S.C.C. File No. 33751

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

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**APPELLANT**

**AND:**

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

**RESPONDENTS**

**AND:**

**THE ATTORNEY GENERAL OF CANADA**
**THE ATTORNEY GENERAL OF ONTARIO**
**THE ATTORNEY GENERAL OF QUEBEC**

**INTERVENERS**

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# APPELLANT'S FACTUM

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***Solicitor for the Appellant:***

**TREVOR SHAW &** ***Counsel***
**SAMIRAN LAKSHMAN**
Counsel for the Appellant
Criminal Appeals
Ministry of Attorney General
6th Floor - 865 Hornby Street
Vancouver, B.C. V6Z 2G3
Tel: (604) 660-4219
Fax: (604) 660-3433
E-Mail: Trevor.Shaw@gov.bc.ca

***Ottawa Agents for the Solicitor for the Appellant:***

**ROBERT HOUSTON, Q.C.** ***Counsel***
Burke-Robertson
Barristers & Solicitors
70 Gloucester Street
Ottawa, ON K1P 0A2
Tel: (613) 236-9665
Fax: (613) 235-4430
E-Mail: rhouston@burkerobertson.com

***Solicitor for the Respondent, Yat Fung Albert TSE:***

**SIMON R.A. BUCK** *Counsel*
Wilson Buck Butcher & Sears
Barristers & Solicitors
400 – 744 West Hastings Street
Vancouver, B.C. V6C 1A5
Tel: (604) 684-4751
Fax: (604) 684-8319
Email: sbuck@wbbslaw.com

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

**BRIAN A. CRANE, Q.C.** *Counsel*
Gowling Lafleur Henderson LLP
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: (613) 233-1781
Fax: (613) 788-3433
E-mail: brian.crane@gowlings.com

***Solicitor for the Respondent, Nhan Trong LY:***

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

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

**BRIAN A. CRANE, Q.C.** *Counsel*
Gowling Lafleur Henderson LLP
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: (613) 233-1781
Fax: (613) 788-3433
E-mail: brian.crane@gowlings.com

***Solicitor for the Respondent, Viet Bac NGUYEN:***

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

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

**BRIAN A. CRANE, Q.C.** *Counsel*
Gowling Lafleur Henderson LLP
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: (613) 233-1781
Fax: (613) 788-3433
E-mail: brian.crane@gowlings.com

***Solicitor for the Respondent, Huong Dac DOAN:***

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

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

**BRIAN A. CRANE, Q.C.** *Counsel*
Gowling Lafleur Henderson LLP
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: (613) 233-1781
Fax: (613) 788-3433
E-mail: brian.crane@gowlings.com

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

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

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

**BRIAN A. CRANE, Q.C.** ***Counsel***
Gowling Lafleur Henderson LLP
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel: (613) 233-1781
Fax: (613) 788-3433
E-mail: brian.crane@gowlings.com

***Solicitor for the Intervener, Attorney General of Canada:***

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

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

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

***Solicitor for the Intervener, Attorney General of Ontario:***

**MICHAL FAIRBURN** ***Counsel***
Crown Law Office – Criminal
Ministry of Attorney General
720 Bay Street
Toronto, ON
Tel: (416) 326-4658
Fax: (416) 326-4556
E-mail: Michal.Fairburn@ontario.ca

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

**ROBERT HOUSTON, Q.C.** ***Counsel***
Burke-Robertson
Barristers & Solicitors
70 Gloucester Street
Ottawa, ON K1P 0A2
Tel: (613) 236-9665
Fax: (613) 235-4430
E-Mail: rhouston@burkerobertson.com

*Solicitor for the Intervener, Attorney General of Quebec:*

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

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

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

# TABLE OF CONTENTS

## TABLE OF CONTENTS CONT...

## PART I - OVERVIEW & STATEMENT OF FACTS

### A. Overview

1. This is a Crown appeal from a decision declaring the emergency wiretap provision of the *Criminal Code* (s. 184.4) unconstitutional. Police rely on this provision in life-or-death situations, often when attempting to rescue kidnapping victims. It allows for the interception of private communications without prior judicial authorization where police have reasonable grounds to believe that an interception is immediately necessary to prevent serious harm:

