

**IN THE SUPREME COURT OF CANADA
(On Appeal from the Supreme Court of British Columbia)**

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

**Tay Fung Albert TSE, Nhan Trong LY, Huong Dac DOAN,
Viet Bac NGUYEN, Daniel Luis SOUX, AND Myles Alexander VANDRICK**

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PART 1

OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Respondents Daniel Louis Soux and Myles Alexander Vandrick (herein “these respondents”) submit that the learned trial judge correctly found that section 184.4 of the *Criminal Code* violated the *Charter*. He interpreted the provision narrowly, consistently with prior jurisprudence. He defined “victims” in a sensible way to interpret the statute. He correctly found that the classes of “peace officers” purportedly authorized by section 184.4, relying in turn on the definitional section of the *Code* (section 2) was too broad. He correctly found that the scope of unlawful acts covered by section 184.4 was extremely broad, and that the lack of judicial oversight, and any reporting provision, were highly problematic given the abrogation of the constitutional right to be secure against unreasonable search and seizure, and the requirement for prior judicial authorization where feasible. He appropriately balanced the *Charter* section 8 rights of all citizens against the need for the police to act swiftly in certain circumstances in holding as he did.

B. Facts of the Case Relevant to the Constitutional Question

2. These respondents will not repeat the facts in the appellant’s statement of facts, and adopt as generally accurate the Crown’s summary of the evidence.

3. ~~The evidence was that a superior court judge or other judicial official was available on short notice at any time. The police knew this and how to locate one. It would have taken little longer to find a judicial official than it did to obtain ‘authorisation’ from a senior officer.~~

C. Additional Facts on the Constitutional Application

4. The Crown adduced considerable evidence not relating specifically to the case at bar on the constitutional issue. There were seven affidavits from police forces across Canada. The trial

judge had no doubt that the section addressed important goals, but the evidence was “of dubious value” [para. 228] in justifying the infringement under *Charter* section 1 because of the “many varying implementation policies followed by different police forces...” [para. 228]. The appellant suggests that there is “remarkable uniformity” in the implementation of section 184.4, but even assuming this is correct it cannot save an unreasonable search from constitutional scrutiny. A search is not more permissible because most police forces breach rights in similar circumstances. The issue here fundamentally is whether a gross departure from *Duarte* is warranted.

D. Serious Nature of Cases Where Section 184.4 is Invoked

5. The appellant submits [paras. 17-21] that because the police forces tend to use this section only in kidnapping, hostage taking, or similar serious circumstances that this is a justification. The section itself requires that such an interception be “immediately necessary to prevent an unlawful act that would cause serious harm”, so it is not surprising that police forces interpret their actions under this section to apply to these types of events. It cannot reasonably be suggested that s. 184.4 should apply to all offences for which an authorization under section 186 may be issued. The list of offences in section 183 is very broad, and includes many offences where the threshold in section 184.4 could not be reached. As to the appellant’s reliance on statistics suggesting an increase in kidnapping, these respondents suggest they are of little utility.

6. The appellant also makes much of the short duration of the interceptions, and what is characterized as a “restrained implementation” or use of section 184.4 [factum paras. 19-21]. These arguments suggest only that the police attempt to apply section 184.4 to the circumstances referred to in that section.

7. Other Courts have considered the legislation at issue. In Quebec Justice Davies’ decision was applied. In Ontario none of the three decisions support the legislation as worded, and all have found that it fails to pass constitutional muster for one reason or another, and must be judicially “rewritten” to be upheld. No Court has concluded that the legislation is constitutional as written.

R. v. Tse, 2008 BCSC 211

R. v. Riley (No. 1) (2008), 174 C.R.R. (2d) 250 (Ont. S.C.)

R. v. Moldovan, 2009 CarswellOnt 6468 (S.C.)

R. v. Brais, [2009] R.J.Q. 1092 (S.C.)

R. v. Deacon, 2008 CarswellOnt 9130 (S.C.)

8. These respondents submit that the legislation cannot be saved under *Charter* s. 1 as it does not pass the *Oakes* test, as the trial judge found.

R. v. Oakes, [1986] 1 S.C.R. 103

PART 2

QUESTIONS IN ISSUE

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

PART 3

ARGUMENT

9. These respondents respectfully submit that s. 184.4 of the *Criminal Code* infringes ss. 7, 8, and 11(d) of the *Canadian Charter of Rights and Freedoms*. These respondents submit that s. 184.4 of the *Criminal Code* cannot be saved by *Charter* s. 1, and that it is necessary to declare it of no force and effect under s. 52(1) of the *Constitution Act*, 1982.

A. Warrantless Searches are Presumptively Unreasonable

10. These respondents submit that interceptions made under s. 184.4 are warrantless and presumptively unreasonable. The appellant stands “exigent circumstances” on its head by suggesting that because the s. 184.4 applies to exigent circumstances, there is no *Charter* presumption against it. These respondents submit that this argument presumes the conclusion. The logic is faulty. What this Honourable Court has repeatedly held is that exigent circumstances are an exception.

