

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 BAC NGUYEN, DANIEL LUIS SOUX, AND MYLES ALEXANDER VANDRICK
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**FACTUM OF THE RESPONDENTS,
VIET BAC NGUYEN and HUONG DAC DOAN**

PART I: THE FACTS

1. This is a joint factum of the Respondents Viet Bac Nguyen and Huong Dac Doan. These respondents will address only some of the issues, and in order to avoid duplicating the efforts of all of the other parties, will rely upon the articulation of the facts by the other counsel.
2. Due to time constraints in oral submissions these respondents will address only the *Galbraith* / Law Reform Commission issue, and the context and framework for all applications for a wiretap authorization under Part VI of the **Criminal Code**. In oral submissions the issues set out will be divided by counsel.

PART II: QUESTIONS IN ISSUE

3. Section 184.4 of the **Criminal Code** is an unnecessary delegation of an emergency wiretap decision to the police, because technology developed since 1973¹ can now provide a judicial emergency wiretap authorization by cell phone and a recording of the grounds under s. 188 if this Court finds that *R. v. Galbraith*, (1989), 49 C.C.C (3d) 178 (Alta. C.A.) was correctly decided, or if s. 188 is amended in the manner recommended by the Law Reform Commission in *Working Paper 47*, 1986².
4. Most of the offences covered by s. 184.4 are not the kind of offences which justify an exception to the requirement of prior judicial authorization on the basis of possible exigent circumstances.

¹ Section 188 is worded almost the same as s. 178.15 of the, S.C. 1973-74, c. 50, the original emergency judicial wiretap, a time when there were no cell phones.

² In 1986 the Law Reform Commission specifically addressed police concerns for an emergency wiretap to investigate kidnapping without having to apply for the authorization. The LRC's solution was not to delegate the decision to the police, but to recommend allowing amending s. 188 to allow the police to hook up to the telephone lines, hold off intercepting and wait for a telephone judicial authorization application with oral evidence, recorded and transcribed. Parliament did not implement either version, until 1993. Parliament then implemented the police request for a delegation of the decision to peace officers. This issue is developed below.

5. Emergencies have time limits and some limitation of the need in the context of the facts. *Hunter, et al v. Southam Inc.*, [1984] 2 S.C.R. 145 held open a limited exception to the Constitutional standard of prior judicial authorization of any search and seizure. The omission of time limits; omission of statutory controls or some requirement of after the fact judicial oversight, executive oversight, or parliamentary oversight; and the omission of a requirement that the police consider terms and conditions take s. 184.4 outside any limited exception left open in *Hunter, et al v. Southam Inc.*

PART III: ARGUMENT

6. The respondents agree with the crown approach to statutory interpretation, that s. 184.4 must be considered in the context of the other provisions of Part VI and other provisions of the **Criminal Code** (para. 28, Appellant's factum). The respondents agree that this is the correct statutory construction approach, to consider a section in the context of other provisions of the Act. However the respondent sees s. 184.4 of the **Criminal Code** as being out of sync, inconsistent and having irrational differences that point to it being unnecessary, because of the other provisions.
7. The respondents will approach the discussion of s. 184.4 on the basis suggested by the crown that it is not to be considered in isolation and any analysis depends not only on the immediate context but also on the context of the **Criminal Code** as a whole. *R. v. Tapaquon*, [1993] 4 S.C.R. 535.

Section 188 of the Criminal Code makes s. 184.4 unnecessary

8. Section 188 can be used in the same way as applications for tele-warrants through call centers to a Superior Court judge and without any amendments, with *vive voce* evidence recorded and preserved. According to Stevenson J.A. as he then was in *R. v. Galbraith*, (1989), 49 C.C.C (3d) 178 (Alta. C.A.), the requirement of evidence under s. 188 is on oath, but permissibly *viva voce*, as follows:

19 In my view, oral evidence to support a pre-authorized search must be given on oath (or affirmation), unless the circumstances practically preclude its being so given. I see nothing in the circumstances contemplated by s. 178.15 [now s. 188] that precludes oral testimony on oath, although I agree that urgency would justify dispensing with the affidavit required on a regular application.

9. The respondents respectfully submit that *Galbraith* is the correct interpretation of what is now s. 188 and the solution to emergency wiretapping lies in implementing call centers to provide cell phone emergency wiretap authorizations.³ If this Court affirms *R. v. Galbraith*, s. 184.4 is unnecessary.
10. The cases which support the need for an emergency wiretap section, reject the *R. v. Galbraith* approach of oral evidence, and assume that there is considerable time required for the preparation of a written affidavit for a s. 188 application just as in a s. 185 application. In *R. v. Riley #2*, 174 C.R.R. (2d) 288 at para. 50 [Respondent's authorities, tab 5] Dambrot J. disagreed with *Galbraith*, because section 188(1) had been changed from "Notwithstanding section 178.12, an application for an authorization may be made... by a peace officer specially designated in writing for the purposes of this section..." to "Notwithstanding section 185, an application made under that section for an authorization may be made..." .
11. Section 188 (1) addresses who may make an exigent wiretap application. Sub-section 2 provides for the emergency where the wiretap has to start before an authorization could, with reasonable diligence, be obtained under section 186. Section 188 reads as follows:

188(1) Applications to specially appointed judges

Notwithstanding section 185, an application made under that section for an authorization may be made *ex parte* to a judge of a superior court of criminal jurisdiction, or a judge as defined in section 552, designated from time to time by the Chief Justice, by a peace officer specially designated in writing, by name or otherwise, for the purposes of this section by

(a) the Minister of Public Safety and Emergency Preparedness, if the offence is one in respect of which proceedings, if any, may be instituted by the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or

³ *R. v. Galbraith* was applied in *R. v. Laudicina*, (1990) 53 C.C.C. (3d) 281 (Ont. H.C.J.) R. Auth tab 9; *c.f. R. v. Myers*, 126 N.S.R. (2d) 237, R. Auth tab 11; *R. c. St-Yves*, [1994] R.J.Q. 2257, R. Auth tab 15, held that an affidavit or other document was required; *R. v. Riley #2*, (2008) 174 C.R.R. (2d) 288 at 302, para. 50, R. Auth tab 14, declined to follow *Galbraith* because supposedly a subsequent amendment made it clear that s.188 did not create a separate emergency authorization, but merely modifies the procedure for a s.186 authorization in an emergency, and that required an affidavit in hand. If this Court agrees with *Galbraith* then the amendment to s. 188 recommended by the Law Reform Commission in 1986 is not required. This respondent supports the position in *Galbraith* as discussed *infra*.

(b) the Attorney General of a province, in respect of any other offence in the province, if the urgency of the situation requires interception of private communications to commence before an authorization could, with reasonable diligence, be obtained under section 186.

Section 188(2) Authorizations in emergency

Where the judge to whom an application is made pursuant to subsection (1) is satisfied that the urgency of the situation requires that interception of private communications commence before an authorization could, with reasonable diligence, be obtained under section 186, he may, on such terms and conditions, if any, as he considers advisable, give an authorization in writing for a period of up to thirty-six hours.

As a result s.s. (1) governs to whom and by whom the application is to be made, and in a different manner than under s. 185(1), delegating the application to a “peace officer” instead of to an agent of the Minister or agent of the Attorney General. Subsection (2) governs how the emergency application shall be made, and also in a different manner than under s. 185(1). Subsection (2) delegates to the authorizing judge a discretion as to how to modify the procedure taking into account the urgency, *mutatis mutandis*. The only substantive difference is the time required to prepare the one page application, type an affidavit, and go to court under s. 185. The limit of 36 hours in s. 188 (2), provides this time required to prepare the s. 185 application. The s. 188 authorizing judge can impose a term that the oral affidavit evidence be transcribed as sworn. Dambrot J. is in error when he decided that s. 188 merely modified the procedure for a s.186 authorization in an emergency. The section is silent on how the procedure is modified. The headings of subsection (2) supports this approach.

12. Therefore using the headings, “[a]uthorizations in emergency” s. 188 (2) describes an emergency wiretap process. There is no requirement of a written affidavit. The references to s. 185 and 186 are to ensure that the judge has been satisfied of the requirements in s. 185 and 186, but the legislation leaves open how the judge is to be satisfied, with a discretion on terms to take into account the inability to type the affidavit beforehand due to the emergency time constraints; the terms can deal with how the oral affidavit evidence is to be preserved.
13. In *R. v. Grant*, 2009 SCC 32, Resp’s. Auth. tab 6, McLachlin C.J.C. and Charron J set out that headings are a, “part of the legislation and should be read and relied on like any other

contextual feature” (quoting R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 269).

14. In the alternative, this respondent submits that s. 184.4 is unnecessary, because any urgency is created by the failure of Parliament to implement the recommendation of the Law Reform Commission in 1986 to modify the s. 188 emergency wiretap application to allow the police to apply by telephone to a judge in the same way as applications for tele-warrants (currently s. 487.1), and although not referenced by the LRC in 1986, in the same way that Parliament created a telephone process of application for a *Duarte* wiretap under 184.3 (1) and (3) in 1993 in the same Bill C-109, S.C. 1993, ch. 40 that created s. 184.4. If this Court rejects *R. v. Galbraith*, any urgency under s. 184.4 has been created by Parliament’s failure to update s. 188 in this way. Section 188 is substantially the same wording as passed in 1973/1974, a time when there were no cell phones. The present prevalence and availability of cell phones by the police and by the duty judge narrows the time required for an oral application through a call center.
15. The LRC, *Working Paper 47 - Electronic Surveillance*, 1986 at 65, 66 (Resp. Auth tab 19) discloses that the origin of s. 184.4 was a problem drawn to their attention by the police in the investigation of a kidnap victim some 25 years ago. The LRC said that law enforcement agencies wanted to be in a position to wiretap immediately should they learn the whereabouts of the victim, without even having to resort to the emergency procedure under then s. 178.15 now s. 188. The LRC disagreed and their preferred solution was expressed as follows:

In our view, particularly in light of our recommendation concerning disclosure, it is desirable that there be some record of the application; for this purpose, the tele-warrant procedure, as proposed in section 70 of Bill C-18 which would add section 443.1 to the **Criminal Code**, would appear to be the simplest and most effective mechanism for recording the facts relied upon by the judge in granting the authorization. The facts which would be required to be set out would be: the reasons for resorting to the emergency procedures; the grounds for seeking authorization to intercept; and, the persons and places sought to be intercepted. In our view, this is the minimum record necessary.

16. The change recommended by the LRC included allowing the police to hook up but not intercept until a telephone order was granted and as well as follows:

That an application for an emergency authorization under section 178.15 shall be made in writing or by telephone or other means of telecommunication and there shall be a record including: a statement of the reasons why an authorization could not, with reasonable diligence, be obtained under section 178.13; the facts relied upon to justify the belief that an authorization should be given, together with particulars of the offence; the persons whose private communication it is sought to intercept; and, the places of interception.

17. In the case at bar, *R. v. Tse*, 2008 BCSC 211, beginning at paragraph 326, Justice Davies addresses the issue of how long it would have taken to apply for a s. 188 judicially authorized emergency order. Justice Davies assumes the *Galbraith* approach that the evidence in the British Columbia Supreme Court would be given orally. Then he carefully tested how long that would take and in the *Tse* facts made a finding that if the police could provide the s. 188 evidence *vive voce* that would take less than 10 minutes. He discusses time requirements for a s. 188 application beginning at paragraph 329 as follows:

[330] Corporal McDonald's testimony proves beyond question that he was able to communicate, without prompting, not only his thought process but also his command of the facts upon which he based his decision. He was able to do so in the courtroom in less than ten minutes. Even though that he had obviously reviewed the circumstances in detail before testifying, the fact remains that in a very limited time he was able to articulate the necessary facts to establish the need for an emergency wiretap authorization. I am not able to accept that he could not have conveyed that same information in that same time frame to a designated officer under s. 188 of the *Code*. That designated officer could then have appeared before a judge of the Court by way of an oral application for an emergency judicial authorization under that section.

[331] While I agree that some time would obviously have then been required to brief the designated officer, the evidence on this *voir dire* establishes that Superintendent Schmietenknop was one of the designated officers empowered by statute to appear before a judge of this Court for an oral application under s. 188 of the *Code*. Further, Superintendent Schmietenknop had already been briefed by Sergeant Brown when he himself approved the implementation of s. 184.4.

[332] In those circumstances, I cannot accept that the R.C.M.P. should not have immediately pursued a judicial authorization under s. 188 of the *Code* after invoking s. 184.4 in order to minimize the length of time during which interceptions that were not judicially approved would be made

18. Now this analysis does not take into account how long is required for the police to hook up the interception after the order is made by a s. 188 judge. But if the hook up could be made before the authorization is granted, as recommended by the LRC, and as soon as the court

order is granted, turning on the interception, then by starting the hook up at the same time as the police officer phones the call center for a duty judge the whole process will likely take no more time than is required to hook up under a police decision under s. 184.4, except where a Superior Court judge is unavailable.

19. *R. v. Moldovan*, 2009 CarswellOnt 6468 [Resp. Auth. tab10] addresses how long it takes to hook up a wiretap. The designated police officer, S/Insp Izzett initially declined to approve a s. 184.4 police instigated wiretap. He explained that, "... he considers s. 184.4 to be one of the most invasive powers at the disposal of the police", and balancing that with the seriousness of a kidnapping he initially instructed his officers that further investigation was required. After a further briefing, S/Insp. Izzett said he "signed the book", at 12:30 p.m., thereby giving his permission to engage in dialled number recording and "full audio" interception. para. 28. At 1:22 p.m. the police began to monitor under s. 184.4. para. 31. It took 52 minutes to hook up in *Moldovan*. Therefore, if the police can simultaneously apply for and get a tele-authorization to wiretap in less than this 52 minutes, then s. 184.4 is unnecessary.

20. The changes recommended by the LRC were never made. Instead, the police request for a direct delegation of the decision to a peace officer, rejected by the LRC, was implemented by s. 184.4 in 1993. Strangely parliament created a *Duarte* telephone application, but did not provide for emergency s. 188 telephone applications. If this Court prefers the analysis of Dambrot J. in *R. v. Riley #2*, to that of Justice Stevenson in *Galbraith*, there is no reason why s. 188 could not be amended, as recommended 25 years ago by the LRC. Using the statutory principle of interpretation that would give a harmonious interpretation to all of the provisions of Part VI. Having a cell phone application for a *Duarte* authorization under s. 184.3 (1) and (3) is inconsistent with not having a cell phone application for an emergency authorization under s. 188. Having this process for a cell phone application for a *Duarte* judicial authorization, is inconsistent with the need for s. 184.4. Having the process for a cell phone search warrant under s. 487.1, is inconsistent with the need for s. 184.4. It is also inconsistent with the views of the LRC in 1986.

21. All of the lower court decisions approach the Constitutional challenge to s. 184.4, as if it would take too much time to apply for a s. 188 emergency wiretap authorization from a judge, because they all presume that an affidavit is required. They all discuss the time necessary to draft an affidavit. Allowing oral applications is according to the LRC the simple solution and in the submission of the respondent the simple solution makes the police authority to wiretap unnecessary. That was the conclusion of the LRC.
22. The respondent also submits that there can be no justification for an emergency wiretap for most of the offences covered by s. 184.4 as they are not the kind of offences resulting in a serious enough harm to justify circumventing the requirement of prior judicial wiretap authorization. The delegation to the police to wiretap to investigate or prevent any unlawful act causing harm to property circumvents the requirement of prior judicial authorization for all property offences about to be committed and prior judicial authorization for offences against morality, including some which have no potential for serious bodily harm and are not of national security concern. All unlawful acts can be interpreted by the police as causing serious harm of some kind. The exception swallows the rule, and makes all acts that are unlawful open to police wiretapping without prior judicial authorization.
23. The omission of time limits; omission of statutory controls or some requirement of after the fact judicial oversight, executive oversight, or parliamentary oversight; and the omission of a requirement that the police consider terms and conditions may be less of a problem if s. 183.4 was drafted as a stop gap necessity exemption just to deal with the immediate urgency. If s. 184.4 wiretapping was limited to the moment of the immediate necessity to prevent harm to persons or to national security, then the s. 188 authorization can quickly take over control of the wiretapping, especially if this Court follows *R. v. Galbraith* or if the recommendation of the LRC in *Working Paper 47*, a recommendation to Parliament in 1986, is implemented. A stop gap s. 184.4 should read, that it only applies if the judge is unavailable by cell phone from the call center.⁴ The current legislation is quite different.

⁴ In *R. v. Moldovan*, 2009 CarswellOnt 6468 [App. Authorities, tab 42] the kidnapping took place in the early hours of December 23, the initial investigation continued until the evening of the next day when the police decided on Christmas Eve that they needed to intercept communications. On Christmas Eve a duty judge might not be available, and the police should

24. Trying to institutionalize an exception limited to the exceptional circumstance where a police officer has no time to apply for a s. 188 cell phone authorization simply because a judge is unavailable is a drafting challenge and it would be a mistake to attempt to provide for all limited exceptions to an exceptional circumstances already delegated to a peace officer under s. 188. Dealing with those exceptional circumstances on a case by case basis under s. 24(2) and the guidelines in *R. v. Grant* will avoid the abuses inherent in legislating such a broadly defined exceptional circumstance authority as under s. 184.4.
25. The respondents will limit their submissions to these issues, analysing whether the provisions of Part VI can cope with emergencies, using the framework set by this court in *Hunter, et al v. Southam Inc.*, which provided a limited use exception for legislation which falls within the narrow confines where it is not feasible to obtain prior judicial authorization. That limited use exception did not contemplate Parliament creating the urgency, in order to submit that it was not feasible to obtain prior judicial authorization.
26. The respondents adopt the s.s 7, 8, 11, and 52 *Charter* framework analysis of the Learned Trial Judge. The respondent also submits that *Hunter, et al v. Southam Inc.* provides the Constitutional framework with a narrow window for an emergency wiretap by the police with the onus on the state to justify an exception to an already decided issue.

