S.C.C. File No. 33751

IN THE SUPREME COURT OF CANADA

(On Appeal from the Supreme Court of British Columbia)

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

AND:

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION AND CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

FACTUM OF THE RESPONDENT, NHAN TRONG LY

Solicitor for the Respondent, Nhan Trong LY:

BRENT V. BAGNALL *Counsel*
Barrister & Solicitor
420 – 625 Howe Street
Vancouver, BC V6C 2T6
Tel: 604-687-4288
Fax: 604-687-4299

Ottawa Agents for the Solicitor for the Respondent, Nhan Trong LY:

BRIAN A. CRANE, Q.C.
Gowling Lafleur Henderson LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: 613-233-1781
Fax: 613-788-3433
Email: brian.crane@gowlings.com

Solicitor for the Respondent, Yat Fung Albert TSE:

SIMON R. A. BUCK & DAGMAR DLAB *Counsel*
Wilson Buck Butcher
400 – 744 W. Hastings Street
Vancouver, BC V6C 1A5
Tel: 604-684-4751
Fax: 604-684-8319
Email: sbuck@wbbslaw.com

Ottawa Agents for the Solicitor for the Respondent, Yat Fung Albert TSE:

BRIAN A. CRANE, Q.C.
Gowling Lafleur Henderson LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: 613-233-1781
Fax: 613-788-3433
Email: brian.crane@gowlings.com

Solicitor for the Appellant:

TREVOR SHAW & SAMIRAN LAKSHMAN *Counsel*
Criminal Appeals
Ministry of Attorney General
6th Floor – 865 Hornby Street
Vancouver, BC V6Z 2G3
Tel: 604-660-4219
Fax: 604-660-3433
Email: Trevor.Shaw@gov.bc.ca

Ottawa Agents for the Solicitor for the Appellant:

ROBERT HOUSTON, Q.C.
Burke-Robertson
70 Gloucester Street
Ottawa, ON K1P 0A2
Tel: 613-236-9665
Fax: 613-235-4430
Email: rhouston@burkerobertson.com

Solicitor for the Respondent, Viet Bac NGUYEN:

HOWARD RUBIN, Q.C. *Counsel*
Howard Rubin Law Corporation
405 East 4th Street
North Vancouver, BC V7L 1J4
Tel: 604-984-2030
Fax: 604-988-0025

Ottawa Agents for the Solicitor for the Respondent, Viet Bac NGUYEN:

BRIAN A. CRANE, Q.C.
Gowling Lafleur Henderson LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: 613-233-1781
Fax: 613-788-3433
Email: brian.crane@gowlings.com

Solicitor for the Respondent, Huong Dac DOAN:

KENNETH S. WESTLAKE, Q.C. ***Counsel***
Barrister & Solicitor
1720 – 355 Burrard Street
Vancouver, BC V6C 2G8
Tel: 604-687-9831
Fax: 604-687-7089
Email: kenwestlake@telus.net

Ottawa Agents for the Solicitor for the Respondent, Huong Dac DOAN:

BRIAN A. CRANE, Q.C.
Gowling Lafleur Henderson LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: 613-233-1781
Fax: 613-788-3433
Email: brian.crane@gowlings.com

Solicitor for the Respondents, Daniel Luis SOUX & Myles Alexander VANDRICK:

IAN DONALDSON, Q.C. ***Counsel***
Donaldson's
490 – 1090 Homer Street
Vancouver, BC V6B 2W9
Tel: 604-681-5232
Fax: 604-681-1331
Email: ian@donaldsonlaw.ca

Ottawa Agents for the Solicitor for the Respondents, Daniel Luis SOUX & Myles Alexander VANDRICK:

BRIAN A. CRANE, Q.C.
Gowling Lafleur Henderson LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: 613-233-1781
Fax: 613-788-3433

Solicitor for the Intervener, Attorney General of Canada:

NANCY DENNISON ***Counsel***
Attorney General of Canada
130 King Street West, #3400
Toronto, ON M5X 1K6
Tel: 416-954-8032
Fax: 416-973-4328
Email: Nancy.Dennison@Justice.gc.ca

Ottawa Agents for the Solicitor for the Intervener, Attorney General of Canada:

CHRISTOPHER M. RUPAR
Attorney General of Canada
Bank of Canada Building – East Tower
234 Wellington Street, Room 1212
Ottawa, ON K1H 0H8
Tel: 613-941-2351
Fax: 613-954-1920
Email: Christopher.rupar@justice.gc.ca

Solicitor for the Intervener, Attorney General of Ontario:

MICHAL FAIRBURN *Counsel*
Crown Law Office - Criminal
Ministry of Attorney General
720 Bay Street
Toronto, ON M7A 2S9
Tel: 416-326-4658
Fax: 416-326-4556
Email: Michal.Fairburn@ontario.ca

Ottawa Agents for the Solicitor for the Intervener, Attorney General of Ontario:

ROBERT HOUSTON, Q.C.
Burke-Robertson
70 Gloucester Street
Ottawa, ON K1P 0A2
Tel: 613-236-9665
Fax: 613-235-4430
Email: rhouston@burkerobertson.com

Solicitor for the Intervener, Attorney General of Quebec:

GILLES LAPORTE *Counsel*
Ministère de la Justice-Québec
Direction du droit public
1200, route de l'Église, 2e étage
Québec (Québec) G1V 4M1
Tel: 418-643-1477 poste 20733
Fax: 418-644-7030
Email: Gilles.Laport@justice.gouv.qc.ca

Ottawa Agents for the Solicitor for the Intervener, Attorney General of Quebec:

ME PIERRE LANDRY
Noël & Assoicates, s.e.n.c.R.L.
111, rue Champlain
Gatineau (Quebec) J8X 3R1
Tel: 819-771-7393
Fax: 819-771-5397

Solicitor for the Intervener, Criminal Lawyers' Association (Ontario)

Scott C. Hutchison
Fredrick Schumann
Stockwoods LLP
The Sun Life Tower
150 King Street West, Suite 2512
Toronto, Ontario
M5H 1J9
Telephone: (416) 593-7200
FAX: (416) 593-9345

Ottawa Agents Criminal Lawyers' Association (Ontario)

Michael J. Sobkin
90 blvd. de Lucerne
Unit #2
Gatineau, Quebec
J9H 7K8
Telephone: (819) 778-7794
FAX: (819) 778-1740
E-mail: msobkin@sympatico.ca

Solicitor for the Intervener, BCCLA

Roy W. Millen
Peter W. Hogg, Q.C.
Laura M. Cundari
Blake, Cassels & Graydon LLP
2600 - 595 Burrard Street
Vancouver, British Columbia
V7X 1L3
Telephone: (604) 631-4220
FAX: (604) 631-3309
E-mail: roy.millen@blakes.com

Ottawa Agents for BCCLA

Nancy K. Brooks

Blake, Cassels & Graydon LLP
45 O'Connor St.
20th Floor
Ottawa, Ontario
K1P 1A4
Telephone: (613) 788-2200
FAX: (613) 788-2247
E-mail: nancy.brooks@blakes.com

Solicitor for the Intervener, CCLA)

Christopher A. Wayland
H. Michael Rosenberg

McCarthy Tétrault LLP
Suite 4700, TD Bank Tower
Toronto, Ontario
M5K 1E6
Telephone: (416) 601-8109
FAX: (416) 868-0673
E-mail: cwayland@mccarthy.ca

Ottawa Agents for CCLA

Colin Baxter

Cavanaugh Williams Conway Baaxter, LLP
Barristers and Solicitors
401 – 1111 Prince of Wales Dr.
Ottawa, ON, K2C 3T2

Tel: (613) 569-8558
Fax: (613) 569-8668

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PART I – INTRODUCTION

A. Summary of Matter at Bar

1. The Crown appeals from a decision declaring *Criminal Code* Section 184.4 unconstitutional. The provision permits peace officers to intercept private communications without the necessity of obtaining prior judicial approval. The scope of discretion permitted is broad and without equal in Canadian criminal law.

184.4 Interception in exceptional circumstances — A peace officer may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, 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 to 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.

1993, c. 40, s. 4

This extraordinary provision permits a wide range of persons, including agents of the state engaged in activities other than criminal law enforcement, mayors and military personnel, many of whom are ill-equipped to bring proper consideration its use, to interfere in a profound way with the privacy interests of individuals in potentially unlimited fashion without judicial authorization or review.