Hunter v. Southam, [1984] 2 S.C.R. 145
R. v. Colarusso, [1994] 1 S.C.R. 20

11. The Crown contends that warrantless searches in exigent circumstances are presumptively constitutional. The applicants submit that this is not what the jurisprudence says.

12. The starting point is *Hunter v. Southam*. An assessment of the constitutionality of a search and seizure, or of a statute authorizing it, must focus on its reasonable or unreasonable impact on the subject of the search and seizure, and not simply on its rationality in furtherance of a valid government objective. A purposive interpretation of *Charter* s. 8 requires that it be interpreted in a fashion which protects individuals from unjustified state intrusion upon their privacy, and prevents unjustified searches before they happen.

Hunter v. Southam, *supra*

13. This protection and prevention can only be accomplished by a system of prior authorization, not one of subsequent validation. Accordingly, where it is feasible to obtain prior

authorization, such authorization is a precondition for a valid search and seizure. A warrantless search is *prima facie* unreasonable under s. 8 of the *Charter*, and the party seeking to justify the warrantless search must rebut this presumption.

Hunter v. Southam, supra

14. While the Crown contests that s. 184.4 violates s. 8 of the *Charter*, these respondents submit that the ratio of *Duarte* makes this conclusion unavoidable:

[W]here persons have reasonable grounds to believe their communications are private communications in the sense defined above, the unauthorized surreptitious electronic recording of those communications cannot fail to be perceived as an intrusion on a reasonable expectation of privacy. (emphasis added)

R. v. Duarte, [1990] 1 S.C.R. 30, at 47 d

15. The Court in *Duarte* held that the state may only violate the privacy rights of an individual through surreptitious interception of private communications when such interception is authorized by a detached judicial officer. The role of the detached judicial officer is necessary in order to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that an individual's privacy right is breached only where the appropriate standard has been met, and the interests of the state are demonstrably superior to those of the individual. It is therefore necessary that the person authorizing the search be able to assess the evidence in an entirely neutral and impartial manner, and while this person need not be a judge, he or she must at a minimum be capable of acting judicially. The standard which must be met before a search should be authorized is the establishment upon oath of reasonable and probable grounds to believe that an offence has been committed, and that evidence will be captured as a result of the search.

Duarte, supra, at p. 45 e-g, 46 b

16. The scheme of s. 184.4 of the *Code*, it is respectfully submitted, fails to comply with any of the dictates of *Hunter v. Southam*, and subsequent cases, including those in the wiretap context, and those which deal with searches and seizures.

17. The Crown relies upon *Tessling*. *Tessling* involved a challenge to the gathering of heat patterns from the rooftop of homes. The Supreme Court found that there was no reasonable expectation of privacy in what was being captured by the technology, so it can hardly be suggested that in the quote (respondent's para. 11) that the Court intended to overrule any of its previous jurisprudence.

R. v. Tessling, [2004] 3 S.C.R. 432

18. "Exigent circumstances", as contemplated, can apply to endless scenarios. A police officer may see a person committing a crime, and be entitled to arrest him pursuant to the *Code* provisions, without obtaining a warrant. It cannot be suggested that a peace officer viewing an offence being committed is obliged to apply for a warrant before effecting an arrest. *Feeney*, of course, created a warrant requirement to enter a dwelling house for the purpose of arrest, absent exigent circumstances. The Court expressly limited its judgment to hot pursuit, and left for another day whether "exigent circumstances other than hot pursuit" would be sufficient to enter without warrant (*Feeney*, para. 47). It was the dissent in *Feeney* which thought that all exigent circumstances ought to comprise the exception, but this was not the majority holding. *Colarusso* is a case which must be read in its context, which is markedly different than the situation here, although it involved heightened privacy interests. The quotation from *Hunter* (appellant's para. 23, p. 11) supports these respondents' position: it was feasible to obtain prior authorization in the circumstances of the case at bar, and in many, if not most of the circumstances contemplated by section 184.4, after allowing for a short window in which this might not be so.

R. v. Colarusso, [1994] 1 S.C.R. 20
Hunter v. Southam, *supra*

19. The appellant suggests that *Tessling* somehow overruled *Duarte*. The sentence quoted is in the context of an airplane flying over houses, and no reasonable expectation of privacy, where *Charter* s. 8 had no application. Binnie J., the applicants say, did not impliedly suggest in any fashion that *Duarte* was bad law, and this sentence must be read in the context of the case which was then before the Court.

R. v. Tessling, *supra*
R. v. Duarte, *supra*

20. Even if *Duarte* is not dispositive in these ‘exigent circumstances’, as this Honourable Court has observed, it cannot be avoided or disregarded. The type of electronic surveillance, and the nature of the invasion of privacy, in the case at bar is identical to that in *Duarte*. The only difference is a situation of urgency and the need for the police to be able to proceed with dispatch.

21. It follows that the respondents disagree with the Crown and their suggestion that the “burden” rests upon them. We say it has been discharged by the warrantless search, when it was feasible to obtain prior authorization. In the words of *Collins*, the search was warrantless, and the Crown now has the burden of showing that the search was reasonable: it must be authorised by law, the law must be reasonable, and the manner in which the search was carried out must have been reasonable. On all these issues we say the Crown fails. No matter where the burden lies, these respondents submit that it has been discharged.

