hubbard, for the respondent.

//Sopinka J.//

The judgment of Dickson C.J. and Lamer C.J. and La Forest, Sopinka and Gonthier JJ. was delivered by

SOPINKA J. -- This appeal is part of a series of appeals heard together by the Court dealing with various aspects of the law relating to the interception of private communications (hereinafter "wiretaps"). The other cases in the series are *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 000, *R. v. Lachance*, [1990] 2 S.C.R. 000, and *R. v. Zito*, [1990] 2 S.C.R. 000. This appeal addresses a number of issues consequent upon the opening of the sealed packet. Principal among them are the grounds for challenges to the validity of authorizations, what is the appropriate editing of wiretap affidavits, and cross-examination on the affidavit relied on in support of an authorization.

Facts

The appellant was convicted with four others (Scibetta, Criminisi, Vanderkooy, and Allen) of conspiring to import a narcotic (cocaine). The principal evidence consisted of: (a) intercepted private communications, many of which were between Garofoli in Hamilton and Frank Savasta in Florida; (b) the evidence of Earl Smith, who was employed by Savasta to transport three kilograms of cocaine from Florida to Hamilton in November 1983; (c) the evidence of Biebuyck, as to the purchase by Vanderkooy of a quantity of cocaine in November or December 1983, and the subsequent sale and the delivery of certain of the proceeds to Scibetta; and (d) evidence confirming the presence of Smith in Hamilton in November 1983 and Savasta in Hamilton in January 1984.

The Court of Appeal held that the jury would be warranted in finding the following facts. Garofoli in Hamilton arranged with Savasta in Florida to purchase three kilograms of cocaine. On November 20, 1983, Criminisi and Allen flew to Florida and paid Savasta \$20,000 of a total price of \$61,000 for three kilograms of cocaine. Criminisi rented a car, and the cocaine was placed in its spare tire. Smith and Allen drove the car to Buffalo where Smith was to collect the balance of the purchase price. Smith and Allen registered at a hotel in Buffalo, and were joined by Scibetta. It was decided that Smith would drive the car across the border. After crossing the border, Smith and Allen drove to a hotel in Hamilton where they registered as guests early in the morning of November 23. Later that morning, Criminisi and Scibetta joined them at the hotel. Scibetta removed the spare tire from the rental car's trunk, put it in his car, and drove away. Smith, Criminisi and Allen went to the M & R Auto Body Shop, and met Garofoli and others. The car was stored there, with the Florida licence plates removed.

Smith remained in Hamilton, attempting to collect the balance of the purchase price. Around November 27 Criminisi paid him a further \$10,000. A few days later, Smith, Criminisi and Allen went to Garofoli's home to discuss the balance. They telephoned Savasta at his office in Florida from a nearby pay telephone. Criminisi spoke first to Savasta. Then Garofoli spoke to Savasta, telling him he could be trusted to pay the balance. While speaking to Savasta, he gave \$4,790 to Criminisi which he gave to Smith. Then Smith spoke to Savasta who told him to return to Florida.

In late November or in early December 1983, Vanderkooy and Biebuyck drove to the M & R Body Shop. Vanderkooy went in, returned with Scibetta, and pointed to his car. Vanderkooy and Biebuyck left, and returned about one half-hour later. Vanderkooy again went into the shop. He returned and drove to Biebuyck's home, where he removed a package containing a kilogram of cocaine from the trunk of his car. The cocaine was divided into one-ounce packages. Most of it was sold, with certain of the proceeds being turned over to Scibetta.

After Smith returned to Florida, there were several telephone calls from Savasta to Garofoli concerning payment of the money. In January 1984 Savasta came to Hamilton where he met with Garofoli.

During the investigation, there were four orders authorizing the interception of the private communications. They were granted September 26, September 29, November 21 and December 30, 1983, by judges of the High Court of Justice of the Supreme Court of Ontario. The evidence of Garofoli's involvement in the conspiracy is derived in large measure from private communications intercepted under these authorizations. These included telephone conversations which ostensibly referred to the importing of various automobiles and jewelry, but which the jury were invited to interpret as referring to cocaine.

At the conclusion of a voir dire to determine the admissibility of the intercepted communications, the trial judge refused to order the opening of the sealed packets containing the affidavits upon which the orders were obtained and ordered that the wiretap evidence was admissible. The appellant did not appear for the next day of the trial. The trial was adjourned while inquiries were made as to his whereabouts. When it appeared that there was no explanation for his absence, a bench warrant was issued for his arrest. Pursuant to s. 431.1 of the Criminal Code, R.S.C. 1970, c. C-34, the trial judge made a finding that he had absconded and ordered that the trial continue in his absence. The appellant's counsel was permitted to withdraw at that point.

The appellant appealed to the Court of Appeal of Ontario against his conviction and sentence on numerous grounds. It dismissed the appeal against conviction but allowed the appeal against sentence.

Courts Below

Court of Appeal (1988), 41 C.C.C. (3d) 97

Martin J.A., Cory J.A. Concurring

The first ground of appeal considered by the court was whether the trial judge erred in refusing the appellant access to the affidavits upon which the authorizations were granted. The trial judge had held that the appellant had not provided the necessary evidentiary basis for being granted access, nor established that denial of access contravened s. 7 of the Canadian Charter of Rights and Freedoms .

The trial judge's ruling was made before the release of *R. v. Playford* (1987), 40 C.C.C. (3d) 142 (Ont. C.A.), which held that an accused is entitled to access to the sealed packet, generally speaking, as of right. The Court of Appeal itself opened the sealed packets, pursuant to s. 610(1) (a) of the Criminal Code, to determine whether any substantial miscarriage of justice had occurred. The affidavits were edited as proposed by Crown counsel to protect confidential informants and then released to the appellant.

There was inconsistency among the dates contained in the documents for the November 21 authorization. The Court of Appeal, pursuant to s. 610(1) (b) of the Criminal Code, heard evidence from Roderick Flaherty, the agent designated by the Solicitor General to apply for the authorization and the commissioner who had sworn the affidavit. Flaherty was cross-examined by the appellant's counsel. The Court of Appeal was satisfied that the inconsistent dates were the result of a clerical error.

Martin J.A. then reviewed the law with respect to the review of orders authorizing the interception of private communications. The Supreme Court of Canada, in *Wilson v. The Queen*, [1983] 2 S.C.R. 594, held that an authorization which has not been set aside is not subject to collateral attack and must receive full effect according to its terms. An authorization may be set aside on the grounds of fraud, material non-disclosure, misleading disclosure or the discovery of new evidence that shows that the actual facts are different from those upon which the authorization was granted. The application to set aside the authorization (a "Wilson application") must be made to the same court, though not necessarily the same judge, that authorized the interceptions. Martin J.A. noted that there is no appeal directly from a ruling on a Wilson application. He suggested, however, that a record of a Wilson application should be kept, which can be filed before the trial judge. The Crown or the accused could then appeal the Wilson ruling on an appeal from acquittal or conviction.

Martin J.A. then examined the effect of the Charter on the review of wiretap authorizations. In his view, the Charter does not expand the grounds, set out in *Wilson*, upon which an order to set aside an authorization may be based. However, the Charter does alter the power of a trial judge to go behind an authorization. If, at the trial, the accused alleges that the authorization constitutes an unreasonable search or seizure and thereby infringes s. 8 of the Charter, the trial judge has a duty to hear submissions or evidence on this point and to rule on the lawfulness of the interception. The trial judge may not necessarily have the power to set aside the authorization, where, for instance, the conditions outlined in *Wilson* are not met. But he or she may, without setting aside the order, hold that the necessary statutory conditions for the granting of the authorization were not met and that the interception constitutes an unreasonable search and seizure in violation of s. 8.

A finding that the interception constituted an unreasonable search, however, will not necessarily result in the exclusion of the evidence. If the authorization has not been set aside on a Wilson application, the evidence can only be excluded if the trial judge decides, under s. 24(2) of the Charter, that the admission of the evidence could bring the administration of justice into disrepute. Martin J.A. leaves open the issue whether s. 24(1) could be employed to quash an authorization.

Martin J.A. then reviewed American law with respect to applications for orders authorizing electronic surveillance. Under Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-20 (1988), a trial judge may suppress the contents of any intercepted wire or oral communication, among other things, on the ground that the communication was unlawfully intercepted. With respect to examining affidavits for conformity with the Criminal Code in order to judge the reasonableness of a search and seizure under s. 8 of the Charter, he approved of two American cases in particular. First, *United States v. Tufaro*, 593 F. Supp. 476 (S.D.N.Y. 1983), held that an interception order carries a presumption of validity. Deference is given to the determination of the issuing judge by demanding only that a "substantial basis" for finding probable cause existed. Second, *People v. Baris*, 500 N.Y.S. 2d 572 (A.D. 4 Dept. 1986), held that in showing the necessity of electronic surveillance (similar to the requirement in ss. 178.12(1) (g) and 178.13(1) (b)) a common sense approach must be taken whereby eavesdropping should not be used routinely as a first investigative step but neither should the police be required to show that it is a last resort.

Martin J.A. also approved of U.S. law with respect to going behind the face of the affidavit to attack the truth of the statements contained in it. The U.S. Supreme Court in *Franks v. Delaware*, 438 U.S. 154 (1978), held that the Fourth Amendment demands an evidentiary hearing if the accused makes a substantial preliminary showing that a false statement was included by the affiant intentionally or with reckless disregard for the truth and that the false statement is necessary to the finding of probable cause. If at the hearing the allegation of perjury or reckless disregard for the truth is established by a preponderance of evidence, and the remaining content of the affidavit is insufficient to establish probable cause, then the warrant is to be treated as a nullity and the fruits of the search excluded. Martin J.A. noted that the U.S. Supreme Court held that truthfulness in this context is not equivalent to correctness. A warrant can be based on hearsay, statements from informers, etc. The affidavit must only be truthful in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Applying these conclusions to the facts of the case, Martin J.A. held with respect to the facial sufficiency of the affidavits that: (1) the editing of the affidavits did not impair counsel's ability to assess their content to determine their facial validity; (2) the affidavits set out sufficient indicia of reliability of an informant, whose statements form some of the facts included in the affidavit; and (3) the affidavits set out ample facts to meet constitutional requirements for a reasonable search and seizure.

With respect to the truthfulness of the affidavits, Martin J.A. held that the appellant made no preliminary showing that the affiant knowingly, intentionally, or recklessly made a false statement in his affidavit in support of the authorizations. In his application to cross-examine the affiant, the appellant had attacked the truthfulness of assertions in the affidavits provided by an informant. This will be described below in greater detail. Martin J.A. held that the appellant had not made the requisite showing to justify an evidentiary hearing. Even if the informant was mistaken or had lied, there was no showing that Constable Campbell had made a false statement knowingly and intentionally, or with reckless disregard for the truth. The appellant therefore was not entitled to cross-examine Constable Campbell.

Martin J.A. therefore concluded that the refusal of the trial judge to permit the appellant to have access to the affidavits did not result in a miscarriage of justice.

Other issues raised by the appellant included an argument that the judge's instructions were insufficient with respect to accepting the evidence of witnesses Smith and Biebuyck. The trial judge noted that they had criminal records which were relevant to assessing their credibility, that they were co-conspirators, and that it would be prudent to look for confirmatory evidence. He later said that their credibility was crucial for the Crown's case, and that while their motivation to testify was self-serving he was of the opinion that they were not lying. He then went on to detail the independent evidence which confirmed much of Smith's testimony.

