

TELUS Communications Company (appellant) v. Her Majesty the Queen (respondent) and Attorney General of Ontario, Canadian Civil Liberties Association and Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (interveners)
(34252; 2013 SCC 16; 2013 CSC 16)

Indexed As: R. v. TELUS Communications Co.

Supreme Court of Canada
McLachlin, C.J.C., LeBel, Fish, Abella, Cromwell, Moldaver and Karakatsanis, JJ.
March 27, 2013.

Summary:

TELUS Communications, a wireless telephone service provider, sought to quash a general warrant obliging it to produce, on a prospective daily basis, all future text messages sent and received by two TELUS subscribers that were stored in the TELUS computer database. TELUS applied to quash the warrant, arguing that the general warrant was invalid because the police had failed to satisfy the requirement under s. 487.01(1)(c) of the Criminal Code that a general warrant could not be issued if another provision in the Code was available to authorize the technique used by police. TELUS argued that in this situation, the scheme that authorized the interception of private communications (Part VI of the Code) was available, because the investigative technique used here constituted an "intercept" within the meaning of s. 183 of the Code.

The Ontario Superior Court, in a decision reported at [2011] O.T.C. Uned. 1143, dismissed TELUS' application. TELUS appealed.

The Supreme Court of Canada allowed the appeal and quashed the warrant and the related assistance order. Abella, J., (LeBel and Fish, JJ., concurring), held that the general warrant in this case purported to authorize an investigative technique (i.e., an "intercept") contemplated by a wiretap authorization under Part VI of the Criminal Code, namely, it allowed the police to obtain prospective production of future private communications from a computer maintained by a service provider as part of its communications process. Because Part VI applied, a general warrant under s. 487.01 was unavailable. Moldaver, J. (Karakatsanis, J., concurring) agreed in the result, but found it unnecessary to resolve whether what occurred here was, strictly speaking, an intercept. Cromwell, J., dissenting, (McLachlin, C.J.C., concurring), would have dismissed the appeal on the basis the general warrant did not authorize an interception requiring a Part VI wiretap authorization and that the "no other provision" requirement of s. 487.01(1)(c) was met.

Criminal Law - Topic 3042.1

Special powers - Search warrants - When available - [See both **Criminal Law - Topic 3046**].

Criminal Law - Topic 3046

Special powers - Search warrants - Validity of - General - Section 487.01(1) of the Criminal Code provided that a judge could issue a general warrant a " ... authorizing a

peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if ... (c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done" - The Supreme Court of Canada interpreted this provision - See paragraphs 15 to 46, 54 to 108 and 160 to 195.

Criminal Law - Topic 3046

Special powers - Search warrants - Validity of - General - TELUS Communications sought to quash a general warrant obliging it to produce, on a prospective daily basis, all future text messages sent and received by two TELUS subscribers and stored in the TELUS computer database - The Supreme Court of Canada quashed the warrant - Abella, J., (LeBel and Fish, JJ., concurring), held that the general warrant in this case purported to authorize an investigative technique ("intercept") contemplated by the wiretap authorization scheme under Part VI of the Criminal Code, namely, it allowed the police to obtain prospective production of future private communications from a computer maintained by a service provider as part of its communications process - Pursuant to s. 487.01(1)(c) of the Code, where a warrant was available under another provision of the Code, in this case Part VI, a general warrant under s. 487.01 was unavailable - Moldaver, J. (Karakatsanis, J., concurring), agreed in the result - See paragraphs 1 to 108.

Criminal Law - Topic 3095

Special powers - Issue of search warrants - Conditions precedent - [See both **Criminal Law - Topic 3046**].

Criminal Law - Topic 5271

Evidence and witnesses - Interception of private communications - General principles - [See first **Criminal Law - Topic 5294**].

Criminal Law - Topic 5275.1

Evidence and witnesses - Interception of private communications - Access to recordings and transcripts of intercepted communications (incl. text messages in computer database) - [See second **Criminal Law - Topic 3046**].

