S.C.C. File No. 33751

IN THE SUPREME COURT OF CANADA

(On Appeal from the Supreme Court of Canada)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

YAT FUNG ALBERT TSE, NHAN TRONG LY, HUONG DAC DOAN, VIET BACK NGUYEN, DANIEL LUIS SOUX, AND MYLES ALEXANDER VANDRICK

RESPONDENTS

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PART I- OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. Section 184.4 of the *Criminal Code* provides a broad range of individuals with the power to intercept private communications without prior judicial authorization upon meeting a certain number of listed conditions. This power constitutes a substantial encroachment upon personal privacy and goes well beyond other warrantless emergency search powers validated by this Court. This power is extraordinary because it is without independent oversight, and it is secretive, indefinite, and paperless.

2. Section 184.4 violates section 8 of the *Charter* for the following reasons:

i. there is no requirement that an external and independent person in authority authorize the emergency interceptions;
ii. there is no requirement that the s.184.4 interceptions be made known to anyone who is intercepted, and there is no requirement that the interceptions be reported by the government;
iii. there is no time-limit on the duration of the interceptions under this power;
iv. there is no requirement that the police must take immediate steps to seek the appropriate judicial authorization under Part VI of the *Criminal Code* (s.184.2, s.186 or s.188) without delay; and
v. there is no requirement that records of any authorization process be maintained.

3. We further submit that the s.184.4 violates sections 7 and 11(d) of the *Charter*.

4. Section 184.4 cannot be saved by section 1 of the *Charter* because it does not pass any of the three parts of the *Oakes* proportionality test.

5. Section 184.4 should not be re-drafted by this court pursuant to section 52 of the *Charter*. The proper remedy is to declare s. 184.4 of no force and effect.

B. RESPONSE TO APPELLANT'S STATEMENT OF FACTS

6. In response to paragraphs 14 to 21 of the Appellant's factum, the seven affidavits provided by police forces across Canada, demonstrate that the implementation of s.184.4 by these police forces varies dramatically.

i. In the Affidavit of Lieutenant Martin Charrette (Quebec City) at Exhibit "A" there is an detailed three-page written policy in place which includes a requirement that the head of the department or his substitute authorize the interception under s.184.4 and mandates record keeping.
ii. In the Affidavit of Detective Sergeant Stéphane Dumont (City of Montreal) paragraph 3 provides that there is no internal procedure regarding the use of s.184.4.
iii. In the Affidavit of Staff Sergeant Robert Rajsic (Ontario Provincial Police, Orillia) there is no mention of a policy on record keeping. At paragraph 4, it is mentioned that an Inspector or Superintendant "traditionally" decides on the use s. 184.4 surveillance.
iv. In the Affidavit of Detective Janine Crowley (City of Toronto) at paragraph 4 the only person who can give authority to intercept under s.184.4 is a member generally ranked as Staff Inspector. There is no mention of a policy in place and no indication of record keeping.
v. Acting Detective Winston Fullinfaw (Peel Regional Police) para. 5: there are no internal policies in regard to how and when s.184.4 can be used. In practice it appears that approval from a senior officer is required. It appears that record keeping is not mandated.
vi. Staff Sergeant Dick Nyenhuis (Calgary Police) para.3 to 5: there exists a standard operating procedure; approval is required by certain members of the Electronic Surveillance Unit (ranks of Inspector, Staff Sergeant and Detective) and there is no mention of record keeping.
vii. Staff Sergeant Keith Whitton (Edmonton) paras. 3 to 6 : no written policy but appears to follow policy of OPP in Toronto, and s.184.4 requires approval from the Specialized Support Services Section Manager. It appears that record keeping is not mandated.

Exhibit "M" (on Wiretap *Voir Dire*); Police Affidavits regarding use of s.184.4 across Canada, *Record*, vol. II pages 153 -208, vol. III pages 1 - 56

7. Furthermore, in some of the affidavits the police cannot give a precise number of times that s.184.4 was invoked.

Exhibit "M" (on Wiretap *Voir Dire*); Police Affidavits regarding use of s.184.4 across Canada, *Record*, vol. II pages 153 -208, vol. III pages 1 - 56

8. Finally, although the deponents in the above-noted affidavits indicate that s.184.4 is a necessary tool in their work, they provide almost no evidence of a connection between harm reduction and s.184.4:

i. Affidavit of Lieutenant Martin Charrette (Quebec City): no evidence of importance of s.184.4 and no evidence of reduction of harm.
ii. Affidavit of Detective Sergeant Stéphane Dumont (City of Montreal): paragraph 9 – s.184.4 is an "absolute necessity". No evidence of connection between s.184.4 interceptions and reduction of harm.
iii. Affidavit of Staff Sergeant Robert Rajsic (Ontario Provincial Police, Orillia): paragraph 9 – there is a need for s.184.4. No evidence that there is a connection between s.184.4 interceptions and reduction of harm.
iv. Detective Janine Crowley (City of Toronto): there is no evidence of a connection between a s.184.4 interception and reduction of harm..
v. Acting Detective Winston Fullinfaw (Peel Regional Police): no evidence that there is a connection between s.184.4 and harm reduction.
vi. Staff Sergeant Dick Nyehnhuis (Calgary Police): paragraph 10 – in both instances s.184.4 did not assist in harm reduction.
vii. Staff Sergeant Keith Whitton (Edmonton); paragraph 7 – one possible vague instance where s. 184.4 was successfully applied to reduce harm.