**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.

**184.4** ***Interception dans des circonstances exceptionnelles***

L'agent de la paix peut intercepter, au moyen d'un dispositif électromagnétique, acoustique, mécanique ou autre, une communication privée si les conditions suivantes sont réunies :

a) il a des motifs raisonnables de croire que l'urgence de la situation est telle qu'une autorisation ne peut, avec toute la diligence raisonnable, être obtenue sous le régime de la présente partie;

b) il a des motifs raisonnables de croire qu'une interception immédiate est nécessaire pour empêcher un acte illicite qui causerait des dommages sérieux à une personne ou un bien;

c) l'auteur de la communication ou la personne à laquelle celui-ci la destine est soit la victime ou la personne visée, soit la personne dont les actes sont susceptibles de causer les dommages.

This power is consistent with other warrantless, emergency search powers that have been validated by this Court and its constitutionality should to be restored on this appeal.

2. The learned trial judge, Justice Davies, erred in holding that the provision violated the *Charter*. In interpreting the provision, he imposed too high a burden on police to start work towards a judicial authorization. He was too restrictive in defining the "victims" whose calls could be intercepted. When it came to the *Charter* analysis, Justice Davies purported to decide as matter of constitutional law which classes of "peace officers" were appropriate to carry out s. 184.4 wiretaps. This error was compounded by his concern that Parliament had not limited the scope of the unlawful acts covered by s. 184.4 (despite the superceding requirement of serious harm found elsewhere in the section). His requirement of reporting to targets, superior officials and to Parliament represents an unprecedented extension of s. 8 into the executive's domain and into the policy-making function of Parliament. If anything, those concerns should have resulted in reading-in "after-the-fact" reporting rather than striking out the entire section. In Ontario, s. 184.4 has been upheld subject to reading-in and severance.

**B. Facts of this kidnapping relevant to the constitutional question**

3. The constitutional question was argued at a pre-trial motion. Though s. 184.4 was declared unconstitutional, the interceptions were admitted under s. 24(2) of the *Charter*. After a trial, the Respondents were convicted of a number of offences including kidnapping, extortion, and unlawful confinement as set out in the trial reasons. As those convictions are the subject of an appeal by five of the six Respondents, the facts below reflect the situation known to the police at the time of the events or as found by Justice Davies at the time of the constitutional hearing unless otherwise noted.

*R. v. Tse* [s. 24(2)], 2009 CarswellBC 1950 (S.C.) at para. 44-45
*R. v. Tse* [trial reasons], 2010 CarswellBC 839 (S.C.) at para. 524

4. The kidnapping case involved three direct victims: Sum (Peter) Li, Chun Yin (Jennifer) Pan and Xiao Chun Chen. At the time of the abductions, Peter Li was under strict conditions relating to charges in a major drug trafficking case. One of the lead investigators, Sgt. B.J. Brown, testified about the potential for violence in this type of drug-related kidnapping. Other officers involved testified that in such cases police assistance is only sought with great reluctance by family to avoid unwelcome scrutiny in the victims' affairs.

> *R. v. Tse* (2008), 235 C.C.C. (3d) 161 (B.C.S.C.) at p. 174, para. 10, 13; p. 183, para. 47; p. 188, para. 69 [for ease of reference, pagination is to C.C.C.]
> Affidavit of D. Carr, at p. 2, para. 5(a), (b), p. 3, para. 7, pp. 11-12, para. 18 at *Record*, vol. II, pp. 99-100, 108-09

5. Other RCMP officers testified on the *Charter voir dire* about the importance of s. 184.4 especially in relation to drug-related kidnappings where "the potential for violence is extreme". Staff Sergeant Trent Rolfe testified that all the kidnappings he had been involved in were drug-related and were "very violent" including "aggravated assaults, beatings to broken bones. Some [victims] were sexually assaulted".