Martin J.A. concluded that it would have been preferable had the trial judge not baldly stated that in his opinion Smith and Biebuyck were not lying. But, he found that this did not amount to reversible error, in light of the abundance of independent confirmatory evidence.

Another issue raised was whether there had been sufficient proof that the appellant absconded within the meaning of s. 431.1 of the Criminal Code . Martin J.A. held that "absconds" means voluntarily absenting oneself from a trial for the purpose of frustrating a trial or avoiding its consequences. He further held that the trial judge did not misdirect himself in this respect. It was evident that the onus was on the Crown to prove that the appellant had absconded although it was unclear whether this was on a balance of probabilities or reasonable doubt. Martin J.A. held that even assuming the onus was reasonable doubt, there was abundant unchallenged evidence to meet the onus. Martin J.A. noted the significance of the timing of the appellant's disappearance (immediately after the wiretap evidence was held admissible), and that his counsel admitted at sentencing that he had absconded.

Martin J.A. rejected the submission that much of the evidence of absconding was hearsay, and that therefore there was no evidential basis for the trial judge's finding. Citing McCormick on Evidence (3rd ed. 1984), at pp. 743-44, he held that negative results of inquiries such as were conducted in this case are regarded as non-hearsay, and, in any event, there was ample admissible evidence to find that the appellant had absconded. Having properly determined that the appellant had absconded, Martin J.A. held that the trial judge did not err by inviting the jury to draw an adverse inference against the accused. Nor did the trial judge err by exercising his discretion to continue the trial in the absence of the appellant or his counsel, who had properly

withdrawn.

I omit Martin J.A.'s discussion of the other nine grounds of appeal.

Finlayson J.A. (Concurring)

Finlayson J.A. added some comments with regard to Wilson applications. In his view, Wilson adds little to the inherent jurisdiction of a court to review its ex parte orders to protect itself from becoming an instrument of fraud or abuse of process. The question, then, is whether it is appropriate to exercise this inherent jurisdiction when an accused person affected by wiretaps has a remedy at trial by reason of ss. 8 and 24(2) of the Charter .

In virtually all litigated cases, the only issue of practical concern is the admissibility of intercepted private communications at trial. In the interest of avoiding duplicative judicial supervision and conflicting decisions, the best course is for the motions judge to adjourn a Wilson application to the trial judge. The practice in civil cases is to direct the trial of an issue on an application or motion where material facts are controverted. Likewise with wiretaps, the trial is the appropriate forum to hear all matters relating to the interception of private communications, so that these matters can be dealt with fully and with finality.

Relevant Legislation

Canadian Charter of Rights and Freedoms, ss. 7 , 8 , 24(1) and 24(2) :

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
8. Everyone has the right to be secure against unreasonable search or seizure.
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter , have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter , the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Criminal Code

Part IV.1 of the Criminal Code is entitled "Invasion of Privacy". Section 178.1 is the definition section. The definition of "offence" for Part IV.1 is limited to enumerated offences of a serious nature created by the Criminal Code , the Food and Drugs Act , the Narcotic Control Act, the Customs Act , the Excise Act , the Bankruptcy Act, and the Official Secrets Act. Also included are offences under the Criminal Code which are punishable by five or more years imprisonment, and offences under ss. 3 to 20 of the Small Loans Act, for which there are grounds to believe there is a

pattern of criminal activity carried on by persons in concert. The relevant Code sections read as follows:

178.11 [now 184] (1) Every one who, by means of an electromagnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for five years.

(2) Subsection (1) does not apply to

- (a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;
- (b) a person who intercepts a private communication in accordance with an authorization or any person who in good faith aids in any way a person whom he has reasonable and probable grounds to believe is acting with any such authorization;

...

178.12 [now 185] (1) An application for an authorization shall be made ex parte and in writing to a judge of a superior court of criminal jurisdiction, or a judge as defined in section 482 [now 552] and shall be signed by the Attorney General of the province in which the application is made or the Solicitor General of Canada or an agent specially designated in writing for the purposes of this section by

- (a) the Solicitor General of Canada personally, if the offence under investigation is one in respect of which proceedings, if any, may be instituted at the instance of the Government of Canada and conducted by or on the behalf of the Attorney General of Canada, or
- (b) the Attorney General of a province personally, in respect of any other offence in that province,

and shall be accompanied by an affidavit which may be sworn on the information and belief of a peace officer or public officer deposing to the following matters, namely:

- (c) the facts relied upon to justify the belief that an authorization should be given together with particulars of the offence;
- (d) the type of private communication proposed to be intercepted;
- (e) the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable and probable grounds to believe may assist the investigation of the offence, a general description of the nature and location of the place, if known, at which private communications are proposed to be intercepted and a general description of the manner of interception proposed to be used;

(e.1) [now 185(1)(f)] the number of instances, if any, on which an application has been made under this section in relation to the offence and a person named in the affidavit pursuant to paragraph (e) and on which the application was withdrawn or no authorization was given, the date on which each such application was made and the name of the judge to whom each such application was made;

(f) [now 185(1)(g)] the period for which the authorization is requested; and

(g) whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that 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.

...

178.13 [now 186] (1) An authorization 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.

(1.1) [now 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.

(1.2) [now 186(3)] 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.

(2) [now 186(4)] An authorization shall

(a) state the offence in respect of which private communications may be intercepted;

(b) state the type of private communication that may be intercepted;

(c) state the identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used;

- (d) contain such terms and conditions as the judge considers advisable in the public interest; and
- (e) be valid for the period, not exceeding sixty days, set forth therein.

(2.1) [now 186(5)] The Solicitor General of Canada or the Attorney General, as the case may be, may designate a person or persons who may intercept private communications under authorizations.

Subsections (3) and (4) (now 185(6) and (7)) concern renewals of authorizations.

178.14 [now 187] (1) All documents relating to an application made pursuant to section 178.12 or subsection 178.13(3) or 178.23(3) are confidential and, with the exception of the authorization, shall be placed in a packet and sealed by the judge to whom the application is made immediately upon determination of such application, and such packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be

- (a) opened or the content thereof removed except
 - (i) for the purpose of dealing with an application for renewal of the authorization, or
 - (ii) pursuant to an order of a judge of a superior court of criminal jurisdiction or a judge as defined in section 482; and
 - (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.

Section 178.15 (now 188) deals with authorizations granted in emergency situations.

178.16 [now 189] (1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or by the person intended by the originator to receive it unless

- (a) the interception was lawfully made; or
- (b) the originator thereof or the person intended by the originator to receive it has expressly consented to the admission thereof;

but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.

- (2) Notwithstanding subsection (1), the judge or magistrate presiding at any proceedings may refuse to admit evidence obtained directly or indirectly as a result of information acquired by interception of a private communication that is itself inadmissible as evidence where he is of the opinion that the admission thereof would bring the administration of justice into disrepute.
- (3) Where the judge or magistrate presiding at any proceedings is of the opinion that a private communication that, by virtue of subsection (1), is inadmissible as evidence in the proceedings
 - (a) is relevant to a matter at issue in the proceedings, and
 - (b) is inadmissible as evidence therein by reason only of a defect of form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorization under which such private communication was intercepted,

he may, notwithstanding subsection (1), admit such private communication as evidence in the proceedings.

(3.1) [now 189(4)] A private communication that has been intercepted and that is admissible as evidence may be admitted in any criminal proceeding or in any civil proceeding or other matter whatever respecting which the Parliament of Canada has jurisdiction, whether or not the criminal proceeding or the civil proceeding or other matter relates to the offence specified in the authorization pursuant to which the communication was intercepted.

- (4) [now 189(5)] A private communication that has been lawfully intercepted shall not be received in evidence unless the party intending to adduce it has given to the accused reasonable notice of his intention together with
 - (a) a transcript of the private communication, where it will be adduced in the form of a recording, or a statement setting forth full particulars of the private communication, where evidence of the private communication will be given viva voce: and
 - (b) a statement respecting the time, place, and date of the private communication and the parties thereto, if known.
- (5) [now 189(6)] Any information obtained by an interception that, but for the interception would have been privileged, remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege.

Section 178.17 (now 190) provides that a judge of the court in which a trial is being or is to be held may order further particulars of the private communication intended to be adduced. Section 178.18 (now 191) creates an offence for possessing, selling, or purchasing a device which is primarily useful for surreptitious interception of private communications, and creates exceptions for use of such devices in law enforcement. Section 178.19 (now 192) provides for the forfeiture of the interception devices in addition to any punishment imposed for a conviction under ss. 178.11 or 178.18. Section 178.2 (now 192) creates an offence for the wilful use or disclosure of contents of

intercepted communications without the consent of the originator or the intended receiver, except in specified situations in legal proceedings and law enforcement. Section 178.21 (now 194) empowers a court to exact punitive damages, upon application of the person aggrieved, from a person convicted under s. 178.11 or 178.2. Section 178.22 provides that the Solicitor General of Canada shall prepare each year a statistical report of authorizations obtained for the year. Section 178.23 (now 196) sets out notice requirements above and beyond s. 178.16(4), such that after a certain period after an authorization or renewal is granted or after an investigation is over, persons subject to interception are informed of the interception of their private communications.

Points in Issue

The appellant lists twelve points in issue but they may be summarized as follows:

1. What is the entitlement of an accused person to the sealed packet?
2. Upon what grounds may an accused challenge an authorization for wiretap and before what court?
3. What remedy is appropriate?
4. What special requirements apply when information from informants is relied on to obtain an authorization?
5. What principles and procedures apply to the editing of the contents of the sealed packet?
6. Is the accused entitled to cross-examination on the affidavit filed with the authorizing judge?
7. Did the failure of the authorizing judge to include a minimization clause result in the authorization of an unreasonable search and seizure in violation of s. 8 of the Charter ?
8. Did the accused abscond?
9. Did the trial judge properly caution the jury with respect to the evidence of accomplices?

Points 2, 3 and 4 all relate to the sufficiency of the affidavits in satisfying the prerequisites to a valid authorization.

1. What is the entitlement of an accused person to the sealed packet?

The trial judge refused to order access based on the restricted access cases. For the reasons that I gave in *Dersch*, those cases no longer apply in view of ss. 7 and 8 of the Charter . The accused is entitled to have the packet opened and, subject to editing, to have its contents produced in order to enable him or her to make full answer and defence. The Court of Appeal was, therefore, right in opening the sealed packets.

2. Upon what grounds may an accused challenge an authorization for wiretap and before what court?

Minimum Statutory and Constitutional Requirements

Section 178.13(1) sets out the statutory conditions of which a judge must be satisfied before an authorization is issued:

178.13 (1) An authorization 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.

In *R. v. Duarte*, [1990] 1 S.C.R. 30, a majority of this Court held that wiretaps constitute a search or seizure within the meaning of s. 8 of the Charter. The statutory provisions authorizing them must, therefore, conform to the minimum constitutional requirements demanded by s. 8 of the Charter. These are set out by Dickson J. (as he then was) in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, as "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search" (p. 168). Since wiretaps are considered to be more intrusive on the privacy of individuals than searches of premises, there is no reason to consider applying lesser minimum requirements to them. In addition, the applicant must meet the requirements of para. (b) of s. 178.13(1) with respect to other investigative procedures.