Exhibit "M" (on Wiretap *Voir Dire*); Police Affidavits regarding use of s.184.4 across Canada, *Record*, vol. II pages 153 -208, vol. III pages 1 - 56

9. In response to paragraph 6 of the Appellant's Factum, the evidence is *not* that the interception can help locate the caller. The speculative answer given by Robert Laporte was that a location for the money drop off may be given. Furthermore, the Appellant's statement that interceptions can used to "pinpoint the cellular phone" is also an incorrect statement of the evidence, which contains a number of "indiscernible" statements and speaks about the cell *site* location and not the cell *phone* location. This is the only evidence in the entire record of how the police might use the evidence to locate a victim.

Transcript, *Laporte*, p. 70, ll. 17-32 at *Record*, vol. II, p.34

C. ADDITIONAL FACTS

10. The police did not advise either Mary Li or Michael Li that their phone lines were being wiretapped. The police offered no explanation for this failure.

11. None of the intercepted calls assisted the police in locating the victims of the kidnapping or in helping the captives escape. In fact, the sole use of the intercepted calls in this case was to introduce some of them into evidence against the accused at trial. Thus s.184.4 was used as evidence-gathering in this case rather than for harm reduction.

PART II – QUESTIONS IN ISSUE

12. The Respondent Tse does not take issue with the questions in issue as framed by the Appellant. However, it is submitted that the fundamental issues in this appeal are the constitutional questions stated as questions B to H in the Appellant's factum.

PART III – STATEMENT OF ARGUMENT

I/ PRELIMINARY ISSUE

A. BURDEN OF PROOF

13. The burden of proof in a *Charter* challenge generally rests on the party asserting a breach of his or her rights. However, warrantless searches are considered to be *prima facie* unreasonable, such that the onus shifts to the Crown to demonstrate that the search in question was reasonable in all of the circumstances.

Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145 at p. 160h

14. The Appellant has submitted that warrantless searches in exigent circumstances are presumptively constitutional. The cases cited by the Appellant do not support this conclusion. There is nothing in *Colarusso*, *Tessling*, *Feeney* or *Hunter* to suggest that the burden of proof should be reversed for warrantless searches obtained in exigent circumstances.

R. v. Colarusso, [1994] 1 S.C.R. 20 at p. 53c-d
R. v. Tessling, [1997] 2 S.C.R. 432 at p. 448; para. 33
R. v. Feeney, [1997] 2 S.C.R. 13 at pp 48-50; paras. 46 - 47
Hunter, supra. at pp 160 – 161

15. Furthermore, the Appellant's submissions raise the issue of who bears the onus of proving that sufficient exigent circumstances exist to make the warrantless search a constitutionally valid one. Clearly the onus of proving that there is sufficient exigency should rest with the Crown. The requirement of exigency is a factor in assessing the reasonableness of a warrantless search, and the Crown should bear the onus of proving that the exigency, as defined under s. 184.4, meets constitutional standards.

R. v. Golden, [2001] 3 S.C.R. 679 at p. 736; para. 105

16. The Appellant has attempted to distinguish *Wong* and *Duarte* from the present case (paragraph 24 of 25 of the Appellant's factum) on the basis that *Wong* is a consideration of unrestricted video surveillance and *Duarte* considers unrestricted warrantless one-party consents. The Appellant has stated that the existence of "restrictions" contained within s.184.4 serves to displace the onus. We submit that the presence of so-called restrictions in s. 184.4 provides no compelling reason for displacing the burden of proof. The onus of proving that the restrictions (on the availability of s.184.4) were met, including the exigency requirement, should remain with the Crown. There is no reason to displace the burden of proof simply because s 184.4 contains a list of requirements. The common issue in *Duarte*, *Wong*, and the present case is the assessment of the constitutionality of state intrusion into the privacy of individuals at the sole discretion of the police. The key common fact in these cases is that there has been no authorization of the search by an external and independent body.

R. v. Wong, [1990] 3 S.C.R. 36
R. v. Duarte, [1990] 1 S.C.R. 30

17. The three cases cited in paragraph 26 of the Appellant's factum have no application to the present case. These cases deal with the presumption of constitutionality in the context of the statutory interpretation of constitutional legislation that may be amenable to various readings. They do not address the issue of the burden of proving constitutionality when considering a breach of the *Charter*.

Re Application under s 83.28 of the Criminal Code, [2004] 2 S.C.R. 248
at pp 269 – 270; para. 35
R. v. Mills,[1999] 3 S.C.R. 668 at p. 711; para. 56
Ontario v. Canadian Pacific, [1995] 2 S.C.R. 1031 at pp 1058 – 1059; para. 21

18. Furthermore, in response to paragraphs 26 to 29 of the Appellant's factum, a close review of the Parliamentary debates in regard to Bill C-109, and Bill C-109 itself, suggests that only certain portions of the Bill respond to this court's decisions in *Wong*, *Duarte* and *Wiggins*.

Section 184.4, in particular, does not *give effect* to the concerns raised in *Wong*, *Duarte* and *Wiggins*.

R. v. Duarte, supra.
R. v. Wong, supra.
R. v. Wiggins, [1990] 1 S.C.R. 62

19. In any event, this court has stated, in the context of the Crown's burden of proof under section 1 of the *Charter* that the mere fact that the legislation being examined represents Parliament's response to a decision of this court does *not* militate for or against deference.