R. v. Collins, [1987] 1 S.C.R. 265

22. These respondents say that the statutory provision authorizes warrantless searches and seizures, without an independent judicial officer, for an indefinite time. To the extent that the applicants must demonstrate a “reasonable hypothetical” (*Goltz*), we say we have done so, and that we have demonstrated an infringement of constitutionally protected interests by state action pursuant to a flawed statute.

R. v. Duarte, *supra*

Hunter v. Southam, *supra*

R. v. Goltz, [1991] 3 S.C.R. 485

B. Proper Interpretation of the Provision and Void for Vagueness Argument

23. These respondents accept that an important aspect of assessing the legislation’s constitutionality is to interpret it properly.

24. These respondents argued in the court below that the statutory provisions of section 184.4 were overbroad and vague. This doctrine arises from this Honourable Court’s decisions in *Nova Scotia Pharmaceutical Society* and others. The judge below found against the respondents on these arguments, but these respondents say that he erred in those findings.

Ontario v. Canadian Pacific, [1995] 2 S.C.R. 1031

R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606

R. v. Morales, [1992] 3 S.C.R. 711

25. A law that is overbroad, or vague, or both, breaches section 7 because it renders indefinite and unpredictable the conditions under which the state can deprive citizens of their liberty. In this context, the fact that it is a criminal offence to intercept private communications (s. 184) make the requirements for certainty greater. A peace officer ought not to be in jeopardy of a prosecution under s. 184 because the law under which he acted was unclear.

26. The “void for vagueness” doctrine is usually considered in the context of challenges to offence-creating provisions. Vague criminal or penal statutes offend section 7 of the *Charter* because they do not provide fair notice of the prohibited act, or clearly delineate the area of risk so that citizens can govern themselves accordingly. The second principle from which the doctrine arises is the limitation of law enforcement discretion. A vague statute does not provide sufficient guidance to agents of the state charged with enforcement. Without such guidance, agents of the state may apply the law in an arbitrary, discriminatory, or capricious manner. This doctrine has also been applied where judicial discretion is not appropriately defined by Parliament, and in both *Nova Scotia Pharmaceutical* and *Morales* this Court held that the doctrine prohibiting vagueness applies to all types of statutory enactments.

Ontario v. Canadian Pacific, *supra*

R. v. Nova Scotia Pharmaceutical Society, *supra*, at 642

R. v. Morales, *supra*, at 715 d-e

27. Invasion of privacy provisions are part of the enforcement mechanism of the state, and they may similarly breach privacy interests protected by s. 7 by being overly broad or vague. The mechanisms by which the state invades its citizens’ privacy must be as amenable to constitutional scrutiny as the offence-creating provisions themselves. Otherwise, citizens’ privacy could be invaded under constitutionally non-compliant provisions, and they could then stand to be convicted upon unconstitutionally gathered evidence. In *Nova Scotia Pharmaceutical*, a unanimous Court held that the constitutional standard applies to all

enactments, whether civil, criminal, or administrative. The Court emphasized that the state should outline the terms of legal debate “with special care” in the criminal context.

Nova Scotia Pharmaceutical Society, supra, at 642-3

28. Under the “void for vagueness” doctrine, a law is unconstitutionally vague “if it so lacks in precision as not to give guidance for legal debate”: (*Nova Scotia Pharmaceutical Society*). In the impugned provision, the following conditions or phrases are vague, ambiguous, or undefined:

“urgency of the situation” – whose situation, the victim or the investigators (i.e. isolated peace officer – go up on a 184.4, vs a lower mainland peace officer – go get a 188.8 .

“serious harm” – undefined. Not bodily harm, because it can be harm to property.

“unlawful act” – not “offence” as defined in Part VI, but any unlawful act. In conjunction with “peace officer” – could be a bylaw offence, as long as the peace officer believes it would cause serious harm.

29. A vague law permits the arbitrary exercise of law enforcement discretion. Parliament cannot delegate its law-making power to individual law enforcement officers, and a law that provides no intelligible standard for the exercise of discretion is unconstitutional. An unconstitutional law cannot be saved by relying on police or prosecutorial policy that stipulates criteria for the exercise of discretion. In any event, the evidence demonstrates that the RCMP, including officers responsible for authorizing the wiretap, did not consult policy; and that members of the Legal Applications Support Team were aware of policy, but encouraged different practices. That they were ignorant of other applicable sections of the *Code* is argued elsewhere, but cannot provide a justification.

R. v. Smith, [1987] 1 S.C.R. 1045

R. v. Heywood, [1994] 3 S.C.R. 761

30. These respondents submit that s. 184.4 far overreaches its objective. Several significant factors include the absence of a time limit on the invasion of privacy, the absence of a reporting requirement to either Parliament or the parties intercepted, and the absence of post-interception

review, judicial or otherwise. A peace officer could reasonably believe that a situation of urgency continued to exist indefinitely in circumstances where it would not be possible to get an authorization under any other provision of Part VI. This is so because s. 184.4 is aimed prospectively at preventing unlawful acts, while other provisions require an offence to have been committed. A peace officer might reasonably believe that until an offence occurred (that is, until the attempt to prevent the unlawful act failed), they could legally intercept private communications indefinitely under s. 184.4. Privacy interests are entitled to a high degree of protection.