In *R. v. Finlay and Grellette* (1985), 23 C.C.C. (3d) 48 (Ont. C.A.), s. 178.13 was attacked on the ground that its prerequisites did not comply with the dictates of s. 8. Martin J.A., of the Ontario Court of Appeal, held that the section was constitutional and met the requirements of s. 8 of the Charter.

This conclusion was affirmed by La Forest J. in *R. v. Duarte*, [1990] 1 S.C.R. 30. Speaking for the majority, he stated, at p. 45:

A judge must be satisfied that other investigative methods would fail, or have little likelihood of success, and that the granting of the authorization is in the best interest of the administration of justice. I share the approach of Martin J.A. in *R. v. Finlay and Grellette*, *supra*, at pp. 70 et seq., that this latter prerequisite imports as a minimum requirement that the issuing judge must be satisfied that there are reasonable and probable grounds to believe that an offence has been, or is being, committed and that the authorization sought will afford evidence of that offence. It can, I think, be seen that the provisions and safeguards of Part IV.1 of the Code have been designed to prevent the agencies of the state from intercepting private communications on the basis of mere suspicion.

In proceeding in this fashion, Parliament has, in my view, succeeded in striking an appropriate balance. It meets the high standard of the Charter which guarantees the right to be secure against unreasonable search and seizure by subjecting the power of the state to record our private communications to external restraint and requiring it to be justified by application of an objective criterion.

The result is that the statutory requirements of s. 178.13(1)(a) are identical to the constitutional requirements. An authorizing judge must, therefore, be satisfied on the basis of the affidavit evidence that these conditions have been met.

Challenging the Authorization

The current state of the law with respect to testing the admissibility of wiretap evidence is a procedural quagmire. The various procedures that are available have come to be known by the names of the cases that initiated them.

First there is a "Parsons voir dire," named after *R. v. Parsons* (1977), 37 C.C.C. (2d) 497 (Ont. C.A.), aff'd [1980] 1 S.C.R. 785, sub nom. *Charette v. The Queen*. The function of this hearing before the trial judge is to determine such issues as whether the authorization is valid on its face, whether the police executed the interception within the terms of the authorization, and whether statutory requirements such as reasonable notice were complied with. The remedy is exclusion under s. 178.16 . The second is the "Wilson application". This hearing takes place before the issuing court, to determine the substantive or subfacial validity of the affidavit. The remedy is the setting aside of the authorization. The third is a "Garofoli hearing". This is a hearing before the trial judge to determine the compliance of the authorization with s. 8 of the Charter . The remedy is a determination under s. 24(2) of the Charter . The fourth, and last, procedure is a "Vanweenan hearing", so-called after one of the appellants in *R. v. Chesson*, [1988] 2 S.C.R. 148. This again is a voir dire before the trial judge, but with the object of determining whether the authorization names all "known" persons as required by ss. 178.12(1) (e) and 178.13(2) (c). The remedy again is exclusion under s. 178.16 .

Consolidation of the Parsons, Garofoli and Vanweenan hearings presents no difficulty, and is in keeping with the view of this Court that all matters that relate to the conduct of the trial should be dealt with by the trial judge. A more difficult question arises with respect to the Wilson and Garofoli applications. It would be highly desirable if they could be dealt with by the trial judge so that all aspects of the admissibility of evidence obtained pursuant to an authorization could be dealt with at one time and at trial. Whether this can be done requires an examination of this Court's judgment in *Wilson v. The Queen*, supra, and the effects of s. 8 of the Charter on its application.

Wilson, supra, concerned authorizations, granted by the Manitoba Court of Queen's Bench, which were valid on their face and for which the sealed packets were not opened. The trial judge (Provincial Court) held wiretap evidence inadmissible on the basis of evidence, brought out in cross-examination of the deponent of the affidavit, which conflicted with the statutory

requirement of showing that other investigative methods had failed or were likely to fail. The Court of Appeal ordered a new trial. This decision was upheld by the Supreme Court of Canada. The Court was unanimous in the result, but McIntyre J. (Laskin C.J. and Estey J. concurring) and Dickson J. (as he then was, Chouinard J. concurring) gave rather different reasons.

McIntyre J. held that a court order stands unless it is set aside on appeal, or is lawfully quashed. In the case of wiretaps the Criminal Code gives no right of appeal, and there is no possibility of quashing by writ of certiorari because there is no issue of jurisdiction. The general rule is that a court order is immune from collateral attack, that is, an attack in proceedings other than those the object of which is the variation of the court order. In this case, the trial judge's ruling amounted to a collateral attack on the order of a (superior) court. The trial judge's ruling should be limited to defects or irregularities on the face of the authorization. Any substantive review of an authorization must be undertaken by the judge (or court) which issued the order. McIntyre J. supported this view by analogy to civil cases holding that an issuing court has power to conduct inter partes review of its ex parte orders. In such a case the court may rescind the order if the facts upon which the authorization was granted are different from the facts as proved on an inter partes review.

Dickson J. held that a trial judge can look behind a facially valid authorization, but in this case did so improperly because he did not have access to the sealed packet in making his determination as to the lawfulness of the authorization. Dickson J. accepted the general rule against collateral attack, but held that Parliament had altered it in this case by legislation. Section 178.16(1) provides that, absent consent, evidence of a private communication can only be admitted if lawful. Section 178.16(3)(b) gives the trial judge discretion to admit unlawful interceptions if there is a non-substantive defect in the authorization process. The corollary is that there is no discretion with respect to substantive defects. If the court order were conclusive, there would be no need for the curative provision of 178.16(3)(b); the trial judge is thus bound by the legislation to consider if the authorization is substantively valid. In so holding, Dickson J. refuted the policy reasons given for limiting the trial judge to facial review. He reasoned that the order of another court could be held unlawful and this would not show disrespect to that court, but would merely question the evidence upon which that court based its decision. He further opined that concern about breaches of confidentiality could be dealt with by judicial editing.

Because the trial judge must go behind the face of an authorization, Dickson J. held that in most cases it will be necessary to open the sealed packet. Dickson J. made no comment on the cases which create a high barrier before the packet will be opened, for in this case there was ample evidence of misleading disclosure. He concluded that the trial judge could not properly decide whether the interceptions were lawfully made without examining the contents of the packets. Dickson J. also held that in keeping with a substantive review of the authorization, the accused must have the opportunity to cross-examine the affiant. The questioning must be directed to whether the authorization was properly obtained, without the disclosure of information that ought to be kept confidential.

Dickson J. noted that in this case, the trial judge was not among the categories specified in s. 178.14 and therefore was not himself authorized to open the packet. In such a case, the trial must be adjourned for the accused to apply to the proper court to open the packet, which it may or may not do in its discretion. Substantive review of the authorization, though, lies with the trial judge.

This Court was recently asked, *inter alia*, to reconsider Wilson, *supra*, in R. v. Meltzer, [1989] 1 S.C.R. 1764. McIntyre J., for the Court, made the following observation, at p. 1771:

It has been said that this has led to a confusion and delay and that the trial judge should, in his capacity as trial judge, have full power to open the sealed packet and review the High Court order, regardless of the status of the trial judge, and make any necessary rulings. That this procedure would probably expedite matters and remove some confusion may well be true. It is not, however, a procedure provided by Parliament, and subject to arguments relating to the application of the Canadian Charter of Rights and Freedoms it is not, in my opinion, open to the courts to disregard the statutory provisions of Part IV.1 of the Criminal Code . If there is confusion and delay in this matter it arises from the Criminal Code itself and, subject as aforesaid, it will be for Parliament to change. [Emphasis added.]

In the passage cited above, McIntyre J. acknowledged that the application of the Charter might have an effect on the conclusion reached in Wilson. In my opinion, when it is asserted by an accused that a wiretap infringes s. 8 , an appropriate review is incompatible with the restrictions of Wilson. The judge conducting the review must hear evidence and submissions as to whether the interception constitutes an unreasonable search or seizure. Inasmuch as it is an issue as to the admissibility of evidence, it may be raised at trial. Under s. 24 of the Charter , the trial judge is a court of competent jurisdiction. In Mills v. The Queen, [1986] 1 S.C.R. 863, McIntyre J., speaking of trial courts exercising criminal jurisdiction other than superior courts, stated, at p. 955:

These courts will be courts of competent jurisdiction, where they have jurisdiction conferred by statute over the offences and persons and power to make the orders sought. It is to be hoped that trial judges will devise, as the circumstances arise, imaginative remedies to serve the needs of individual cases. Such remedies must remain, however, subject to constitutional restraint, that is, they must remain within the ambit of criminal powers. A claim for a remedy under s. 24(1) arising in the course of the trial will fall within the jurisdiction of these courts as a necessary incident of the trial process.

An objection to the reception of evidence is very much a necessary incident of the trial process. A trial judge before whom wiretap evidence is tendered is obliged to rule on an objection based on an alleged breach of the accused's constitutional rights. He or she has jurisdiction and it cannot be declined.

It is true that the procedure on a Wilson application was to combine an application to open the packet with an application for review of its contents to determine the legal validity of the authorization. This procedure was suggested as the appropriate one in Wilson. Nothing in s.

178.14(1)(a)(ii), however, requires that the review of the contents of the sealed packet be made by the judge designated therein. It deals exclusively with the unsealing of the packet and does not purport to provide for a review of its contents. The source of review under Wilson was the general jurisdiction of the courts to set aside their own orders, either by action in the High Court or by a motion to set aside an *ex parte* order. Resort to this jurisdiction attracted the restrictions inherent in the exercise of this jurisdiction both with respect to the available grounds and with respect to collateral attacks on court orders. These restrictions are fully explained in Wilson. The Charter provides a clear alternative basis for resort to the court and with it the appropriate grounds for a determination as to whether there has been a breach of s. 8 .

Accordingly, while applications to open the packet must, by reason of the explicit language of the section, be made to a judge designated therein, applications for review should be made to the trial judge. This will achieve the desirable objective of leaving all matters relating to the admissibility of wiretap evidence to the trial judge.

Further, it would remove any doubts as to the right to appeal a decision rejecting or admitting the evidence. Martin J.A., in his reasons in this case, expressed concern about the lack of appeal where an authorization is set aside during a preliminary hearing. I would go further and question the right of appeal from the judgment of the trial judge who admits or rejects the evidence pursuant to the order of a Wilson judge. Since the trial judge cannot question the decision made on the Wilson application, I fail to see how it can be shown that the trial judge committed any error in accepting it. Martin J.A. refers to *R. v. Bailey* (1983), 4 C.C.C. (3d) 21 (Ont. C.A.), and *R. v. Banas and Haverkamp* (1982), 65 C.C.C. (2d) 224 (Ont. C.A.), for the proposition that an appeal lies from an acquittal. Those cases did not involve a Wilson application, and in each case there was a decision made by the trial judge with respect to the admissibility of evidence which could be the subject of attack on the basis of an error of law. In *R. v. Bailey*, supra, Morden J.A. stated the test for an appeal from an acquittal as follows, at p. 24:

To succeed on an appeal from an acquittal under s. 613(4) of the Criminal Code the Crown must satisfy the appellate court that the trial judge erred and that the result would not necessarily have been the same if he had not so erred: *R. v. McMillan* (1975), 23 C.C.C. (2d) 160, 7 O.R. (2d) 750, 20 C.R.N.S. 191, and *Vezeau v. The Queen* (1976), 28 C.C.C. (2d) 81, 66 D.L.R. (3d) 418, [1977] 2 S.C.R. 277.