Canada (Attorney General) v. JTI-MacDonald Corp., [2007] 2 S.C.R 610
at pp 621 - 622

20. *Duarte* is important and relevant to the assessment of the present case because it sets the constitutional standard for intrusions by the state into the privacy of citizens. The only distinguishing feature with the present case is the situation of urgency, which we submit can be addressed within the context of the *Duarte* safeguards, and which we will elaborate on further herein.

B. PRESUMPTION OF PROPER IMPLEMENTATION

21. In response to the Appellant's submission, the Respondent Tse does not take any issue with the proposition that, for the purpose of *Charter* analysis, one assumes that s.184.4 had been properly implemented by the police.

II/ SECTION 8 OF THE CHARTER

22. The Respondent Tse's primary position is that s.184.4 is an unreasonable search and seizure law that infringes s.8 of the *Charter* and that it cannot be saved by s.1 of the *Charter*.

A. PRIVACY RIGHTS UNDER SECTION 8 OF THE CHARTER

1. The right to privacy under s. 8 of the Charter

23. Section 8 of the *Charter* provides that:

"Everyone has the right to be secure against unreasonable search or seizure."

24. This court has stated that the purpose of section 8 is to ensure that an individual's right privacy is free from unreasonable state interference.

Hunter, supra. at pp 157 – 158

25. This court further stated that an assessment under s.8 of the *Charter* must be made to determine whether the privacy interest of the public must "give way" to the government interest in law enforcement. The court in *Hunter* went on to consider when the assessment is made; by whom the assessment is made; and on what basis the assessment is made.

Hunter, supra. at p. 159i – p. 160b

2. A System of Prior Judicial Authorization

26. In balancing the interests of individual rights in privacy against government law enforcement, it is essential that unjustified searches are prevented before they happen. This can only happen, as Mr. Justice Dickson said in *Hunter,* by a "system of prior authorization, not one of subsequent validation." Where it is feasible to obtain prior authorization, he held that such authorization is a pre-condition for a valid search and seizure.

Hunter, supra. at p. 160c – p. 161a

27. In order for an authorization to be meaningful, it is necessary for the person authorizing the search to be able to assess the conflicting interests of the state and the individual in a neutral and impartial manner.

Hunter, supra. at p. 162a

28. In *Hunter*, Dickson J. held as follows:

> "The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests o the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorization to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether the standard has been met, in an entirely neutral and impartial manner....The person performing this function need not be a judge, but he must at a minimum be capable of acting judicially."

Hunter, supra. at p. 161j – p. 162d

29. The precondition of prior judicial authorization was reaffirmed by this court in the *Duarte* decision.

Duarte, supra. at p. 45a – p. 46c

3. Electronic surveillance and s. 8 of the Charter

30. There is no doubt that electronic surveillance constitutes a "search and seizure" within the meaning of s.8 of the *Charter*. The decision in *Duarte* is relevant to the present case in that it concerned rights under s.8 of the *Charter* in the context of electronic recordings of conversations between individuals and the police or informers in the absence of judicial authorization. This court described the issue it had to decide to be whether the risk of warrantless surveillance may be imposed on all members of society at the sole discretion of the police. The court held that it was "obvious" that as a general proposition the surreptitious electronic surveillance of the

individual by an agency of the state constitutes an unreasonable search or seizure under s.8 of the *Charter.*

Duarte, supra, at p. 42f – j

31. Mr. Justice La Forest recognized in *Duarte* the immense danger posed by electronic surveillance by the state to individual privacy, and underscored that the regulation of electronic surveillance was important to protect the public from the "insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words":

> "If one is to give s.8 the purposive meaning attributed to it by Hunter v. Southam Inc., once can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance and to which, in consequence, the protection accorded by s.8 should be more directly aimed..."

Duarte, supra. p. 43d – p. 44g

32. The implications of allowing the police to conduct warrantless surveillance undermines the expectations of privacy of individuals living in a free society.

Duarte, supra. p. 53f – i

33. This point was emphasized just as forcefully in the case of *Wong*. At issue in *Wong* was whether s. 8 protected against warrantless surreptitious *video* recording in a hotel room being used for illegal gambling. The court divided on the issue of whether the accused had a reasonable expectation of privacy in the room. The majority ruled that he did and went on to examine the nature of the intrusion on his privacy. The court approached the issue by asking whether the nature of unauthorized surveillance would diminish privacy rights to a point inconsistent with the aims of a free and open society. *Duarte* decided that unauthorized *audio* surveillance would diminish the right to privacy to an unacceptable level. In keeping with the principles enunciated in *Duarte*, the court in *Wong* found that unauthorized *video* surveillance at the discretion of the police is equally unacceptable. In so doing, the court had this to say:

> When the intrusion takes the form unauthorized and surreptitious audio surveillance, *R. v. Duarte* makes it clear that to sanction such an intrusion would see our privacy diminished in just such an unacceptable manner. While there are societies in which persons have learned, to their cost, to expect that a microphone may be hidden in every wall, it is the hallmark of a society such as ours that its members hold to the belief that they are free to go about their daily business without running the risk that their words will be recorded at the sole discretion of agents of the state.
>
> *R. v. Wong*, [1990] 3 S.C.R. 36 at p. 44h – p. 47h

34. In *R. v Thompson*, [1990] 2 S.C.R. 1111 at p. 1166 Mr. Justice La Forest J. (dissenting) made the following relevant statements about the interception of electronic surveillance which he contrasted with other searches and seizures:

> "It is important as well to underline the specially intrusive nature of this kind of search. As noted, I am in full agreement with Goodman J.A. who in *R. v. Playford*, supra, at p. 143, expressed the opinion that the interception of private communications is a more serious intrusion on privacy than a conventional search or seizure. As J.G. Carr in The Law of Electronic Surveillance, 2nd ed. (1986), at pp. 2-20 and 2-20.1, points out, an electronic search is a secret search, one that usually affects more persons, and lasts for substantially longer periods than conventional searches. And since at the moment of authorization the things to be seized are neither tangible nor in existence, electronic searches are indiscriminately acquisitive. As Carr puts it, at pp. 2-28 and 2-29:
>
> > With electronic searches nothing may be known about many of the persons who may be overheard. As conversations of unknown individuals are intercepted, the electronic surveillance resembles a random stop-and-search, without probable cause, of every person who appears in the company of some known person who is suspected of being involved in criminal activity.
>
> Moreover, unlike conventional searches in which it is relatively easy to determine whether the object of the search has been found, electronic searches have the potential to last long after incriminating evidence has been intercepted or to continue at a time when there can no longer be probable cause for presuming that interceptions will in fact produce such evidence. In *R. v. Duarte*, at p. 43, this court observed that "one can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance and to which, in consequence, the protection accorded by s. 8 should be more directly aimed".

35. This court has held that the interpretation of the constitution must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary as the guardian of the constitution must bear these realities in mind. Therefore perspective in approaching constitutional documents is warranted.

Hunter, supra. at p. 155c – p. 156a

36. Section 184.4 was enacted in 1993. Since then, technology has produced a number of means by which the public is more vulnerable to invasions of privacy. For example, there is now extensive use of the internet, cell phones, cell phone cameras, smartphone devices, email, social networking, which have all contributed to the public's words and actions being more readily open to intrusions of privacy.

37. Thus we live in a technological world where the four walls of the castle no longer exist. The principle of the sanctity of the dwelling needs to be expanded to recognize this technological reality and that our privacy has been dispersed beyond the home. Electronic surveillance takes full advantage of the technological world we live in and casts a far wider net in terms of the privacy rights it breaches than it did in 1993.

38. Our privacy is now more vulnerable than ever and requires more protection from the courts. Following upon the statements of Mr. Justice Dickson in *Hunter*, we submit that this court must recognize this new social reality. In the face of this vulnerability there must be more limitations placed on the state in its ability to intrude on individual privacy.

B. INTERPRETATION OF SECTION 184.4 OF THE CRIMINAL CODE

39. Section 184.4, titled "Interception in Exceptional Circumstances", provides that a "peace officer" may intercept a private communication where:

> "(a) the peace officer believes on reasonable grounds that the urgency of the situation is such that an authorization could not, with reasonable diligence, be obtained under any other provision of this Part;
>
> (b) the peace officer believes on reasonable grounds that such an interception is immediately necessary to prevent an unlawful act that would cause serious harm to any person or property; and
>
> (c) either the originator of the private communication or the person intended by the originator to receive it is the person who would perform the act that is likely to cause the harm or is the victim, or intended victim, of the harm."

40. Section 184.4 must be considered in the context of Part VI and other provisions of the *Criminal Code*. Part VI of the *Code*, titled "Invasion of Privacy", provides a framework for the circumstances under which the state may intercept private communications.

41. Within this legislative scheme, a judicial authorization may be obtained pursuant to s. 186 (in combination with s. 185) in order to intercept private communications (typically police eavesdropping without the knowledge of any of the participants in the conversation) or s.184.2 to intercept one party consent communications (one of the parties is aware of the fact of the interception, typically an undercover police officer or an agent for the police). The more invasive power under s.186, has a more stringent test as it includes the requirement of investigative necessity.

42. The legislature has recognized that there may be urgency to obtaining a judicial authorization. For that purpose, s.188 allows for urgent applications for a s.186 authorization to specially appointed judges. Also, s. 184.3 allows for applications under s.184.2 to be made by telephone where it is "impractical" to appear in person. We submit that "impracticality" includes "urgency".

43. We note that in other "impractical" situations, "telewarrants" are obtainable under s. 487.1 of the *Criminal Code* (for a search warrant or a warrant for a blood sample in an impaired driving case) and s. 529.5 of the *Criminal Code* (warrant to enter a dwelling house; warrant to enter a dwelling house in order to arrest or apprehend a person).

44. We note also that the legislature has recognized the importance of maintaining a record of the interceptions obtained by the state pursuant to an authorization. Under s. 195, the Minister of Public Safety and Emergency Preparedness is required to prepare an annual report in regard to s.186 and s. 188 authorizations. Furthermore, s. 196 provides that those persons whose private communications have been intercepted under s. 186 must be notified that they have been the object of such interception.

45. Finally, section 187 provides that for all applications for authorizations under Part VI, the documents relating to the applications shall be kept in the custody of the court as a package of materials to which limited access is given.