Criminal Law - Topic 5294

Evidence and witnesses - Admissibility of private communications - What constitutes "interception" - The Supreme Court of Canada interpreted the word "intercept" as used in s. 183 of the Criminal Code, in relation to the interception of private communications - See paragraphs 4 to 36, 48 to 53 and 149 to 159.

Criminal Law - Topic 5294

Evidence and witnesses - Admissibility of private communications - What constitutes "interception" - The Supreme Court of Canada interpreted the word "intercept" as it was used in s. 183 of the Criminal Code, in relation to the interception of private communications - Abella, J. (LeBel and Fish, JJ., concurring), stated that "The

interpretation should be informed not only by the purposes of Part VI, but also by the rights enshrined in s. 8 of the Charter, which in turn must remain aligned with technological developments ... A technical approach to 'intercept' would essentially render Part VI irrelevant to the protection of the right to privacy in new, electronic and text-based communications technologies, which generate and store copies of private communications as part of the transmission process ..." - See paragraph 33.

Criminal Law - Topic 5294

Evidence and witnesses - Admissibility of private communications - What constitutes "interception" - The Supreme Court of Canada interpreted the word "intercept" as it was used in s. 183 of the Criminal Code, in relation to the interception of private communications - Abella, J. (LeBel and Fish, JJ., concurring), rejected a narrow definition of "intercept" - Abella, J., stated that "... A narrow or technical definition of 'intercept' that requires the act of interception to occur simultaneously with the making of the communication itself is therefore unhelpful in addressing new, text-based electronic communications. A narrow definition is also inconsistent with the broad language and purpose of Part VI ..." - See paragraphs 34 and 35.

Criminal Law - Topic 5294

Evidence and witnesses - Admissibility of private communications - What constitutes "interception" - [See second **Criminal Law - Topic 3046**].

Words and Phrases

Intercept - The Supreme Court of Canada interpreted the word "intercept" as it appeared in s. 183 of the Criminal Code, R.S.C. 1985, c. C-46, in relation to the interception of private communications - See paragraphs 4 to 36, 48 to 53 and 149 to 159.

Cases Noticed:

- R. v. Ha (M.T.) (2009), 249 O.A.C. 43; 96 O.R. (3d) 751; 245 C.C.C.(3d) 546; 2009 ONCA 340, rehd to. [paras. 17, 63, 162].
- R. v. Brand (S.) et al. (2008), 252 B.C.A.C. 108; 422 W.A.C. 108; 229 C.C.C. (3d) 443; 2008 CarswellBC 384; 2008 BCCA 94, rehd to. [paras. 17, 69, 162].
- R. v. Ford (D.M.) - see R. v. Brand (S.) et al.
- R. v. Welsh and Iannuzzi (No. 6) (1977), 32 C.C.C.(2d) 363 (Ont. C.A.), rehd to. [para. 23].
- R. v. Lyons, Prevedoros and McGuire, [1984] 2 S.C.R. 633; 56 N.R. 6; 58 A.R. 2; 15 C.C.C.(3d) 417; 14 D.L.R.(4th) 482, rehd to. [paras. 24, 68].
- R. v. Araujo (A.), [2000] 2 S.C.R. 992; 262 N.R. 346; 143 B.C.A.C. 257; 235 W.A.C. 257; 2000 SCC 65, rehd to. [paras. 28, 101].
- R. v. Tse (Y.F.A.) (2012), 429 N.R. 109; 321 B.C.A.C. 1; 547 W.A.C. 1; 2012 SCC 16, rehd to. [para. 30].
- R. v. Wong et al., [1990] 3 S.C.R. 36; 120 N.R. 34; 45 O.A.C. 250, rehd to. [paras. 33, 54].
- Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers et al., [2004] 2 S.C.R. 427; 322 N.R. 306; 2004 SCC 45, rehd to. [para. 41].
- Schreiber v. Canada (Attorney General), [1997] 2 F.C. 176; 210 N.R. 9; 114 C.C.C.(3d) 97 (F.C.A.), revd. [1998] 1 S.C.R. 841; 225 N.R. 297; 124 C.C.C.(3d) 129, rehd to. [para.