The language of s. 178.14 (now s. 187) will continue to require an application to open before a judge referred to therein. In some cases, this will not be the trial judge. I have referred in Dersch to the desirability of a legislative amendment to enable the trial judge to order the opening of the packet.

Grounds for Review

In *R. v. Collins*, [1987] 1 S.C.R. 265, Lamer J. (as he then was) set out the basic test for determining the reasonableness of a search under s. 8 of the Charter . He stated, at p. 278:

A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable.

In *Hunter v. Southam*, supra, this Court set out the basic requirements with respect to prior authorizations. In *Duarte*, supra, this Court decided that s. 178.13(1)(a) complies with these standards, and that before granting an authorization, a judge must be satisfied by affidavit that there are reasonable and probable grounds to believe that:

- (a) a specified crime has been or is being committed; and,
- (b) the interception of the private communication in question will afford evidence of the crime.

To arrive at the conclusion that the search is authorized by law, the reviewing judge must therefore conclude that these conditions were complied with. If he concludes that they were not, then the search is not authorized by law and is unlawful. Consequently, in order to discharge the duty cast upon the reviewing judge to determine whether there has been a breach of s. 8, he or she must determine whether the Code provisions have been satisfied. This is the inevitable result of the statutory conditions being identical to the requirements of s. 8. Whereas *Wilson* precluded a review of the authorizing judge's decision that the statutory conditions had been complied with, unless some ground such as fraud or new evidence was established, the application of s. 8 requires review as a step in determining the reasonableness of the search and seizure.

While a judge exercising this relatively new power need not comply with the *Wilson* criteria, he should not review the authorization *de novo*. The correct approach is set out in the reasons of *Martin J.A.* in this appeal. He states, at p. 119:

If the trial judge concludes that, on the material before the authorizing judge, there was no basis upon which he could be satisfied that the pre-conditions for the granting of the authorization exist, then, it seems to me that the trial judge is required to find that the search or seizure contravened s. 8 of the Charter.

The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

3. What remedy is appropriate?

Once the reviewing judge determines that the interception was not lawfully made, he or she has made a determination in the very language of s. 178.16(1)(a), which provides:

178.16 (1) A private communication that has been intercepted is inadmissible as evidence against the originator of the communication or the person intended by the originator to receive it unless

(a) the interception was lawfully made

I must respectfully disagree with Martin J.A. that the mere fact that the authorization is not set aside precludes a determination that the interception is not lawfully made. In his reasons, he describes the determination of the reviewing judge as follows, at p. 119:

The trial judge, whether or not he or she is a Supreme Court judge, may, however, without setting aside the authorization, hold that the statutory pre-conditions for the granting of the authorization were not met, and hence the interception was unlawful and resulted in an unreasonable search or seizure within s. 8 of the Charter . [Emphasis added.]

The mere fact that, technically, the authorization has not been set aside can have little significance where its legal underpinnings have been removed. This degree of respect for the sanctity of a court order cannot be maintained. A determination that the Charter has been breached and that perhaps admission of evidence would bring the administration of justice into disrepute will have already discredited the authorization to such an extent that I see no reason for preserving its formal validity purely for the purpose of showing deference for court orders. To maintain the validity of orders that have been undermined by a declaration of illegality by a court would only engender disrespect for court orders.

In the result, a finding that the interception is unlawful attracts the peremptory language of s. 178.16 and the evidence is inadmissible. Section 24(2) cannot have the effect of making the evidence admissible even if to do so would not bring the administration of justice into disrepute. Section 24(2) is an exclusionary and not an inclusionary rule. It operates to exclude evidence that would otherwise be admissible where to admit the evidence would bring the administration of justice into disrepute. Evidence that is inadmissible by reason of some other exclusionary rule cannot be admitted by invoking s. 24(2) . Accordingly, an accused who has invoked the jurisdiction of s. 24 and who establishes as part of the necessary operation of Charter review that an interception was unlawfully obtained is entitled to the benefit of the provisions of s. 178.16 to have the evidence excluded.

4. What special requirements apply when information from informants is relied on to obtain an authorization?

The appellant submitted that in order to establish reasonable and probable grounds to justify a search, a detailed set of requirements was necessary in respect of the use of informants' information. He contends that in coming to the conclusion that the affidavits in this case were sufficient, the Court of Appeal must have applied the "totality of the circumstances" test set out in *Illinois v. Gates*, 462 U.S. 213 (1983). The pertinent passage from that judgment reads as follows, at p. 238:

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

The general requirement with which the authorizing judge must comply has already been referred to in these reasons. He or she must be satisfied that the statutory conditions have been established. The reviewing judge should not set aside this decision unless he or she is satisfied on the whole of the material presented that there was no basis for the authorization. While this is the general instruction that each judge should apply, special problems arise with respect to the use of information of informants. It is therefore desirable to examine what special requirements, if any, should be developed to enable judges to apply the general instruction in a way that strikes a just balance between the needs of law enforcement and the protection of the rights of privacy.

This issue has been addressed by this Court in connection with the use of informant information to support a warrantless search.

In *R. v. Debot*, [1989] 2 S.C.R. 1140, police officers acting on the information of an informer stopped and detained the appellant's motor vehicle and conducted, without warrant, a search of the vehicle and the persons of the appellant and others. In assessing the weight to be given to the evidence relied on by the police officer, Wilson J. applied "the totality of the circumstances" standard which had been applied by Martin J.A. in the Court of Appeal. On this basis, Wilson J. found that there were reasonable and probable grounds to justify the search. This conclusion was concurred in by the other members of the Court.

In *R. v. Greffe*, [1990] 1 S.C.R. 755, the Crown conceded that in conducting a rectal search, there had been a violation of ss. 8 and 10 of the Charter. The parties differed, however, in characterizing the seriousness of the violation for the purpose of determining admissibility under s. 24(2). Lamer J. (as he then was) considered that "the core difference centres on whether the police had reasonable and probable grounds to believe that the appellant was in possession, and therefore trying to import into Canada, an illegal narcotic" (p. 788).

The only evidence on the record was testimony that on the basis of "confidential information received and background investigation" the officer had "grounds to believe . . . that he [Greffe] was going to be in possession of an unknown amount of heroin". Lamer J. held that the trial judge erred in concluding that the police had confidential and reliable information by reason of the eventual recovery of the heroin. He wrote, at p. 790:

It was incumbent upon the Crown to establish at trial, if it could, the basis upon which the police claimed to have reasonable and probable grounds to believe that the appellant was in possession of the heroin. This would have been done through an inquiry into the source and reliability of the "confidential information" in the possession of the police.

...

What should have happened is that the police should have been asked at trial about the confidential information to determine if, in the totality of the circumstances, there existed reasonable and probable grounds to believe the accused was carrying the heroin. [Emphasis added.]

Lamer J. also referred with approval to the following passage from Martin J.A.'s judgment in *R. v. Debot* (1986), 30 C.C.C. (3d) 207 (Ont. C.A.), at pp. 218-19, as the test for assessing confidential informer's information:

I am of the view that such a mere conclusory statement made by an informer to a police officer would not constitute reasonable grounds for conducting a warrantless search. . . . Highly relevant . . . are whether the informer's "tip" contains sufficient detail to ensure it is based on more than mere rumour or gossip, whether the informer discloses his or her source or means of knowledge and whether there are any indicia of his or her reliability, such as the supplying of reliable information in the past or confirmation of part of his or her story by police surveillance.

Although Greffe concerns admissibility under s. 24(2) , in my opinion the discussion has a bearing on the sort of information that must be put before a judge issuing an authorization for electronic surveillance. I see no difference between evidence of reliability of an informant tendered to establish reasonable and probable grounds to justify a warrantless search (the issue in the cases cited by Lamer J.) and evidence of reliability of an informant tendered to establish similar grounds in respect of a wiretap authorization. Moreover, I conclude that the following propositions can be regarded as having been accepted by this Court in *Debot* and *Greffe*.

- (i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.
- (ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors including:
 - (a) the degree of detail of the "tip";
 - (b) the informer's source of knowledge;
 - (c) indicia of the informer's reliability such as past performance or confirmation from other investigative sources.
- (iii) The results of the search cannot, *ex post facto*, provide evidence of reliability of the information.

Conclusion on Issues 2, 3 and 4

While I have differed somewhat with the reasons of Martin J.A. with respect to issues 2 and 3, I am in agreement with the result reached by him that the affidavits were sufficient on their face. He concludes his reasons as follows, at pp. 129-30:

I am satisfied that the affidavits set out ample facts upon which the authorizing judges could be satisfied that there were reasonable grounds to believe that the specified offences were being or had been committed, that the interceptions sought would afford evidence of the offences, that other investigative procedures were unlikely to succeed and that it would be in the best interests of the administration of justice to grant the authorizations.

5. What principles and procedures apply to the editing of the contents of the sealed packet?

The appellant does not take issue with the exercise by the Court of Appeal of the power to edit the affidavit in order to preserve the identity of informants. His principal submission is that the appellant should be provided with judicially approved summaries of the edited words and phrases.

The power to edit clearly exists and derives from the supervisory and protecting power which a court possesses over its own records: *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 189.

In determining the procedure to be followed in editing the materials in the packet, regard must be had for the competing interests of law enforcement, and in particular the protection of the identity of informers and investigative techniques, on the one hand and the right of the accused to make full answer and defence on the other. The following observations of Dickson J. in *MacIntyre*, *supra*, at pp. 180 and 184, are apt:

As is often the case in a free society there are at work two conflicting public interests. The one has to do with civil liberties and the protection of the individual from interference with the enjoyment of his property. There is a clear and important social value in avoidance of arbitrary searches and unlawful seizures. The other, competing, interest lies in the effective detection and proof of crime and the prompt apprehension and conviction of offenders. Public protection, afforded by efficient and effective law enforcement, is enhanced through the proper use of search warrants.

...

In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime.

Judicial editing appears to be the rule in every province except British Columbia. In *Dersch v. Canada (Attorney General)* (1987), 17 B.C.L.R. (2d) 145, Esson J.A. expressed the view that editing constituted judicial legislation. This statement was made in the context of his reasons supporting restricted access to the sealed packet. In *Dersch*, I have determined that the restricted access cases are no longer sound. Editing, therefore, is essential in cases in which confidential information is included in the affidavit filed in support of an authorization. In determining what to edit, the judge will have regard for the rule against disclosure of police informants. The most recent expression of the rule by this Court is in the case of *Bisaillon v. Keable*, [1983] 2 S.C.R. 60. Beetz J. stated, at p. 93:

It follows from these reasons that at common law the secrecy rule regarding police informers' identity has chiefly taken the form of rules of evidence based on the public interest, which prohibit judicial disclosure of police informers' identity by peace officers who have learned the informers' identity in the course of their duties. A witness also may not be compelled to state whether he is himself a police informer. The rule was developed in criminal proceedings, apparently in trials for high treason, but it also applies in civil matters, and in both cases it has been established for reasons which relate to the essential effectiveness of the criminal law. The rule is subject to only one exception, imposed by the need to demonstrate the innocence of an accused person. There are no exceptions in proceedings other than criminal. Its application does not depend on the judge's discretion, as it is a legal rule of public order by which the judge is bound.