C. WHETHER S. 184.4 OF THE CRIMINAL CODE INFFRINGES SECTION 8 OF THE CHARTER

1. Constitutional safeguards absent from s. 184.4

46. We submit that, taking into account Parliament's legitimate concern to prevent serious harm in exigent circumstances, the following safeguards are absent in s. 184.4, thus rendering this provision unconstitutional:

a) there is no external approving authority, thus the police is the sole arbiter of its actions;
b) there is no requirement that the s.184.4 intercept be made known to anyone who has been intercepted and no requirement that the intercept be reported by the government, thus the interceptions are secretive and remain so indefinitely;
c) there is no time limit on the availability of a s.184.4 intercept, thus making the duration of the interception indefinite;
d) there is no requirement that the police take immediate steps to seek judicial authorization without delay under Part VI, thus unreasonably expanding the availability of s.184.4; and
e) there is no record-keeping requirement, thus there is no ability to review the decisions of the police in invoking s.184.4.

47. For the purpose of its examination of the participant surveillance (one party consent) provision at issue in *Duarte*, this court proceeded on the basis that Parliament had included a number of safeguards in Part IV.1 (the predecessor to Part VI) in order to make the predecessor to a s. 186 interception constitutionally valid. The *Duarte*-safeguards include the safeguards we have submitted in paragraph 46 above. The *Duarte*-safeguards are listed as follows:

> Part IV.1:
>
> (a) stipulates that authorizations for electronic surveillance are to be given only on a showing that there is no real practical alternative;
> (b) sets strict limits on authorizations as set out in s.178.13(e) [now s. 186(4)(e)];
> (c) prescribe that a judge may include any conditions and restrictions that he considers advisable in the public interest;
> (d) authorizes renewals only on a showing of cause and detailing of all interceptions made prior to the request for the authorization and the number of previous authorizations;
> (e) mandates that notification be given to the person whose communications have been intercepted;
> (f) requires that the Solicitor General of Canada prepare a comprehensive report on all electronic surveillance;
> (g) engages the responsibility of the Attorney General of the province in which the application is sought or of the Solicitor General (or duly-appointed agents); and
> (h) provides that authorizations may issue only on the order of a superior court judge.
>
> *Duarte, supra.* p. 55e – p. 56e

a) No external approving authority

48. An external approving authority is required to protect the privacy rights of the public. This is clear in *Hunter* where the court examined s. 8 in the context of balancing the competing interests of privacy and law enforcement. Within the context of Part VI, the protection of privacy rights is implicit in the requirement under s. 186 that "it would be in the interests of the administration of justice" to authorize the interception. An authorization under s. 184.2 requires that the external approving authority can impose terms and conditions which are "advisable in

the public interest" (s. 184.2 (4) (d)). In contrast, the police are not required to consider privacy interests when invoking s. 184.4.

49. An external approving authority is required to weigh the privacy interests at the outset, before a breach of s.8 of the *Charter* occurs. An external approving authority is also required to ensure that the police are accountable for their decisions and actions. Furthermore, an external approving authority can ensure neutrality, impartiality and objectivity when making the decision to intrude upon privacy rights.

50. From a practical standpoint, there is no evidence that an external approving authority would take more time to authorize an intercept than a police officer seeking approval from a superior. We submit that a telewarrant is a feasible option to the exigency of the circumstances. Parliament has already recognized that telewarrants can be resorted to in cases of urgency. Moreover, recognizing the urgency of the situation, an external approving authority does not need to be a superior court judge. It could be a provincial court judge or a judicial justice of the peace, who is available to the police on a rotating 24 hour basis. In the final analysis, the police can phone an external approving authority and make a brief statement explaining why a s.184.4 intercept is necessary.

b) No notice or reporting requirement

51. Section 184.4 allows for secretive and indefinite interceptions. There is no requirement that the state advise a person who has been intercepted of the fact of the interception at any time whatsoever. It would no doubt be unsettling for any member of the community to contemplate that the police may have been eavesdropping on his or her conversations and not know about it. This unease impacts the security of the person. For a person to feel secure in the community, that person needs to at least believe that the state has not been secretly intercepting his or her private conversations.

52. It is of relevance that Parliament found this notice requirement important by enacting s.196 with respect to the notification of persons who have been intercepted under a s.186 authorization. We submit that the failure by Parliament under s.184.4 to require that anyone who has been intercepted under s.184.4 be notified of the interceptions violates s.8 of the *Charter*. It is true that the fact of a s. 184.2 interception need not be disclosed to the person who has been intercepted. However, a s. 184.2 intercept is overseen by an external approving authority who may impose terms and conditions advisable in the public interest. One such term or condition would be to notify the person whose communications have been intercepted.

53. Parliament has also recognized the importance of keeping track of the instances of s.185 and s. 188 authorizations by requiring the government to file an annual report in regard to these applications. There is no such requirement in regard to s.184.4. There is even more reason for such a requirement in the case of s.184.4 interceptions because this power is so secretive and there is no external authority reviewing this power. Thus we can be informed as a society as to the extent to which the police intrude upon privacy interests. It may be that the police have good reason to intrude upon these interests. But before the public can agree with those reasons, they need to know at least the extent of the intrusions. Therefore, the failure to require reporting of s.184.4 instances violates s.8 of the *Charter*.

c) No time-limit on the availability of s.184.4

54. The fact that there is no time limit condition on the interception under s.184.4 means that the interception could be indefinite and still be lawful. It is counterintuitive for there to exist an indefinite power to intercept which is based on exigency. By definition exigent circumstances are circumscribed. It is necessary to have a time-limit on any invasion of privacy, otherwise, the invasion is unjustifiably egregious. If privacy rights are to be protected, there needs to be a limit on the extent to which the rights are intruded upon. The law must recognize that the circumstances upon which an initial intrusion into privacy was sanctioned will change.