R. v. Duarte, supra

R. v. Mills, [1999] 3 S.C.R. 668

31. The breadth of s. 184.4 is substantial. “Peace officer” as defined in s. 2 of the *Criminal Code* is extremely broad. This is argued below, at paras. 53 to 58.

32. These respondents plead and rely upon overbreadth and vagueness as a second, independent argument against the constitutionality of the impugned provision. We submit that s. 184.4 cannot be construed to be a statutory provision “prescribed by law”, as required in order for the Crown to attempt to uphold it under *Charter* s. 1. These respondents argue this issue at this stage, in support of the unconstitutionality of the provision itself, and say that s. 184.4 is both overbroad and vague, and offends settled constitutional jurisprudence in this regard.

33. Should this Honourable Court find that this analysis is misplaced at this stage of the argument, without repetition the applicants adopt it in support of their arguments in response to the Crown under *Charter* s. 1. The trial judge found that these arguments were more appropriately dealt with and subsumed under the s. 8 *Charter* issues, which are addressed below. Whether vagueness and overbreadth alone invalidate the statute, or whether they are considered as part of the s. 8 analysis, these respondents submit the ambit and breadth of the seizures purported to be authorized cannot be sustained.

1. “Reasonable Diligence” in s. 184.4(a)

34. These respondents submit that the trial judge correctly found that if “reasonable diligence” is constitutionally sound and not impermissibly vague, it must require the police immediately to take all steps necessary to obtain a judicial authorization with the least delay possible in the circumstances. This makes perfect sense and is consistent with the dictates of *Hunter v. Southam*, and subsequent jurisprudence dealing with exigent circumstances generally. An authorization under section 188 can be obtained by telephone. There is no need for a written application. The process should include memorializing or recording the gist of the allegations, but there is at least some authority that the remarks are not required to be under oath. The only delay would be in locating a superior court judge, and there was unchallenged evidence before the trial judge that judicial officials were available at any time in urgent circumstances.

Hunter v. Southam, supra

R. v. Galbraith (1989), 49 C.C.C. (3d) 178 (Alta. C.A.)

R. v. Laudicina (1990), 53 C.C.C. (3d) 281 (Ont. H.C.J.)

Record, Vol. II, p. 19

35. It seems unlikely that a section 186 authorization will be available as expeditiously as a section 188 order, notwithstanding the holdings in *Riley (No. 2)* and *Moldovan*. The need to reduce the grounds to writing takes time which would not be necessary under section 188. These respondents submit that “reasonable diligence” requires exactly what the trial judge found in the case at bar, and does not require a “presumptive allocation of investigative resources toward immediate drafting” as the appellant submits [para. 36]. Any room or necessity for section 184.4 should be limited only to the time necessary to locate a superior court judge by telephone, assuming that events are transpiring that quickly. There was no evidence that finding a judge would have taken longer than finding a superior officer.

R. v. Riley (No. 2) (2008), 174 C.R.R. (2d) 288

R. v. Moldovan, 2009 Carswell Ont 6468

36. These respondents submit that the interpretation of the trial judge in the case at bar is preferable to that of Dambrot J. in *Riley (No. 1)*. An authorization under section 188 is time limited. The judiciary acts as a safeguard concerning terms and conditions. The invasion of

privacy, and permanent electronic recording of private communications, commences after an independent arbiter has decided whether it is justified in the circumstances, and not before.

2. “Serious harm” and “unlawful act”

37. The serious harm threshold upon which the appellant places great reliance is entirely inconsistent with the list of offences for which section 184.4 is available. The list is contained in section 183. It does not assist the appellant to sustain the constitutional validity of the section by suggesting [para. 42] that the police practice is to rely upon this section for offences such as kidnapping or murder. Simply because the section as relied upon in narrow circumstances does not save a *Code* section authorizing unconstitutional action. *Hunter v. Southam*, *Heywood*, and writs of assistance under the *Narcotic Control Act* were not upheld for that reason. In *Smith* this argument was specifically rejected.

Hunter v. Southam, *supra*

R. v. Heywood, *supra*

R. v. Hamill, [1987] 1 S.C.R. 301, 56 C.R. (3d) 220

R. v. Smith, [1987] 1 S.C.R. 1045

38. The appellant suggests that “unlawful act” should be narrowly read. There are several problems with this supporting the constitutionality of the section, including the breadth of the offences listed in section 183 referred to above. These respondents submit that the trial judge was right in concluding that the section 183 list could not be justified as being a class of crimes justifying an unwarranted seizure of private communications.

3. Urgency of the situation [appellant’s factum para. 44]

39. The appellant relies upon *Golden* to suggest that “urgency” is a sufficient test. The appellant refers as well to *Morales*, but that decision held that the *Code* provisions did not meet constitutional requirements.