2. The Respondent says that the learned trial judge did not err in holding the provision was unconstitutional. Rather the respondent says that in addition to the findings of the learned trial judge, there are additional reasons why this section cannot withstand

constitutional scrutiny. It is fundamentally at odds with *Charter* jurisprudence and with other sections within the Part VI of the *Criminal Code.*

B. Comments of the Appellant's Statement of Facts

3. Paragraphs 3-22 of the Appellant's factum contain a summary of the facts which are said to be relevant to the constitutional question. No issue is taken with the accuracy of the facts for the purposes of this appeal.

4. However the Respondent says that it is the broad range of factual circumstances contemplated by Section 184.4 that is of more concern. The near consistent use of the section by police services across the country as of 2008 provides no guarantee that it will not be used in a wide range of circumstances, whether in conformity with the section's language or not, in the future. Society's values vary with the times. Police and law enforcement personnel reflect the changes in values. What was unacceptable today may be acceptable tomorrow or sometime in the near future. It is submitted that what is at issue is how Section 184.4 can be used and not how it has been used to date.

PART II - RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

A. Questions in Issue

1. Did the trial judge correctly interpret Section 184.4 of the *Criminal Code*?
2. Does Section 184.4 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe Section 7 of the *Canadian Charter of Rights and Freedoms*?
3. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under Section 1 of the *Canadian Charter of Rights and Freedoms*?
4. Does Section 184.4 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe Section 8 of the *Canadian Charter of Rights and Freedoms*?
5. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under Section 1 of the *Canadian Charter of Rights and Freedoms*?
6. Does Section 184.4 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe Section 11(d) of the *Canadian Charter of Rights and Freedoms*?
7. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under Section 1 of the *Canadian Charter of Rights and Freedoms*?
8. If Section 184.4 of the Criminal Code, R.S.C. 1985, c. C-46, infringes the *Canadian Charter of Rights and Freedoms*, is it necessary to declare it of no force or effect under Section 52(1) of the *Constitution Act, 1982*, or is a lesser remedy available.

B. Respondent's Statement of Issue

5. The Respondent says that Section 184.4 infringes Section 8 of the *Canadian Charter of Rights and Freedoms* because it permits an interception of private communications without prior judicial authorization.

6. Even if Section 184.4 is not fatally flawed by reason of its permitting unauthorized searches and seizures, the section is overly broad in scope, and otherwise inconsistent with established *Charter* principles relating to the interception of private communications.

7. The Respondent concedes that legitimate law enforcement goals can be achieved by permitting the timely interception of private communications. Protection of persons from serious harm may be characterised as the quintessential role of the police. At first glance it may appear that the objective of Section 184.4 relates to a pressing and substantial need.

8. However even if there were a need for unauthorized interceptions of private communications as contemplated by Section 184.4 at the time of its introduction, the Respondent says that the development of telecommunication technologies since 1993 when Section 184.4 was made law have rendered it an antique. Other provisions within Part VI can achieve the same goal without infringing the *Charter*.

9. Even assuming the first stage of the *Oakes* test is met, the range of activities and persons contemplated by Section 184.4 is far beyond the legitimate objective of protection of the public from serious harm.

10. Finally it is submitted that for the Court to attempt to rectify the serious constitutional inadequacies instanced by Section 184.4 would be an exercise in futility. The final result would be very much like the other emergency interception provisions already included in Part VI of the *Criminal Code*.

PART III - ARGUMENT

A. Burden of demonstrating that Section 184.4 does not violate the Charter is with the Appellant.

11. The Appellant contends that the burden of demonstrating that Section 184.4 violates the *Charter* rests with the Respondents. The Appellant argues that the presumption that a warrantless search contravenes Section 8 does not apply when the search takes place in exigent circumstances.

12. The Respondent says that this is a mischaracterization of the prior decisions of this Court.

13. It is notable that Section 184(1) reflects the fact that we in Canada value our privacy, and in particular, our private communications. The section makes it an offence to intercept private communications absent a lawful justification or other incidental lawful purpose. The only exceptions are interceptions of private communications with consent, or pursuant to a judicial authorization, or those interceptions that may be necessarily incidental to other lawful activities involving such communications, or under the impugned Section 184.4.