The identity of informers is generally not relevant. When a trial judge is engaged in the editing process, he or she must consider the "innocence at stake" exception. In *Re Rideout and The Queen* (1986), 31 C.C.C. (3d) 211 (Nfld. S.C.), Goodridge J. took the following view of the exception, at p. 220:

The rule against the identification of police informants is only made possible because, in almost every case, it will not be relevant. . . . Where it is relevant, it will be admitted for that was the one exception mentioned by Beetz J. in the passage set forth above -- the situation where disclosure was needed to demonstrate the innocence of an accused person.

In *Roviaro v. United States*, 353 U.S. 53 (7th Cir. 1957), Justice Burton wrote, at pp. 60-61:

Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defence of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.

In *Re Chambers and The Queen* (1985), 20 C.C.C. (3d) 440 (Ont. C.A.), Martin J.A. pointed out that the exception was "more likely to apply where the informer is a witness to material facts" (p. 451).

The determination in each case will require the balancing of the relevance of the identity of the informer to the accused's case against the prejudice to the informer and to the public interest in law enforcement which disclosure would occasion. The issue does not arise in this appeal since it is not contended that the identity of the informer is relevant. It is undesirable, therefore, to delve further into the process of weighing these interests in determining whether an exception has been made out. Suffice it to say that it is very much a determination to be made by the trial judge.

The question remains as to the extent of editing and the procedure to be followed. Since there will be more than one method of striking a proper balance between the interests of law enforcement and of the right to make full answer and defence, I would not wish to place trial judges in a "strait-jacket" by laying down iron-clad rules with respect to editing. In deciding what to edit, the following factors outlined by Watt J. in *R. v. Parmar* (1987), 34 C.C.C. (3d) 260 (Ont. H.C.), at pp. 281-82, commend themselves to me:

- (a) whether the identities of confidential police informants, and consequently their lives and safety, may be compromised, bearing in mind that such disclosure may occur as much by reference to the nature of the information supplied by the confidential source as by the publication of his or her name;
- (b) whether the nature and extent of ongoing law enforcement investigations would thereby be compromised;
- (c) whether disclosure would reveal particular intelligence-gathering techniques thereby endangering those engaged therein and prejudicing future investigation of similar offences and the public interest in law enforcement and crime detection, and
- (d) whether the disclosure would prejudice the interests of innocent persons.

I have examined the procedure followed in *Parmar*, approved in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.), and the procedure followed by the Court of Appeal in this case. The following outline is the procedure which, in my view, should be followed. It is not intended to be exclusive or exhaustive.

1. Upon opening of the packet, if the Crown objects to disclosure of any of the material, an application should be made by the Crown suggesting the nature of the matters to be edited and the basis therefor. Only Crown counsel will have the affidavit at this point.
2. The trial judge should then edit the affidavit as proposed by Crown counsel and furnish a copy as edited to counsel for the accused. Submissions should then be entertained from counsel for the accused. If the trial judge is of the view that counsel for the accused will not be able to appreciate the nature of the deletions from the submissions of Crown counsel and the edited affidavit, a form of judicial summary as to the general nature of the deletions should be provided.
3. After hearing counsel for the accused and reply from the Crown, the trial judge should make a final determination as to editing, bearing in mind that editing is to be kept to a minimum and applying the factors listed above.
4. After the determination has been made in (3), the packet material should be provided to the accused.
5. If the Crown can support the authorization on the basis of the material as edited, the authorization is confirmed.
6. If, however, the editing renders the authorization insupportable, then the Crown may apply to have the trial judge consider so much of the excised material as is necessary to support the authorization. The trial judge should accede to such a request only if satisfied that the accused is sufficiently aware of the nature of the excised material to challenge it in argument or by evidence. In this regard, a judicial summary of the excised material should be provided if it will fulfill that function. It goes without saying that if the Crown is dissatisfied with the extent of disclosure and is of the view that the public interest will be

prejudiced, it can withdraw tender of the wiretap evidence.

In this case, the Court of Appeal was in substantial compliance with the procedures outlined above. The process stopped after step (5). No issue can be taken with respect to the procedure followed.

6. Is the accused entitled to cross-examination on the affidavit filed with the authorizing judge?

The appellant asserts a right to cross-examine the affiant on the affidavits filed in support of the authorization. Specifically, he seeks to attack the statement made by the affiant that he (the affiant) received information from an informer, who had proved reliable in the past, and that in the month of December 1982 Garofoli and Criminisi had approached . . . (edited) with an offer to supply him with two kilograms of cocaine to sell for them. He filed two affidavits, his own and that of his former counsel. The substance of the affidavits is described in the reasons of Martin J.A. as follows, at p. 130:

Garofoli's affidavit states that he lived in Florida from September, 1977 up to August, 1983, when he returned to Hamilton to live. He was charged in Hamilton with certain offences of fraud and conspiracy to defraud, and he states in his affidavit that the only occasions on which he was in Hamilton, or even in Ontario, until he returned to Hamilton to live in August, 1983, were in connection with court appearances on those charges. He states that the only occasions on which he was in Hamilton during the latter part of 1982 or the early part of 1983 were in connection with court appearances on November 3, 1982, January 14, 1983, and on certain dates in February, March, April and May, 1983. He states that the allegation contained in Officer Campbell's affidavit, sworn on September 29, 1983, that some person was approached by Garofoli and Criminisi in December, 1982 with a proposal that this individual sell cocaine for them, is totally false, that he was not in Hamilton in the month of December, 1982, nor did he see or meet with Criminisi during any of his visits to Hamilton in connection with court appearances. He further states that the officer in charge of the fraud and conspiracy case was well aware that he was living in Florida and travelled to Hamilton only in connection with his court appearances, and that if Officer Campbell had made any inquiries he would readily have been aware that he was living in Florida during December, 1982.

The Court of Appeal refused cross-examination on the ground that accepting these affidavits as true, they did not establish that the affiant Campbell had "made a false statement in his affidavit knowingly and intentionally or with reckless disregard for its truth".

These preconditions for cross-examination of the affiant are based largely on the American case of *Franks v. Delaware*, supra. They were adopted by the Court of Appeal in *Re Church of Scientology and The Queen* (No. 6) (1987), 31 C.C.C. (3d) 449 (and in *Rowbotham*, supra). Most recently, they were upheld by Watt J. in *R. v. Parmar* (1987), 37 C.C.C. (3d) 300, where Watt J. stated them to be as follows, at p. 344:

- (i) there must be specific allegation(s) of deliberate falsehood or reckless disregard for the truth in respect of specific aspects of the supportive affidavit;

(ii) there must be prima facie proof by the applicant in admissible form, of the substance of what is alleged to controvert the specific contents of the affidavit, and

(iii) it must be made to appear that, if the material impugned as false or in reckless regard of the truth is set aside, that which remains is insufficient to sustain the issuance of the impugned order under s. 178.13(1) or 178.13(4), as the case may be.

In my opinion, these preconditions are subject to the same criticisms that were levelled at the preconditions for the sealed packet imposed by the restricted access cases. In *R. v. Playford*, *supra*, Goodman J.A. stated, at p. 178:

... he cannot gain access to the affidavit unless he can prove on a prima facie basis the grounds for such access and he cannot prove such grounds unless he has access.

And in *Finlay and Grellette*, *supra*, Martin J.A. stated, at p. 77:

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.

Applying that statement to this situation, the appellant cannot cross-examine unless he provides proof of deliberate falsehood or reckless disregard for the truth, and he cannot establish deliberate falsehood or reckless disregard for the truth unless he can cross-examine.

Furthermore, I question the utility of cross-examination if the accused can establish, even on a prima facie basis, deliberate falsehood or reckless disregard for truth. Except on television, most cross-examiners would consider a cross-examination to have succeeded marvelously if the result is a prima facie case that the affiant has been deliberately false or reckless. If this can be made out *ab extra*, there is no need to cross-examine.

This Court has consistently demonstrated a policy to uphold the right to cross-examine. In *Innisfil (Corporation of the Township) v. Corporation of the Township of Vespra*, [1981] 2 S.C.R. 145, the right was maintained with respect to evidence of government policy before an administrative tribunal. See also *R. v. Potvin*, [1989] 1 S.C.R. 525. In *Wilson*, *supra*, Dickson J., speaking for himself and Chouinard J., approved of the right to cross-examine on an affidavit filed in support of an authorization. He stated, at p. 624:

It is of little avail to defence counsel to have a statement of law that an authorization can be held to be invalid if obtained, for example, by material non-disclosure and then preclude counsel from asking questions tending to show there has in fact been non-disclosure.

Although McIntyre J. did not deal explicitly with the point, he did not disagree with this statement. Furthermore, in accepting the jurisprudence with respect to review of ex parte orders, he must have adopted the right to cross-examination which is inherent in such review. For example, in *Gulf Islands Navigation Ltd. v. Seafarers' International Union of North American (Canadian District)* (1959), 18 D.L.R. (2d) 625 (B.C.C.A.), the court stated: "if the second Judge hears the motion, he should hear it de novo as to both the law and facts involved" (p. 627).

In my opinion, the preconditions in *Franks v. Delaware*, supra, are too restrictive. I believe that they are inconsistent with the approach which we have taken in Canada with respect to the right to cross-examine. Moreover, subject to the protection of the identity of informants and the concern with respect to the prolongation of proceedings, I see no reason for such a drastic curtailment of the right. I believe these concerns can be accommodated without imposing restrictions as inhibitive as those in *Franks v. Delaware*. With respect to informants, there is no right to cross-examine them. The informant is not a witness and cannot be identified unless the accused brings himself within the "innocence at stake" exception.

With respect to prolixity, I am in favour of placing reasonable limitations on the cross-examination. Leave must be obtained to cross-examine. The granting of leave must be left to the exercise of the discretion of the trial judge. Leave should be granted when the trial judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. A basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as for example the existence of reasonable and probable grounds.

When permitted, the cross-examination should be limited by the trial judge to questions that are directed to establish that there was no basis upon which the authorization could have been granted. The discretion of the trial judge should not be interfered with on appeal except in cases in which it has not been judicially exercised. While leave to cross-examine is not the general rule, it is justified in these circumstances in order to prevent an abuse of what is essentially a ruling on the admissibility of evidence.

In my opinion, the appellant has shown a basis for the cross-examination here. In view of the degree of reliance by the police on the informant in this case, if the informant is discredited then the factual basis for the authorization is undermined. If it is shown that the informant lied, then it could raise the inference that the police knew or ought to have known that he lied. If the police were not warranted in their belief that the information was true, then the basis for belief that a crime was to be committed disappears. Accordingly, the appellant should have been permitted to cross-examine. Cross-examination having been denied, there must be a new trial.

7. Did the failure of the authorizing judge to include a minimization clause result in the authorization of an unreasonable search and seizure in violation of s. 8 of the Charter ?