40. Searches incident to arrest fall into their own category notwithstanding the heightened privacy interests. A search of the person requires an arrest, which in turn is premised upon reasonable and probable grounds to believe that the person has committed an indictable offence. An arrest is an immediate and dynamic process which requires that the individual will be held in

circumstances where officer safety can be assured, together with the safety of others who may be with that person in cells. The real issue arising from cases such as *Golden* is the degree to which the search is permissible, the reasons for which it is conducted, and the amount by which the privacy interest must yield in certain circumstances. The search of a person is a different class of events than the interception and recording of private communications.

R. v. Morales, supra

R. v. Golden, [2001] 3 S.C.R. 679

4. Specified targets [appellant's factum paras. 45 to 46]

41. These respondents submit that the trial judge correctly interpreted who may be intercepted pursuant to the section. To the extent that the appellant seeks to include additional classes of individuals, this is a red herring because the "victims" not included by statute presumably will consent. What the trial judge was doing was attempting to interpret the section narrowly (as the Crown below submitted he should), in order to avoid being obliged to find it overbroad and unconstitutional.

C. Overbreadth Argument Subsumed by Section 8 [appellant's factum paras. 47-49]

42. The respondents argued the case in the court below on independent footings under *Charter* sections 7, 8, and 11(d). The trial judge found that the best analytical approach took account of overbreadth and vagueness as components of the section 8 analysis. These respondents agree that it was open to the trial judge to use the analytical framework he did, while maintaining in this Court as below that overbreadth and vagueness may independently invalidate Vagueness and overbreadth remain important tools to assess the breadth of the *Code* provision, what is captured by it, what ought not to be, and its indefinite edges.

43. These respondents suggest that the Crown's reliance on *W.(K.L.)* is misplaced. This Court decided that the first priority was the safety of the child, which is not surprising. It is consistent with *Godoy* and the 'cry for help'. There will always be some circumstances where immediate safety concerns justify action without judicial oversight. *W.(K.L.)* is in the class of circumstances contemplated by "hot pursuit", arrests without warrant, and concerns about notice, due process, and accountability are of necessity dealt with by the judiciary after the fact. The

requirement is that there be prior judicial authorization “where feasible” and these respondents say that in this case, and other cases, it is feasible.

W.(K.L.) v. Winnipeg Child and Family Services, [2000] 2 S.C.R. 159

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

44. The appellant relies upon *Moldovan* and *W.(K.L.)* to suggest that section 184.4 requires consideration of the “s. 7 rights of the victims”. These respondents submit that it is unsound to approach an assessment of the constitutional validity of a provision which purports to enable an invasion of privacy based upon these considerations. *Moldovan* stands alone in so suggesting.

R. v. Moldovan, supra

D. Charter S. 8 and Exigent Circumstances [appellant’s factum paras. 52-62]

45. The appellant submits that the trial judge erred in considering “peripheral matters”, and suggests that previous jurisprudence of this Court supports its position. With respect, *Tessling* involved a challenge to the gathering of heat patterns from the rooftops of homes. There was no reasonable expectation of privacy in what was being captured, so it can hardly be suggested that this Court intended to overrule any previous jurisprudence. In *Feeney*, the Crown relied upon exigent circumstances, at common law, to justify the police’ actions, but this Court created a warrant requirement to enter a dwelling house for the purpose of arrest, absent exigent circumstances. The evidence of the application of section 184.4 from other police forces is only what they have chosen to put forward in order to support the Crown’s position below. The Crown’s reliance on a “reasonable grounds” requirement contained in 184.4 is of little moment or comfort to a target, because a lack of notice provisions and after the fact safeguard means that only in rare circumstances will a person whose communications have been intercepted and recorded ever become aware of that fact, let alone be able to test whether the grounds were reasonable and probable after the fact.

R. v. Tessling, [2004] 3 S.C.R. 432

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

46. These respondents disagree that s. 184.4 is comparable to the cases on which the appellant relies. As earlier was submitted, *Feeney* is limited to cases of “hot pursuit”. The Court left a consideration of other exigent circumstances to another day. We submit that *Feeney* is of

no assistance. *Maccooh* may define “fresh pursuit”, or “hot pursuit” as it is called in *Feeney*, but again, with respect, hot pursuit involves the attempted capture of a person premised upon reasonable and probable grounds that they are a criminal, and by definition the person is fleeing to avoid apprehension. Many potential risks arise on these facts which have no application to the case at bar. These respondents disagree that this Court in *Feeney*, or *Maccooh*, validated a warrantless search under section 8 using the reasonable diligence wording, as the appellant suggests.

R. v. Maccooh, supra

R. v. Feeney, supra

47. *Godoy* authorizes the police to enter to find the source of the “cry for help”. The 911 call is considered to be exactly that, a “cry for help”. In those limited circumstances the police are authorized to enter, *but not to search or seize*. There is no opportunity, by definition, to seek judicial authorization prior to entry; but this Court did not endorse entry, searching and seizing, remaining indefinitely, and making a permanent record, pursuant to a hangup 911 call.