14. In *Hunter*, this Court held that a minimum standard for obtaining a judicial authorization to intrude on an individual's privacy interests was reasonable and probable grounds to believe that an offence had been committed and that evidence would be found at the place of the search. It is in that context that the following comments of Justice Dickson (as he then was) must be considered:

> I recognize that it may not be reasonable in every instance to insist on prior authorization order to validate governmental intrusions upon individual's expectations of privacy. Nevertheless where it is feasible to obtain prior authorization, I would hold that such an authorization is a precondition for a valid search and seizure.

Hunter v. Southam Inc. [1984], 2 S.C.R. 145 at p. 161a

15. Similar pronouncements of this Court are found in other cases cited by the Appellant including *R. v. Colarusso*, [1994], 1 S.C.R. 20 at p. 53 c-d and *R. v. Feeney*, [1997], 2 S. C. R. 13 at pp. 48-50, para. 46-47.

16. It is submitted that it is important to remember that Section 184.4 is not primarily an evidence gathering provision, but rather legislation that authorizes interceptions of private communications without judicial authorization, and at the sole discretion of a peace officer, in advance of an unlawful act being committed. It is preventative in nature, and necessarily speculative. It is one thing to be investigating an offence having been committed and seeking to gather or preserve evidence as contemplated by *Feeney*, and quite another to be intercepting private communications absent any existing unlawfulness. Whether or not an exigency exists can be fairly readily ascertained in a *Feeney* situation while it may not be ascertainable at all in the case of an anticipatory interception. This highlights the unique nature of Section 184.4 even in the context of Part VI.

B. Difficulties with determining whether Section 184.4 was properly implemented

17. The Appellant seeks to distinguish the cases of *Wong* and *Duarte*, each said to involve the unregulated and unlimited state surveillance of individuals. By contrast the Appellant argues that Section 184.4 is highly restrictive in its proper application.

18. It is submitted that the practical effect of Section 184.4 is that there can be no judicial scrutiny as to whether it has been properly implemented unless and until a prosecution results. Since the provision's use is anticipatory and preventive in nature, if it used to its purpose effectively, a prosecution will not result. Arguably then it is only when the Section 184.4 is ineffective that judicial scrutiny may result.

19. The degree of intrusion on the privacy interests of those intercepted is not lessened by virtue of their being no criminal charge as a result however. As stated by this Court in *Wong,* whether persons who are the objects of an electronic search have a reasonable expectation of privacy does not depend on whether those persons were engaged in illegal activities. The privacy interests of the innocent as well as the culpable are equally affected.

20. The Appellant further argues that the presumption of constitutionality reflects the centrality of constitutional values, and that Section 184.4 ought to enjoy the benefit of the presumption because it was introduced after a series of cases from this Court on constitutionally permissible surveillance. It is notable that Section 184.4 is alone amongst the sections of Part VI in permitting the unauthorized interception of private communications with no restrictions on the use to which the contents of communication can be put, nor any restriction on the length of time the recordings may be kept, nor any requirement that the number of instances of the use of Section 184.4 be included in an annual report prepared by the appropriate minister of government.

C. Charter Section 8 summary

21. *Hunter* tells us that Section 8 guarantees a broad and general right to be secure from unreasonable searches and seizures. It protects us against unjustified state intrusion. The purpose of Section 8 is not merely to provide for a remedy in the event that an unreasonable search and seizure has occurred, but rather to prevent an unjustified search before it occurs. Therefore, unless it is not feasible to obtain a prior authorization validating the governmental intrusion, any warrantless search will be unreasonable and in contravention of Section 8.

22. *Hunter* also tells us that the person authorizing the privacy intrusion must be an entirely neutral and impartial arbiter, someone able to assess the conflicting interests of the state and the individual.

23. Finally *Hunter* says that a minimum requirement for such an authorization is that there be reasonable and probable grounds established under oath to believe that an offence has been committed and that there is evidence to be located through the mechanism or technique or action authorized by the independent arbiter.