55. We submit that an indefinite warrantless interception of private communications constitutes a breach of s.8 of the *Charter*.

d) No requirement that the police take immediate steps to seek appropriate judicial authorization without delay

56. For the reasons mentioned above in regard to the lack of a time-limit, the fact that there is no requirement that the police take immediate steps to seek a judicial authorization violates s.8 of the *Charter*.

e) No record-keeping requirement

57. There is no record-keeping requirement under s.184.4 unlike s. 187 which provides that for all applications for authorizations under Part VI, the documents relating to the applications shall be kept in the custody of the court. Therefore, under s.184.4, there is no ability for an individual to examine the basis upon which the police intruded upon the privacy of the community, and monitor the actions of the police. We submit that this failure by Parliament under s.184.4 to require at least some form of record-keeping, supports a finding that s.184.4 violates s.8 of the *Charter*.

2. Response to Submissions of the Appellant in regard to section 8 (paragraphs 52 to 62 of the Appellant's factum)

58. The Appellant has submitted (paras. 56 to 62 of Appellant's factum) that s.184.4 is consistent with three other categories of exigent search powers: 1) "hot pursuit" cases; 2) entries after 911 calls; and 3) strip searches and other searches incident to detention. We submit that the jurisprudence with respect to these three other search powers is distinguishable and of no assistance:

i. Firstly, these cases address circumstances where the intrusion into privacy is open and in plain view, and where the parties involved are aware of state intrusion on privacy. In contrast, under s.184.4 the intrusion into privacy is secretive and there is no reporting requirement of any kind.

ii. Secondly, the cases of referred to by the Appellant involve a singular instance of police intrusion into privacy. In contrast, under s. 184.4, the intrusion may be indefinite. We repeat the words of Mr. Justice Laforest in *Duarte* that "one can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance".

iii. Thirdly, the connection between the invasion of privacy and the police objective to prevent harm is clear in the three categories referred to by the Appellant. This connection is tangible, and before the eyes of the police officer seeking to prevent the harm. In contrast, the connection between the invasion of privacy and harm prevention under s. 184.4 is speculative and only a remote possibility.

iv. Fourthly, in these cases there is no alternative available for the police other than to intrude upon the privacy. In contrast, under s.184.4, and as we have suggested above, a mechanism providing for external and independent authorization is a feasible alternative (eg. by telewarrant).

v. Finally, the cases relied upon by the Appellant have not been subject to proper scrutiny by this court under s.8 of the *Charter*.

Duarte, supra. at p. 43c – e ; p 44c – p. 45a

a) "Hot pursuit" cases

59. The Appellant relies upon *Macooh* and *Feeney*. Both these cases deal with the common law arrest powers of the police. In neither of these cases was the common law power of arrest subject to scrutiny by this court under s.8 of the *Charter*. Therefore privacy interests were not properly examined and weighed against the police's powers of law enforcement. These cases are of no assistance to the issues before the court.

R. v. Macooh, [1993] 2 S.C.R. 602

R. v. Feeney, [1997] 2 S.C.R. 13

60. The narrow issue decided by the court in *Macooh* was that the common law power to enter a dwelling in circumstances of hot pursuit extended to arrests for non-indictable offences.

The common law power of hot pursuit is distinguishable from the powers under s.184.4, in that the intrusion is in the open and circumscribed spatially and temporally to one occasion and one place. The connection between the intrusive search and the objective of the search is direct and obvious. In contrast, the connection between the interception of electronic private communications and the stated objective of reduction of harm is dubious. On the evidence tendered by the Appellant, as summarized herein at paragraphs 8 to 9 in regard to how s.184.4 meets its objective, there is only one instance of a possible connection between the interceptions and the prevention of harm. Furthermore, in these hot pursuit cases, the police have no alternative measures to resort to under the circumstances.

Macooh, supra, at p. 820

61. In the case of *Feeney* this court found that the requirements for hot pursuit were not met because the underlying grounds for a warrantless arrest were not present. The issue of exigent circumstances justifying a warrantless entry meeting constitutional scrutiny were not addressed by the majority.

Feeney, supra. at pp 49 – 50

b) Entries after 911 calls

62. The only 911 case referred to by the Appellant is *Godoy*. Like the arrest cases, the police conduct in *Godoy* was in the open, as well as temporally and spatially limited to one instance and one location. In this sense, the invasion of privacy is markedly distinct from unfettered, indefinite, secretive eavesdropping by the police under s.184.4.

63. In the situation of police entry into a residence to investigate a 911 call, the connection between the intrusive search and the objective of the search is direct and obvious.

64. In *Godoy,* the police had no alternative other than to enter the residence to prevent potential harm. In contrast, other reasonable alternatives to s.184.4 powers exist which would not affect the potential to reduce the imminent harm.

R. v. Godoy, [1999] 1 S.C.R. 311

c) Strip searches and other searches incident to detention

65. In *Golden,* the police strip-searched the accused outside the police station. The court found that the strip search outside the police station was unconstitutional because it did not fall within the limited exigent circumstances, namely: a demonstrated necessity and urgency to search for weapons that could be used to threaten the safety of the accused, the officers and other individuals. Under this principle of permitted warrantless conduct, an accused would be fully aware of the nature of the intrusion. The violation of privacy would be limited to the accused, and would be spatially and temporally circumscribed. The scope of permissible conduct at common law involves a clear connection between the search of the accused and the objective to prevent harm to police officers and others. Furthermore there would be no alternative available to the police other than to engage in this permitted type of warrantless search.