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

48. Searches incident to detention fall into their own category, notwithstanding that there are heightened privacy interests. Search cases (such as *Golden*) involve a person who has been arrested, not merely detained. An arrest, in turn, is premised upon reasonable and probable grounds to believe that the offender has committed an indictable offence. The nature of arrests generally is that they are a dynamic process. Arrested persons must be maintained in circumstances where officer safety can be assured. They may be placed in cells where other inmates must be safe as well, otherwise harmful events could occur. Undoubtedly the police are obliged to search prior to lodging a person in custody, and the real issue arising in these cases is the degree to which a search is permissible, and the reason(s) for which it is conducted. *Golden* is an example of a high privacy interest which is permitted to be invaded in certain circumstances, just as in *Mann* the ambit of the search is constrained substantially from that permitted in the *Golden* scenario. *Clayton* is a vehicle case, and vehicles are in a class of their own due to their mobility, and ability to conceal within, the evidence of the crime and its perpetrators.

R. v. Golden, [2001] 3 S.C.R. 679

R. v. Mann, [2004] 3 S.C.R. 59

R. v. Clayton, [2007] 2 S.C.R. 725

49. These respondents respectfully submit that the cases involving the search of a person, or the stopping of a vehicle, again are of no assistance to the appellant. In addition to requiring prior authorization, the Court in *Duarte* lists factors which are significant to the scheme of interceptions pursuant to judicial authorization, all of which were absent in participant surveillance authorized only by the police.

50. The Crown suggests that the factors identified by the Court are unnecessary, provided for, are all *ex post facto* and do not matter to the constitutional analysis. These respondents disagree and submit that the result of *Duarte*, and the prior authorization requirement, was that the protections which Parliament builds into judicially authorized invasions of privacy become applicable to participant surveillance. It is no answer for the Crown to point to other sections (such as 184.1) to suggest that because other sections share what we say are constitutional deficiencies, Parliament addressed its mind to these problems and ought to be paid great deference. These respondents do not concede that the lack of safeguards in other sections says anything about the constitutional validity of s. 184.4.

R. v. Duarte, supra

51. It is abundantly clear that in the future, should this provision be upheld, then the police will continue to be entitled at their sole discretion to intercept private communications. There is no judicial authorization, no apparent time limit, no notice provision, no ability for the public to be aware of these actions and, in short, this section shares almost all of the problems which *Duarte* identified, including the lack of accountability. These respondents say that cumulatively these are significant defects, and while it may be that one would not suffice to “invalidate”, we submit that the totality of the circumstances compel the conclusion that the impugned section purports to authorize searches and seizures without due regard for constitutional protections.

52. This Court has recognized the need for warrantless searches in emergency situations. None of these situations involve a statute, or a decision, which purports to authorize the type of state action which section 184.4 permits. None of the Crown’s analogies raise the same concerns

about the lack of accountability. These respondents submit that it has been demonstrated that it is *feasible* to obtain prior judicial authorization in all but perhaps a tiny sliver of the circumstances which section 184.4 covers. It follows that section 184.4 purports to authorize searches and seizures in a broad class of circumstances which could not properly be described as exigent, and in the result this area of jurisprudence is of limited utility to the constitutional analysis required in the case at bar.

E. The Definition of Peace Officer [para. 64-70]

53. An overbroad law is one in which overreaches its objective. Overbreadth is often related to vagueness, but it is possible for Parliament to craft a law in which the prohibited conduct is clearly defined, but some element of the law applies too broadly. If a criminal or penal statute is clear but overbroad, citizens may steer clear of behaviour that was not intended by Parliament to be prohibited, or may inadvertently behave unlawfully. If an evidence-gathering provision is overbroad, agents of the state may gather evidence in circumstances or in a manner not contemplated by Parliament. The provision may apply without notice to too many places, too many people, for an indefinite period with no possibility of review. For such evidence then to be adduced at trial clearly impacts upon rights protected by s. 11(d).

R. v. Heywood, supra

54. It is necessary to examine *Code* s. 184.4 with some care. The section opens by authorizing a “peace officer” to intercept. There appears to be no evidence in the case at Bar that the persons physically doing the interceptions were peace officers, but leaving that aside, the section on its face designates a class of individuals defined in s. 2 of the *Criminal Code*. It includes a Mayor, Warden, Sheriff, Deputy Sheriff, a member of the Correctional Service of Canada, or a Jailer or any other employee of a prison or penitentiary, any police officer, a bailiff, a person employed for the service or execution for civil process, officers within the meaning of the *Customs Act*, the *Excise Act*, the *Immigration and Refugee Protection Act*, a Fishery Guardian under the *Fisheries Act*, the pilot in command of an aircraft, and certain members of the Canadian Forces.

Criminal Code, s. 2

55. Any person within this enormous class is said by the Crown to be entitled to intercept private communications, invade persons' privacy, and to authorize others to do it, in the circumstances specified in s. 184.4. This is not in compliance with the strictures of *Hunter v. Southam*. It does not comport with an opportunity, prior to the invasion of privacy, for the conflicting interests of the state and the individual to be assessed by an independent and impartial arbiter. There is no requirement that reasonable and probable grounds exist to believe that an offence has been committed. It is not consistent with the requirements of *Duarte*, which are that an independent person be satisfied that there are reasonable and probable grounds to believe that an offence has been, or is being, committed and that the interception of communications will afford evidence of that offence.