24. *Duarte* further developed our understanding of the application of Section 8 to circumstances involving the interception of private communications without judicial authorization. Justice Dickson (as he then was) stated:

> The rationale for regulating the power of the state to record communications that their originator expects will not be intercepted by anyone other than the person intended by the originator to receive it (see definition section of Part VI.1 of the *Code*) has nothing to do with protecting individuals from the threat that their interlocutors will divulge communications that are meant to be private. No set of laws could immunize us from that risk. Rather, the regulation of electronic surveillance protects us from the risk of a different order, i.e., not the risk that someone will repeat our words but the much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words. *R. v. Duarte*, [1990] 1 S.C.R. 30 at p. 43j-44b

25. Justice Dickson (as he then was) further stated the following in addressing what an individual has a right to expect as to privacy of one's communications:

> If privacy may be defined as the right of an individual to determine for himself when, how and to what extent he will release personal information about himself, a reasonable expectation of privacy would seem to demand that an individual may proceed on the assumption that the state may only violate this right by recording private communications on a clandestine basis when it has established to the satisfaction of a detached judicial officer that an offence has been or is being committed and the interception of private communications stands to afford evidence of that offence.

R. v. Duarte (supra) at p. 46a-c

And further:

> The Charter, it is accepted, proscribes the surreptitious recording by third parties of our private communications on the basis of mere suspicion alone.
> *R. v. Duarte* (supra) at p. 48h

D. Exigency

26. In *Feeney*, consideration is given to exigent circumstances in which it might be said to be impractical to obtain prior judicial authorization before intruding on the privacy of an individual. Justice Sopinka there wrote:

> In cases of hot pursuit, society's interest in effective law enforcement takes precedence over the privacy interest and the police may enter a dwelling house to make an arrest without a warrant. However the additional burden on the police to obtain a warrant before forcibly entering a private dwelling to arrest, while not justified in the case of hot pursuit, is, in general, well worth the additional protection to the privacy interest in welling houses that it brings.
> *R. v. Feeney* (supra) at p. 49

27. In *R. v. Macooh*, [1993] 2 S.C.R. 802, another case considering entry into a dwelling house without warrant, further consideration of the exigencies that may negate the requirement for prior judicial authorization are considered. Justice Lamer (as he then was) makes the following statements in considering the development of the law of hot pursuit:

> To begin with, it would be unacceptable for the police officers who were about to make a completely lawful arrest to be prevented from doing so merely because the offender had taken refuge in his home or that of a third party....These concerns are nowhere as relevant as in the case of hot pursuit. The offender is then not being bothered by the police unexpectedly while in domestic tranquility.

> He has gone to his home fleeing solely to escape arrest....The flight of the offender, an act contrary to public order, also should not thus be rewarded.
> *R. v. Macooh* (supra) at p. 815e-i

28. In R. v. Godoy [1999] 1 S.C.R. 311, a case considering the extent with which police could rely on a 911 call to justify an entry into a private dwelling, Chief Justice Lamer (as he then was) in delivering the unanimous judgment of the Court said the following:

> ...dignity, integrity and autonomy are the very values engaged in a most immediate and pressing nature by the disconnected 911 call. In such a case, the concern that a person's life or safety might be in danger is enhanced. Therefore the interest of the person who seeks assistance by dialing 911 is closer to core values of dignity, integrity and autonomy than the person who seeks to deny entry to the police who arrive in response to a call for help.
> *R. v. Godoy* (supra) at p. 322, para 19

E. Interpretation of the Section

29. Section 184.4 utilizes a number of terms that are unique in the context of Part VI of the *Criminal Code*. Other terms are common to the Part or the *Criminal Code*, but their meaning is not readily reconciled with the preventative purpose of the section.

30. It has already been said that the section differs from other sections within the Part which permit interceptions of private communication (with the exception of Section 184.1) because its apparent purpose is to prevent harm. And Section 184.4 differs from the Section 184.1 because it does not limit either the evidentiary use to which intercepted communications can be put, nor does it impose a temporal limit on their retention.

30. The terms used in Section 184.4 that bear scrutiny are at least the following:

(a) "peace officer"

(b) "reasonable diligence"

(c) "unlawful act"

(e) "serious harm"

(f) "originator" and "victim"

(a) "peace officer"

31. The term "peace officer" is a defined term in Section 2 of the Criminal Code. Other provisions within the Part employ different terms to describe the person who may be permitted to intercept. The following is a list of the terms used:

(i) Section 184.1: "agent of the state"

(ii) Section 184.2: "peace officer or a public officer who has been designated or appointed to administer any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament"

(iii) Section 185: "the Minister of Public Safety and Emergency Preparedness or an agent of the Minister or of the Attorney General or Deputy Attorney General of a province

(iv) Section 188: "peace officer specially designated in writing by the Minister of Public Safety and Emergency Preparedness or the Attorney General of a province"

32. The use of the term "peace officer" alone and unqualified is unique to Section 184.4. All of the other sections utilize other terms, either alone or in conjunction with the term "peace officer".