This issue was not raised before the Court of Appeal and we do not have the benefit of the decision of the Court of Appeal. The appellant's argument before this Court relies on the fact that the affidavit dated November 23 reports that under the prior authorization 1000 calls were

intercepted on the appellant's telephone line, of which 49 were considered relevant. He argues that the authorities were therefore cognizant of the interception of a high number of irrelevant private communications. Therefore, he submits, the failure to impose conditions minimizing the interception of irrelevant communications is unreasonable and renders the authorization invalid.

The issue of minimization is fully discussed in my reasons in *R. v. Thompson*, [1990] 2 S.C.R. 000. The November 21 authorization is within the limitations described in that case. The relevant features of the authorization are as follows. Paragraph 3 names 13 persons whose private communications may be intercepted. Paragraph 4 sets out two classes of other persons whose private communications may be intercepted: (a) other persons at the places set out in para. 6(a)-(g), and (b) persons originating calls received by persons mentioned in paras. 3 and 4(a). Paragraph 6 describes places at which private communications may be intercepted. These are seven particular addresses set out in subparas. (a)-(g) (each connected with the named persons in para. 3) and places to which persons set out in para. 3 are believed on reasonable and probable grounds to resort to, as set out in subpara. (h). Paragraph 6(h) has a proviso that interceptions at public pay telephones shall be accompanied by visual surveillance to ensure that one of the persons named in para. 3 is using the pay telephone.

The authorization does not permit the interception of the private communications of anyone, anywhere. The persons are limited to thirteen named persons, their interlocutors, and persons at seven addresses connected with the named persons. The places are limited to seven named addresses, and places resorted to by the named persons.

The appellant's argument in this case does not attack the particular terms of the authorization so much as it attacks the absence of minimizing conditions in light of the high number of irrelevant interceptions under the September 29 authorization. In *Thompson* I recognized that with any wiretap authorization there is a possibility of invasion of the rights of innocent third parties. It is an unfortunate cost of electronic surveillance, but one that Parliament has judged is justified in appropriate circumstances in the investigation of serious crime. Likewise, the interception of irrelevant conversations, with the resultant invasion of the privacy of the target and third parties, is an unfortunate cost of electronic surveillance. The question is: is the cost so great that it renders the authorization unreasonable?

The circumstances in the case at bar are that some 950 irrelevant telephone calls from Garofoli's home were intercepted under the September 29 authorization. This invasion of privacy is regrettable, but is at least limited in its effect to persons visiting Garofoli's home. This is to be contrasted, for instance, with a public pay telephone, where the privacy of the public at large is threatened. It appears to me that the only feasible method of eliminating the recording of irrelevant calls on Garofoli's telephone line would have been a requirement of live monitoring. Even this method might be ineffective, for the relevance of a particular conversation cannot necessarily be determined with certainty until the content of a conversation is considered along with all other information gathered in an investigation. Furthermore, relevance cannot always be determined with certainty by listening, for instance, to the first few words of a conversation.

Irrelevant calls would still have to be listened to long enough to determine that they are irrelevant.

In Thompson I adopted the position taken by Martin J.A. in *R. v. Finlay and Grellette*, supra, that an absolute requirement of live monitoring in all cases would impose too heavy a burden on Canadian law enforcement officials. In my view, while a requirement of live monitoring or visual confirmation would generally be appropriate when telephone calls are proposed to be intercepted at public pay telephones, the same considerations do not apply with respect to the private residence of a person named in an authorization unless there are special circumstances calling for live monitoring. It must be remembered that constant live monitoring of a private residence can also constitute a serious invasion of privacy.

The presence of special circumstances must be determined on the basis of what will enable the police to obtain the evidence with a minimum invasion of privacy. Thus, if the information in the possession of the police indicates that the subject visits the premises only occasionally and for a short duration, this should be reflected in the extent of the electronic surveillance. It may require live monitoring to determine the presence of the target and indeed may be a term in the authorization. Wholesale interception of all communication in and out of the residence in these circumstances will run the risk of being found to be an unreasonable search and seizure. On the other hand, if the target is an occupant and is usually present, other considerations will apply. Such information may be lacking initially but will often be available after a period of electronic surveillance pursuant to a valid authorization. On renewal, or application for a new authorization, this information must be utilized to minimize the invasion of privacy.

The appellant has not satisfied the Court that this case involves any special considerations. I therefore conclude that the authorization is not rendered unreasonable in the absence of minimizing conditions. The appeal on this ground must fail.

8. Did the accused abscond?

I would dismiss the appeal based on this ground for the reasons given by Martin J.A.

9. Did the trial judge properly caution the jury with respect to the evidence of accomplices?

I would dismiss the appeal based on this ground for the reasons given by Martin J.A.

Disposition

I have found that none of the grounds raised, except the cross-examination issue, is entitled to succeed. In my opinion, however, the appellant ought to have been permitted to cross-examine the affiant on the affidavits and there must therefore be a new trial.

//McLachlin J.//

The reasons of L'Heureux-Dubé and McLachlin JJ. were delivered by

MCLACHLIN J. -- I have read the reasons of Justice Sopinka in this and the related appeals of *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 000; *R. v. Lachance*, [1990] 2 S.C.R. 000; and *R. v. Zito*, [1990] 2 S.C.R. 000. My approach to the interpretation of Part IV.1 of the Criminal Code, R.S.C. 1970, c. C-34, leads me to a different conclusion with respect to a number of the questions presented by these appeals -- a conclusion substantially in accord with the views expressed by Martin J.A. in the Court of Appeal below: (1988), 41 C.C.C. (3d) 97.

The issues on this and the related appeals relate to the proper forums and procedures for challenging judicial orders authorizing wiretaps of private conversations. They involve both the Criminal Code and the Canadian Charter of Rights and Freedoms, and engage the values enshrined in each. Accordingly, I preface my discussion of the issues with observations concerning the operation of Part IV.1 of the Criminal Code and its interaction with the Charter.

I. Part IV.1 of the Criminal Code and the Canadian Charter of Rights and Freedoms

Part IV.1 of the Criminal Code is the primary source of legislative guidance on the subject of wiretaps. It reflects an attempt to reconcile society's interest in the detection of crime and the proper administration of justice with individual interests in privacy and a fair trial. But because state wiretaps raise concerns with respect to individual liberties, the Charter also plays a role in governing the electronic interception of private communications.

The purpose of Part IV.1 is clear from its terms. Part IV.1 seeks to protect the privacy of individuals from invasion by electronic monitoring, while preserving the power of the police to intercept communications, where they have reason to believe that a crime has been or may be committed and the interception is reasonably necessary. The first of these purposes -- the protection of privacy -- is evidenced by the prohibition in s. 178.11(1) (now s. 184(1)) of the electromagnetic, acoustic, or mechanical interception of private communications. The second -- the protection of the administration of justice -- is evidenced by the following subsection, which exempts consensual or authorized communications from the prohibition. This concern with protection of the administration of justice has two aspects. The first is the public interest in securing the prosecution and conviction of the guilty. But the legislation also recognizes the importance of fairness to the accused in providing that only interceptions which have been lawfully obtained will be received in evidence.

The judgment of Parliament is thus clear. Privacy is to be protected, but must yield to the higher interest of the administration of justice where the criteria for obtaining an authorization are established. The fairness of the trial process is maintained in that unlawfully obtained evidence is not admitted. This is the fundamental philosophy which should guide the courts when dealing with the electronic interception of private communications.

Given that the electronic interception of private communications raises questions about individual privacy and the right to a fair trial, the Charter also has a role to play in governing state use of wiretaps. The powers conferred on the courts by Part IV.1 must be exercised in conformity with the principles enshrined in the Charter . These principles include the protection of individual privacy and the right to a fair trial, including the right to make full answer and defence -- values which are complementary to the interests reflected in Part IV.1 of the Code.

Having set out the philosophy which infuses Part IV.1 of the Code and related Charter provisions, I turn to the specific provisions of the Code. Society's interest in the prevention and detection of crime is served most directly by the creation of a mechanism pursuant to which law enforcement agencies can obtain judicial authorization to intercept private communications. Section 178.13(1) sets out the pre-conditions to the granting of an authorization by a judge to whom such an application is made. An authorization is only to be given where the judge is satisfied that it would be in the best interests of the administration of justice to do so and other investigative procedures are inadequate to the task. The power conferred on a judge by this section must be exercised in conformity with the Charter . Like Sopinka J., I agree with Martin J.A. of the Ontario Court of Appeal, who stated in *R. v. Finlay and Grellette* (1985), 23 C.C.C. (3d) 48, that s. 178.13(1) (a) should be read so as to require that a judge granting an authorization be satisfied that there are reasonable grounds to believe that the specified offence has been or is being committed, and that evidence of the offence will be obtained by the interception sought.

Apart from this limitation on a judge's ability to authorize a wiretap, the direct protection for individuals comes from two sources: s. 178.16(1) (a) of the Criminal Code , which states that to be admissible in evidence an electronic interception must have been "lawfully made"; and s. 24(2) of the Charter , which provides for the exclusion of evidence where the evidence was obtained in a manner that infringed a Charter right and it is established that admission of the evidence would bring the administration of justice into disrepute. Properly viewed, these two mechanisms, operating individually and in tandem, respond to individual interests in both privacy and a fair trial.

These protections give rise to three different applications:

- (1) An application to open the packet;
- (2) An application to set aside the authorization (the Wilson application);
- (3) An application to exclude the interception from evidence
 - (i) on the ground that the authorization is invalid on its face or that the interception was not executed within the terms of the authorization (the Parsons voir dire);
 - (ii) on the ground that the authorization does not name all "known" persons as required by ss. 178.12(1)(e) and 178.13(2)(c) of the Code (the Vanweenan application);
 - (iii) on the ground that the authorization fails to comply with the requirements for reasonable search and seizure under s. 8 of the Charter (the Garofoli application).

Under present practice, the first application (to open the packet) must be made before a judge designated under Part IV.1 of the Code (a superior court judge); the second (to set aside) must be made to the court which authorized the order (also a superior court); and the third (to exclude evidence) must be made before the trial judge (who may be a judge of the provincial court).

This case raises issues concerning applications (1), (2) and (3)(iii). The first concern is the relationship between application (2), the Wilson application, and the application on Charter grounds under (3)(iii), the Garofoli application. Since both are ultimately concerned with the admissibility of the wiretap evidence, can they be consolidated so that the trial judge can deal with both? The second concern relates to how the court which ultimately hears the matter should exercise its powers under Part IV.1 of the Code. When should the packet on which the authorization was based be opened? If opened, can it be edited? When should cross-examination of the deponents of affidavits in the packet be permitted?

I propose to deal with each of these concerns in turn.

II. Challenging a Judicially Authorized Interception -- Where Should it Happen?

Apart from technical faults which are dealt with under the Parsons and Vanweenan applications, the existing jurisprudence suggests two remedies for an accused seeking to prevent the use at trial of wiretap evidence -- one under the Code and one under the Charter ; one before a judge of the superior court which issued the order and one before the trial judge. My colleague, Sopinka J., takes the view that the two applications can be consolidated, with the result that the trial judge, regardless of the court he or she sits on, can hear both. I cannot agree. Notwithstanding the procedural advantages of such a solution, I do not think it is open to this Court to impose it.