91].

Tele-Mobile Co. v. Ontario et al., [2008] 1 S.C.R. 305; 372 N.R. 157; 235 O.A.C. 369; 2008 SCC 12, refd to. [para. 127].

R. v. Cole (R.) (2012), 436 N.R. 102; 297 O.A.C. 1; 2012 SCC 53, refd to. [para. 155].

R. v. Jones (R.) (2011), 285 O.A.C. 25; 2011 ONCA 632 (C.A.), refd to. [para. 155].

R. v. Bahr (G.D.) (2006), 434 A.R. 1; 2006 ABPC 360, refd to. [para. 155].

R. v. Cross (J.G.), [2007] O.T.C. Uned. R60 (Sup. Ct.), refd to. [para. 155].

R. v. Little, 2009 CanLII 41212 (Ont. Sup. Ct.), refd to. [para. 155].

R. v. Tse (Y.F.A.), [2008] B.C.T.C. Uned. 841; 2008 BCSC 906, refd to. [para. 155].

R. v. Weir (D.T.) (2001), 281 A.R. 333; 248 W.A.C. 333; 95 Alta. L.R.(3d) 225; 2001 ABCA 181, refd to. [para. 155].

R. v. Lauda (J.M.) (1998), 106 O.A.C. 161; 37 O.R.(3d) 513 (C.A.), affd. [1998] 2 S.C.R. 683; 232 N.R. 1; 115 O.A.C. 293, refd to. [para. 162].

R. v. Noseworthy (J.) (1997), 100 O.A.C. 76; 33 O.R.(3d) 641 (C.A.), refd to. [para. 162].

Statutes Noticed:

Canadian Charter of Rights and Freedoms, 1982, sect. 8 [para. 33], sect. 24(2) [para. 82].

Criminal Code, R.S.C. 1985, c. C-46, sect. 183 [para. 25]; sect. 487.01 [para. 16]; sect. 487.01(1)(c) [paras. 17, 77, 128].

Authors and Works Noticed:

Coughlan, Steve, R. v. Ha: Upholding General Warrants without Asking the Right Questions (2009), 65 C.R.(6th) 41, generally [para. 190].

Fontana, James A., and Keeshan, David, The Law of Search and Seizure in Canada (8th Ed. 2010), p. 459 [para. 91].

Hutchison, Scott C., Hutchison's Canadian Search Warrant Manual 2005: A Guide to Legal and Practical Issues Associated with Judicial Pre-Authorization of Investigative Techniques (2005), pp. 143, 163 [para. 91].

Hutchison, Scott C., et al. Search and Seizure Law in Canada (2005) (loose-leaf updated 2012, release 2), vol. 1, pp. 16-36 [para. 91]; 16-40.3 [paras. 19, 56].

Sullivan, Ruth, Sullivan on the Construction of Statutes (5th Ed. 2008), p. 272 [para. 138].

Watt, David, Law of Electronic Surveillance in Canada (1979), p. 44 [para. 139].

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This appeal was heard on October 15, 2012, before McLachlin, C.J.C., LeBel, Fish, Abella, Cromwell, Moldaver and Karakatsanis, JJ., of the Supreme Court of Canada. The decision of the court was delivered in both official languages on March 27, 2013, including the following opinions:

Abella, J. (LeBel and Fish, JJ., concurring) - see paragraphs 1 to 46;
Moldaver, J. (Karakatsanis, J., concurring), concurring in part and in the result - see paragraphs 47 to 108;
Cromwell, J., dissenting (McLachlin, C.J.C., concurring) - see paragraphs 109 to 196.

Appeal allowed.

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