
CANADA / JUDGMENT

R. v. Lee

2002 BCSC 1912

COURT

Supreme Court of British Columbia

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Ruling on Validity of P48/99 on Voir Dire

The Honourable Mr. Justice Cullen

March 13, 2002

HER MAJESTY THE QUEEN

AGAINST

SEE CHUN LEE, GOU DIN HO, CHUK FONG TAO, WEI BO CHEN,

CHAK NAM CHAN, SIU WAH CHAU AND CHEUNG HUNG

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Place and Date of Hearing:

Vancouver, B.C.

March 13, 2002

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- [1] THE COURT: At issue is the validity of paragraphs (h) and (i) of authorization P48/99, which purport, in part, to authorize the interception of the private communications of unknown persons while in conversation with a police agent, who has consented to the interception of his communications. The paragraphs read as follows:
- (h) The private communications of the persons referred to in subparagraphs (c) and (g) above and persons as yet unknown, where reasonable grounds exist to believe that any such person is involved in any way in the commission of the offences for which this authorization is granted, may also be intercepted pursuant to this authorization when the same are intended by the originator thereof to be received by Chong Quin Tam (phonetic) [and it gives an address].

- (i) The private communications of the person referred to in subparagraph (h)(1) may also be intercepted pursuant to this authorization when the same are intended to be received by any of the persons referred to in subparagraphs (c) and (g) above and persons as yet unknown, where reasonable grounds exist to believe that any such person is involved in any way in the commission of the offences for which this authorization is granted.
- [2] In reasons filed March 1, 2002, I ruled on the validity of other relevant paragraphs of authorization P48/99 as they pertain to Lee, Ho and Wei Bo Chen. In those reasons, I detailed the background and involvement of the police agent, Chong Quin Tam, and found that the issuing judge could have found his evidence to be reliable and could have found a valid basis for the authorization as against Ho. My reasons for that ruling should be read in conjunction with these reasons for the necessary background.
- [3] The particular issue which confronts me in connection with the impugned paragraphs, is whether they are invalid because they constitute an unlawful delegation to the police of the function of the court to determine whether reasonable grounds exist to justify the interception of the private communications of "persons as yet unknown." There are no authorities which are directly on point, but there are a number of decisions, which deal with authorizations which contain "basket clauses" similar to that contained in (h) and (i), which are said to be overbroad.
- [4] One such case is *R. v. Paterson, Ackworth and Kovach* (1985), 18 C.C.C. (3d) 137 (Ont. C.A.). That case dealt with a "basket clause" in an authorization not involving a "participant interception." The impugned clause read as follows:

3(b) Authorization is also hereby given to intercept the private communications of persons whose identities are presently unknown, in accordance with the terms of this Authorization, provided that there are reasonable and probable grounds to believe that the interception of such private communications may assist the investigation of any of the offences stated in paragraph 1 above, whether or not any such person described in paragraph 3(a) above is party to such private communication.

- [5] In holding the clause to be invalid, Martin J.A., speaking for the court, said as follows:

Paragraph 3(b) of the authorization granted by Judge McCart does not restrict the interception of private communications of unknown persons to persons at particular premises as in *R. v. Samson et al* (1983), 9 C.C.C. (3d) 194. Nor does the authorization restrict the interception of private communications of unknown persons to persons who are associating with, dealing with or in contact with the named persons in respect of which the authorization is granted. In my view, the "basket clause" is invalid. It vests in the police the discretion to intercept the private communications of any or all persons if there are reasonable and probable grounds to believe that the interception of such private conversations may assist in the investigation of any of the offences specified in the authorization. That constitutes a delegation of the judge's function to the police. The judge must be satisfied that there are reasonable and probable grounds to believe that the interception, for example, of the private communications of persons at a particular place

may assist in the investigation of the offences specified in the authorization and, if so satisfied, may authorize the interception of the private communications of unknown persons at that place.