I turn first to the Wilson application to set aside the authorization. As Martin J.A., of the Ontario Court of Appeal, explained in his reasons in this case, in order for an accused to succeed on a Wilson application, there must be evidence of fraud, material non-disclosure, misleading disclosure or new evidence which shows that the actual facts are different from those on which the authorization was granted under s. 178.13. The result of a successful Wilson application is that the authorization will be set aside, as if it never existed, so that any interception made pursuant to it will not have been lawfully made, and therefore will not be admissible in evidence under s. 178.16(1)(a) of the Code.

The Code does not expressly provide for the Wilson application, although it contemplates that judicial authorizations may be set aside. The Wilson application rests rather on the common law rule that the court which makes an order can also set it aside. No other court, except a statutorily empowered court of appeal, can set the order aside. This rule is known as the rule against collateral attack. Applied to the problem before us, it precludes holding that a provincial court trial judge can set aside an authorization under Part IV.1 (the Wilson application). That can only be done by a judge of the superior court which granted the authorization.

This is the logic upon which this Court relied in *Wilson v. The Queen*, [1983] 2 S.C.R. 594, where the majority held that an authorization which has not been set aside is not subject to collateral attack and must be given full effect according to its terms. This is also the logic upon which this Court relied in unanimously affirming *Wilson* in *R. v. Meltzer*, [1989] 1 S.C.R. 1764. It is based on sound principle and, in my view, unassailable. Accordingly, I find myself unable to avoid the conclusion which it mandates -- namely, that an application to set aside a wiretap authorization can be made only to a judge of a superior court designated under Part IV.1 of the Code and cannot be brought before a trial judge of a different court.

The second source of protection for the individual interests touched by wiretapping is the Charter . The *Garofoli* review, as it has come to be known from Martin J.A.'s judgment in this case, involves a determination as to the admissibility of an electronic interception under s. 8 of the Charter . That section 8 comes into play here results from the reasoning in *R. v. Finlay and Grellette*, *supra*, which held that electronic interception of private communications is a "search or seizure" within the meaning of s. 8 of the Charter . Given that s. 8 is viewed as, at a minimum, dealing with privacy concerns, the introduction of s. 8 here adds a second level of protection for individual privacy, one that supplements the protection already provided within the Criminal Code . Pursuant to s. 8 , then, the search or seizure must be reasonable, which means that it must comport with the minimum s. 8 requirements set out in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145. Under the Charter , the trial judge, even if not a judge of a superior court, is competent to determine whether evidence was obtained in contravention of s. 8 , which, in this context, means determining whether the authorization was granted so as to meet the pre-conditions in the Code. As Martin J.A. explains, the finding that the pre-conditions were not met leaves the judge with a discretion to exclude the evidence under s. 24(2) of the Charter as a result of a s. 8 breach.

This review of the two general remedies available to exclude wiretap evidence suggests that the two cannot be conceptually combined and cannot both be brought before a trial judge unless that judge happens to belong to the superior court which issued the authorization. The accused has a legal right to apply to the court which issued the authorization to wiretap that this Court cannot take away. No more can this Court empower a judge of another court to hear such an application, in contravention of the rule against collateral review. The *Wilson* application to set an authorization aside and the *Garofoli* application to reject evidence under the Charter are conceptually and jurisprudentially distinct, a fact which this Court is powerless to change.

I thus find myself in agreement with the view taken in the Ontario Court of Appeal that an accused seeking to exclude evidence of an interception has two remedies: (1) a *Wilson* application to a superior court to set aside the authorization, thereby rendering the interception not "lawfully made" within the terms of s. 178.16(1)(a); and (2) a *Garofoli* application before the trial judge (often a provincial court judge) for exclusion of the intercepted evidence on the ground that it constitutes an unreasonable search and seizure under s. 8 of the Charter , the reception of which in evidence would tend to bring the administration of justice into disrepute under s. 24(2) of the Charter . The *Wilson* application carries with it a more onerous burden, but that is offset by the fact that the remedy for a successful applicant is automatic: the interception

cannot be admitted into evidence. Under the Charter, the accused faces a less substantial burden, but the remedy is not automatic; it is based on s. 24(2) of the Charter which is necessarily flexible in that it must deal with a variety of circumstances.

It is necessary to add a comment on the question of what is meant by a "lawfully made" interception in s. 178.16(1)(a), since it impacts on when evidence becomes inadmissible under a Wilson application. Two views are possible in this regard. The first is that of Martin J.A. in the judgment below. On this view, any interception obtained pursuant to an authorization, which has not been set aside, is lawful and hence admissible under Part IV.1. It may, however, be excluded under s. 24(2) of the Charter if it was obtained in breach of the accused's rights under s. 8 of the Charter and its use would tend to bring the administration of justice into disrepute. The second view is that of Sopinka J. It holds that an authorized interception may be unlawful if it was obtained in circumstances where an authorization should not have been granted.

In my view, the governing consideration must be the intention of Parliament. What did it intend "lawfully made" to mean? I share Martin J.A.'s view that Parliament meant an interception made pursuant to a subsisting authorization. To hold that conduct expressly authorized by a court order is unlawful runs contrary to our most fundamental notions of lawfulness. If a person armed with such an order cannot assume he or she is acting lawfully, who can?

It may be that the order pursuant to which an interception has been made is later discredited. If that happens, the order may be set aside rendering the interception unlawful *ab initio*, or the interception may be rejected in evidence under s. 24(2) of the Charter. The question of preserving the formal validity of the order purely for the purpose of showing deference for court orders does not arise in either case. In the first case, Part IV.1 expressly provides for the order to be set aside. In the second, the remedy under s. 24(2) of the Charter is confined to the exclusion of evidence. While there might arguably be power under s. 24(1) to set aside the improperly obtained court order, it is difficult to see what purpose it would serve.

I offer a final comment under this head. While I disagree with Sopinka J.'s view that the Wilson and Garofoli applications can be consolidated, I do not dispute that the present structure creates unnecessary problems. Criminal law and criminal procedure should be simple and easily understandable. The procedural complexity associated with two different courts deciding essentially the same issue -- the admissibility of evidence -- defies this precept. The issue of an appeal from a Wilson application presents particular difficulty. While Martin J.A. in the court below offers a possible temporary solution to the problem of appeal, it is for Parliament to provide final resolution of the confusion created by application of the current legislative regime in conjunction with the Charter. In this regard I reiterate the plea of McIntyre J. in *R. v. Meltzer*, *supra*, that Parliament rectify any confusion or delay that arises from the Criminal Code's treatment of wiretaps.

III. The Scope of Review of Authorizations

I turn now to the second major concern raised on this appeal -- the manner in which courts should approach and resolve certain issues left open by the Criminal Code , which arise when considering the review of authorizations to wiretap. I refer to the issue of when, if ever, the packet should be ordered opened; the related issue of editing the material in the packet upon opening, and the issue of the extent to which a judge should allow cross-examination of deponents of affidavits in the packet.

Part IV.1 of the Criminal Code provides that the material upon which the authorization is based is confidential but can be opened on the order of a judge. It also provides that interceptions unlawfully obtained are inadmissible as evidence unless the defect is procedural only. It says nothing about the right of a person affected by the communication to cross-examine or present evidence on an application to suppress evidence of an interception. Thus a judge may be called upon under the legislation to do two things: (1) permit opening of the packet; and (2) suppress evidence of an intercepted communication. The question is what criteria the judge should use in making his or her decision on these matters in the face of the Code's silence.

Where legislation confers powers upon courts but says nothing as to how those powers are to be exercised, the courts have no choice but to themselves supply the missing criteria. The result, in the case of Part IV.1, has been a plethora of divergent judicial opinion, reflecting a variety of judicial philosophies. One searches, in this sea of uncertainty, for a rock upon which to found a more objective opinion. That rock, in my view, must be the intention of Parliament as manifested in the purposes of the legislation and the values which it reflects.

I affirmed at the beginning of these reasons that the purpose of Part IV.1 of the Criminal Code is to protect the privacy of individuals from invasion by electronic monitoring, while preserving the power of the police to intercept communications where they have reason to believe that a crime has been or may be committed and the interception is reasonably necessary. As will become apparent, it is my view that the answer to the questions of when the packet should be ordered opened, what editing is justifiable and when cross-examination should be permitted, depends on balancing the interests of the Crown and the public in the administration of justice against the interests of the individual whose liberty is at stake.

A. The Application to Open and Edit the Packet

Against this background, I turn to the considerations which should govern a judge on an application to open the packet under s. 178.14(1).

My colleague, Sopinka J., takes the view that the packet should be opened in all cases. I share the view that in most cases this should happen. However, I approach the matter somewhat differently. As I see it, the matter is in the discretion of the judge hearing the application. He or she must decide whether the packet should be opened, by asking whether the interest of the accused in opening the packet is outweighed by the public interest in the administration of justice.

Analysis of the issue must begin with the wording of s. 178.14(1):

178.14 (1) All documents relating to an application made pursuant to section 178.12 or subsection 178.13(3) or 178.23(3) are confidential and, with the exception of the authorization, shall be placed in a packet and sealed by the judge to whom the application is made immediately upon determination of such application, and such packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be

- (a) opened or the contents thereof removed except
 - (i) for the purpose of dealing with an application for renewal of the authorization, or
 - (ii) pursuant to an order of a judge of a superior court of criminal jurisdiction or a judge as defined in section 482; and
- (b) destroyed except pursuant to an order of a judge referred to in subparagraph (a)(ii).

The wording of the section makes it clear that there is no right to see the documents upon which an authorization has been based. Parliament's dominant intention was that the documents should remain confidential; they may be disclosed only on an application for renewal or upon the order of a judge. The only question is when a judge should order them disclosed. This may be contrasted with the situation in the United States, where the legislation requires the contents of the packet to be delivered to the accused ten days before trial: Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-20 (1988).

Should a judge routinely order the contents of the packet disclosed to persons before trial? Or should a judge do so only where circumstances are made out which suggest that the accused's privacy interest has been infringed in a way forbidden by Part IV.1? As a matter of statutory construction, the first alternative is untenable. If Parliament had intended all accused to have access to the packet without more, it would have passed a provision such as that which already existed in the United States. On the other hand, routine denial of access to the contents of the packet puts in doubt an accused's ability to make full answer and defence, a right provided by s. 577(3) (now s. 650(3)) of the Criminal Code .

The next question is what effect the Charter has on the situation. The Charter guarantees an accused a right to a fair trial and to make full answer and defence. It is argued that it is an element of a fair trial that the accused have the right to challenge evidence which may be inadmissible. It is said that the accused cannot challenge an interception if he or she is not granted access to the packet. Therefore, the argument continues, unless access is granted the right to a fair trial is denied. In these circumstances, it is argued that the judge should exercise the discretionary powers conferred by Part IV.1 of the Code in conformity with the Charter and grant access in all cases. Disclosure would be the rule.

The British Columbia Court of Appeal in *Dersch* (1987), 17 B.C.L.R. (2d) 145, per Esson J.A. (as he then was), took issue with the second proposition in this argument -- the proposition that the right to a fair trial includes the right to effectively challenge evidence obtained under Part IV.1 of the Code -- on the basis that the grounds upon which the evidence would be excluded are "technical". He stated, at p. 151:

It follows, in my view, that refusal of the opportunity to demonstrate a defect in the proceedings leading to the authorization does not affect the right to make full answer and defence or the right to fair trial. It merely deprives the accused of an opportunity to have relevant evidence excluded on a technical ground. That opportunity is not a constitutionally protected right.