33. It is submitted that the use of the term "peace officer" in Section 184.4 was intentional and that the term should be given its ordinary meaning as defined in Section 2 of the Criminal Code.

(b) "reasonable diligence"

34. The term "reasonable diligence" has been judicially considered and the Respondent takes no issue with the characterization of the term in the Appellant's factum. However what is significant about the use of the term in Section 184.4 is that it purports to delineate those circumstances in which resort may be made to Section 184.4 in the alternative to other provisions within the Part.

35. But Section 184.4 can only be used to prevent an unlawful act that would cause serious harm to person or property. No other provision in the Part with the exception of Section 184.1 allows for an anticipatory interception of private communications to prevent an event. And Section 184.1 is confined to circumstances in which there is a risk of bodily harm and the purpose of the interception is to prevent the bodily harm.

36. The other provisions permitting the interception of private communications all contemplate the currency of an offence or its completion and an evidence gathering function.

37. It is submitted that the term "reasonable diligence" in the context of the subsection suggests an objective way to measure the appropriateness of the use of Section 184.4, when in reality, no amount of reasonable diligence on the part of a peace officer could permit the use of an alternate section in the Part. No other section allows for interceptions to prevent an unlawful act that would cause serious harm to person or property. If an act cannot be prevented, Section 184.4 cannot be resorted to. Any act that is to be prevented must be unlawful under section 184.4. And unless the serious harm to be prevented is bodily harm, whether caused by an unlawful act or not, then Section 184.1 is the only alternative.

(c) "unlawful act"

38. The term "unlawful act" is not otherwise used within the Part. The definitions applicable to the Part are found in Section 183. The nearest term to "unlawful act" is the defined term "offence" which is defined therein.

39. The term "unlawful act" has been judicially considered in a number of cases including by this Court in *R. v. DeSousa* [1992] 2 S.C.R. 944 and has been interpreted to include any act in contravention of the law, whether criminal or regulatory in nature. In the context of the *DeSousa* case, the issue was one of causation and the unlawful act committed had to have the characteristic of objectively dangerousness.

40. It is submitted that the use of the term by Parliament "unlawful act" was intentional and served to distinguish the concept from other defined terms within the *Criminal Code* and the Part. To conclude that "unlawful act" and "offence" as defined in the Part are equivalents is to ignore that at least some of the offences listed in the definition of "offence" in the Part do not allow of a ready and reasonable inference that their commission could case serious harm.

41. The Appellant argues that giving "unlawful act" a meaning other than "offence" as defined in the Part would render Section 184.4(a) senseless. However it is submitted that the section captures unlawful activity that is not otherwise within the Part. If the unlawful act at issue is not within the list of offences in the definition section, then resort cannot be made to other provisions within the Part, with the exception of Section 184.1.

42. This is also consistent with the wording of the Section 184.4 that provides for an interception of private communications to prevent an unlawful act that would cause serious harm to property.

(d) "serious harm"

43. As noted in Para 42 above, the plain wording of Section 184.4 permits the interception of private communications if the interception were immediately necessary to prevent an unlawful act that would cause serious harm to property, as long as the other pre-conditions are met.

44. While the Appellant has argued that the section is there to permit the police to intervene when the situation is one of "life and death", the section contemplates something much more mundane.

(e) "person who would perform the act" and "victim or intended victim"

45. At first glance, the use of these terms in the sub-section appear to permit a peace officer to intercept private communications of persons who are either the perpetrator of the unlawful act or the victim of the act. However since the wording of the sub-section is disjunctive, the communications which may be intercepted are as follows:

(1) the originator of the private communication is the suspected unlawful actor calling an unrelated party;
(2) the originator of the private communication is the suspected unlawful actor calling the victim or intended victim;
(3) the originator of the private communication is an unrelated party calling the suspected unlawful actor;
(4) the originator of the private communication is the victim or intended victim calling an unrelated party;
(5) the originator of the private communication is the victim or intended victim calling the suspected unlawful actor;
(6) the originator of the private communication is an unrelated party calling the victim or intended victim.