[6] R. v. Paterson was cited with approval in R. v. Thompson (1990), 59 C.C.C. (3d) 225 (S.C.C.) at p. 265 as follows:

Unlike the authorization in Grabowski, the authorizations at issue do not permit the interception of communications of anyone anywhere within the province. It is limited in location to places resorted to by certain named individuals. A basket clause which would permit interception of any persons unknown to the police at the time of the application for the authorization and which would permit the police to intercept such communications at any place provided that there are reasonable and probable grounds to believe that the interception may assist in the investigation has been held to be invalid. The basis for that decision is that such a clause vests in the police the discretion to intercept the private communications of any or all persons if there are reasonable or probable grounds to believe that the interceptions would assist in the investigations, which is the function given by statute to the issuing judge: see R. v. Paterson (1985), 18 C.C.C. (3d) 137, 44 C.R. (3d) 150 (Ont. C.A.), affirmed 39 C.C.C. (3d) 575, [1987] 2 S.C.R. 291, 60 C.R. (3d) 107. Neither paras. (c) nor (d) of the authorizations in this case is in that category. Each contains limitations. Paragraph (c) is limited to named persons. Paragraph (d) is limited to persons who resort to or use named premises or communicate with named persons. As to place, each is limited to places resorted to by five named individuals. It cannot therefore be said to delegate to the police the determination as to whether the interceptions would assist in the investigation. That was determined by the authorizing judge on the basis of the connection to the targets detailed above.

[7] In another decision, R. v. Monte, [1993] O.J. No. 4174 (Ont. S.C.), the court dealt with a "participant interception" under s. 184.2, which was found to permit interception of "any conversation with anyone in the Province of Ontario if (the police agents) are present or a party to the conversation." In finding such an authorization to be too broad, McCrae J. reasoned as follows:

In my view, this authorization is too broad. It has been said, and I agree, that it has the effect of making the agents "walking microphones." Delegating such a wide discretion to the police was never intended by the legislation. In R. v. Paterson, Ackworth and Kovach (1985), 18 C.C.C. (3d) 137 (Ont. C.A.), a differently worded authorization was found to be invalid. The principle enumerated therein applies to the authorization in the present case.

McCrae J. then quoted from the statement of Martin J.A., which I have quoted earlier in these reasons. He went on to say:

The form of the subject authorization delegates to the police using their agents the discretion to intercept any person anywhere which constitutes a delegation of the judge's function to the police.

Accordingly, McCrae J. found the basket clause at issue to be invalid.

- [8] In *Monte*, McCrae J. found an unlawful delegation of discretion, even in the absence of any language fixing the police with the ultimate discretion to determine reasonable grounds before intercepting under the authorization. In other words, he found no limitations on the discretion of the police, which is either a delegation of the judge's function to the police, or perhaps, more precisely, an overly broad power to intercept conferred by the judge on the police.
- [9] The passage from *R. v. Thompson*, *supra*, referred to above at paragraph 6, was relied on in the Matter of an Application for Warrants pursuant to s. 21 of the CSIS Act, R.S.C. 1985, c. 23 1988, 1 F.C. 420, by McGillis J. in holding a clause in a warrant sought under s. 21 of the CSIS Act invalid as an unlawful delegation of the functions assigned to a judge to a "service employee" under that section of the Act.
- [10] The warrant sought would have permitted a CSIS employee to "identify a target and make the decision to direct intrusive powers against that person." It was conceded before McGillis J. by counsel for the Attorney General of Canada that the effect of the warrant sought, if granted, would "endorse in advance decisions as to the use of certain powers that might be taken by the service during the course of the warrant." It was counsel's position, however, that the "clear parameters limiting the (impugned) clause rendered it lawful."
- [11] In ruling the impugned clause invalid, McGillis J., after reviewing the decision of Dickson J. in *Hunter v. Southam*, [1984] 2 S.C.R. 145, and quoting from the passage in *Thompson* above, concluded as follows:

Under paragraph 21.2(a) and s-s. 21.3 of the Act, it is the judge hearing the *ex parte* application for a warrant who must satisfy himself that the facts establish reasonable grounds for believing that the issuance of a warrant is required. By arrogating that function to a service employee the "visitors" clause delegates to him the statutorily mandated functions of a judge. Nothing in the Act permits the judge's function in paragraph 21.2(a) and s-s. 21.3 to be delegated. Furthermore, even if a delegation were permitted by the Act, which it is not, it would offend the minimum constitution requirement in *Hunter et al v. Southam Inc.*, *supra*, in that it would empower a service employee, who by the very nature of his position acts in an investigative and not in an adjudicative capacity to assess evidence and to apply the full range of the intrusive powers in the warrant against a person. For these reasons, I have concluded that the terms of "visitors" clause constitute an unlawful delegation to a service employee of the functions accorded to a judge under paragraph 21.2(a) and s-s. 21.3 of the Act.