Golden, supra. at pp. 734-735; para. 102

66. The same principles enunciated in paragraph 55 above, apply to the searches in *Mann* and *Clayton.*

R. v. Clayton, [2007] 2 S.C.R. 725
R. v. Mann, [2001] 3 S.C.R. 59

67. In paragraph 52 of its factum, the Appellant refers to "this court's extensive jurisdiction on s. 8 in exigent circumstances". In support of this proposition, the Appellant cites only *Tessling* and *Feeney.* The Respondent Tse disagrees with the submission that there is "extensive

jurisprudence" in the area of s.8 of the *Charter* of direct application to this case. *Tessling* is readily distinguishable on the basis that it deals with the use of a thermal imaging device to take photos of a person's home. In that case, this court specifically held that the information obtained through the current stage of technology was "mundane" and that the technology was "non-intrusive". The court found that there was no expectation of privacy in that case. This can be easily contrasted to the information obtained as a result of electronic surveillance which has been found by this court to be at the high end of invasiveness.

Tessling, supra, p. 456; para 55 and p. 459; paras 62 – 63

68. Similarly, *Feeney* is a case dealing with the police's powers of arrest, and warrantless entry onto property in exigent circumstances incidental to the power of arrest, which has little bearing on the present case.

69. In response to paragraphs 53 and 54 of the Appellant's factum, it is evident from the seven affidavits filed by the Crown in these proceedings, and referred to herein at paragraphs 6 to 7, that there is an inconsistent practice in the implementation of s.184.4 across the country.

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D. SECTION 1 ANALYSIS

70. Section 1 of the Charter provides:

> "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

71. The phrase "demonstrably justified" puts the onus of justifying the limitation on a right or freedom set out in the *Charter* on the party seeking to limit the right or freedom.

Hunter, supra, p. 169h

72. This court has held that violations of s.7 and s.8 can be saved under s.1 only in exceptional circumstances.

R. v. Lavallee, [2002] 3 S.C.R. 209 at p. 247; para. 46
R. v. Heywood, [1994] 3 S.C.R. 76 at p. 802h – i

73. The proportionality requirement of the *Oakes* test has three parts: (1) the existence of a rational link between the measures under review and the objective; (2) a minimal impairment of the right or freedom; and (3) a proper balance between the effects of the limiting measures and the legislative objective. We submit that s.184.4 does not meet any of these three parts of the proportionality requirement.

1. Rational Connection

74. We disagree with the submission at paragraph 81 of the Appellant's factum that the constitutional record readily establishes the rational connection between intercepting communications and preventing harm.

75. In fact, the Appellant tendered seven affidavits from police officers across the country who basically stated that s.184.4 was vital to their investigative work, and yet failed to provide almost any evidence to demonstrate that the use s.184.4 intercepts resulted in harm reduction. Thus the Appellant had failed to show a rational connection between intercepting communications and preventing harm.

76. This court has stated that sometimes the connection between the objective of a law and the measure used to obtain the objective is self-evident or that there is a "common sense connection". In the present case there is no "common sense connection" between s.184.4 interceptions and harm reduction. In fact, the Appellant has been unable to articulate how exactly a s.184.4 intercept allows the police to locate a hypothetical kidnapping victim.

RJR-McDonald Inc v. AG of Canada [1995] S.C.R. 199 at p. 290 – 292

2. Minimal Impairment

77. Although the courts accord some deference to Parliament under this part of the *Oakes* test, the Appellant has not discharged its burden of demonstrating that s.184.4 impairs the right to privacy as little as possible. The Appellant has made no submissions as to whether there are alternative means of achieving the objective that are available to Parliament.

78. In the legislative debates on Bill C-109, the Canadian Bar Association presented a workable option to Parliament that s.188 of the *Criminal Code* permits police officers to obtain an emergency authorization on short notice. The Appellant could have shown in the case at bar that s.188 was not feasible in urgent situations, and in that regard could have, for instance, adduced evidence that the s.188 option would take more time. The Appellant failed to do so.

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79. There is no evidence that other less intrusive measures were unavailable to Parliament when it enacted s.184.4. The Appellant therefore fails this part of the proportionality test, and has not discharged its burden under s.1 of the *Charter*.

80. As already mentioned there are other alternatives available to Parliament that would result in minimal impairment.

3. Balance between Effects and Legislative Objective

81. For the reasons set out above, there is no proper balance between the effects of the limiting measures and the legislative objective. There is a significant imbalance between the effect of the measure (pervasive intrusion into privacy through indefinite and secretive

interceptions of the public) and the legislative objective (harm reduction). The Appellant therefore also fails this part of the s.1 test.

III/ SECTION 7 OF THE CHARTER

82. We submit that s.184.4 violates s. 7 of the *Charter* because it is both vague and overbroad.

83. We submit that the following terms are vague and/or overbroad:

"peace officer"

This term is defined in the *Criminal Code* and contains a list of people which reaches beyond the objective of s. 184.4. If the objective of s. 184.4 is to reduce serious harm in the context of criminal conduct, then it is the police (and perhaps other law enforcement agencies, such as customs officers) who have the responsibility to investigate those circumstances. The list of people in within the term "peace officer" includes people who do not have any expertise or training in law enforcement. A "peace officer" who might invoke s. 184.4 would need to be able to decide "urgency" and to exercise "reasonable diligence". Only a police officer can gauge what is "urgency" within the context of criminal conduct. Only a police officer can exercise "reasonable diligence" because only a police officer would be familiar with the alternatives under Part VI of the *Criminal Code*;

"unlawful act"

This term is not defined, and is therefore overly broad and includes acts which do not contain an element of harm.