Hunter v. Southam, supra

56. The underlying rationale for regulating the power of the state to record communications which are expected to be private is to protect against the insidious danger inherent in allowing the state in its unfettered discretion to record and transmit our words. It is unacceptable in a free and democratic society that agents of the state be free to use this technology at their sole discretion, even where one party consents to the interception.

Duarte, supra at p. 44 a-b

57. In these circumstances, the applicants respectfully submit that it cannot be held that interceptions carried out pursuant to s. 184.4 comply with the minimum constitutional standards which have existed for over twenty years in the search and seizure context. This is, the respondents say, a warrantless search where the onus for justification has shifted to the Crown.

58. The appellant seeks to uphold this list of individuals. A mayor, jailor, penitentiary guard, fisheries officer and others presumably need to be able to do this without judicial intervention. Given the absence of a requirement to report nobody would know. These respondents submit that the Crown's attempt to maintain the breadth of this section cannot be sustained. We say that there is no defensible reason why this class of individuals should be entitled to create a permanent electronic record of private communications, without reporting to anyone at any time, nor have their actions later examined. *Riley (No. 1)* suggests that the requirement found by the

trial judge that section 184.4 intercepts should be reported to the executive branch was “anomalous” and without precedent. This ignores the particular scheme that exists under part VI of the *Code* for the interception of private communications, and the need for reporting. There should be no lesser need in the case of a presumptively unreasonable seizure, but instead the converse.

R. v. Riley (No. 1), supra

F. The Constitutional Requirement of Notice to Third Parties [paras. 71-74]

59. The trial judge found that the need to have ex-post facto scrutiny and accountability were important considerations in assessing the scheme of section 184.4, and the reasonableness of permanent electronic records of private communications without judicial authorization. These respondents submit that the trial judge was entirely right in having these concerns. It is a problem that the police can do this without any oversight. The appellant’s observation that notice is a weak way of vindicating section 8 privacy rights is correct, because there should be prior judicial authorization. The lack of notice, and the concern of the trial judge is quite justified. The suggestion that because the accused get notice of the interceptions if they are being tendered assumes that a person is charged, and that the interceptions are being tendered. But for these events where would be no oversight at all, and no accountability. To the extent that *Riley (No. 1)* finds fault with these requirements, these respondents submit that *Riley* wrongly erodes *Charter* section 8 and fails to take proper account of this Court’s previous jurisprudence in the section 8 context, as well as the scheme of part VI of the *Code*.

R. v. Riley (No. 1), supra

G. Section 1 Argument

60. These respondents submit that section 184.4 cannot be saved under section 1 of the *Charter*.

61. In the context of this case, section 1 may apply to override *Charter* breaches found by this Court only in circumstances where the Crown establishes on a preponderance of

probabilities that such a breach is a reasonable limit prescribed by law, and that the breach of the *Charter* can be demonstrably justified in a free and democratic society.

62. The evidentiary burden on the Crown on section 1 is informed by the nature of the statute in question. A criminal statute requires a high degree of proof of justification. As noted by the Court in *Oakes*:

Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Lord Denning, “commensurate with the occasion”. Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. See: *Law Society of Upper Canada v. Skapinker*, *supra*, at p. 384; *Singh et al. v. Minister of Employment and Immigration*, *supra*, at p. 217. A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where elements of the s. 1 analysis are obvious or self-evident.

R. v. Oakes, [1986] 1 S.C.R. 103, at para. 68

63. *Charter* s. 1 constitutionally guarantees the rights and freedoms set out, and states explicitly the criteria for justification against which limitations on those rights and freedoms must be measured. An inquiry under this section is premised on a foundation that the impugned law violates constitutional rights and freedoms guaranteed by s. 8.

64. For the Crown to succeed under s. 1, it must satisfy the Court of two matters. First, the objective of s. 184.4 must be of sufficient importance to warrant overriding a constitutional right or freedom. Second, the Crown must demonstrate that the means chosen are reasonable and demonstrably justified.

65. The first criterion requires at a minimum that the objective relate to concerns which are pressing and substantial in a free and democratic society. The Crown argues that the need to respond in a timely fashion to apprehended bodily harm satisfies this part of the *Oakes* test. The trial judge found this objective to be an important one.

66. The second requirement involves a form of proportionality test, and while the nature of this test may vary, depending on the circumstances, the Court is obliged to balance the interests of society with those of the individual and groups. The three components of this proportionality test are as follows:

- A. The measures adopted must be carefully designed to achieve the objective in question, and must not be arbitrary, unfair, or based on a rationale considerations, but rather must be rationally connected to the objective;
- B. The means, even if rationally connected to the objective, should impair as little as possible the right or freedom in question; and
- C. There must be a proportionality between the effects of the measures which are responsible for limiting the right infringed, and the objective which has been identified as of sufficient importance. The more severe the deleterious effects of a measure, the more important the objective must be if it is to be reasonable and demonstrably justified in a free and democratic society.

67. Section 184.4 is not rationally connected to the objective. There is no evidence that the section in question is effective to any degree in reaching the objective of preventing bodily harm. It is a section which has an implementation requirement within the RCMP that is at least as onerous as the requirement for prior judicial authorization, without any of the essential safeguards for constitutional compliance.