***Hunter, et al v. Southam Inc.*, [1984] 2 S.C.R. 145 and Delegation to the Police**

27. *Hunter, et al v. Southam Inc.* provides the Constitutional framework for the *Charter* standard of protection of privacy requiring a prior judicial order for any search or seizure. *Hunter* also provides for a limited use exception. The issue of requiring a prior judicial authorization is a decided issue, and the issue in this appeal is whether s. 184.4 falls within the limited use exception carved out by this Court in *Hunter* and whether it is necessary to institutionalize the limited need for a police officer to wiretap in the 20 minutes or more than it would take to apply for a judicial cell phone authorization.

be able to immediately wiretap either under a modified s. 184.4 or falling under s. 24 of the *Charter* it would not bring the administration of justice into disrepute.

28. This court has rejected wiretap authorizations in which the authorizing judge has sub-delegated his authority to police officers who could then decide where to intercept based on reasonable and probable grounds. *R. v. Thompson*, [1990] 2 S.C.R. 1111 para. 95, applying *R. v. Paterson*, (1985) 18 C.C.C. (3d) 137 (Ont. C.A.) aff'd *sub nom R. v. Ackworth*, [1987] 2 S.C.R. 291. There should be a similar Constitutional presumption against further delegating an emergency wiretap provision already delegated to a peace officer under s. 188(1) and described in the heading to s. 188 (2) as “[a]uthorizations in emergency”. Section 184.4 is an exception to an emergency exception application by the same category of peace officers under s.188, and the application by a peace officer under s. 188 is an exception to the application by an agent of the crown (invariably a lawyer) under s. 185.

29. The framework of *Hunter, et al v. Southam Inc.* provides a narrow and limited exception to the Constitutional requirement of prior judicial authorization and was expressed as:

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

32 The person performing this function need not be a judge, but he must At a minimum be capable of acting judicially.

30. This appeal revisits the issues considered by a divided panel of this Court in *R. v. Kang Brown*, 2008 SCC 18.

31. At para. 10, LeBel J. for Justices Fish, Abella and Charron J.J., said that Constitutional *Charter* privacy constraints still include prior judicial authorization and reasonable and probable cause, and departures from that Constitutional framework have to be justified by the state. It is respectfully submitted that unlike analysis under s. 24(1) and (2) of the Charter where there is an onus on the accused, where the state seeks a departure from the framework of *Hunter, et al v. Southam Inc.* the onus should fall on the state to establish that the legislation falls within the limited exception left open by this Court in *Hunter, et al v.*

Southam Inc. Other Justices of this Court disagreed with the conclusion of Justice LeBel, but not necessarily with the framework and onus.

32. McLachlin C.J., Binnie, Deschamps and Rothstein J.J. disagreed on the basis that there was a common law power to search using drug sniffer dogs, based upon a different standard than in *Hunter, et al v. Southam Inc.*, a *Charter* compliant standard of reasonable suspicion and that prior judicial authorization was not required because it would not be feasible for police performing their duties at a bus station. Justice Bastarache disagreed and would have opted for a standard of generalized suspicion, and he would have accepted random searches at a public bus terminal.
33. These issues are back before this Court differently constituted and in a modified context. The context is different, because the Justices who accepted that reasonable suspicion was a *Charter* compliant standard that could be applied by a peace officer in the *Kang Brown* context, did so on the basis that the search was minimally intrusive and focused on a specific contraband. Due to the use of s. 184.4 by the police being to “prevent an unlawful act”, it cannot be said that the wiretap searches are focused by the legislation on a specific category of offences, nor would a wiretap be minimally intrusive.
34. McLachlin C.J.C. and Binnie J. held that the after –the-fact judicial scrutiny of the grounds had to be rigorous and the *Kang Brown* search failed because it was based on speculation. Deschamps and Rothstein J.J. disagreed that the search was based in speculation. Given that experienced judges have difficulty applying a standard of probable cause, s. 184.4 cannot be expected to be properly applied by police officers with no legal training.
35. Deschamps and Rothstein J.J. held that the investigative technique was relatively non-intrusive and it was conducted in a bus station where the expectation of privacy was not high. Justice Deschamps said that the *Hunter, et al v. Southam Inc.* standard was established in a context where the accused had “a well-defined reasonable expectation of privacy, there were no exigent circumstances and the sweeping search technique in issue was clearly intrusive in relation to the claimant’s privacy interest”. SCR at p. 522, para 146.

36. The divided Court did not overrule the *Hunter, et al v. Southam Inc.* Constitutional Charter standard that “where it is feasible to obtain prior authorization ... such authorization is a precondition for a valid search and seizure”. para. 29 above quoting from *Hunter*. It would be feasible to obtain a wiretap authorization at bar, because s. 188 provides for an “[a]uthorizations in emergency”, depending on whether it can be processed on oral evidence. The exigent circumstances are a result of Parliament not implementing the LRC *Working Paper* 47 recommendation to Parliament in 1986, and instead choosing the police preferred solution in 1993. As to the other two contextual factors in *Hunter, et al v. Southam Inc.*, the well defined expectation of privacy and the sweeping search techniques, an expectation of privacy in private communications is certainly “well defined” and to intercept private communications without a statutory focus on a specific group of offence, without any protection for the innocent use of the phone and without a time limit is pretty sweeping.
37. If the Part VI, s. 188 wiretapping provisions can be adjusted to provide for a step process in which it is possible to obtain an emergency judicial authorization by cell phone to a call center for a Superior Court judge or a designated Provincial Court judge, then there is no need for an exception to the Constitutional standard of the prior judicially authorized wiretap. Because *Hunter* places the onus on the state to justify the need for a departure from the Constitutional standard, if the emergency provisions in s. 188 can be adjusted, given the technological advances since this legislation was passed in 1993, to allow for the police to apply by cell phone to a call center which connects to the Superior Court duty judge, that has to be taken into account in assessing the emergency need and the feasibility of providing for an emergency authorization.
38. In considering the feasibility it is necessary to examine all of the emergency wiretap provisions, and not just s. 184.4. This respondent will now analyze the existing emergency wiretap sections of the **Criminal Code**.

There are three Emergency Wiretap Sections in the Criminal Code

39. The appellant submits that Bill C - 109 introduced in 1993 is a connected spectrum of emergency wiretapping, and to single out s. 184.4 is to upset the graduated scheme. Appellant’s factum, para. 28. The respondent agrees that there are other provisions that need

to be examined together with s. 184.4, but respectfully submits that there are irrational differences in the emergency wiretap sections in the **Criminal Code**. The emergency wiretap sections should be connected in their use. In the first step under s. 184.4, if necessary, the police officer could start wiretapping, perhaps a one half hour before the second step of an oral application made under s. 188, hopefully by cell phone to a duty judge. Ultimately within the 36 hours the police would obtain a traditional s. 186 judicial authorization supported by a typed affidavit. In this way the wiretapping could be the graduated scheme said by the crown to be the proper way of looking at Part VI. The wiretapping could be judicially authorized by cell phone under s. 188, and s. 184.4 could be amended to be used only where it is not feasible to phone, as a judge is not available under s. 188, or the situation is so dire that even a short delay is a problem. It is the failure to coordinate the legislation and to provide for a duty judge available by phone in the same way s. 187.1 tele-warrants are obtained which creates the current urgency. It is a self imposed urgency.

40. In submitting this narrow role for s. 184.4, the respondents also submit that should this Court see a need for an amended s. 184.4 there needs to be a brief specific time limit so that it only applies in the brief time before a police officer can make a cell phone application under s. 188 and that the offences should be focused on those which cause imminent bodily harm or harm to national security. In the vast majority of cases there is no role for s. 184.4, and it is necessary for the legislation to spell out the limited time and basis for this interception. The exception to the already provided for exception, would be so limited that it would be best dealt with under s. 24 of the *Charter*. Legislating an exception to an exception invites the police to impose a broader interpretation and it will result in unintended consequences.

41. The three emergency wiretap provisions are:

- s. 184.4,
- s.184.1, and s.184.2 by means of an application under s. 184.3 (1), and (3), and
- s. 188 of the **Criminal Code**.

They each operate very differently, as if there is no common emergency rationale. In the first two emergency wiretap provisions the discretion to wiretap is delegated to a peace officer.

Duarte Applications: s. 184.1 and 184.2 by an application under s. 184.3 (1) and (3)

42. Section 184.1 is an emergency provision for an exceptional circumstance *Duarte* interception where the originator or intended recipient consents and there is a risk of bodily harm. This section allows the police officer to make the decision. A section 184.2 or 184.3 application, for the same kind of transaction, is not a true emergency application.⁵ It can be made in person before a judge under s.184.2 with an affidavit or under s.184.3 (1) and (3) by telephone or cell phone, as follows:

S. 184.3 (1): Application by means of telecommunication

Notwithstanding section 184.2, an application for an authorization under subsection 184.2(2) may be made ex parte to a provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, by telephone or other means of telecommunication, if it would be impracticable in the circumstances for the applicant to appear personally before a judge.

The evidence can be given *vive voce* and is recorded under s. 184.3(3). as follows:

S. 184.3 (3): **Recording** - The judge shall record, in writing or otherwise, the application for an authorization made under this section and, on determination of the application, shall cause the writing or recording to be placed in the packet referred to in subsection 187(1) and sealed in that packet, and a recording sealed in a packet shall be treated as if it were a document for the purposes of section 187.

There is no reason why s. 188 cannot be set up to function by cell phone in the same way. Because these applications can be heard by a Provincial Court Judge, in British Columbia they can be processed through the Justice Centre call facility and hooked up to a judge.

Emergency Applications where there is not enough time to prepare an Affidavit

43. In the third emergency wiretap provision, s. 188 of the **Criminal Code**, the legislation has been read by different lower courts to require an in person application with an affidavit, but the legislation is actually silent on whether the application has to be supported by evidence in writing or by oral evidence recorded in some way. Lower courts have disagreed on the oral evidence issue.⁶ If Parliament intended s. 188 to proceed on the basis of a typed affidavit, that would be irrational given that it is an emergency application, and there would be no need

⁵ A s. 184.2(2) in person application requires an affidavit, but the same application by telephone under s. 184.3(1) can be an oral application. There is no express requirement of an emergency in a telephone application, just that it is impracticable to appear in person.

⁶ See footnote 3.

for the 36 hours provided in the section if the affidavit has to be typed. Detailing that a *Duarte* application to a judge can be made by telephone and detailing how to record the evidence is inconsistent with not detailing that under s. 188. This negates the crown submission that the provisions of Part VI are a connected and graduated scheme for interception. In fact there are irrational differences.

44. The s. 188 emergency authorization has been part of the original *Protection of Privacy Act* since the beginning, enacted as s. 178.15 of S.C. 1973-74, c. 50, s. 2. It was re-enacted in 1993 in essentially the same terms.⁷

45. There is no reason why a judge should not be able to use modern technology to quickly make decisions in all emergencies.

46. This legislation needs to be over-hauled to provide a co-ordinated approach to police emergencies, something the crown thinks it already provides. Instead the current legislation is disjointed. If a search warrant or a *Duarte* authorization can be obtained by cell phone, then the s. 188 emergency wiretap authorization should similarly be dealt with by cell phone as in s. 184.3 (1) and (3).

The definition of unlawful act/offence provides sweeping search powers to police officers without any executive or judicial oversight: the issue raised in paragraph 4 above

47. The fact that the government submits to this Court that there has been no other use except to investigate kidnapping, conspiracy to kidnap, hostage taking, confinement, robbery, child abduction or murder⁸ is some evidence that it is unnecessary to have an exceptional investigative tool implemented by a decision of the police, to investigate offences like theft or fraud (s. 183 offences and as well unlawful acts), or the like, on the basis of exigency. The only police concern presented to the LRC was kidnapping. Investigation of other s.183 listed offences, such as municipal corruption or sedition can be politically motivated, and in logic call out for the decision to wiretap to be made by a judge.

⁷ The current and historical sections are set out one after another in Part VII, Statutes Relied Upon, at the end of this factum at pages [12] – [14].

⁸ This list comes from the factum of the appellant at p. 7, and from affidavit evidence at trial referred to at that page.

48. The offences covered by the words “unlawful act” provide a much broader discretion to a peace officer than merely investigating kidnapping, and can be used, for example, to intercept lawful political assemblies which some peace officer or mayor has decided, disturbs the peace tumultuously. The extent of offences covered under s.183 includes the investigation of imminent offences such as s. 57: forgery; s. 119 & 120: bribery; s. 121: fraud on government; s. 162: voyeurism; s. 334: theft or s. 335 -- credit card theft; s. 380: fraud; and s. 381: using mails to defraud. The list of offences also includes the investigation of morality offences such as keeping a gaming or betting house, keeping a common bawdy house; and offences of procuring and prostitution. The totality of offences falling under the “unlawful act” standard does not provide the specific focus to meet the limited exception requirements of *Hunter*.
49. Section 184.4 creates an exceptional emergency use wiretap similar to the discretion of a peace officer to wiretap without judicial authorization in s. 184.1. However, the section 184.1 emergency wiretap is at least focused to prevent bodily harm and requires at least one party to the interception has consented. The problem is the broad discretion in the s. 184.4 emergency wiretap directed to an undefined unlawful act that would cause serious harm to a person or property. The harm in s. 184.4 is not confined to bodily harm or harm to national security, and the discretion in the hands of peace officers is unbound if the section is to prevent harm from all unlawful acts. There is no justification for an emergency wiretap for ordinary property harm not involving a risk to bodily harm, for morality offences or for offences the investigation of which can be politically motivated.
50. Davies J. agreed that this broad definition of unlawful act was a problem, but read in a limitation to the offences listed under s.183⁹.

⁹ *R. v. Tse*, 2008 BCSC 211, para. 240 (2)(a) Dambrot J. disagreed with limiting the offences to s. 183, and found the broad list constitutionally acceptable: *R. v. Riley* #1, (2008) 174 C.R.R. (2d) 250 at 258, para. 21, (Ont. Sup. Ct.) [appellant's authorities, tab47]. Because of this disagreement, this respondent includes the example of unlawful assembly as a possible politically motivated abuse.

51. With respect, even this judicial limiting of offences is inadequate to protect against abuse from intercepting political dissent, and permits interceptions of property and morality crimes and perhaps a multitude of unlawful acts which do not meet the requirements of an emergency exception.¹⁰
52. Section 183 legitimately provides for intercepting some offences involving physical harm and national security, including: s. 52 – sabotage and various offences involving terrorist activities. Canada's international obligations impose requirements to protect United Nations personnel and offences on airplanes. Given the use of airplanes in the 9/11 attack in New York, these offences would also fall under national security, and for that reason could legitimately be listed in a definition of offences for s. 183. However the emergency wiretapping without a judicial authorization extends well beyond that kind of national security interest. Some offences such as income tax offences are not even listed in s. 183, presumably because they are not considered to be the kind of offences to be intercepted by a s. 186 authorization. The “unlawful act” boundary allows all the offences not thought to be the kind of offences that we would want to be wiretapped, to be intercepted under the s. 184.4 if there is some serious harm from the offence. Also to allow a police officer to intercept fraud, theft, and morality offences just because they are listed in s. 183 creates a sweeping search power that Justice Deschamps said in *Kang Brown* was contextually a search that would fall under the *Hunter v. Southam Inc.* Constitutional *Charter* framework and it is respectfully submitted that it should require prior judicial authorization. See para. 35, above.
53. Dambrot J. disagreed with Davies J. and held that s. 184.4 was intended to apply to any unlawful act. It is not without significance that even under the ruling of Davies J. which

¹⁰ Appendix “B”. Clause 3 of Bill C-50 which died on the order papers in 2010 would have resolved the different interpretations of Davies J. and Dambrot J. by replacing “unlawful act” with “offence” with the intent according to legislative notes of confining s. 184.4 police wiretapping to the offences listed in s. 183.

limits interceptions, this allows the police to secretly¹¹ intercept for sedition without any time limit.

54. The McDonald Commission found that the RCMP kept files on over 800,000 people and they concluded that the police would wiretap people who dissented. They examined files involving a lawyer who was known to represent what the RCMP called “revolutionary youth elements”. The Security Service section of the RCMP monitored this lawyer’s telephones based on an authorization that alleged that he was engaged in offences involving security. The Commission concluded that RCMP were wrong and there was no such concern. Third Report, 1981, Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, at p. 335 to 337.

55. It remains necessary for this Court to at least choose between the analysis of Justice Davies in *Tse* that reads in a limitation on emergency wiretap offences to those under offences listed in s. 183 of the **Criminal Code** or the analysis of Justice Dambrot in *Reilly # I* that declines the *Tse* analysis and sees the limitation of offences as being “unlawful acts”. Even if this Court prefers Justice Davies analysis, given that the crown says that the provision is virtually only used for kidnapping offences and similar offences, then the endless list of offences under s. 183 provides a discretion to the police to wiretap for harm from sedition and other potential offences of a political dissent nature.. If this Court prefers the analysis of Justice Dambrot, then the panalogy of offences includes unlawful assembly as discussed below.

Section 184.4 lacks clarity

56. Glanville Williams cautions that legislation which does not have clarity results in a wide discretion to the police and leads to decisions taken in secrecy and without effective control. See *Textbook of Criminal Law*, 2 Ed., (Stevens: London, 1983) at p. 7:

The law should tell us with reasonable clarity what it expects of us. Complete precision cannot be achieved, but very nebulous prescriptions should be avoided, because they give

¹¹ Notification or report to Parliament is not required under s. 184.4. There is no requirement of advising the Solicitor General. Bill C-50 would have imposed the requirement of a report to Parliament, but the bill died on the order papers in 2010. This means that there is no supervision by the courts, the executive or Parliament. It can be a secret police tool of investigation.

insufficient guidance to the citizen and correspondingly too wide at discretion to law-enforcement agencies. The practical way in which law is administered would depend too much on the decisions of the police... taken in private and without effective control.