"serious harm"

This term is vague in regard to the notion of property. One usually speaks about "damage" to property and harm to persons.

IV/ SECTION 11(d) OF THE CHARTER

84. Section 11(d) of the *Charter* provides the accused with a right to a fair trial. As mentioned above in these submissions, s. 184.4 is deficient in that there is no legislative requirement to make and maintain a record of the basis upon which s. 184.4 was invoked by the police. The absence of any record of how or why the police decide to invoke s. 184.4 or of how the police implement s. 184.4 deprives an accused of the ability to challenge the basis upon which the police make decisions to invoke s. 184.4 or to challenge the manner in which they implement s. 184.4.

85. We submit that legislation which deprives the accused of the means to challenge the basis upon which the accused is tried is an infringement of s. 11(d) of the *Charter*.

V/ SECTION 184.4 IS OF NO FORCE AND EFFECT PURSUANT TO SECTION 52(1) OF THE CHARTER

86. Section 52(1) of the *Charter* provides:

> "The Constitution of the Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

87. The first step in choosing an appropriate remedy under s. 52(1) of the *Charter* is to define the extent of the impugned law's constitutional inconsistency. This involves an assessment of the manner in which the law violates the *Charter* and the manner in which it fails to be justified under s. 1.

Schachter v. Canada, [1992] 2 S.C.R. 679 at p. 702g

88. After determining the extent of the inconsistency, the court turns to determining what the appropriate remedy is under the circumstances. In that regard, this court can either strike down the legislation in its entirety, or it can use the technique of severance or reading in.

Schachter, supra, p. 695

89. In *Schachter*, this court held that "reading in" under s. 52(1) of the *Charter* would be warranted only in the clearest of cases, and only where each of the following three criteria are met:

> A. the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s.1 argument, and severance or reading in would further the objective, or constitute a lesser interference with that objective than would striking it down;
>
> B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and,
>
> C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.

Schachter, supra. p. 717j – p. 718 d

90. In *Hunter* the court found that insofar as the *Combines Investigation Act* does not specify minimum standards consistent with s.8 of the *Charter*, the court will not read the appropriate standard into the provisions. It is the legislature's responsibility to enact legislation which complies with the *Charter* requirements:

> "In the present case, the overt inconsistency with s. 8 manifested by the lack of a neutral and detached arbiter renders the appellant's submissions on reading in appropriate standards for issuing a warrant purely academic."

Hunter, supra, at p. 168i - j

91. It should not fall on the courts to fill in the details that will render legislative lacunae constitutional. Any law that is inconsistent with the provisions of the Constitution, is to the extent of the inconsistency, of no force and effect. In *Hunter* the court found that certain sections of the *Combines Investigation Act* were inconsistent with the *Charter* and of no force and effect, because of their failure to specific an appropriate standard for the issuance of warrants and for their designation of an improper arbiter to issue them.

1. Extent of the Inconsistency

92. The inconsistency between s.184.4 and s.8 of the *Charter* is extensive because the provision lacks the various safeguards identified in paragraph 46 herein. Furthermore, as we have submitted herein, s.184.4 fails all three parts of the proportionality test under s.1. Accordingly, the extent of the inconsistency of the legislation with the *Charter* should be defined broadly.

2. Appropriate Remedy

93. We submit that the appropriate remedy in the present case is to strike down s.184.4 in its entirety, because otherwise the court would be required to read-in the following in order to render s.184.4 constitutionally valid:

a. a provision for an external approving authority, who would have the power to impose terms and conditions on the interception of private communications;
b. a requirement that all persons who have been intercepted be notified;
c. a requirement that the interceptions be reported by the government;
d. a time limit on the availability of the interception;
e. a requirement that the police seek judicial authorization without delay; and
f. a requirement that records be kept of the process by which the interception is approved.

94. We submit that reading in the above would not meet the three-part test set out in *Schachter*. The second part of the test is not met because, as in *Hunter*, reading in all the

constitutional requirements would result in an intrusion by this court on the legislative domain. For instance, it is clear that Parliament decided that a peace officer could approve the s.184.4 intercept. To read in the external approving authority would require the court to intrude on the legislative domain.

95. Similarly, we submit that the third part of the *Schachter* test is not met. It is self-evident that a reading in of the above requirements would substantially intrude into legislative budgetary decisions.

96. We note that the Appellant has only requested that the court read-in a notice requirement and that the court read down the definition of "peace officer".

97. For all of the above reasons, s.184.4 should be struck down.

PART IV: SUMISSION CONCERNING COSTS

98. The Respondent Tse makes no submission on costs.

PART V: ORDER SOUGHT

99. The Respondent Tse asks that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Simon Buck
Counsel for Tse

Dagmar Dlab
Counsel for Tse

DATED this 20th day of September, 2011 at Vancouver, British Columbia.

PART VI: TABLE OF AUTHORITIES

PART VII: LEGISLATION AT ISSUE

1. *Criminal Code* Part VI and sections 487.1 and 529.5