- [12] There is, of course, a parallel to ss. 21.2(a) and 21.3 of the CSIS Act in the applicable legislation in the case at bar. It is s. 184.2(3)(a), (b) and (c) of the Criminal Code of Canada. The issue before me is whether the court in this case has delegated its function under s. 184.2(3)(c) to the police by virtue of paragraphs (h) and (i), or whether those paragraphs represent a legitimate minimization of an intrusion otherwise warranted by the authorization.

- [13] There is no doubt that a court can authorize the police to intercept the private communications of those whose identity and existence is unknown at the time the authorization is granted. There is also no doubt that a court can authorize the police to intercept private communications at places unknown or unidentified at the time of the authorization's issuance [see *R. v. Samson et al* (1993), 9 C.C.C. (3d) 194 (Ont. C.A.) and *R. v. Thompson*, supra]. Thus, in a general sense, there is nothing wrong with a clause in an authorization, which purports to grant to the police the authority to intercept those whose existence is unknown and at places unknown at the time of the issuance of the authorization. What is at issue is not the legitimacy of such an order, but rather the legitimacy of the method by which the scope of such an order is to be determined.
- [14] The Crown relies on *R. v. Thompson*, supra, as authority for the proposition that the court legitimately can pass on some discretion to the police to give effect to a valid order. In particular, the Crown points to a passage from the reasons of Sopinka J., in that judgment at pages 271 to 272, as follows:

To require a determination by the police officers that they have reasonable and probable grounds for believing that the place complies with the general description before an authorization is acted upon is an additional safeguard to the dictates of the section. This and the fact that the section is not attacked is conclusive against the contention that the "resort to" clause is per se contrary to the requirements of s. 8 of the Charter as laid down in *Hunter v. Southam*, supra. *Hunter v. Southam* concerned a search warrant, whereas this case concerns electronic interception. A physical search is a single event, which admits a prior authorization in its entirety. A wiretap on a telephone "resorted to" by a target is not analogous to the police taking it upon themselves to undertake a second and different search under a search warrant. It is more closely analogous to the "plain view" doctrine whereby seizure of evidence in plain view under the scope of the search as authorized, but not itself authorized, is justified. In a related matter, the appellant's submission appears to me to ignore Dickson J.'s reasoning in *Hunter v. Southam*, where he adopts, with respect to s. 8, the opinion of Stewart J. of the United States Supreme Court in *Katz v. United States* 389 U.S. 347 (1967) at p. 351 that the Fourth Amendment protects people, not places."

From the perspective of the rights of a person who is the target of the authorization, if it is reasonable to intercept the communication of a person at a specified address, it seems equally reasonable to intercept that person's communication at another place to which he resorts. Subject to what will be said about residences and pay telephones, the nature of the invasion of that person's privacy does not change with that person's location. It is the issuing judge's function to determine whether there are grounds sufficient to justify this invasion. If the judge is so satisfied, it is no invalid shirking delegation of his or her function to permit the police to conduct this surveillance at places for which there is sufficient evidence to believe the target resorts to.

- [15] It is the Crown's submission that by analogy, just as the court can delegate to the police discretion to determine where a target can be intercepted, it can also delegate, in a similar way, discretion to determine who can be intercepted. The Crown also relies on a passage by

Brooke J.A. in *R. v. Samson* in support of its submission that the court can delegate to the police the authority to intercept those of whom the grounds for interception only emerge after issuance of the authorization. That paragraph is at pages 201 to 202 of *Samson* and reads as follows:

In the circumstances of this case, a person who, during the period the authorization is in force, may use the telephone at the residence of a named suspected member of the conspiracy to traffic in methamphetamine is in such proximity or relationship to that person as to be one whose private communications the police may have reasonable grounds to believe may assist in the investigation of the offence. I think this would include anyone who may live there and indeed could include a casual visitor. For example, a tradesman who attends at the residence and while using the telephone discloses that the occupant will be out until a fixed time, or who answers an incoming telephone call and relays a message as requested by the occupant, may well have information which assists in the investigation of the offence. Further, the business of trafficking in drugs depends on suppliers, customers, and often confederates and confidants. These are not imaginary people although individually unknown to the police at the time when the application for authorization was made. They are persons who, because of a close business relationship with the named individuals, may attend at his residence and whose private communications from there may well assist in the investigation of the offence. The trial judge was wrong in concluding from the change in the wording of the section, that parliament intended to limit the power of a judge to grant an authorization which includes unknown persons, as he could have done before the amendment, because of a concern that that would amount to authorizing the interception of the private communications of imaginary people and so permit indiscriminate wire-tapping. With respect, it is sufficient to say that Part IV.1 of the Code leaves it to the judge to decide if the authorization to intercept the private communications of unknown persons should be granted, a discretion that must of course be exercised judicially having regard to the purposes underlying the legislation as stated in the cases: reference to *Goldman v. The Queen* (1981), 1 S.C.R. 976 at 994 ... and *R. v. Welsh and Iannuzzi* No. 6 at p. 11 or, p. 372 C.C.C.

And he refers to *Goldman v. The Queen*, citation given, and *R. v. Welsh and Iannuzzi*, citation given.

- [16] The Crown submits, in effect, in *Samson* it was left to the police to determine which persons fell into the categories established by the court and, hence, by analogy the discretion conferred on the police by the impugned paragraphs in the case at bar is similarly legitimate.
- [17] In my opinion, neither *Thompson* nor *Samson* provides support for the Crown's position in relation to the impugned paragraphs in the case at bar. In *Thompson*, it is clear that what was left for the discretion of the police was the place at which the authorized interceptions could take place, not the person or persons whose communications were to be intercepted. As Sopinka J. pointed out in *Thompson*, s. 8 "protects people, not places," and, accordingly, leaving it to the police to determine whether an authorized target resorted to a particular place and could be intercepted there is not akin to leaving it to the police to determine

whether a person should be regarded as a target, and thus intercepted.

[18] Insofar as Samson is concerned, although the police were granted authority to intercept persons whose identity and existence were unknown to the court when granting the authorization, that did not pass to the police the discretion to determine whose private communications were to be intercepted. Rather, it was the court which determined on the basis of the evidence before it what set or category of persons could be intercepted and in what circumstances. It was left to the police to apply the court's order to the existing circumstances, but not to determine what circumstances justified the interception of particular unknowns.

[19] In my view, it is important to bear in mind the provisions of s. 184.2(3)(c), which read as follows:

An authorization may be given under this section if the judge to whom the application is made is satisfied that

(c) there are reasonable grounds to believe that information concerning the offence referred to in paragraph (a) will be obtained through the interception sought.

[20] The impugned portions of paragraphs (h) and (i) in P48/99 are worded so as to leave any determination of the reasonable grounds referred to in s. 184.2(3)(c) in relation to unknown persons in the hands of the police, which is a discretion expressly reserved for the authorizing judge by that section.

[21] In my view, while, in the result, the scope of the basket clause portions of paragraphs (h) and (i) is not as broad as that in *R. v. Monte*, supra, or *R. v. Paterson et al*, the fact that its scope is to be determined by the police rather than the court offends s. 184.2(3)(c), and as with the proposed warrant in *Re CSIS Act*, supra, it constitutes an unlawful delegation of the court's discretion to the police.

[22] I accept the force of Ms. Devlin's argument that in determining the validity of clauses such as (h) and (i) the courts cannot be blind to the exigencies presented to the police in complex, difficult and sometimes unpredictable investigations. It seems to me, however, that a court is not prevented from granting a participant authorization that permits the interception of unknowns who may be encountered unexpectedly by police agents, provided the court can be satisfied that the interception of a certain category of unknown person or the interception of unknown persons in certain circumstances is likely to afford evidence of the offence being investigated. The proscription is not against authorizing the interception of unknowns, it is against authorizing the interception of unknowns where the court has not been satisfied there are reasonable grounds to believe the interception sought will afford evidence of the offences under investigation.

The Honourable Mr. Justice Cullen

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