57. The dissent of Justice La Forest in *R. v. Landry*, [1986] 1 S.C.R. 145 became the law in *R. v. Feeney*, [1997] 2 S.C.R. 13. In *Landry*, Justice La Forest expressed similar concerns as Glanville Williams about delegation of amorphous search powers to the police based on an investigator's subjective belief that he has reasonable and probable grounds. as follows:

72 Let me first say something about the vagueness of the proposed test of "reasonable and probable cause" and the consequential danger of giving the police power to enter into a private dwelling on that basis. The expression no doubt comprises something more than mere surmise, but determining with any useful measure of precision what it means beyond that poses rather intractable problems for both the police and the courts. If the principle in *Eccles v. Bourque* is to be extended to permit forcible entry into private homes for the purpose of making arrests simply on the basis that a police officer has reasonable and probable cause, then, as the Law Reform Commission put it in its working paper on Arrest at p. 115, it would allow him a 'wide latitude based on vague, sometimes contradictory statements which provide police with few guidelines, individuals with few definable rights, and courts with little means of control'Because of the vagueness of the discretion it gives a police officer, that discretion is virtually uncontrollable.

And:

87 There is another cause for concern in granting such a vague discretion. It is unlikely to be used as much against the economically favoured or powerful as against the disadvantaged.

58. A judgment, reading in provisions does not filter down to guide police officers. The bright line guidance should be set out in the legislation. Even senior officers who would be called upon to implement s. 184.4 wiretapping, are usually unaware of the details of what the courts say. In *R. v. Moldovan*, 2009 CarswellOnt 6468 [Appellant's. Authorities, tab 42] the trial judge explains that a senior police officer, S/Insp. Izzett, who made the decision to implement s. 184.4, and who had to decide what was required to obtain traditional authorizations, when asked about the discussion by this court in *R. v. Araujo*, 2000 SCC 65, regarding drafting affidavits, "candidly acknowledged that he was not familiar with what was contained in paragraph 46 [of *Araujo*] ...". *Moldovan* at paras. 67, 68.

59. Case law is of assistance to lower court judges and to lawyers, but the details do not necessarily filter down to the level of the police officer. The police officer can be familiar

with the broad principles in case law, but the details of control and accountability have to go into the legislation, because the decision to intercept is not judicially authorized prior to the interception. In the absence of prior judicial authorization, reading in limitations will only help the person intercepted to exclude the wiretap at trial.

60. The respondents adopt the approach of Glanville Williams and of retired Justice La Forest, above, that expressions in statutes can pose intractable interpretation problems for the police, if based on vague, sometimes contradictory statements in the legislation or by the courts, and lead to the police taking on a wide latitude. As in *Moldovan*, it is unlikely that the officers who make the decisions will even know about the details of the case law. Case law may assist judges who are called upon to authorize a search, but they do not find their way into the pocket **Criminal Code** of the police officer. To put this another way, a common law dog sniffing search power is focused on a specific contraband, but an emergency search power for any unlawful act is completely unfocussed.

Unlawful assembly and the concern for abuse in delegating a judicial discretion to Police

61. Be it unlawful assembly or sedition, there is an excessive delegation of wiretapping to the police, under s. 184.4, because the investigation of these offences can be politically motivated. Accepting the view of Dambrot J. that s. 184.4 allows emergency wiretapping by peace officers for “unlawful acts”, this gives too wide a latitude to the police, that is not subject to accountability and as pointed out by Glanville Williams, taken in private without controls.

62. The phrase “unlawful acts” expands the situations in which peace officers can make what should be a judicial decision. A normal application under s. 186 is limited by s. 186 (4) which is captioned “[c]ontents and limitation of authorization” and the limitation restricts normal authorizations to the listed offences, because of the use of the word “offence” as follows:

s. 186 (4) (a) – An authorization shall (a) state the offence in respect of which private communications may be intercepted...

The Court focuses the police interceptions by stating the offence.

63. The definition section, s. 183, in defining the word “offence” does so by listing offences. Section 184.4 does not authorize the interception of “offences”; s. 184.4 (b) authorizes the interception of private communications without any such limitation, with the stated goal “to prevent an unlawful act”.
64. The crown in its factum concedes that the main use for this emergency exceptional wiretap is to combat kidnapping and similar offences. Given the limited need, there is no good reason for such an overbroad scope delegating a judicial discretion to peace officers, given the provisions of s. 188 which provided a parallel emergency wiretap application by a judge.
65. The respondents accept that the main use for this provision would be kidnapping and other offences involving serious bodily harm, but there is no doubt that this section authorizes well beyond what can possibly be necessary. It is for that reason that the respondents use the example of investigating “unlawful assembly” and sedition.
66. Unlawful assembly is a crime under s. 63 of the **Criminal Code** committed by three or more persons who with intent to carry out a common purpose, assemble themselves and cause persons to fear, on reasonable grounds, that they will disturb the peace tumultuously. It is like the common law offence of “public mischief”, the basis for Glanville William’s concern about legislative clarity and the danger of insufficient guidance and delegating too wide a discretion to the police, referred to above in para. 56. The concern of Glanville Williams was that the common law offence of “public mischief” allowed the police to arrest and the courts to punish any conduct of which they disapproved. The common law offence of “public mischief” no longer exists in England and the only remaining common law offence in Canada is contempt. That aside, the respondent seriously questions the delegation of an amorphous and vague description under the banner of “unlawful act” as a limitation on police wiretapping. It raises the problem addressed by Glanville Williams in the context of police action and court orders and common law offences, which in the wiretap legislation now allows the police to wiretap any conduct of which they disapprove.

67. This extent of police discretionary wiretapping is a sweeping and invasive delegation which allows the police to intercept private communications which should after the discussion in *Hunter v. Southam Inc.* regarding United States wiretap laws protecting people and not places, have a well-defined reasonable expectation of privacy under the *Charter*. It is significant that the origin of s. 8 jurisprudence, *Hunter v. Southam Inc.*, took its lead from wiretap privacy analysis, and the courts have repeatedly pronounced that wiretapping is invasive.

Section 184.4 Delegates a Sweeping Discretion to the Police to wiretap without any time limits, statutory controls, or requirement of after the fact judicial oversight, executive oversight, or parliamentary oversight; and no requirement that the police consider terms and conditions: the issue raised in paragraph 5 above

68. Part VI introduced accountability and control measures which included time limits for authorizations with provisions for renewal. With the advent of s.184.4 in 1993, the urgency for accountability and for control measures was eliminated, at least for that section. The result is to give the police a sweeping power to wiretap without any time limit, without control by way of terms to protect innocent or privileged conversations, and without any oversight unless there are charges laid.

69. Sections 184.1 and s. 184.4, the police implemented wiretaps, are the only Part VI Wiretaps that do not have a time limit.

70. Section 188(2) limits emergency judicially authorized emergency wiretaps to 36 hours, presumably to permit time for a traditional application. A *Duarte* application which is made by a designated police officer or public officer under s. 184.2 if made on an affidavit to a judge is limited by s. 184.2(4) (e) to 60 days, and if made by telephone under s. 184.3 is limited by s. 184.3(6) to 36 hours. The traditional authorization is also limited to 60 days by s. 186 (4) (c), but can be renewed for another 60 days. The only interceptions under Part VI that have absolutely no time limit are the s. 184.1 emergency *Duarte* police wiretap and the s. 184.4 exceptional circumstance police interception for serious harm to persons or property, both wiretaps instigated by a police decision. Why do we limit *Duarte* judicial wiretaps under s. 184.3(6) to 36 hours and s. 188(2) emergency judicial wiretaps to 36 hours when

wiretapping by police without an authorization under s. 184.1 or under s. 184.4 have absolutely no time limit and how is this the “a graduated scheme of electronic interception” as submitted by the Appellant, in which the legislation as a whole provides the moderation claimed for by the appellant. Paragraph 28, Appellant’s factum?

71. Under s. 196 (1) of Part VI, the Provincial Attorney General or the Minister of Public Safety and Emergency Preparedness are required within 90 days after the period for which a traditional s. 185 authorization was given or renewed or within such other period as is fixed pursuant to subsection 185(3) or subsection (3) to notify in writing the person who was the object of the interception and certify to the court that the notice has been served. This ensures executive and judicial oversight because the police are required to give the names of the persons to the crown who send out the notices and certify to the court. Why do we have executive and judicial oversight when the police have an authorization obtained by crown lawyers, but there is no oversight when the police are intercepting under a s. 184.1 *Duarte* wiretap or a s. 184.4 emergency police decision to wiretap, both without an authorization or involvement of crown lawyers? How is this a graduated and reasonable system? In the case at bar, *R. v. Tse*, 2008 BCSC 211 at paragraph 215, Justice Davies said that, “[i]n any and all of these circumstances, the police would be answerable to no one.”

72. Because the decision to wiretap under s. 184.4 is made by a police officer and there is no authorization, and as a result s. 196(1) does not apply, there is no requirement to notify persons intercepted. Why do we notify people that they have been intercepted under a properly obtained judicial order, but we do not notify them when the police have wiretapped them without a judicial order?

73. Section 195(1) requires annual reports to Parliament for all wiretapping pursuant to an authorization except under s. 184.4 and s. 184.1 as there is no authorization:

The Minister of Public Safety and Emergency Preparedness shall, as soon as possible after the end of each year, prepare a report relating to

(a) authorizations for which he and agents to be named in the report who were specially designated in writing by him for the purposes of section 185 made application, and

(b) authorizations given under section 188 for which peace officers to be named in the report who were specially designated by him for the purposes of that section made application, and interceptions made thereunder in the immediately preceding year.

74. For the same reason that notification is not required, reports to Parliament are not required, because there is no authorization granted.¹² The Appellant submits at p. 32 of its factum, that excluding s. 184.4 from the requirement of notice under s. 196 was a reasonable policy decision given the nature of the emergencies involved and the reasonable diligence test for seeking an authorization, as the period of interception will be short. This submission is based on the evidence set out in the appellant's factum at p. 7 and discussed above in paragraph 44. That list is a short list of only some of the offences set out in s. 183 or covered by the term "unlawful act". It may be that in some cases, the police decision to wiretap will be for only a short period, but that is a decision made by the police and there is no recourse if the wiretapping goes on endlessly, because there is no requirement to even report to the Solicitor General, never mind the judiciary or Parliament. The fact that the government introduced legislation last year to require notification, but which died on the order papers, calls into question the submission that this initial decision not to require reporting to Parliament is a reasonable policy choice by the government.

75. Neither section 184.1 nor 184.4 has any provision for imposing terms and conditions, because the decision is made by a peace officer. The problem is that there is no independent adjudicator to impose terms or conditions to shield innocent discussions of parties. There are no statutory terms to protect the various privileged communications such as legal communications or marital communications. Why do we impose terms when there is an authorization applied for by a crown lawyer, but there is no conditions imposed on the police when they wiretap without any oversight?

¹² Bill C-50, An Act to amend the Criminal Code (Interception of private communications and related warrants and orders) died on the order papers in 2010. A copy of the Bill is annexed as Appendix "B". Clause 7 of the Bill would have imposed a requirement of a public report under s. 184.4. However s. 184.1 interceptions to prevent bodily harm and s. 184.2 interceptions on consent by the police officer and without an authorization would not have been amended to require reports.

Summary

76. This legislation falls short of the mark of clarity required to legislate an exception to so important a rule as in *Hunter*, requiring a prior judicial authorization, and the appellant fails its onus of proving that the legislation falls within the *Hunter* exception. It is so lacking in clarity, that in *R. v. Moldovan* at p. 34, paragraph 166 Justice Clarke tells us, "the authorities are not uniform as precisely how the section falls short of constitutional compliance.". The fact that judges have difficulty interpreting legislation and deciding whether it falls within the *Hunter* limited exception, is some evidence that this legislation is either badly drafted or the task is so difficult that it is best left to be decided on a case-by-case basis under s. 24 of the *Charter*.
77. The respondent respectfully submits that for the most part there is no need for s. 184.4, as a properly implemented emergency wiretap application to a judge should be able to be made under s. 188 in the same way that Part VI, s. 184.3 (1) and (3), provides for a telephone application and a recording of grounds for a *Duarte* authorization.
78. Section 184.4 undertakes the extremely difficult task of trying to anticipate the offences in which the harm is so great that it is a necessary exception to our Constitutional framework for the police to be authorized to decide to wiretap. Anticipating all of the emergencies of this kind that could arise, presents a difficult drafting challenge, that is probably better dealt with on a case by case basis under s. 24 of the *Charter*. However, there are examples in s. 183 of offences like theft or fraud in which it is difficult to conceive of an ensuing harm so great that it would justify delegating the decision to wiretap theft and fraud to the police. As submitted above, using the standard of "unlawful act" is according to the analysis of Glanville Williams, like delegating to the police the decision to wiretap for any unlawful act that they morally disapprove. As submitted this legislation which is supposed to be an exception to an exception to the emergency application under s. 188, swallows the rule in *Hunter*.
79. Section 184.4 does not have sufficient clarity to limit its application to the situation where there is no judge available at the call center, or to where the facts are so immediately dire that

the 20 minutes or so required to phone a call center is too long a time to wait. Moreover, it has no time limit, control, accountability and no protection by terms and conditions.

80. This court should resolve the *Galbraith*/Riley disagreement and this appellant supports *Galbraith*.

PART IV: SUMISSION ON COSTS

81. The Applicant makes no submission on costs.

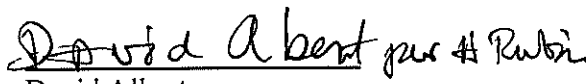
PART V: ORDER SOUGHT

82. The respondent asks that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED


Kenneth S. Westlake, Q.C.
Counsel for Doan


Howard Rubin, Q.C.
Counsel for Nguyen


David Albert
Counsel for Nguyen

PART VI: AUTHORITIES

	paragraph
<i>R. v. Ackworth</i> , [1987] 2 S.C.R. 291	28
<i>R. v. Araujo</i> , 2000 SCC 65	58
<i>R. v. Kang Brown</i> , 2008 SCC 18	30 – 36, 52
<i>R. v. Feeney</i> , [1997] 2 S.C.R. 13	57
<i>R. v. Galbraith</i> , (1989), 49 C.C.C. (3d) 178 (Alta. C.A.)	2, 3, 8 – 10, 14, 20, 23, <i>footnotes</i> 3
<i>R. v. Grant</i> , 2009 SCC 32	13, 24
<i>Hunter, et al v. Southam Inc.</i> ,	5, 25 - 27, 29, 31, 32, 35 – 37, 76
<i>R. v. Landry</i> , [1986] 1 S.C.R. 145	57, 60
<i>R. v. Laudicina</i> , (1990) 53 C.C.C. (3d) 281 (Ont. H.C.J.)	<i>footnote</i> 3
<i>R. v. Moldovan</i> , 2009 CarswellOnt 6468	19, 58, 60, 77, <i>footnote</i> 4
<i>R. v. Myers</i> , 126 N.S.R. (2d) 237	<i>footnote</i> 3
<i>R. v. Paterson</i> , (1985) 18 C.C.C. (3d) 137 (Ont. C.A.)	28
<i>R. v. Riley #1</i> , (2008) 174 C.R.R. (2d) 250	53, 55 <i>footnote</i> 9
<i>R. v. Riley #2</i> , 174 C.R.R. (2d) 288	10, 11, 20, <i>footnote</i> 3
<i>R. c. St-Yves</i> , [1994] R.J.Q. 2257	<i>footnote</i> 3
<i>R. v. Tapaquon</i> , [1993] 4 S.C.R. 535	7
<i>R. v. Thompson</i> , [1990] 2 S.C.R. 1111	28
<i>R. v. Tse</i> , 2008 BCSC 211	17, 62, <i>footnote</i> 9

Government Commissions and Reports

Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Third Report, 1981,	54
Law Reform Commission, <i>Working Paper</i> 47	<i>footnote</i> 2, 3 p.p. 2, 3, 14, 15. 19 - 21, 35, 47
- <i>Electronic Surveillance</i> , 1986	

Texts

<i>Textbook of Criminal Law</i> , 2 Ed., (Stevens: London, 1983), Glanville Williams	56, 60, 66, 78
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PART VII: STATUTES RELIED UPON

Part VI Criminal Code

183. Definitions

In this Part,

"authorization" means an authorization to intercept a private communication given under section 186 or subsection 184.2(3), 184.3(6) or 188(2);

"electro-magnetic, acoustic, mechanical or other device" means any device or apparatus that is used or is capable of being used to intercept a private communication, but does not include a hearing aid used to correct subnormal hearing of the user to not better than normal hearing;

"intercept" includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof;

"offence" means an offence contrary to, any conspiracy or attempt to commit or being an accessory after the fact in relation to an offence contrary to, or any counselling in relation to an offence contrary to

(a) any of the following provisions of this Act, namely,

(i) section 47 (high treason),

(ii) section 51 (intimidating Parliament or a legislature),

(iii) section 52 (sabotage),

(iii.1) section 56.1 (identity documents),

(iv) section 57 (forgery, etc.),

(v) section 61 (sedition),

(vi) section 76 (hijacking),

(vii) section 77 (endangering safety of aircraft or airport),

(viii) section 78 (offensive weapons, etc., on aircraft),

(ix) section 78.1 (offences against maritime navigation or fixed platforms),

(x) section 80 (breach of duty),

(xi) section 81 (using explosives),

(xii) section 82 (possessing explosives),

(xii.1) section 83.02 (providing or collecting property for certain activities),

(xii.2) section 83.03 (providing, making available, etc., property or services for terrorist purposes),