68. These respondents submit that the Crown cannot satisfy this aspect of the test. We say that the objectives can be met by constitutional means, and that the Crown fails on the 'minimal impairment' test. The evidence establishes that there is no situation where the police do not have access to judicial resources, if an authorisation to invade privacy is required.

69. The *Oakes* test does not simply place an onus on the Crown; it imposes a high persuasive and evidentiary burden. While the standard of proof is the civil standard of a balance of probabilities, that probability must be established to a very high degree, and on cogent and persuasive evidence that makes clear to the Court the consequences of imposing or not imposing the limit to the *Charter* right or freedom that has been violated.

70. Section 184.4 does not minimally impair the rights of the individual. It does not require prior authorization by a judicial officer who must be satisfied by evidence on oath. It does not have a limitation in time nor is the interception required to be reported to a judicial officer subsequent to the intercept. There is no minimization requirement. The trial judge agreed with this view.

Reasons, paras. 253-258, Record Vol. I, pp. 105-106

71. There is no proportional relationship between the breach (interception and recording) and the apprehended harm. There is no evidence that could satisfy this Court of the fact that the interception without authority is a proportional response in circumstances where a constitutionally acceptable response, prior judicial authorization based upon evidence on oath, is available.

72. In respect of the section 1 analysis, one need go no further than the discussion of section 1 in the case of participant wiretapping in *Duarte*:

In a word there is no justification for warrantless searches once it is accepted that the police could employ the same investigatory tool with or without a warrant. The simple fact (and I find no argument by the respondent refuting the notion that the police could have attended before a judge to secure an authorization for participant surveillance) destroys, in my view, any argument that participant surveillance can be upheld as a reasonable limit to the right to be secure from unreasonable search and seizure.

The evidence in this case makes it clear that these words describe the problem faced by the Crown before this Court. The evidence establishes that all the police hope to accomplish by means of s. 184.4 can be accomplished with prior judicial authorization.

Duarte, supra, para. 49

73. These respondents submit that:

- a. The affidavits filed, including statistics, and conclusory statements by police officers as to the necessity for s. 184.4, do not assist this Honourable Court on the *Oakes* test;

b. The statistics concerning kidnapping are of no utility. They suggest that reported incidents of “kidnapping” have increased. There are no definitions, no terms of reference, no ability to understand what is behind the statistics, and no suggestion that in the cases referred to that s. 184.4 would have any application or be of any assistance;

c. The preponderance of the evidence before this Honourable Court indicates that even assuming that there is a pressing and substantial objective, the impugned section fails the *Oakes* proportionality test, because all of the goals of the Crown and police can be achieved in a manner which does not infringe constitutionally protected rights.

74. These respondents submit that while Bill C-109 may be the result of a dialogue between the Courts and Parliament, section 184.4 is not such a product.

75. The Crown submits that Parliament’s solution should be entitled to deference because of the need for leeway in emergencies. These respondents submit that administrative expediency will seldom form the basis of a successful section 1 justification, and that

This conclusion is based on the realization that expediency is, under normal conditions, the function of a priority based on global costs and benefits. As such, it is repugnant to section 1 justification because it merely restates the desire to subordinate constitutionally protected interests to other non-constitutional values. Such argumentation would invert the supremacy of constitutional values over political choice, and consequently must fail. As Dickson J. had noted in *Big M*, the argument is circular.

76. Even assuming that section 184.4 is primarily preventative legislation, the same might be said of the security certificate. Even preventative legislation must be subject to appropriate constitutional scrutiny, and should it not pass, the Court’s duty is clear.

R. v. Charkaoui (Citizenship and Immigration), [2008] 2 S.C.R. 326

77. The Crown submits that the Court may find a pressing objective. However, under the *Oakes* test these respondents maintain that section 184.4 cannot pass the proportionality test, because:

a. The measure adopted has not been carefully designed;

b. Even if the means are rationally connected, section 184.4 does not *impair as little as possible* the rights and freedoms in question; and

c. The measure adopted (section 184.4) has severe deleterious effects in purporting to authorize the invasion of privacy in circumstances where it cannot be justified, in the

applicants' submission, notwithstanding the important objectives the legislation seeks to further.

78. The applicants submit that the Crown cannot meet the high persuasive and evidentiary burden resting upon it, and that the impugned legislation does not pass the settled jurisprudential tests under *Charter* section 1.

PART 4

SUBMISSIONS CONCERNING COSTS

79. These respondents make no submission concerning costs.

PART 5

NATURE OF ORDER SOUGHT

80. These respondents pray that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

DATED at Vancouver, British Columbia this 22nd day of September, 2011

A handwritten signature in dark ink, appearing to read "Ian Donaldson", is written over a horizontal line.

Ian Donaldson, Q.C.
Counsel for Daniel Louis Soux and Myles
Alexander Vandrick

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PART 7
LEGISLATIVE PROVISIONS RELIED UPON

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),
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 (xxxviii) subsection 212(4) (offence — prostitution of person under eighteen),
 (xxxix) section 235 (murder),
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 (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.1.1) section 279.01.1 (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*,

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

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.

(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

(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