Communications involve two or more persons. It is submitted that at least some of the communications that are encompassed by Section 184.4 are likely to have nothing to do with any suspected unlawful act and its prevention.

F. Mischief Section 184.4 permits

46. It is respectfully submitted that even assuming the proper implementation of Section 184.4, the provision allows for the interception of private communications of a wide range or persons (including persons unrelated to the matter at issue) for unlawful

acts (including regulatory offences) which would cause serious harm to property if committed, if the person who embarks upon the interception (a person who is not independent of the inquiry) concludes that there are reasonable grounds to believe that the interception is immediately necessary to prevent the suspected unlawful act.

47. The provision permits of no judicial review except in circumstances in which a prosecution results. If the implementation of the provision achieves it goal, then the serious harm is prevented. There may be no proceeding to follow and no opportunity to review the exercise of discretion.

48. If the peace officer's exercise of discretion in invoking the provision ultimately proves to be incorrect or improper, the communications have still been intercepted without any opportunity for judicial review. No provision is made for the securing of the interceptions, or their destruction, and no one is the wiser. This serves to highlight the "insidious danger" identified by Justice Dickson in *Hunter*.

G. Alternatives to use of Section 184.4

49. While it is true that Section 184.4 contemplates a wider range of circumstances in which private communications may be intercepted, and all prior to any unlawful or offending acts, it is in part that unique aspect of the provision that makes it constitutionally invalid. It is submitted that legitimate law enforcement activities can be achieved in 2 alternative ways.

1. The development of technology

50. When Section 184.4 was introduced, the availability of radio-based telecommunication devices was far less prevalent than today. Section 184.3 already contemplates an application for a consent intercept authorization by telecommunication. It is submitted that an alternative to upholding Section 184.4 would be to read in to Section 188 that applications for emergency authorizations be permitted.

2. Alternative Sections within the Part

51. It is submitted that Section 184.1 already addresses the need for a preventative authorization where bodily harm is to be prevented, something that encompasses those aspects of Section 184.4 that are legitimate.

H. Section 1 argument

52. The Appellant submits that Section 184.4 is the result of a dialogue between the courts and Parliament in which Charter implications were considered. The Respondent says that Section 184.4 shows itself for what it is; an incomplete and ill-considered effort to capture information in relation to suspected unlawful activity in the sole and likely unreviewable discretion of someone partial to the result.

53. The broad reach of the section even appears to extend beyond the criminal law by encompassing unlawful acts that could cause serious harm to property, and permits persons from outside of the justice system to exercise discretion in favour of a surreptitious intrusion into the private matters of persons who have no rational connection to the objective of the legislation.

I. Why alternative constitutional remedies are not sufficient

54. The Appellant urges this Court to consider a remedy less drastic than striking the legislation. The Appellant correctly states that Section 52 of the *Constitution Act, 1982* renders a law invalid but only "to the extent of the inconsistency".

1. "Reading in" cannot correct the scope of the legislation

55. The provision allows for a practically unfettered exercise of discretion to interfere in the privacy of individuals through interceptions of their private communications. Notice to intercepted persons cannot undo the fact that their communications were intercepted without judicial authorization. The harm has already been done by the time notice is given.

2. "Reading down" still permits excessive discretion in non-judicial officers

56. Even in the event that the term "peace officer" were read down to include only police officers, the discretion to engage in an interception still rest with a non-judicial officer without any safeguards in the way of review of the decision-making process, or restrictions in the use to which the interceptions can be put, or any safeguards in the way the recordings are secured or maintained after interception.

PART IV – SUBMISSIONS CONCERNING COSTS

57. The Respondent does not seek costs and resists the imposition of costs.

PART V – NATURE OF THE ORDER SOUGHT

58. That the Appeal be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

B.V. Bagnall

Brent V. Bagnall

Counsel for the Respondent Ly

Dated this 23rd day of September, 2011 at Vancouver, BC

PART VI – TABLE OF AUTHORITIES

PART VII – LEGISLATIVE PROVISIONS RELIED ON