(xii.3) section 83.04 (using or possessing property for terrorist purposes),

(xii.4) section 83.18 (participation in activity of terrorist group),

(xii.5) section 83.19 (facilitating terrorist activity),

(xii.6) section 83.2 (commission of offence for terrorist group),

(xii.7) section 83.21 (instructing to carry out activity for terrorist group),

(xii.8) section 83.22 (instructing to carry out terrorist activity),

(xii.9) section 83.23 (harbouring or concealing),

(xii.91) section 83.231 (hoax — terrorist activity),

(xiii) section 96 (possession of weapon obtained by commission of offence),

(xiii.1) section 98 (breaking and entering to steal firearm),

(xiii.2) section 98.1 (robbery to steal firearm),

(xiv) section 99 (weapons trafficking),

(xv) section 100 (possession for purpose of weapons trafficking),

(xvi) section 102 (making automatic firearm),
 (xvii) section 103 (importing or exporting knowing it is unauthorized),
 (xviii) section 104 (unauthorized importing or exporting),
 (xix) section 119 (bribery, etc.),
 (xx) section 120 (bribery, etc.),
 (xxi) section 121 (fraud on government),
 (xxii) section 122 (breach of trust),
 (xxiii) section 123 (municipal corruption),
 (xxiv) section 132 (perjury),
 (xxv) section 139 (obstructing justice),
 (xxvi) section 144 (prison breach),
 (xxvii) subsection 145(1) (escape, etc.),
 (xxvii.1) section 162 (voyeurism),
 (xxviii) paragraph 163(1)(a) (obscene materials),
 (xxix) section 163.1 (child pornography),
 (xxx) section 184 (unlawful interception),
 (xxxi) section 191 (possession of intercepting device),
 (xxxii) subsection 201(1) (keeping gaming or betting house),
 (xxxiii) paragraph 202(1)(e) (pool-selling, etc.),
 (xxxiv) subsection 210(1) (keeping common bawdy house),
 (xxxv) subsection 212(1) (procuring),
 (xxxvi) subsection 212(2) (procuring),
 (xxxvii) subsection 212(2.1) (aggravated offence in relation to living on the avails of prostitution of a person under the age of eighteen years),
 (xxxviii) subsection 212(4) (offence — prostitution of person under eighteen),
 (xxxix) section 235 (murder),
 (xxxix.1) section 244 (discharging firearm with intent),
 (xxxix.2) section 244.2 (discharging firearm — recklessness),
 (xl) section 264.1 (uttering threats),
 (xli) section 267 (assault with a weapon or causing bodily harm),
 (xlii) section 268 (aggravated assault),
 (xliii) section 269 (unlawfully causing bodily harm),
 (xliii.1) section 270.01 (assaulting peace officer with weapon or causing bodily harm),
 (xliii.2) section 270.02 (aggravated assault of peace officer),
 (xliv) section 271 (sexual assault),
 (xlv) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm),
 (xlvi) section 273 (aggravated sexual assault),
 (xlvii) section 279 (kidnapping),
 (xlvii.1) section 279.01 (trafficking in persons),
 (xlvii.11) section 279.011 (trafficking of a person under the age of eighteen years),
 (xlvii.2) section 279.02 (material benefit),
 (xlvii.3) section 279.03 (withholding or destroying documents),
 (xlviii) section 279.1 (hostage taking),
 (xlix) section 280 (abduction of person under sixteen),
 (l) section 281 (abduction of person under fourteen),
 (li) section 282 (abduction in contravention of custody order),

(lii) section 283 (abduction),
(liii) section 318 (advocating genocide),
(liv) section 327 (possession of device to obtain telecommunication facility or service),
(liv.1) section 333.1 (motor vehicle theft),
(lv) section 334 (theft),
(lvi) section 342 (theft, forgery, etc., of credit card),
(lvi.1) section 342.01 (instruments for copying credit card data or forging or falsifying credit cards),
(lvii) section 342.1 (unauthorized use of computer),
(lviii) section 342.2 (possession of device to obtain computer service),
(lix) section 344 (robbery),
(lx) section 346 (extortion),
(lxi) section 347 (criminal interest rate),
(lxii) section 348 (breaking and entering),
(lxii.1) section 353.1 (tampering with vehicle identification number),
(lxiii) section 354 (possession of property obtained by crime),
(lxiii.1) section 355.2 (trafficking in property obtained by crime),
(lxiii.2) section 355.4 (possession of property obtained by crime — trafficking),
(lxiv) section 356 (theft from mail),
(lxv) section 367 (forgery),
(lxvi) section 368 (use, trafficking or possession of forged document),
(lxvi.1) section 368.1 (forgery instruments),
(lxvii) section 372 (false messages),
(lxviii) section 380 (fraud),
(lxix) section 381 (using mails to defraud),
(lxx) section 382 (fraudulent manipulation of stock exchange transactions),
(lxx.1) subsection 402.2(1) (identity theft),
(lxx.2) subsection 402.2(2) (trafficking in identity information),
(lxx.3) section 403 (identity fraud),
(lxxi) section 423.1 (intimidation of justice system participant or journalist),
(lxxii) section 424 (threat to commit offences against internationally protected person),
(lxxii.1) section 424.1 (threat against United Nations or associated personnel),
(lxxiii) section 426 (secret commissions),
(lxxiv) section 430 (mischief),
(lxxv) section 431 (attack on premises, residence or transport of internationally protected person),
(lxxv.1) section 431.1 (attack on premises, accommodation or transport of United Nations or associated personnel),
(lxxv.2) subsection 431.2(2) (explosive or other lethal device),
(lxxvi) section 433 (arson),
(lxxvii) section 434 (arson),
(lxxviii) section 434.1 (arson),
(lxxix) section 435 (arson for fraudulent purpose),
(lxxx) section 449 (making counterfeit money),
(lxxxi) section 450 (possession, etc., of counterfeit money),
(lxxxii) section 452 (uttering, etc., counterfeit money),

- (lxxxiii) section 462.31 (laundering proceeds of crime),
- (lxxxiv) subsection 462.33(11) (acting in contravention of restraint order),
- (lxxxv) section 467.11 (participation in criminal organization),
- (lxxxvi) section 467.12 (commission of offence for criminal organization), or
- (lxxxvii) section 467.13 (instructing commission of offence for criminal organization),
- (b) section 198 (fraudulent bankruptcy) of the *Bankruptcy and Insolvency Act*,
- (b.1) any of the following provisions of the *Biological and Toxin Weapons Convention Implementation Act*, namely,
 - (i) section 6 (production, etc., of biological agents and means of delivery), or
 - (ii) section 7 (unauthorized production, etc., of biological agents),
- (c) any of the following provisions of the *Competition Act*, namely,
 - (i) section 45 (conspiracies, agreements or arrangements between competitors),
 - (ii) section 47 (bid-rigging), or
 - (iii) subsection 52.1(3) (deceptive telemarketing),
- (d) any of the following provisions of the *Controlled Drugs and Substances Act*, namely,
 - (i) section 5 (trafficking),
 - (ii) section 6 (importing and exporting), or
 - (iii) section 7 (production),
- (e) section 3 (bribing a foreign public official) of the *Corruption of Foreign Public Officials Act*,
- (e.1) the *Crimes Against Humanity and War Crimes Act*,
- (f) either of the following provisions of the *Customs Act*, namely,
 - (i) section 153 (false statements), or
 - (ii) section 159 (smuggling),
- (g) any of the following provisions of the *Excise Act, 2001*, namely,
 - (i) section 214 (unlawful production, sale, etc., of tobacco or alcohol),
 - (ii) section 216 (unlawful possession of tobacco product),
 - (iii) section 218 (unlawful possession, sale, etc., of alcohol),
 - (iv) section 219 (falsifying or destroying records),
 - (v) section 230 (possession of property obtained by excise offences), or
 - (vi) section 231 (laundering proceeds of excise offences),
- (h) any of the following provisions of the *Export and Import Permits Act*, namely,
 - (i) section 13 (export or attempt to export),
 - (ii) section 14 (import or attempt to import),
 - (iii) section 15 (diversion, etc.),
 - (iv) section 16 (no transfer of permits),
 - (v) section 17 (false information), or
 - (vi) section 18 (aiding and abetting),
- (i) any of the following provisions of the *Immigration and Refugee Protection Act*, namely,
 - (i) section 117 (organizing entry into Canada),
 - (ii) section 118 (trafficking in persons),
 - (iii) section 119 (disembarking persons at sea),
 - (iv) section 122 (offences related to documents),
 - (v) section 126 (counselling misrepresentation), or
 - (vi) section 129 (offences relating to officers), or
- (j) any offence under the *Security of Information Act*,

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and includes any other offence that there are reasonable grounds to believe is a criminal organization offence or any other offence that there are reasonable grounds to believe is an offence described in paragraph (b) or (c) of the definition "terrorism offence" in section 2;

"private communication" means any oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it;

"public switched telephone network" means a telecommunication facility the primary purpose of which is to provide a land line-based telephone service to the public for compensation;

"radio-based telephone communication" means any radiocommunication within the meaning of the *Radiocommunication Act* that is made over apparatus that is used primarily for connection to a public switched telephone network;

"sell" includes offer for sale, expose for sale, have in possession for sale or distribute or advertise for sale;

"solicitor" means, in the Province of Quebec, an advocate or a notary and, in any other province, a barrister or solicitor.

R.S.C. 1985, c. 27 (1st Supp.), ss. 7(2)(a), 23; R.S.C. 1985, c. 1 (2nd Supp.), s. 213(1) (Sched. I, item 2); R.S.C. 1985, c. 1 (4th Supp.), s. 13; R.S.C. 1985, c. 29 (4th Supp.), s. 17; R.S.C. 1985, c. 42 (4th Supp.), s. 1; 1991, c. 28, s. 12; 1992, c. 27, s. 90; 1993, c. 7, s. 5; 1993, c. 25, s. 94; 1993, c. 40, s. 1; 1993, c. 46, s. 4; 1995, c. 39, s. 140; 1996, c. 19, s. 66; 1997, c. 18, s. 7; 1997, c. 23, s. 3; 1998, c. 34, s. 8; 1999, c. 2, s. 47; 1999, c. 5, s. 4; 2000, c. 24, s. 43; 2001, c. 32, s. 4; 2001, c. 41, ss. 5, 31, 133(2), (5); 2002, c. 22, s. 409(2)(b); 2004, c. 15, s. 108; 2005, c. 32, s. 10; 2005, c. 43, s. 1; 2008, c. 6, s. 15; 2009, c. 2, s. 442; 2009, c. 22, s. 4; 2009, c. 28, s. 3; 2010, c. 3, s. 1; 2010, c. 14, s. 2

184.1

184.1(1) Interception to prevent bodily harm

An agent of the state may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication if

- (a) either the originator of the private communication or the person intended by the originator to receive it has consented to the interception;
- (b) the agent of the state believes on reasonable grounds that there is a risk of bodily harm to the person who consented to the interception; and
- (c) the purpose of the interception is to prevent the bodily harm.

184.1(2) Admissibility of intercepted communication

The contents of a private communication that is obtained from an interception pursuant to subsection (1) are inadmissible as evidence except for the purposes of proceedings in which actual, attempted or threatened bodily harm is alleged, including proceedings in respect of an application for an authorization under this Part or in respect of a search warrant or a warrant for the arrest of any person.

184.1(3) Destruction of recording and transcripts

The agent of the state who intercepts a private communication pursuant to subsection (1) shall, as soon as is practicable in the circumstances, destroy any recording of the private communication that is obtained from an interception pursuant to subsection (1), any full or partial transcript of the recording and any notes made by that agent of the private communication if nothing in the private communication suggests that bodily harm, attempted bodily harm or threatened bodily harm has occurred or is likely to occur.

184.1(4) Definition of "agent of the state"

For the purposes of this section, "Agent of the state" means

- (a) a peace officer; and
- (b) a person acting under the authority of, or in cooperation with, a peace officer.

184.2**184.2(1) Interception with consent**

A person may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication where either the originator of the private communication or the person intended by the originator to receive it has consented to the interception and an authorization has been obtained pursuant to subsection (3).

184.2(2) Application for authorization

An application for an authorization under this section shall be made by a peace officer, or a public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, ex parte and in writing to a provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, and shall be accompanied by an affidavit, which may be sworn on the information and belief of that peace officer or public officer or of any other peace officer or public officer, deposing to the following matters:

- (a) that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed;
- (b) the particulars of the offence;
- (c) the name of the person who has consented to the interception;
- (d) the period for which the authorization is requested; and
- (e) in the case of an application for an authorization where an authorization has previously been granted under this section or section 186, the particulars of the authorization.

184.2(3) Judge to be satisfied

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

- (a) there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed;
- (b) either the originator of the private communication or the person intended by the originator to receive it has consented to the interception; and
- (c) there are reasonable grounds to believe that information concerning the offence referred to in paragraph (a) will be obtained through the interception sought.

184.2(4) Content and limitation of authorization

An authorization given under this section shall

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

- (b) state the type of private communication that may be intercepted;
- (c) state the identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used;
- (d) contain the terms and conditions that the judge considers advisable in the public interest; and
- (e) be valid for the period, not exceeding sixty days, set out therein.

184.3

184.3(1) Application by means of telecommunication

Notwithstanding section 184.2, an application for an authorization under subsection 184.2(2) may be made ex parte to a provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, by telephone or other means of telecommunication, if it would be impracticable in the circumstances for the applicant to appear personally before a judge.

184.3(2) Application

An application for an authorization made under this section shall be on oath and shall be accompanied by a statement that includes the matters referred to in paragraphs 184.2(2)(a) to (e) and that states the circumstances that make it impracticable for the applicant to appear personally before a judge.

184.3(3) Recording

The judge shall record, in writing or otherwise, the application for an authorization made under this section and, on determination of the application, shall cause the writing or recording to be placed in the packet referred to in subsection 187(1) and sealed in that packet, and a recording sealed in a packet shall be treated as if it were a document for the purposes of section 187.

184.3(4) Oath

For the purposes of subsection (2), an oath may be administered by telephone or other means of telecommunication.

184.3(5) Alternative to oath

An applicant who uses a means of telecommunication that produces a writing may, instead of swearing an oath for the purposes of subsection (2), make a statement in writing stating that all matters contained in the application are true to the knowledge or belief of the applicant and such a statement shall be deemed to be a statement made under oath.

184.3(6) Authorization

Where the judge to whom an application is made under this section is satisfied that the circumstances referred to in paragraphs 184.2(3)(a) to (c) exist and that the circumstances referred to in subsection (2) make it impracticable for the applicant to appear personally before a judge, the judge may, on such terms and conditions, if any, as are considered advisable, give an

authorization by telephone or other means of telecommunication for a period of up to thirty-six hours.

184.3(7) Giving authorization

Where a judge gives an authorization by telephone or other means of telecommunication, other than a means of telecommunication that produces a writing,

- (a) the judge shall complete and sign the authorization in writing, noting on its face the time, date and place at which it is given;
- (b) the applicant shall, on the direction of the judge, complete a facsimile of the authorization in writing, noting on its face the name of the judge who gave it and the time, date and place at which it was given; and
- (c) the judge shall, as soon as is practicable after the authorization has been given, cause the authorization to be placed in the packet referred to in subsection 187(1) and sealed in that packet.

184.3(8) Giving authorization where telecommunication produces writing

Where a judge gives an authorization by a means of telecommunication that produces a writing, the judge shall

- (a) complete and sign the authorization in writing, noting on its face the time, date and place at which it is given;
- (b) transmit the authorization by the means of telecommunication to the applicant, and the copy received by the applicant shall be deemed to be a facsimile referred to in paragraph (7)(b); and
- (c) as soon as is practicable after the authorization has been given, cause the authorization to be placed in the packet referred to in subsection 187(1) and sealed in that packet.

1993, c. 40, s. 4

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.

185.

185(1) Application for authorization

An application for an authorization to be given under section 186 shall be made *ex parte* and in writing to a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 and shall be signed by the Attorney General of the province in which the application is made or

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the Minister of Public Safety and Emergency Preparedness or an agent specially designated in writing for the purposes of this section by

(a) the Minister personally or the Deputy Minister of Public Safety and Emergency Preparedness personally, if the offence under investigation is one in respect of which proceedings, if any, may be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or

(b) the Attorney General of a province personally or the Deputy Attorney General of a province personally, in any other case,

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

(c) the facts relied on to justify the belief that an authorization should be given together with particulars of the offence,

(d) the type of private communication proposed to be intercepted,

(e) the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence, a general description of the nature and location of the place, if known, at which private communications are proposed to be intercepted and a general description of the manner of interception proposed to be used,

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

(g) the period for which the authorization is requested, and

(h) whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

185(1.1) Exception for criminal organizations and terrorist groups

Notwithstanding paragraph (1)(h), that paragraph does, not apply where the application for an authorization is in relation to

(a) an offence under section 467.11, 467.12 or 467.13;

(b) an offence committed for the benefit of, at the direction of or in association with a criminal organization; or

(c) a terrorism offence.

185(2) Extension of period for notification

An application for an authorization may be accompanied by an application, personally signed by the Attorney General of the province in which the application for the authorization is made or the Minister of Public Safety and Emergency Preparedness if the application for the authorization is made by him or on his behalf, to substitute for the period mentioned in subsection 196(1) such longer period not exceeding three years as is set out in the application.

185(3) Where extension to be granted

Where an application for an authorization is accompanied by an application referred to in subsection (2), the judge to whom the applications are made shall first consider the application referred to in subsection (2) and where, on the basis of the affidavit in support of the application

for the authorization and any other affidavit evidence submitted in support of the application referred to in subsection (2), the judge is of the opinion that the interests of justice warrant the granting of the application, he shall fix a period, not exceeding three years, in substitution for the period mentioned in subsection 196(1).

185(4) Where extension not granted

Where the judge to whom an application for an authorization and an application referred to in subsection (2) are made refuses to fix a period in substitution for the period mentioned in subsection 196(1) or where the judge fixes a period in substitution therefor that is less than the period set out in the application referred to in subsection (2), the person appearing before the judge on the application for the authorization may withdraw the application for the authorization and thereupon the judge shall not proceed to consider the application for the authorization or to give the authorization and shall return to the person appearing before him on the application for the authorization both applications and all other material pertaining thereto.

1993, c. 40, s. 5; 1997, c. 18, s. 8; 1997, c. 23, s. 4; 2001, c. 32, s. 5; 2001, c. 41, ss. 6, 133(8);
2005, c. 10, ss. 22, 34(1)(f)(v)

186.