This raises the question of what is meant by "fair trial" and "full answer and defence". Prior to the Charter, evidence which was reliable and relevant was routinely admitted, notwithstanding that it might have been obtained improperly: see *R. v. Wray*, [1971] S.C.R. 272. However, at least since the advent of the Charter, this Court has emphasized that the right to make full answer and defence is "a cornerstone of the justice system" and cannot lightly be eroded: see *Mills v. The Queen*, [1986] 1 S.C.R. 863, per Wilson J. (dissenting on other grounds), at p. 969. The words "full answer and defence" entitle the accused to put forward all defences, regardless of whether they are based on a technicality or not. Indeed, the adjective "full" permits no other conclusion. The right to make full answer and defence cannot be diminished to the right to make non-technical answer and defence. For this reason, I must reject the reasoning of the British Columbia Court of Appeal.

At the same time, I do not subscribe to the view that there is in all cases an automatic right to disclosure of the contents of the packet. Like other rights under the Charter, the right to make full answer and defence may come into conflict with other rights and values. It may be necessary to balance these interests against the right to make full answer and defence.

This is illustrated by the problem of editing. I agree with Sopinka J. that a judge may withhold certain portions of the packet on grounds, for example, that those portions might disclose the identity of an undercover operative. Denial of this information might lead an accused to complain about being deprived of the right to make full answer and defence. Nevertheless, the editing must be permitted because the public's interest in the administration of justice outweighs the accused's interest in obtaining the identity of the informant. I further agree with Sopinka J. that edited material can be considered in deciding whether the authorization can be supported.

On the balancing approach I propose, the accused must make a preliminary showing that his or her interest in privacy or a fair trial justifies opening the packet. This will not be difficult to do in most cases, since, as the Court of Appeal below and Sopinka J. point out, it is in most cases virtually impossible for an accused to challenge evidence which may turn out to have been improperly obtained unless the accused is permitted to see the material upon which the authorization was granted.

The next question is whether there are countervailing interests which outweigh the accused's interest in seeing the contents of the packet. In most cases there will be few, provided that proper editing takes place. As a result, it can be predicted that in most cases the accused will be granted access to the packet.

To summarize, it is my view that the accused's right to make full answer and defence mandates that a judge on an application to open the packet should give the accused access to the packet, subject to any overriding interests in the due and proper administration of justice.

Notwithstanding that the onus is on the accused to show that his or her interest in production outweighs concerns relating to the administration of justice, it may be predicted that in most cases this will result in reasonably complete disclosure of the contents of the packet, since in most cases the accused's interest is clear and disclosure will not unduly impede the administration of justice.

B. The Right to Cross-Examine

I turn next to the question of whether the accused, having gained access to the packets, should be permitted to cross-examine the deponents of the affidavits thus disclosed with a view to having the wiretap evidence declared inadmissible. Under what circumstances is the accused entitled to an evidentiary hearing?

Cross-examination may be relevant either on an application under Part IV.1 to set aside an authorization, or on an application to reject the interception under s. 24(2) of the Charter on the ground that it constitutes an unreasonable search and seizure under s. 8 of the Charter. Since the Code and the Charter are both silent on the right to cross-examination on such an application, the matter is entirely within the discretion of the judge.

My colleague, Sopinka J., rejects the approach adopted by the Court of Appeal below, which in turn reflected the American rule in *Franks v. Delaware*, 438 U.S. 154 (1978), requiring a preliminary showing of deliberate or reckless falsehood coupled with *prima facie* proof controverting the affidavits such that sufficient grounds for the authorization may not be present. Sopinka J. rejects imposition of such conditions on the ground that they might deny the right to make full answer and defence. Although he would require that leave be granted in the discretion of the judge and suggests that "a basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as for example the existence of reasonable and probable grounds", it is clear that he sees the right of cross-examination as broad and wide-ranging. Indeed, this is apparent in his rejection of the conclusion of the Court of Appeal that the case for cross-examination had not been made out. By contrast, I see the right of cross-examination on an application under Part IV.1 as a function of balancing the conflicting interests of the accused and the public, a balancing which, in my view, will not infrequently result in denial of the opportunity to cross-examine those who have sworn affidavits in support of the authorization.

I would approach the problem in the same way as I did the question of opening the packet. The accused, in order to justify an evidentiary hearing and the right to cross-examine, must show that this is necessary. In the case of an application to set aside the authorization, he or she must show that cross-examination may assist in establishing that the requirements for an authorization were not met in fact. In the case of an application to suppress evidence on the basis of a Charter violation, he or she must show that cross-examination may assist in establishing that violation and hence is necessary to ensure that he or she is able to make full answer and defence. Against these considerations the judge must weigh conflicting interests, including the public interest in the proper administration of justice.

An evidentiary hearing and cross-examination of deponents is potentially much more detrimental to the administration of justice than is opening the packet. Cross-examination is much more likely to reveal the details of investigative operations and the identity of informers than affidavits, which can be carefully drafted to avoid such pitfalls. How can one cross-examine an officer on the reliability of an informant without probing details that might reveal that informant's identity, for example? Once a damaging statement is made in answer to a question in cross-examination, editing is to no avail. Attempts to restrict the scope of cross-examination are notoriously fallible. Since effective cross-examination usually depends on considerable latitude in questioning, a restricted cross-examination may be of little value. Moreover, it is often difficult to predict when a particular question will evoke a response that trenches on a prohibited area. Finally, cross-examination may lead to unduly lengthening trials on collateral evidentiary matters.

On the other side of the balance, the importance to the defence of cross-examination may often be less than opening the packet. The issue on a hearing to set aside an authorization, or suppress evidence for a Charter violation, is not whether the information is true per se, but rather whether it was capable of supporting a reasonable belief that a crime had been or was about to be committed. Thus the cross-examination must do more than show that some of the averments may have been untrue or that an informer, for example, lied to the deponent -- it must show that the averments could not have supported a reasonable belief on the part of the deponent. It has been observed that cross-examination is a powerful engine for ferreting out the truth; but what is reasonable as opposed to true may be susceptible of being determined by review of the record as much as by cross-examination in many cases. In these circumstances, it may be difficult to conclude that cross-examination is essential to establishing that the conditions for authorization were not made out and to presenting full answer and defence.

In summary, cross-examination may present greater problems for the administration of justice and less importance from the point of view of ensuring a fair trial, than does access to the packet. In the result, the public interest in the administration of justice may be expected to more often outweigh the accused's interest in privacy and in presenting full answer and defence.

It is against this background that the Franks test adopted in the court below should be viewed. Given the tenuous connection between cross-examination and reasonableness, and given the potential impact on the administration of justice of permitting cross-examination and the

difficulty involved in controlling its scope, the requirement that the accused make a substantial preliminary showing that a false statement in the affidavit was made knowingly or recklessly does not seem unreasonable. The judge's task on an application for cross-examination must be to determine whether the accused has raised a right which is not outweighed by considerations relating to the proper administration of justice. As a general rule, this will require the accused to make a preliminary showing that false statements in the affidavit in question were made knowingly or recklessly, and that without those statements there would be insufficient grounds for the authorization and the search and seizure which the interception represents. Only if this is established, can cross-examination possibly be of value to the accused. If the statements were in fact true, cross-examination cannot avail. Moreover, even if they were untrue but believed and made in good faith and without recklessness, cross-examination cannot avail, since the reasonable belief required for a valid search and seizure or interception under the Code is present. Thus, unless the accused can make a *prima facie* showing that the affidavit contains false statements made knowingly or recklessly, he or she has not raised any real possibility that the cross-examination sought will avail him or her. In short, he or she has failed to make out an interest in cross-examining. In these circumstances, the public interest in maintaining the confidentiality of police information and avoiding unnecessary delay in the trial process is virtually certain to outweigh the accused's interest in cross-examination. In saying this, I do not suggest that the Franks test should be mechanically applied in this country, nor do I discount the possibility that a number of obvious errors might alone be sufficient to make a preliminary showing of recklessness.

It is apparent from the foregoing that I propose the same test for the Wilson application under the Code and the Garofoli application under the Charter . In my view, this is appropriate, since the same considerations arise both under the Code and under the Charter applications. Under both the Code and the Charter , it is necessary to consider whether there were reasonable and probable grounds to believe that the offence has been or is being committed. Similarly, the existence of alternative investigative procedures is relevant both under the Code, by its express language, and under the Charter in considering whether the evidence should be excluded under s. 24(2) . Moreover, the ultimate issue in each case is the same -- namely, whether the wiretap evidence should be excluded.

C. Application to the Case at Bar

I would summarize my conclusions on the issues of opening the packet and cross-examination on the affidavits found in it, as follows. The fundamental considerations in both cases are the interest of the accused in protection of privacy and a fair trial, including the right to make full answer and defence, on the one hand, and the public interest in the administration of justice, on the other. The judge in exercising his or her discretion must balance these considerations. On applications to open the packet, the balance will generally fall in favour of opening the packet, subject to editing and special concerns for the administration of justice which may arise in particular cases. On applications to cross-examine the deponent of affidavits, the balance will generally favour denial unless the accused is able to make a preliminary showing establishing the

special relevance of the cross-examination.

Turning to the facts of this case, the Court of Appeal held that the packet should have been ordered opened, subject to editing. I agree that the balance in this case between the interests of the accused and the public interest in the administration of justice mandates that conclusion.

On the question of cross-examination, the Court of Appeal satisfied itself that no such showing had been made and after reviewing the accused's allegations concluded that the proposed cross-examination would have served little purpose. As Martin J.A. wrote at p. 131:

Even if it be assumed in Garofoli's favour that he was not in Hamilton in December, 1982, that would merely show that the informant may have been mistaken as to the date of the alleged "approach". Furthermore, even if the informant lied as to the occurrence, that would not show that Officer Campbell had, in his affidavit, made a false statement knowingly and intentionally, or with reckless disregard for the truth. Similarly, even if the informant lied as to Garofoli being the "unidentified person" observed by the police on July 25, 1983, this would not show that Officer Campbell had made a false statement in his affidavit knowingly and intentionally or with reckless disregard for its truth.

I see no error in this conclusion.

It follows that the accused in this case has failed to establish that cross-examination was likely to assist him in presenting a full answer and defence. On the other hand, cross-examination posed risks of disclosure of confidential police information and of lengthening the proceedings to no purpose. In these circumstances, the balance clearly favours rejection of the right to cross-examine.

IV. Conclusion

I have expressed my views on points 1 to 6 raised in this appeal, as summarized by Sopinka J. I agree with Sopinka J.'s conclusion on point 7 and conclude that the absence of a minimization clause is not per se in violation of the Charter or Part IV.1 of the Code. I also agree with his views on whether the accused was shown to have absconded, and whether the trial judge properly cautioned the jury with respect to the evidence of accomplices (points 8 and 9).

I would dismiss the appeal.

Appeal allowed, L'HEUREUX-DUBÉ and MCLACHLIN JJ. dissenting.

Solicitor for the appellant: Keith E. Wright, Toronto.

Solicitor for the respondent: John C. Tait, Ottawa.

* Chief Justice at the time of hearing.

** Chief Justice at the time of judgment.

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