186(1) Judge to be satisfied

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

- (a) that it would be in the best interests of the administration of justice to do so; and
- (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

186(1.1) Exception for criminal organizations and terrorism offences

Notwithstanding paragraph (1)(b), that paragraph does not apply where the judge is satisfied that the application for an authorization is in relation to

- (a) an offence under section 467.11, 467.12 or 467.13;
- (b) an offence committed for the benefit of, at the direction of or in association with a criminal organization; or
- (c) a terrorism offence.

186(2) Where authorization not to be given

No authorization may be given to intercept a private communication at the office or residence of a solicitor, or at any other place ordinarily used by a solicitor and by other solicitors for the purpose of consultation with clients, unless the judge to whom the application is made is satisfied that there are reasonable grounds to believe that the solicitor, any other solicitor practising with him, any person employed by him or any other such solicitor or a member of the solicitor's household has been or is about to become a party to an offence.

186(3) Terms and conditions

Where an authorization is given in relation to the interception of private communications at a

place described in subsection (2), the judge by whom the authorization is given shall include therein such terms and conditions as he considers advisable to protect privileged communications between solicitors and clients.

186(4) Content and limitation of authorization

An authorization shall

- (a) state the offence in respect of which private communications may be intercepted;
- (b) state the type of private communication so that may be intercepted;
- (c) state the identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used;
- (d) contain such terms and conditions as the judge considers advisable in the public interest; and
- (e) be valid for the period, not exceeding sixty days, set out therein.

186(5) Persons designated

The Minister of Public Safety and Emergency Preparedness or the Attorney General, as the case may be, may designate a person or persons who may intercept private communications under authorizations.

186(5.1) Installation and removal of device

For greater certainty, an authorization that permits interception by means of an electro-magnetic, acoustic, mechanical or other device includes the authority to install, maintain or remove the device covertly.

186(5.2) Removal after expiry of authorization

On an *ex parte* application, in writing, supported by affidavit, the judge who gave an authorization referred to in subsection (5.1) or any other judge having jurisdiction to give such an authorization may give a further authorization for the covert removal of the electro-magnetic, acoustic, mechanical or other device after the expiry of the original authorization

- (a) under any terms or conditions that the judge considers advisable in the public interest; and
- (b) during any specified period of not more than sixty days.

186(6) Renewal of authorization

Renewals of an authorization may be given by a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 on receipt by him or her of an *ex parte* application in writing signed by the Attorney General of the province in which the application is made or the Minister of Public Safety and Emergency Preparedness — or an agent specially designated in writing for the purposes of section 185 by the Minister or the Attorney General, as the case may be — accompanied by an affidavit of a peace officer or public officer deposing to the following matters:

- (a) the reason and period for which the renewal is required,
- (b) full particulars, together with times and dates, when interceptions, if any, were made or attempted under the authorization, and any information that has been obtained by any interception, and

(c) the number of instances, if any, on which, to the knowledge and belief of the deponent, an application has been made under this subsection in relation to the same authorization and on which the application was withdrawn or no renewal was given, the date on which each application was made and the name of the judge to whom each application was made, and supported by such other information as the judge may require.

186(7) Renewal

A renewal of an authorization may be given if the judge to whom the application is made is satisfied that any of the circumstances described in subsection (1) still obtain, but no renewal shall be for a period exceeding sixty days.

1993, c. 40, s. 6; 1997, c. 23, s. 5; 1999, c. 5, s. 5; 2001, c. 32, s. 6; 2001, c. 41, ss. 6.1, 133(8.1);
2005, c. 10, ss. 23, 34(1)(f)(vi)

188.

188(1) Applications to specially appointed judges

Notwithstanding section 185, an application made under that section for an authorization may be made *ex parte* to a judge of a superior court of criminal jurisdiction, or a judge as defined in section 552, designated from time to time by the Chief Justice, by a peace officer specially designated in writing, by name or otherwise, for the purposes of this section by

(a) the Minister of Public Safety and Emergency Preparedness, if the offence is one in respect of which proceedings, if any, may be instituted by the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or

(b) the Attorney General of a province, in respect of any other offence in the province, if the urgency of the situation requires interception of private communications to commence before an authorization could, with reasonable diligence, be obtained under section 186.

188(2) Authorizations in emergency

Where the judge to whom an application is made pursuant to subsection (1) is satisfied that the urgency of the situation requires that interception of private communications commence before an authorization could, with reasonable diligence, be obtained under section 186, he may, on such terms and conditions, if any, as he considers advisable, give an authorization in writing for a period of up to thirty-six hours.

188(3) [Repealed 1993, c. 40, s. 8.]

188(4) Definition of "chief justice"

In this section, "**Chief Justice**" means

(a) in the Province of Ontario, the Chief Justice of the Ontario Court;

(b) in the Province of Quebec, the Chief Justice of the Superior Court;

(c) in the Provinces of Nova Scotia and British Columbia, the Chief Justice of the Supreme Court;

(d) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Chief Justice of the Court of Queen's Bench;

- (e) in the Provinces of Prince Edward Island and Newfoundland, the Chief Justice of the Supreme Court, Trial Division; and;
- (f) in Yukon, the Northwest Territories and Nunavut, the senior judge within the meaning of subsection 22(3) of the *Judges Act*.

188(5) Inadmissibility of evidence

The trial judge may deem inadmissible the evidence obtained by means of an interception of a private communication pursuant to a subsequent authorization given under this section, where he finds that the application for the subsequent authorization was based on the same facts, and involved the interception of the private communications of the same person or persons, or related to the same offence, on which the application for the original authorization was based.

R.S.C. 1985, c. 27 (1st Supp.), s. 25; R.S.C. 1985, c. 27 (2nd Supp.), s. 10 (Sched., item 6); 1990, c. 17, s. 10; 1992, c. 1, s. 58(1) (Sched. I, item 4); 1992, c. 51, s. 35; 1993, c. 28, s. 78 (Sched. III, item 29) [Repealed 1999, c. 3, s. 12 (Sched., item 6).]; 1993, c. 40, s. 8; 1999, c. 3, s. 28; 2002, c. 7, s. 140; 2005, c. 10, s. 34(1)(f)(vii)

Statutory Reference: R.S.C. 1985, c. C-46, s. 188

Protection of Privacy Act, S.C. 1973-74, c. 50

Section 178.15 was enacted by S.C. 1973-74, c. 50, s. 2:

178.15 (1) Applications to specially appointed judges — Notwithstanding section 178.12, an application for an authorization may be made *ex parte* to a judge of a superior court of criminal jurisdiction, or a judge as defined in section 482, designated from time to time by the Chief Justice, by a peace officer specially designated in writing for the purposes of this section by

(a) the Solicitor General of Canada, if the offence is one in respect of which proceedings, if any, may be instituted by the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or

(b) the Attorney General of a province, in respect of any other offence in the province, if the urgency of the situation requires interception of private communications to commence before an authorization could, with reasonable diligence, be obtained under section 178.13.

(2) Authorizations in emergency — Where the judge to whom an application is made pursuant to subsection (1) is satisfied that the urgency of the situation requires that interception of private communications commence before an authorization could, with reasonable diligence, be obtained pursuant to section 178.13, he may, on such terms and conditions, if any, as he considers advisable, given an authorization in writing for a period of up to thirty-six hours.

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(3) Certain interceptions deemed not lawful — For the purposes of section 178.16 only, an interception of a private communication in accordance with an authorization given pursuant to this section shall be deemed not to have been lawfully made unless the judge who gave the authorization or, if such judge is unable to act, a judge of the same jurisdiction, certifies that if the application for the authorization had been made to him pursuant to section 178.12 he would have given the authorization.

(4) "Chief Justice" defined — In this section, "Chief Justice" means

- (a) in the Province of Ontario, the Chief Justice of the Supreme Court;
- (b) in the Province of Quebec, the Chief Justice of the Court of Queen's Bench (Crown Side);
- (c) in the Provinces of Nova Scotia, New Brunswick, Prince Edward Island, Alberta and Newfoundland, the Chief Justice of the Supreme Court;
- (d) in the Province of British Columbia, the Chief Justice of the Supreme Court;
- (e) in the Provinces of Manitoba and Saskatchewan, the Chief Justice of the Court of Queen's Bench;
- (f) in the Yukon Territory, the judge of the Supreme Court; and
- (g) in the Northwest Territories, the judge of the Supreme Court.

(5) Inadmissibility of evidence — The trial judge may deem inadmissible the evidence obtained by means of an interception of a private communication pursuant to a subsequent authorization given under this section, where he finds that the application for such subsequent authorization was based on the same facts, and involved the interception of the private communications of the same person or persons, or related to the same offence, on which the application for the original authorization

195.

195(1) Annual report

The Minister of Public Safety and Emergency Preparedness shall, as soon as possible after the end of each year, prepare a report relating to

- (a) authorizations for which he and agents to be named in the report who were specially designated in writing by him for the purposes of section 185 made application, and
- (b) authorizations given under section 188 for which peace officers to be named in the report who were specially designated by him for the purposes of that section made application, and interceptions made thereunder in the immediately preceding year.

195(2) Information respecting authorizations

The report referred to in subsection (1) shall, in relation to authorizations and interceptions made thereunder, set out

- (a) the number of applications made for authorizations;
- (b) the number of applications made for renewal of authorizations;
- (c) the number of applications referred to in paragraphs (a) and (b) that were granted, the number of those applications that were refused and the number of applications referred to in paragraph (a) that were granted subject to terms and conditions;
- (d) the number of persons identified in an authorization against whom proceedings were commenced at the instance of the Attorney General of Canada in respect of
 - (i) an offence specified in the authorization,
 - (ii) an offence other than an offence specified in the authorization but in respect of which an authorization may be given, and
 - (iii) an offence in respect of which an authorization may not be given;
- (e) the number of persons not identified in an authorization against whom proceedings were commenced at the instance of the Attorney General of Canada in respect of
 - (i) an offence specified in such an authorization,
 - (ii) an offence other than an offence specified in such an authorization but in respect of which an authorization may be given, and
 - (iii) an offence other than an offence specified in such an authorization and for which no such authorization may be given,
 and whose commission or alleged commission of the offence became known to a peace officer as a result of an interception of a private communication under an authorization;
- (f) the average period for which authorizations were given and for which renewals thereof were granted;
- (g) the number of authorizations that, by virtue of one or more renewals thereof, were valid for more than sixty days, for more than one hundred and twenty days, for more than one hundred and eighty days and for more than two hundred and forty days;
- (h) the number of notifications given pursuant to section 196;
- (i) the offences in respect of which authorizations were given, specifying the number of authorizations given in respect of each of those offences;
- (j) a description of all classes of places specified in authorizations and the number of authorizations in which each of those classes of places was specified;
- (k) a general description of the methods of interception involved in each interception under an authorization;
- (l) the number of persons arrested whose identity became known to a peace officer as a result of an interception under an authorization;
- (m) the number of criminal proceedings commenced at the instance of the Attorney General of Canada in which private communications obtained by interception under an authorization were adduced in evidence and the number of those proceedings that resulted in a conviction; and
- (n) the number of criminal investigations in which information obtained as a result of the interception of a private communication under an authorization was used although the private communication was not adduced in evidence in criminal proceedings commenced at the instance of the Attorney General of Canada as a result of the investigations.

195(3) Other information

The report referred to in subsection (1) shall, in addition to the information referred to in subsection (2), set out

- (a) the number of prosecutions commenced against officers or servants of Her Majesty in right of Canada or members of the Canadian Forces for offences under section 184 or 193; and
- (b) a general assessment of the importance of interception of private communications for the investigation, detection, prevention and prosecution of offences in Canada.

195(4) Report to be laid before Parliament

The Minister of Public Safety and Emergency Preparedness shall cause a copy of each report prepared by him under subsection (1) to be laid before Parliament forthwith on completion thereof, or if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting.

195(5) Report by Attorneys General

The Attorney General of each province shall, as soon as possible after the end of each year, prepare and publish or otherwise make available to the public a report relating to

- (a) authorizations for which he and agents specially designated in writing by him for the purposes of section 185 made application, and
 - (b) authorizations given under section 188 for which peace officers specially designated by him for the purposes of that section made application,
- and interceptions made thereunder in the immediately preceding year setting out, with such modifications as the circumstances require, the information described in subsections (2) and (3).

R.S.C. 1985, c. 27 (1st Supp.), s. 27; 2005, c. 10, s. 34(1)(f)(ix), (x)

196.

196(1) Written notification to be given

The Attorney General of the province in which an application under subsection 185(1) was made or the Minister of Public Safety and Emergency Preparedness if the application was made by or on behalf of that Minister shall, within 90 days after the period for which the authorization was given or renewed or within such other period as is fixed pursuant to subsection 185(3) or subsection (3) of this section, notify in writing the person who was the object of the interception pursuant to the authorization and shall, in a manner prescribed by regulations made by the Governor in Council, certify to the court that gave the authorization that the person has been so notified.

196(2) Extension of period for notification

The running of the 90 days referred to in subsection (1), or of any other period fixed pursuant to subsection 185(3) or subsection (3) of this section, is suspended until any application made by the Attorney General or the Minister to a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 for an extension or a subsequent extension of the period for which the authorization was given or renewed has been heard and disposed of.

196(3) Where extension to be granted

Where the judge to whom an application referred to in subsection (2) is made, on the basis of an affidavit submitted in support of the application, is satisfied that

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(a) the investigation of the offence to which the authorization relates, or
 (b) a subsequent investigation of an offence listed in section 183 commenced as a result of information obtained from the investigation referred to in paragraph (a),
 is continuing and is of the opinion that the interests of justice warrant the granting of the application, the judge shall grant an extension, or a subsequent extension, of the period, each extension not to exceed three years.

196(4) Application to be accompanied by affidavit

An application pursuant to subsection (2) shall be accompanied by an affidavit deposing to

(a) the facts known or believed by the deponent and relied on to justify the belief that an extension should be granted; and
 (b) the number of instances, if any, on which an application has, to the knowledge or belief of the deponent, been made under that subsection in relation to the particular authorization and on which the application was withdrawn or the application was not granted, the date on which each application was made and the judge to whom each application was made.

196(5) Exception for criminal organizations and terrorist groups

Notwithstanding subsections (3) and 185(3), where the judge to whom an application referred to in subsection (2) or 185(2) is made, on the basis of an affidavit submitted in support of the application, is satisfied that the investigation is in relation to

(a) an offence under section 467.11, 467.12 or 467.13,
 (b) an offence committed for the benefit of, at the direction of or in association with a criminal organization, or
 (c) a terrorism offence,

and is of the opinion that the interests of justice warrant the granting of the application, the judge shall grant an extension, or a subsequent extension, of the period, but no extension may exceed three years.

R.S.C. 1985, c. 27 (1st Supp.), s. 28; 1993, c. 40, s. 14; 1997, c. 23, s. 7; 2001, c. 32, s. 8; 2001, c. 41, ss. 8, 133(10); 2005, c. 10, s. 25

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C-50

C-50

Third Session, Fortieth Parliament,
59 Elizabeth II, 2010

Troisième session, quarantième législature,
59 Elizabeth II, 2010

HOUSE OF COMMONS OF CANADA

CHAMBRE DES COMMUNES DU CANADA

BILL C-50

PROJET DE LOI C-50

An Act to amend the Criminal Code (interception of private communications and related warrants and orders)

Loi modifiant le Code criminel (interception de communications privées et mandats et ordonnances connexes)

FIRST READING, OCTOBER 29, 2010

PREMIÈRE LECTURE LE 29 OCTOBRE 2010

MINISTER OF JUSTICE

MINISTRE DE LA JUSTICE

90587

SUMMARY

This enactment amends the *Criminal Code*, primarily in respect of authorizations to intercept private communications and warrants and orders. Among other things, it

- (a) provides that if an authorization is given under certain provisions of Part VI, the judge may at the same time issue a warrant or make an order that relates to the investigation in respect of which the authorization is given;
- (b) provides that the rules respecting confidentiality that apply in respect of an authorization to intercept private communications also apply in respect of a request for a related warrant or order;
- (c) requires the Minister of Public Safety and Emergency Preparedness to report on the interceptions of private communications made without authorizations;
- (d) provides that a person who has been the object of an interception made without an authorization must be notified of the interception within a specified period;
- (e) permits a peace officer or a public officer, in certain circumstances, to install and make use of a number recorder without a warrant; and
- (f) extends to one year the maximum period of validity of a warrant for a tracking device and a number recorder if the warrant is issued in respect of a terrorism offence or an offence relating to a criminal organization.

SOMMAIRE

Le texte modifie certaines dispositions du *Code criminel* relatives aux autorisations d'intercepter une communication privée, aux mandats et aux ordonnances, notamment afin

- a) de prévoir que, lorsque le juge accorde une autorisation en vertu de certaines dispositions de la partie VI, il peut en même temps rendre certaines ordonnances et délivrer certains mandats ayant trait à l'enquête à l'égard de laquelle l'autorisation est accordée;
- b) de prévoir que les règles visant à assurer le secret de la demande d'autorisation d'interception de communication privée s'appliquent aux demandes d'ordonnance ou de mandat connexe;
- c) d'imposer au ministre de la Sécurité publique et de la Protection civile l'obligation de faire rapport sur les interceptions de communications privées sans autorisation;
- d) de prévoir que toute personne qui a fait l'objet d'une interception de communication privée sans autorisation doit en être avisée à l'intérieur de certains délais;
- e) de permettre, dans certaines circonstances, à un agent de la paix ou à un fonctionnaire public d'utiliser un enregistreur de numéro sans mandat;
- f) d'étendre à un an la période de validité maximale d'un mandat pour l'utilisation d'un dispositif de localisation ou d'un enregistreur de numéro lorsqu'il vise une infraction de terrorisme ou une infraction liée à une organisation criminelle.

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<http://www.parl.gc.ca>

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R.S., c. C-46 Short title	An Act to amend the Criminal Code (interception of private communications and related warrants and orders) Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:	Loi modifiant le Code criminel (interception de communications privées et mandats et ordonnances connexes) Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :	L.R., ch. C-46 Titre abrégé
	1. This Act may be cited as the <i>Improving Access to Investigative Tools for Serious Crimes Act</i>. 2. Section 184.2 of the <i>Criminal Code</i> is amended by adding the following after subsection (4):	1. Titre abrégé : <i>Loi visant à améliorer l'accès aux outils d'enquête sur les crimes graves</i>. 2. L'article 184.2 du <i>Code criminel</i> est modifié par adjonction, après le paragraphe (4), de ce qui suit :	EXPLANATORY T <i>Criminal Code</i> Clause 2: New.
Related warrant or order	(5) A judge who gives an authorization under this section may, at the same time, issue a warrant or make an order under section 487, 487.01, 487.012, 487.013, 487.02, 492.1 or 492.2 if the judge is of the opinion that the requested warrant or order relates to the investigation in respect of which the authorization is given.	(5) Lorsqu'il accorde une autorisation en vertu du présent article, le juge peut simultanément rendre une ordonnance ou délivrer un mandat en vertu des articles 487, 487.01, 487.012, 487.013, 487.02, 492.1 ou 492.2 s'il est d'avis que l'ordonnance ou le mandat demandé a trait à l'enquête à l'égard de laquelle l'autorisation est accordée.	Ordonnance ou mandat connexe
1993, c. 40, s. 4	3. Section 184.4 of the Act is replaced by the following:	3. L'article 184.4 de la même loi est remplacé par ce qui suit :	1993, ch. 40, art. 4 Clause 3: Existing text of section 184.4 A peace officer may intercept, by means of a mechanical or other device, a private communication if the peace officer has reasonable grounds to believe that (a) the peace officer believes on reasonable grounds that an authorization could not, with reason any other provision of this Part; (b) the peace officer believes on reasonable grounds immediately necessary to prevent an unlawful act by any person or in property; and (c) either the originator of the private communication to receive it is the person who would commit the offence that is likely to cause the harm or is the victim, or intended victim, of the harm.
Interception in exceptional circumstances	184.4 A peace officer may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication if the peace officer has reasonable grounds to believe that (a) 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 interception is immediately necessary to prevent an offence 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 commit the offence that is likely to cause the harm or is the victim, or intended victim, of the harm. 4. Section 186 of the Act is amended by adding the following after subsection (7):	184.4 L'agent de la paix peut intercepter, au moyen d'un dispositif électromagnétique, acoustique, mécanique ou autre, une communication privée s'il a des motifs raisonnables de croire que, à la fois : a) l'urgence de la situation est telle qu'une autorisation ne peut, avec toute la diligence raisonnable, être obtenue sous le régime de la présente partie; b) une interception immédiate est nécessaire pour empêcher une infraction qui causerait des dommages sérieux à une personne ou un bien; c) l'auteur de la communication ou la personne à qui celui-ci la destine est soit la personne dont l'infraction causerait des dommages, soit la victime de ces dommages ou la cible de ceux-ci. 4. L'article 186 de la même loi est modifié par adjonction, après le paragraphe (7), de ce qui suit :	Interception dans des circonstances exceptionnelles Clause 4: New.
Related warrant or order	(8) A judge who gives an authorization under this section may, at the same time, issue a warrant or make an order under section 487, 487.01, 487.012, 487.013, 487.02, 492.1 or 492.2 if the judge is of the opinion that the requested warrant or order relates to the investigation in respect of which the authorization is given. 5. Section 187 of the Act is amended by adding the following after subsection (7):	(8) Lorsqu'il accorde une autorisation en vertu du présent article, le juge peut simultanément rendre une ordonnance ou délivrer un mandat en vertu des articles 487, 487.01, 487.012, 487.013, 487.02, 492.1 ou 492.2 s'il est d'avis que l'ordonnance ou le mandat demandé a trait à l'enquête à l'égard de laquelle l'autorisation est accordée. 5. L'article 187 de la même loi est modifié par adjonction, après le paragraphe (7), de ce qui suit :	Ordonnance ou mandat connexe Clause 5: New.
Documents to be kept secret — related warrant or order	(8) The rules provided for in this section apply to all documents relating to a request for a related warrant or order referred to in subsection 184.2(5), 186(8) or 188(6) with any necessary modifications. 6. Section 188 of the Act is amended by adding the following after subsection (5):	(8) Les règles prévues au présent article s'appliquent, avec les adaptations nécessaires, à tous les documents relatifs aux demandes d'ordonnances ou de mandats connexes visés aux paragraphes 184.2(5), 186(8) ou 188(6). 6. L'article 188 de la même loi est modifié par adjonction, après le paragraphe (5), de ce qui suit :	Facon d'assurer le secret de la demande — ordonnance ou mandat connexe Clause 6: New.
Related warrant or order	(6) A judge who gives an authorization under this section may, at the same time, issue a warrant or make an order under section 487, 487.02, 492.1 or 492.2 if the judge is of the opinion that the requested warrant or order relates to the investigation in respect of which the authorization is given.	(6) Lorsqu'il accorde une autorisation en vertu du présent article, le juge peut simultanément rendre une ordonnance ou délivrer un mandat en vertu des articles 487, 487.02, 492.1 ou 492.2 s'il est d'avis que l'ordonnance ou le mandat demandé a trait à l'enquête à l'égard de laquelle l'autorisation est accordée.	Ordonnance ou mandat connexe

Annual report

195. (1) The Minister of Public Safety and Emergency Preparedness shall, as soon as possible after the end of each year, prepare a report relating to

(a) authorizations for which that Minister and agents to be named in the report who were specially designated in writing by that Minister for the purposes of section 185 applied and to the interceptions made under those authorizations in the immediately preceding year;

(b) authorizations given under section 188 for which peace officers to be named in the report who were specially designated by that Minister for the purposes of that section applied and to the interceptions made under those authorizations in the immediately preceding year; and

(c) interceptions made under section 184.4 in the immediately preceding year if the interceptions relate to an offence for which proceedings may be commenced by the Attorney General of Canada.

(2) The portion of subsection 195(2) of the Act before paragraph (a) is replaced by the following:

(2) The report shall, in relation to the authorizations and interceptions referred to in paragraphs (1)(a) and (b), set out

(3) Section 195 of the Act is amended by adding the following after subsection (2):

(2.1) The report shall, in relation to the interceptions referred to in paragraph (1)(c), set out

(a) the number of interceptions made;

(b) the number of parties to each intercepted private communication against whom proceedings were commenced in respect of the offence that the peace officer sought to prevent in intercepting the private communication or in respect of any other offence that was detected as a result of the interception;

(c) the number of persons who were not parties to an intercepted private communication but whose commission or alleged commission of an offence became known to a peace officer as a result of the interception of a private communication, and against whom proceedings were commenced in respect of the offence that the peace officer sought to prevent in intercepting the private communication or in respect of any other offence that was detected as a result of the interception;

(d) the number of notifications given under section 196.1;

(e) the offences in respect of which interceptions were made and any other offences for which proceedings were commenced as a result of an interception, as well as the number of interceptions made with respect to each offence;

(f) a general description of the methods of interception used for each interception;

(g) the number of persons arrested whose identity became known to a peace officer as a result of an interception;

(h) the number of criminal proceedings commenced in which private communications obtained by interception were adduced in evidence and the number of those proceedings that resulted in a conviction;

(i) the number of criminal investigations in which information obtained as a result of

195. (1) Le ministre de la Sécurité publique et de la Protection civile établit, après la fin de chaque année, aussitôt que possible, un rapport comportant l'information relative :

a) aux autorisations demandées par lui-même et les mandataires, nommés dans le rapport, qu'il a spécialement désignés par écrit pour l'application de l'article 185 et aux interceptions faites en vertu de ces autorisations au cours de l'année précédente;

b) aux autorisations données en vertu de l'article 188 demandées par les agents de la paix, nommés dans le rapport, qu'il a spécialement désignés pour l'application de cet article et aux interceptions faites en vertu de ces autorisations au cours de l'année précédente;

c) aux interceptions faites en vertu de l'article 184.4 au cours de l'année précédente, si elles ont trait à une infraction pour laquelle des poursuites peuvent être intentées par le procureur général du Canada.

(2) Le passage du paragraphe 195(2) de la même loi précédant l'alinéa a) est remplacé par ce qui suit :

(2) Le rapport indique, en ce qui concerne les autorisations et les interceptions visées aux alinéas (1)a) et b) :

(3) L'article 195 de la même loi est modifié par adjonction, après le paragraphe (2), de ce qui suit :

(2.1) Le rapport indique aussi, en ce qui concerne les interceptions qui sont visées à l'alinéa (1)c) :

a) le nombre d'interceptions qui ont été effectuées;

b) le nombre de personnes qui sont parties à chaque communication privée interceptée et contre lesquelles des poursuites ont été intentées relativement à l'infraction que l'agent de la paix a tenté de prévenir par l'interception de la communication privée ou à toute autre infraction découverte à cette occasion;

c) le nombre de personnes qui ne sont parties à aucune communication privée interceptée — lorsque la perpétration ou prétendue perpétration de l'infraction a été découverte par un agent de la paix par suite de l'interception d'une communication privée — et contre lesquelles des poursuites ont été intentées relativement à l'infraction que l'agent de la paix a tenté de prévenir en interceptant la communication privée et toute autre infraction;

d) le nombre d'avis donnés conformément à l'article 196.1;

e) les infractions visées par des interceptions, celles qui ont donné lieu à des poursuites par suite d'une interception, ainsi que le nombre d'interceptions effectuées pour chacune des infractions;

f) une description sommaire des méthodes d'interception utilisées pour chaque interception;

g) le nombre de personnes arrêtées dont l'identité a été découverte par un agent de la paix par suite d'une interception;

h) le nombre de poursuites pénales intentées dans lesquelles des communications privées interceptées ont été produites en preuve et le nombre de ces poursuites qui ont donné lieu à une condamnation;

i) le nombre d'enquêtes en matière pénale au cours desquelles des renseignements

possible after the end of each year, prepare a report
(a) authorizations for which he and agents to be specially designated in writing by him for the purpose, application, and
(b) authorizations given under section 188 for which report who were specially designated by him for it application,

and interceptions made thereunder in the immediate;

Rapport annuel

Information
respecting
authorizations —
sections 185 and 188

Information
respecting
interceptions — s.
184.4

Renseignements
concernant les
autorisations —
articles 185 et 188

Renseignements
concernant les
interceptions —
article 184.4

(2) Relevant portion of subsection

(2) The report referred to in subsection (1) shall, in interceptions made thereunder, set out

(3) New.

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the interception of a private communication was used even though the private communication was not adduced in evidence in criminal proceedings commenced as a result of the investigations; and

(7) the duration of each interception and the aggregate duration of all the interceptions related to the investigation of the offence that the peace officer sought to prevent in intercepting the private communication.

(4) The portion of subsection 195(3) of the Act before paragraph (a) is replaced by the following:

(3) The report shall, in addition to the information referred to in subsections (2) and (2.1), set out

(5) Subsection 195(5) of the Act is replaced by the following:

Other information

Report by Attorney General

(5) The Attorney General of each province shall, as soon as possible after the end of each year, prepare and publish or otherwise make available to the public a report relating to

(a) authorizations for which the Attorney General and agents specially designated in writing by the Attorney General for the purposes of section 185 applied and to the interceptions made under those authorizations in the immediately preceding year;

(b) authorizations given under section 188 for which peace officers specially designated by the Attorney General for the purposes of that section applied and to the interceptions made under those authorizations in the immediately preceding year; and

(c) interceptions made under section 184.4 in the immediately preceding year if the interceptions relate to an offence not referred to in paragraph (1)(c).

The report must set out, with any modifications that the circumstances require, the information described in subsections (2) to (3).

8. The Act is amended by adding the following after section 196:

Written notice -- interception in exceptional circumstances

196.1 (1) Subject to subsections (3) and (5), the Attorney General of the province in which a peace officer intercepts a private communication under section 184.4 or if the interception relates to an offence for which proceedings may be commenced by the Attorney General of Canada, the Minister of Public Safety and Emergency Preparedness shall give notice in writing of the interception to any person who was the object of the interception within 90 days after the day on which it occurred.

Extension of period for notification

(2) The running of the 90-day period or of any extension granted under subsection (3) or (5) is suspended until any application made by the Attorney General of the province or the Minister to a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 for an extension or a subsequent extension of the period has been heard and disposed of.

Where extension to be granted

(3) The judge to whom an application under subsection (2) is made shall grant an extension or a subsequent extension of the 90-day period — each extension not to exceed three years — if the judge is of the opinion that the interests of justice warrant granting the application and is satisfied, on the basis of an affidavit submitted in support of the application, that one of the following

obtenus par suite de l'interception d'une communication privée ont été utilisés, même si la communication n'a pas été produite en preuve dans des poursuites pénales intentées par suite des enquêtes;

7) la durée de chaque interception et la durée totale des interceptions liées à l'enquête relative à l'infraction que l'agent de la paix a tenté de prévenir en interceptant la communication privée.

(4) Le passage du paragraphe 195(3) de la même loi précédant l'alinéa a) est remplacé par ce qui suit :

(3) Le rapport contient, outre les renseignements visés aux paragraphes (2) et (2.1) :

(5) Le paragraphe 195(5) de la même loi est remplacé par ce qui suit :

Autres renseignements

Rapport par les procureurs généraux

(5) Aussitôt que possible après la fin de chaque année, le procureur général de chaque province établit et publie — ou met à la disposition du public de toute autre façon — un rapport comportant l'information relative :

a) aux autorisations demandées par lui-même et les mandataires qu'il a spécialement désignés par écrit pour l'application de l'article 185 et aux interceptions faites en vertu de ces autorisations au cours de l'année précédente;

b) aux autorisations données en vertu de l'article 188 demandées par les agents de la paix qu'il a spécialement désignés pour l'application de cet article et aux interceptions faites en vertu de ces autorisations au cours de l'année précédente;

c) aux interceptions faites en vertu de l'article 184.4 au cours de l'année précédente, dans les cas non visés à l'alinéa (1)(c).

Le rapport contient les renseignements visés aux paragraphes (2) à (3), compte tenu des adaptations nécessaires.

8. La même loi est modifiée par adjonction, après l'article 196, de ce qui suit :

(4) Relevant portion of subsection

(3) The report referred to in subsection (1) shall, if referred to in subsection (2), set out

(5) Existing text of subsection 15

(5) The Attorney General of each province shall, at each year, prepare and publish or otherwise make available to

(a) authorizations for which he and agents specially designated in writing by the Attorney General for the purposes of section 185 made application, and

(b) authorizations given under section 188 for which designated by him for the purposes of that section and interceptions made thereunder in the immediate; such modifications as the circumstances require, the subsections (2) and (3).

Clause 8: New.

Avis écrit — interception dans des circonstances exceptionnelles

196.1 (1) Sous réserve des paragraphes (3) et (5), soit le procureur général de la province dans laquelle l'agent de la paix a intercepté une communication privée en vertu de l'article 184.4, soit le ministre de la Sécurité publique et de la Protection civile, si l'interception vise une infraction pour laquelle des poursuites peuvent être intentées par le procureur général du Canada, avise par écrit, dans les quatre-vingt-dix jours suivant l'interception, toute personne qui en a fait l'objet.

Prolongation du délai

(2) Le délai initial de quatre-vingt-dix jours ou la période de la prolongation obtenue en vertu des paragraphes (3) ou (5) est interrompu par toute demande de prolongation présentée par le procureur général de la province ou par le ministre à un juge d'une cour supérieure de juridiction criminelle ou à un juge au sens de l'article 552 jusqu'à ce qu'il soit statué sur la demande.

Cas où la prolongation est accordée

(3) Le juge saisi de la demande visée au paragraphe (2), s'il l'estime dans l'intérêt de la justice et s'il est convaincu par l'affidavit appuyant la demande que l'une des enquêtes ci-après continue, accorde une prolongation — initiale ou ultérieure — du délai de quatre-vingt-dix jours, d'une durée maximale de trois ans :

	investigations is continuing: <u>(a) the investigation of the offence to which the interception relates; or</u> <u>(b) a subsequent investigation of an offence commenced as a result of information obtained from the investigation referred to in paragraph (a).</u> (4) An application shall be accompanied by an affidavit deposing to <u>(a) the facts known or believed by the deponent and relied on to justify the belief that an extension should be granted; and</u> <u>(b) the number of instances, if any, on which an application has, to the knowledge or belief of the deponent, been made under subsection (2) in relation to the particular interception and on which the application was withdrawn or the application was not granted, the date on which each application was made and the judge to whom each application was made.</u> (5) Despite subsection (3), the judge to whom an application under subsection (2) is made shall grant an extension or a subsequent extension of the 90-day period — each extension not to exceed three years — if the judge is of the opinion that the interests of justice warrant granting the application and is satisfied, on the basis of an affidavit submitted in support of the application, that the interception of the communication relates to an investigation of <u>(a) an offence under section 467.11, 467.12 or 467.13;</u> <u>(b) an offence committed for the benefit of, at the direction of or in association with a criminal organization; or</u> <u>(c) a terrorism offence.</u>	<i>a) l'enquête au sujet de l'infraction visée par l'interception;</i> <i>b) toute enquête subséquente à l'égard d'une infraction entreprise en raison de renseignements obtenus lors de l'enquête visée à l'alinéa a).</i> (4) La demande est accompagnée d'un affidavit indiquant ce qui suit : <i>a) les faits connus du déclarant ou auxquels il croit et sur lesquels il se fonde pour justifier que, à son avis, il y a lieu d'accorder une prolongation;</i> <i>b) le nombre de cas, s'il y a lieu, où, à la connaissance ou selon la croyance du déclarant, une demande a été faite en vertu du paragraphe (2) au sujet de cette interception et où la demande a été retirée ou refusée, la date de chacune de ces demandes et le juge auquel chacune a été présentée.</i> (5) Malgré le paragraphe (3), le juge saisi de la demande visée au paragraphe (2) accorde une prolongation — initiale ou ultérieure — du délai de quatre-vingt-dix jours, d'une durée maximale de trois ans, s'il l'estime dans l'intérêt de la justice et s'il est convaincu par l'affidavit appuyant la demande que l'interception est liée à une enquête visant l'une des infractions suivantes : <i>a) une infraction prévue aux articles 467.11, 467.12 ou 467.13;</i> <i>b) une infraction commise au profit ou sous la direction d'une organisation criminelle, ou en association avec elle;</i> <i>c) une infraction de terrorisme.</i>	Application to be accompanied by affidavit Exception — criminal organization or terrorism offence 1997, c. 18, s. 46	Demande accompagnée d'un affidavit Exception dans le cas d'une organisation criminelle ou d'une infraction de terrorisme 1997, ch. 18, art. 46
	1997, c. 18, s. 46 9. Section 487.11 of the Act is replaced by the following:	9. L'article 487.11 de la même loi est remplacé par ce qui suit :	1997, c. 18, s. 46	Clause 9: Existing text of section 487.11 A peace officer, or a public officer who has administer or enforce any federal or provincial law or enforcement of this or any other Act of Parliament, in duties, exercise any of the powers described in subsection (1) if the conditions for obtaining a warrant exist circumstances it would be impracticable to obtain a
	Exigent circumstances 487.11 Either a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament may, in the course of their duties, exercise any of the powers described in section 487, 492.1 or 492.2 without a warrant if the conditions for obtaining a warrant exist but it would not be feasible to obtain a warrant because of exigent circumstances. 10. Section 492.1 of the Act is amended by adding the following after subsection (2): <u>(2.1) A warrant is valid for the period specified in it as long as that period ends no more than one year after the day on which the warrant is issued, if the warrant relates to</u> <u>(a) an offence under any of sections 467.11 to 467.13;</u> <u>(b) an offence committed for the benefit of, at the direction of or in association with a criminal organization; or</u> <u>(c) a terrorism offence.</u> 11. Subsection 492.2(3) of the Act is replaced by the following: <u>(3) Subsections 492.1(2), (2.1) and (3) apply to any warrant or order issued or made under this section, with any modifications that the circumstances require.</u>	487.11 L'agent de la paix ou le fonctionnaire public nommé ou désigné pour l'exécution ou le contrôle d'application d'une loi fédérale ou provinciale et chargé notamment de faire observer la présente loi ou toute autre loi fédérale peut, pour l'accomplissement de ses fonctions, exercer sans mandat tous les pouvoirs prévus aux articles 487, 492.1 ou 492.2 lorsque l'urgence de la situation rend difficilement réalisable l'obtention du mandat, pourvu que les conditions d'obtention soient réunies. 10. L'article 492.1 de la même loi est modifié par adjonction, après le paragraphe (2), de ce qui suit : <u>(2.1) Le mandat est valide pour la période qui y est indiquée, laquelle ne peut dépasser un an à compter de la date de délivrance dans les cas où il vise :</u> <u>a) soit une infraction prévue à l'un des articles 467.11 à 467.13;</u> <u>b) soit une infraction commise au profit ou sous la direction d'une organisation criminelle, ou en association avec elle;</u> <u>c) soit une infraction de terrorisme.</u> 11. Le paragraphe 492.2(3) de la même loi est remplacé par ce qui suit : <u>(3) Les paragraphes 492.1(2), (2.1) et (3) s'appliquent, avec les adaptations nécessaires, aux mandats délivrés et aux ordonnances rendues en vertu du présent article.</u>	Urgence de la situation Période de validité : organisation criminelle ou infraction de terrorisme 1993, c. 40, art. 18	Clause 10: New. Clause 11: Existing text of subse (3) Subsections 492.1(2) and (3) apply to warrants section, with such modifications as the circumstances

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**Legislative Summary of Bill C-50:
An Act to amend the Criminal Code (interception of private communications and related warrants and orders):²**

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Library of Parliament

9 November 2010

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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Notes

- Status of the Bill
- LegisInfo
-  PDF (154 Kb, 10 pages)

Bill C-50, An Act to amend the Criminal Code (interception of private communications and related warrants and orders) (short title: Improving Access to Investigative Tools for Serious Crimes Act) was introduced in the House of Commons on 29 October 2010 by the Minister of Justice and Attorney General of Canada, the Honourable Robert Nicholson.

1 Background

1.1 Purpose of the Bill

Bill C-50 amends the *Criminal Code* (the Code) with respect to the interception of private communications,¹ tracking devices and telephone number recorders. It aims to facilitate the use of electronic surveillance techniques by law enforcement agencies and make such use more transparent, to a certain extent. Its provisions should be read in conjunction with those of bills C-51 and C-52, which also deal with electronic surveillance.

1.2 Principal Amendments in the Bill

The principal amendments in the bill:

- provide that if an authorization to intercept communications is given, a related warrant, such as a search warrant, may be issued at the same time (clauses 2, 4 and 6);
- require the government to report annually on the interceptions of private communications made without prior authorization and to notify individuals who have been the object of an interception (clauses 7 and 8);
- permit the use of a telephone number recorder without a warrant and extend the maximum period for the use of this electronic surveillance technique in investigations into organized crime or terrorism (clauses 9 and 11); and
- extend the maximum period for the use of tracking devices in investigations of terrorism or organized crime (clause 10).

1.3 Electronic Surveillance Under the *Criminal Code*

Criminal Code provisions regarding the interception of communications date back to 1974. In the 1980s and 1990s, Code provisions regarding search and seizure were amended to expressly include computers.

In 2005, a document published by the Department of Justice stated that Canadian legislation on electronic surveillance had not kept pace with the latest technologies.² Law enforcement agencies believe such gaps allow criminals and terrorists to more easily operate undetected by police forces.

1.3.1 Basic Rules

Part VI of the Code ("Invasion of Privacy") is the centrepiece of federal legislation on electronic surveillance by law enforcement agencies.³ Its scope is generally limited to the interception of oral communications and to certain offences set out in the Code,⁴ including the wilful interception of private communications by means of a technical device (section 184). With a few exceptions, police forces can nevertheless intercept such communications as long as certain specific conditions are met and judicial authorization is obtained.⁵

Part VI sets out stricter conditions for the issuance of an authorization to intercept private communications than it does for the granting of a search warrant or a production order. It contains additional protection measures: there must, for example, be "investigative necessity" (because other investigative procedures have been tried and failed, are unlikely to succeed, or the urgency of the matter is such that electronic surveillance is necessary) (section 186(1)(b));⁶ and the judge must be satisfied that giving the authorization is in the best interests of the administration of justice (section 186(1)(a)).

In 2001 and 2002, legislation regarding terrorism (Bill C-36) and organized crime (Bill C-24) amended Part VI with respect to applications for judicial authorization for the electronic surveillance of terrorist groups and criminal organizations. These amendments:

- eliminated the obligation to show "investigative necessity" (section 186(1.1));⁷
- extended, from 60 days to one year, the maximum period of an authorization of an interception (or the renewal of an authorization) (section 186.1); and
- extended, from 90 days to three years, the maximum period after which the person who was the object of the interception must be notified (section 196(5)).

Electronic surveillance techniques used to determine the location of any thing or person or to record telephone numbers or video images are excluded from Part VI. Three main provisions found elsewhere in the Code authorize electronic surveillance:

- a warrant authorizing video surveillance (in this case, however, most sections of Part VI apply) (sections 487.01(4) and (5));
- a warrant authorizing the use of a tracking device (section 492.1); and
- a warrant authorizing the use of a telephone number recorder (section 491.2).

The various warrants authorizing the use of electronic surveillance have one thing in common: they all allow the judge to determine the terms and conditions that he or she considers advisable. The peace officer's affidavit in support of the application must provide reasonable grounds justifying the use of this technique. The criteria on which the judge relies are ranked. If an officer wants to intercept private communications or use video surveillance, the judge must be satisfied, under the Code, that there are reasonable grounds to *believe* that an offence has been or will be committed. However, if the officer wants to use tracking devices or number recorders, the judge can, under the Code, issue a warrant if he is satisfied that there are reasonable grounds to *suspect* that an offence has been or will be committed.⁸ In general, then, the greater the invasion of privacy, the more rigorous the criteria.

1.3.2 Requirement to Present an Annual Report

Electronic surveillance under the Code is an effective investigative technique used primarily by law enforcement agencies, such as the Royal Canadian Mounted Police and municipal and provincial police forces, as well as the Competition Bureau. As an accountability measure, every year the federal minister of Public Safety and the attorney general of each province must prepare a public report on authorizations to intercept private communications under Part VI and on video surveillance warrants. Section 195 of the Code sets out the information to be contained in the report. Tables 1 and 2 and Figure 1 provide an overview of the statistics contained in the report of the minister of Public Safety for 2009.⁹

Table 1 – Number of Electronic Surveillance Applications and Renewals in Canada, 2005–2009^a

Type of Application Made	Criminal Code Section	Number of Applications				
		2005	2006	2007	2008	2009
Audio	185	96	81	68	77	87
Video	487.01	17	16	36	11	21
Renewals	186	4	5	5	16	9
Emergency audio	188	1	0	1	1	1
Emergency video	487.01	0	0	0	0	0
Total		118	102	110	105	118

a. Two applications for an authorization or a renewal were refused for the 2005–2009 period.

Source: Table prepared by the author based on Public Safety Canada, *Annual Report on the Use of Electronic Surveillance – 2009*, Section III, "Statistics," Table 1.

Table 2 – Number of Electronic Surveillance Authorizations in Canada According to Type of Offence, 2005–2009

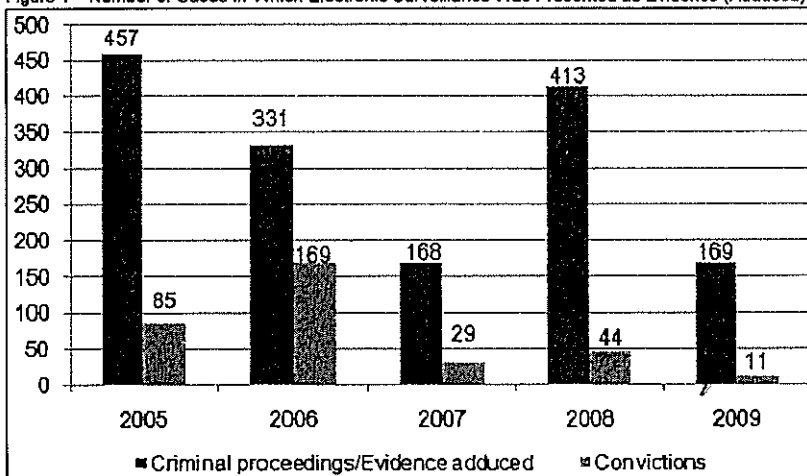
Type of Offence	Number of Authorizations ^a
Drug-related offences (possession, trafficking, importing/exporting, production, etc.)	1,084
Conspiracy	471
Possession of property obtained by crime	281
Organized crime offences (participating, instructing, etc.)	208
Laundrying proceeds of counterfeit money	203

Murder	72
Terrorism offences (funding, participating, facilitating, instructing)	9

a. Most authorizations apply to more than one offence.

Source: Table prepared by the author based on Public Safety Canada, *Annual report on the use of electronic surveillance – 2009*, Section III, "Statistics," Table 4.

Figure 1 – Number of Cases in Which Electronic Surveillance Was Presented as Evidence (Adduced) in Canada, 2005–2009



Source: Public Safety Canada, *Annual report on the use of electronic surveillance – 2009*, Section III, "Statistics," Figure 3.

2 Description and Analysis

2.1 Authorizations and Related Warrants (Clauses 2, 4, 5 and 6)

Police forces often use electronic surveillance in conjunction with other investigative techniques. Given that an application for judicial authorization to intercept communications is sometimes based on the same information presented in support of an application for a warrant – a search warrant, for example – or may come from the same source, the bill allows the judge to authorize the interception of communications and issue the requested warrant at the same time.

Regardless of whether the interception is done with the consent of one of the parties to the communication (section 184.2 of the Code), without the consent of the parties (sections 185 and 186 of the Code) or, in an emergency, for a maximum period of 36 hours (section 188 of the Code), the judge can, in addition to giving an authorization, issue a search warrant, make an assistance order or issue a warrant to use a tracking device or a number recorder (clauses 2, 4 and 6 of the bill).¹⁰ When the situation is not an emergency – that is, when sections 184.2, 185 or 186 apply – the judge can issue a general warrant, make a general production order or make a production order for financial information (clauses 2 and 4 of the bill).¹¹ In each case, these clauses allow police officers to more quickly investigate past or possible offences.

All documents relating to an application for authorization to intercept communications are confidential; that is why they are placed in a packet sealed by the judge (section 187 of the Code). Clause 5 of the bill provides that all documents relating to a request for a warrant or order in connection with an authorization are subject to the same rules as an authorization: they are generally kept secret until the trial.

2.2 Interceptions of Communications Without Judicial Authorization (Clauses 3, 7 and 8)

Currently, pursuant to section 184.4 of the Code, a peace officer can intercept private communications without judicial authorization if the following conditions are met:

- there are reasonable grounds to believe that the urgency of the situation is such that an authorization could not be obtained;
- an interception is immediately necessary to prevent an *unlawful act* that would cause serious harm to a person or to property; and
- one of the parties to the communication is the originator or intended victim of the *unlawful act*.¹²

The expression *unlawful act* is not defined elsewhere in the Code.

Clause 3 of the bill limits, to a certain extent, the scope of section 184.4 by replacing "unlawful act" with "offence," which is defined in section 183 of the Code.¹³ Therefore, the interception of communications without authorization in the exceptional circumstances set out in section 184.4 is not permitted except in regard to the offences set out in section 183, as is the case for most other types of interception.

Section 195 of the Code currently requires the federal minister of Public Safety and the attorney general of each province to prepare an annual report on the use by police forces of warrants for video surveillance (subsections 487.01(4) and (5)) and on these authorizations to intercept private communications pursuant to Part VI: authorizations to intercept communications without the consent of the parties to the communication (sections 185 and 186 of the Code) and authorizations valid for a maximum period of 36 hours in emergencies (section 188 of the Code).

Clause 7 of the bill extends the requirement to present a public report on interceptions without judicial authorization in exceptional circumstances set out in section 184.4 of the Code. The clause also sets out new information to be included in the report. However, the following types of interception and electronic surveillance set out in the Code are still not subject to the requirement that governments present a public report on their use: interception without judicial authorization, to prevent bodily harm (section 184.1), interception with the consent of one of the parties to the communication

(section 184.2) and use of a tracking device (section 492.1) or number recorder (section 492.2).

Lastly, as with interception without consent but with judicial authorization (sections 185 and 186 of the Code), clause 8 of the bill provides that, in the case of an interception without judicial authorization in exceptional circumstances set out in section 184.4 of the Code, the federal minister of Public Safety or the attorney general of a province must generally notify the person who was the object of the interception within 90 days of the interception. On application to a judge, this period may be extended to three years if the police investigation is continuing (section 196 of the Code). As is currently the case, this extension may be obtained more readily if the investigation relates to a terrorism or organized crime offence.

2.3 Number Recorders (Clauses 9 and 11)

Section 492.2 of the Code permits a peace officer with a warrant to covertly install a number recorder on a telephone or telephone line if there are reasonable grounds to suspect that an offence has been or will be committed and that information that would assist in the investigation of the offence could be obtained through the use of a number recorder. A law enforcement agency could therefore obtain the "incoming and outgoing" numbers from a telephone under surveillance.

Clause 9 of the bill contains a provision that was included in former Bill C-46:¹⁴ it authorizes a police officer to use a number recorder without a warrant when the urgency of the situation makes it impracticable to obtain the warrant. It is already possible to act without a warrant in an emergency with respect to searches and the use of tracking devices (section 487.11 of the Code).

Clause 11 of the bill harmonizes the period of validity of a warrant relating to an organized crime investigation or terrorism offence with the period of validity that applies to the interception of private communications (section 186.1 of the Code). In such investigations, the maximum period of validity of a warrant is extended from 60 days to one year.

2.4 Tracking Devices (Clause 10)

Section 492.1 of the Code allows a peace officer with a warrant (or without a warrant, in an emergency) to covertly install a "tracking device"¹⁵ (e.g., GPS device) on any thing if there are reasonable grounds to suspect that an offence has been or will be committed and that information that would assist in a police investigation, including the whereabouts of a person, can be obtained through the use of a tracking device.

Clause 10 of the bill extends the maximum period of a warrant for the use of a tracking device from 60 days to one year in the case of investigations relating to a terrorism offence or a criminal organization. This maximum period would therefore be identical to the period that applies to authorizations to intercept private communications and warrants for the use of number recorders.

Notes

- * Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force. [Return to text]

1. This type of interception is commonly called "wiretapping." [Return to text]
2. Department of Justice Canada, *Summary of Submissions to the Lawful Access Consultation*, 2005. [Return to text]
3. Other Acts also allow for wiretapping in certain circumstances. For example, since 1984, the *Canadian Security Intelligence Service Act* has permitted the Canadian Security Intelligence Service (CSIS) to lawfully intercept private communications, on the issuance of a judicial warrant, if on reasonable grounds it is suspected that the activities in question constitute a threat to the security of Canada (sections 12 and 21). Moreover, pursuant to the *National Defence Act*, Communications Security Establishment Canada (CSEC) may, after obtaining ministerial authorization, intercept private communications for the purpose of obtaining foreign intelligence (section 273.65). [Return to text]
4. See the offences listed in section 183 under the definition of "offence." This list includes a large number of offences and continues to grow as new legislation relating to criminal law adds offences to the Code. [Return to text]
5. Under Part VI, the procedure police officers must follow to use electronic surveillance varies according to the circumstances. In the following cases, judicial authorization is not required: interception to prevent bodily harm and protect undercover police officers (section 184.1) or an emergency interception to prevent an unlawful act that would cause serious harm to any person or to property, in a case in which one of the parties to the communication is the originator or potential victim of the act (section 184.4). In other cases, however, police officers must obtain judicial authorization: interception with the consent of one of the parties to the communication (section 184.2), interception for a maximum period of 36 hours because of an emergency (specially designated judges give this authorization) (section 188) or interceptions for other purposes (sections 185 and 186). [Return to text]
6. For the interpretation of this condition by the Supreme Court of Canada, see *R. v. Araujo*, [2000] 2 S.C.R. 992. [Return to text]
7. The constitutional validity of this provision was recognized in *R. v. Doiron* (2007), 221 C.C.C. (3d) 97 (Court of Appeal of New Brunswick). [Return to text]
8. Emphasis added to *believe* and to *suspect*. The criteria on which the judge relies include a concrete evaluation of the particular circumstances of each case. Theoretically, there is no clear dividing line between reasonable grounds to *believe* and reasonable grounds to *suspect*. [Return to text]
9. For more information, see Public Safety Canada, *Annual report on the use of electronic surveillance – 2009*. The report covers a five-year period, from 2005 to 2009. [Return to text]
10. These clauses refer to sections 487, 487.02, 492.1 and 492.2 of the Code. [Return to text]
11. These clauses refer to sections 487.01, 487.012 and 487.013 of the Code. [Return to text]
12. Emphasis added to *unlawful act*. [Return to text]
13. See note 4. [Return to text]
14. Former Bill C-46: An Act to amend the Criminal Code, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act, introduced in the 2nd Session of the 40th Parliament, had passed second reading in the House of Commons when it died on the *Order Paper* following the prorogation of Parliament on 30 December 2009. [Return to text]
15. For the purposes of section 492.1(4), "tracking device" means "any device that, when installed in or on any thing, may be used to help ascertain, by electronic or other means, the location of any thing or person." [Return to text]

487.1**487.1(1) Telewarrants**

Where a peace officer believes that an indictable offence has been committed and that it would be impracticable to appear personally before a justice to make application for a warrant in accordance with section 256 or 487, the peace officer may submit an information on oath by telephone or other means of telecommunication to a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter.

487.1(2) Information on oath and record

An information submitted by telephone or other means of telecommunication, other than a means of telecommunication that produces a writing, shall be on oath and shall be recorded verbatim by the justice, who shall, as soon as practicable, cause to be filed, with the clerk of the court for the territorial division in which the warrant is intended for execution, the record or a transcription of it, certified by the justice as to time, date and contents.

487.1(2.1) Information submitted by other means of telecommunication

The justice who receives an information submitted by a means of telecommunication that produces a writing shall, as soon as practicable, cause to be filed, with the clerk of the court for the territorial division in which the warrant is intended for execution, the information certified by the justice as to time and date of receipt.

487.1(3) Administration of oath

For the purposes of subsection (2), an oath may be administered by telephone or other means of telecommunication.

487.1(3.1) Alternative to oath

A peace officer who uses a means of telecommunication referred to in subsection (2.1) may, instead of swearing an oath, make a statement in writing stating that all matters contained in the information are true to his or her knowledge and belief and such a statement is deemed to be a statement made under oath.

487.1(4) Contents of information

An information submitted by telephone or other means of telecommunication shall include

- (a) a statement of the circumstances that make it impracticable for the peace officer to appear personally before a justice;
- (b) a statement of the indictable offence alleged, the place or premises to be searched and the items alleged to be liable to seizure;
- (c) a statement of the peace officer's grounds for believing that items liable to seizure in respect of the offence alleged will be found in the place or premises to be searched; and
- (d) a statement as to any prior application for a warrant under this section or any other search warrant, in respect of the same matter, of which the peace officer has knowledge.

487.1(5) Issuing warrant

A justice referred to in subsection (1) who is satisfied that an information submitted by telephone or other means of telecommunication

- (a) is in respect of an indictable offence and conforms to the requirements of subsection (4),
- (b) discloses reasonable grounds for dispensing with an information presented personally and in writing, and
- (c) discloses reasonable grounds, in accordance with subsection 256(1) or paragraph 487(1)(a), (b) or (c), as the case may be, for the issuance of a warrant in respect of an indictable offence, may issue a warrant to a peace officer conferring the same authority respecting search and seizure as may be conferred by a warrant issued by a justice before whom the peace officer appears personally pursuant to subsection 256(1) or 487(1), as the case may be, and may require that the warrant be executed within such period as the justice may order.

487.1(6) Formalities respecting warrant and facsimiles

Where a justice issues a warrant by telephone or other means of telecommunication, other than a means of telecommunication that produces a writing,

- (a) the justice shall complete and sign the warrant in Form 5.1, noting on its face the time, date and place of issuance;
- (b) the peace officer, on the direction of the justice, shall complete, in duplicate, a facsimile of the warrant in Form 5.1, noting on its face the name of the issuing justice and the time, date and place of issuance; and
- (c) the justice shall, as soon as practicable after the warrant has been issued, cause the warrant to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution.

487.1(6.1) Issuance of warrant where telecommunication produces writing

Where a justice issues a warrant by a means of telecommunication that produces a writing,

- (a) the justice shall complete and sign the warrant in Form 5.1, noting on its face the time, date and place of issuance;
- (b) the justice shall transmit the warrant by the means of telecommunication to the peace officer who submitted the information and the copy of the warrant received by the peace officer is deemed to be a facsimile within the meaning of paragraph (6)(b);
- (c) the peace officer shall procure another facsimile of the warrant; and
- (d) the justice shall, as soon as practicable after the warrant has been issued, cause the warrant to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution.

487.1(7) Providing facsimile

A peace officer who executes a warrant issued by telephone or other means of telecommunication, other than a warrant issued pursuant to subsection 256(1), shall, before entering the place or premises to be searched or as soon as practicable thereafter, give a facsimile of the warrant to any person present and ostensibly in control of the place or premises.

487.1(8) Affixing facsimile

A peace officer who, in any unoccupied place or premises, executes a warrant issued by telephone or other means of telecommunication, other than a warrant issued pursuant to subsection 256(1), shall, on entering the place or premises or as soon as practicable thereafter, cause a facsimile of the warrant to be suitably affixed in a prominent place within the place or premises.

487.1(9) Report of peace officer

A peace officer to whom a warrant is issued by telephone or other means of telecommunication shall file a written report with the clerk of the court for the territorial division in which the warrant was intended for execution as soon as practicable but within a period not exceeding seven days after the warrant has been executed, which report shall include

- (a) a statement of the time and date the warrant was executed or, if the warrant was not executed, a statement of the reasons why it was not executed;
- (b) a statement of the things, if any, that were seized pursuant to the warrant and the location where they are being held; and
- (c) a statement of the things, if any, that were seized in addition to the things mentioned in the warrant and the location where they are being held, together with a statement of the peace officer's grounds for believing that those additional things had been obtained by, or used in, the commission of an offence.

487.1(10) Bringing before justice

The clerk of the court shall, as soon as practicable, cause the report, together with the information and the warrant to which it pertains, to be brought before a justice to be dealt with, in respect of the things seized referred to in the report, in the same manner as if the things were seized pursuant to a warrant issued, on an information presented personally by a peace officer, by that justice or another justice for the same territorial division.

487.1(11) Proof of authorization

In any proceeding in which it is material for a court to be satisfied that a search or seizure was authorized by a warrant issued by telephone or other means of telecommunication, the absence of the information or warrant, signed by the justice and carrying on its face a notation of the time, date and place of issuance, is, in the absence of evidence to the contrary, proof that the search or seizure was not authorized by a warrant issued by telephone or other means of telecommunication.

487.1(12) Duplicates and facsimiles acceptable

A duplicate or a facsimile of an information or a warrant has the same probative force as the original for the purposes of subsection (11).

R.S.C. 1985, c. 27 (1st Supp.), s. 69; 1992, c. 1, s. 58(1) (Sched. I, items 9, 18); 1994, c. 44, s. 37

487.1 — History

Statutory Reference: R.S.C. 1985, c. C-46, s. 487.1

Criminal Law Amendment Act, R.S.C. 1985, c. 27 (1st Supp.)

Section 487.1 was enacted by R.S.C. 1985, c. 27 (1st Supp.), s. 69:

487.1 (1) Telewarrants — Where a peace officer believes that an indictable offence has been committed and that it would be impracticable to appear personally before a justice

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to make application for a warrant in accordance with section 258 or 487, the peace officer may submit an information on oath by telephone or other means of telecommunication to a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter.

(2) Information on oath and record — An information submitted by telephone or other means of telecommunication shall be on oath and shall be recorded verbatim by the justice, who shall, as soon as practicable, cause to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution the record or a transcription thereof, certified by the justice as to time, date and contents.

(3) Administration of oath — For the purposes of subsection (2), an oath may be administered by telephone or other means of telecommunication.

(4) Contents of information — An information on oath submitted by telephone or other means of telecommunication shall include

- (a) a statement of the circumstances that make it impracticable for the peace officer to appear personally before a justice;
- (b) a statement of the indictable offence alleged, the place or premises to be searched and the items alleged to be liable to seizure;
- (c) a statement of the peace officer's grounds for believing that items liable to seizure in respect of the offence alleged will be found in the place or premises to be searched; and
- (d) a statement as to any prior application for a warrant under this section or any other search warrant, in respect of the same matter, of which the peace officer has knowledge.

(5) Issuing warrant — A justice referred to in subsection (1) who is satisfied that an information on oath submitted by telephone or other means of telecommunication

- (a) is in respect of an indictable offence and conforms to the requirements of subsection (4),
- (b) discloses reasonable grounds for dispensing with an information presented personally and in writing, and
- (c) discloses reasonable grounds, in accordance with subsection 258(1) or paragraph 487(1)(a),(b) or (c), as the case may be, for the issuance of a warrant in respect of an indictable offence,

may issue a warrant to a peace officer conferring the same authority respecting search and seizure as may be conferred by a warrant issued by a justice before whom the peace

officer appears personally pursuant to subsection 258(1) or 487(1), as the case may be, and may require that the warrant be executed within such time period as the justice may order.

(6) Formalities respecting warrant and facsimiles — Where a justice issues a warrant by telephone or other means of telecommunication,

(a) the justice shall complete and sign the warrant in Form 5.1, noting on its face the time, date and place of issuance;

(b) the peace officer, on the direction of the justice, shall complete, in duplicate, a facsimile of the warrant in Form 5.1, noting on its face the name of the issuing justice and the time, date and place of issuance; and

(c) the justice shall, as soon as practicable after the warrant has been issued, cause the warrant to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution.

(7) Providing facsimile — A peace officer who executes a warrant issued by telephone or other means of telecommunication, other than a warrant issued pursuant to subsection 258(1), shall, before entering the place or premises to be searched or as soon as practicable thereafter, give a facsimile of the warrant to any person present and ostensibly in control of the place or premises.

(8) Affixing facsimile — A peace officer who, in any unoccupied place or premises, executes a warrant issued by telephone or other means of telecommunication, other than a warrant issued pursuant to subsection 258(1), shall, on entering the place or premises or as soon as practicable thereafter, cause a facsimile of the warrant to be suitably affixed in a prominent place within the place or premises.

(9) Report of peace officer — A peace officer to whom a warrant is issued by telephone or other means of telecommunication shall file a written report with the clerk of the court for the territorial division in which the warrant was intended for execution as soon as practicable but within a period not exceeding seven days after the warrant has been executed, which report shall include

(a) a statement of the time and date the warrant was executed or, if the warrant was not executed, a statement of the reasons why it was not executed;

(b) a statement of the things, if any, that were seized pursuant to the warrant and the location where they are being held; and

(c) a statement of the things, if any, that were seized in addition to the things mentioned in the warrant and the location where they are being held, together with a statement of the peace officer's grounds for believing that those additional things had been obtained by, or used in, the commission of an offence.

(10) Bringing before justice — The clerk of the court with whom a written report is filed pursuant to subsection (9) shall, as soon as practicable, cause the report, together with the information on oath and the warrant in which it pertains, to be brought before a justice to be dealt with, in respect of the things seized referred to in the report, in the same manner as if the things were seized pursuant to a warrant issued, on an information presented personally by a peace officer, by that justice or another justice for the same territorial division.

(11) Proof of authorization — In any proceeding in which it is material for a court to be satisfied that a search or seizure was authorized by a warrant issued by telephone or other means of telecommunications, the absence of the information on oath, transcribed and certified by the justice as to time, date and contents, or of the original warrant, signed by the justice and carrying on its face a notation of the time, date and place of issuance, is, in the absence of evidence to the contrary, proof that the search or seizure was not authorized by a warrant issued by telephone or other means of telecommunication.

Miscellaneous Statute Law Amendment Act, S.C. 1992, c. 1

Subsection 487.1(1) was repealed by S.C. 1992, c. 1, s. 58(1), Sched. I, Pt. I, item 9(1) and the following substituted therefor:

487.1 (1) Telewarrants — Where a peace officer believes that an indictable offence has been committed and that it would be impracticable to appear personally before a justice to make application for a warrant in accordance with section 256 or 487, the peace officer may submit an information on oath by telephone or other means of telecommunication to a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter.

Paragraph 487.1(5)(c) was repealed by S.C. 1992, c. 1, s. 58(1), Sched. I, Pt. I, item 9(2) and the following substituted therefor:

(c) discloses reasonable grounds, in accordance with subsection 256(1) or paragraph 487(1)(a), (b) or (c), as the case may be, for the issuance of a warrant in respect of an indictable offence.

Subsections 487.1(7) and (8) were repealed by S.C. 1992, c. 1, s. 58(1), Sched. I, Pt. I, item 9(3) and the following substituted therefor:

(7) Providing facsimile — A peace officer who executes a warrant issued by telephone or other means of telecommunication, other than a warrant issued pursuant to subsection 256(1), shall, before entering the place or premises to be searched or as soon as practicable thereafter, give a facsimile of the warrant to any person present and ostensibly in control of the place or premises.

(8) *Affixing facsimile* — A peace officer who, in any unoccupied place or premises, executes a warrant issued by telephone or other means of telecommunication, other than a warrant issued pursuant to subsection 256(1), shall, on entering the place or premises or as soon as practicable thereafter, cause a facsimile of the warrant to be suitably affixed in a prominent place within the place or premises.

Subsection 487.1(5) was amended by S.C. 1992, c. 1, s. 59, Sched. I, Pt. II, item 18 by repealing all that portion of subsection 487.1(5) following paragraph (c) and substituting the following:

may issue a warrant to a peace officer conferring the same authority respecting search and seizure as may be conferred by a warrant issued by a justice before whom the peace officer appears personally pursuant to subsection 256(1) or 487(1), as the case may be, and may require that the warrant be executed within such time period as the justice may order.

Section 487.1 of the French version of the Criminal Code was amended by S.C. 1992, c. 1, s. 60, Sched. I, Pt. III, item 33.

Criminal Law Amendment Act, S.C. 1994, c. 44

Subsection 487.1(2) was replaced by S.C. 1994, c. 44, s. 37(1) and the following substituted therefor:

(2) *Information submitted by telephone* — An information submitted by telephone or other means of telecommunication, other than a means of telecommunication that produces a writing, shall be on oath and shall be recorded verbatim by the justice, who shall, as soon as practicable, cause to be filed, with the clerk of the court for the territorial division in which the warrant is intended for execution, the record or a transcription of it, certified by the justice as to time, date and contents.

(2.1) *Information submitted by other means of telecommunication* — The justice who receives an information submitted by a means of telecommunication that produces a writing shall, as soon as practicable, cause to be filed, with the clerk of the court for the territorial division in which the warrant is intended for execution, the information certified by the justice as to time and date of receipt.

Section 487.1 was further amended by S.C. 1994, c. 44, s. 37(2) by adding the following after subsection (3):

(3.1) *Alternative to oath* — A peace officer who uses a means of telecommunication referred to in subsection (2.1) may, instead of swearing an oath, make a statement in writing stating that all matters contained in the information are true to his or her knowledge and belief and such a statement is deemed to be a statement made under oath.

Subsection 487.1 (4) was further amended by S.C. 1994, c. 44, s. 37(3) by replacing the portion of 487.1(4) before paragraph (a), with the following:

(4) Contents of information — An information submitted by telephone or other means of telecommunication shall include

Subsection 487.1(5) was further amended by S.C. 1994, c. 44, s. 37(4) by replacing the portion of subsection 487.1(5) before paragraph (a) with the following:

(5) Issuing warrant — A justice referred to in subsection (1) who is satisfied that an information submitted by telephone or other means of telecommunication

Subsection 487.1(6) was further amended by S.C. 1994, c. 44, s. 37(5) by replacing the portion of subsection 487.1(6) before paragraph (a), with the following:

(6) Formalities respecting warrant and facsimiles — Where a justice issues a warrant by telephone or other means of telecommunication, other than a means of telecommunication that produces a writing,

Subsection 487.1 was further amended by S.C. 1994, c. 44, s. 37(6), by adding the following after subsection (6):

(6.1) Issue of warrant where telecommunication produces writing — Where a justice issues a warrant by a means of telecommunication that produces a writing,

(a) the justice shall complete and sign the warrant in Form 5.1, noting on its face the time, date and place of issuance;

(b) the justice shall transmit the warrant by the means of telecommunication to the peace officer who submitted the information and the copy of the warrant received by the peace officer is deemed to be a facsimile within the meaning of paragraph (6)(b);

(c) the peace officer shall procure another facsimile of the warrant; and

(d) the justice shall, as soon as practicable after the warrant has been issued, cause the warrant to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution.

Section 487.1 was further amended by S.C. 1994, c. 44, s. 37(7) by replacing subsections 487.1(10) and (11), with the following:

(10) Bring before justice — The clerk of the court shall, as soon as practicable, cause the report, together with the information and the warrant to which it pertains, to be brought before a justice to be dealt with, in respect of the things seized referred to in the report, in the same manner as if the things were seized pursuant to a warrant issued, on an information presented personally by a peace officer, by that justice or another justice for the same territorial division.

(11) Proof of authorization — In any proceeding in which it is material for a court to be satisfied that a search or seizure was authorized by a warrant issued by telephone or other means of telecommunication, the absence of the information or warrant, signed by the justice and carrying on its face a notation of the time, date and place of issuance, is, in the absence of evidence to the contrary, proof that the search or seizure was not authorized by a warrant issued by telephone or other means of telecommunication.

(12) Duplicates and facsimiles acceptable — A duplicate or a facsimile of an information or a warrant has the same probative force as the original for the purposes of subsection (11).