> Transcript, *Rolfe*, p. 15, ll. 24-32 at *Record*, vol. II, p. 27; *German*, p. 21, ll. 18-19 at vol. II, p. 21
> *R. v. Tse, supra*, p. 247, para. 290 [accepting elevated potential for serious harm]

6. Assistant Commissioner German, in charge of the Lower Mainland District of B.C. for the RCMP, testified: "we hear about some kidnappings in the drug world, those we don't hear about either are resolved or we find a body at some point". He called the availability of s. 184.4 "vital" especially with the widespread use of cellular phones. In particular, interceptions can help locate the caller by what is said or heard and by using data to pinpoint the cellular phone.

> Transcript, *German*, p. 21, ll. 21-26 at *Record*, vol. II, p. 21; *German*, p. 22, ll. 23-24 at *Record*, vol. II, p. 22; *Laporte*, p. 70, ll. 17-32 at *Record*, vol. II, p. 34

7. Prior to invoking s. 184.4, police investigated the initial missing person complaint by Peter Li's daughter, Mary Li. She came forward on Thursday, February 23, 2006. Police coordinated with the drug trafficking investigator and obtained background information. They searched Mr. Li's apartment, interviewed the daughter and looked for related vehicles.

*R. v. Tse*, *supra*, pp. 175-177, paras. 16, 18-19, 24, 27; p. 179, para. 30
Affidavit of D. Carr, pp. 3-4, para. 8-9, p. 6, para. 11, at *Record*, vol. II, pp. 100-03

8. Police and family were initially uncertain about why Mr. Li was missing. However, on Saturday evening, February 25, Mary Li received three calls in short succession from her father demanding one to two million dollars or "his ghost would come back for revenge." At around 5:15 p.m., she told police about this and the RCMP began to treat the matter as a kidnapping, assembling an investigation team. Mary Li was interviewed again. Between around 7:15p.m. and 8:50 p.m., investigators started discussing the potential use of s. 184.4.

*R. v. Tse*, *supra*, pp. 179-182, paras. 31, 34-38, 43
Affidavit of D. Carr, pp. 7-9, para. 13(h-n), pp. 10-11, para. 16, at *Record*, vol. II, pp. 104-05, 107-08

9. Pursuant to policy, approval to use s. 184.4 was obtained at the RCMP Superintendant level at 9:15 p.m. That decision was later documented in notes and a report (again following policy). Shortly thereafter, three lines were initially slated for interception:

- Mary Li's cell phone that her father had called that Saturday;
- A cell phone of Peter Li's nephew and business associate (Michael Li) in Toronto who had received similar calls;
- The cellular phone that was displayed when Peter Li had called both Michael and Mary Li (ultimately police were unable to intercept this phone number)

*R. v. Tse, supra*, pp. 183-186, paras. 49-50, 54, 58, 60-61, 63-64
Affidavit of D. Carr, at pp. 10-11, para. 16, at *Record*, vol II, pp. 107-08
Exhibit "A", *RCMP policy*, at para. E.7.b.2., 5., E.7. d.3.1 at *Record*, vol. II, pp.38-39, 41, 43. See also October 2006 RCMP kidnap protocol, Exhibit "N" at vol. III, pp. 84-85, 101

10. Once the decision was made to invoke s. 184.4, Sgt. Brown was advised to immediately commence work to obtain a s. 186 authorization. Work on the supporting affidavit started after a briefing for wiretap specialist officers ending at around 11:45 p.m. Work continued on the affidavit until about 4:00 a.m. Sunday when the affiant left for about six hours in order to get some sleep. Eventually, the required Crown agent was located and met police at 4:20 p.m., Sunday, February 26.

*R. v. Tse, supra*, pp. 183-84, para. 49-54; p. 186, para. 63; pp. 188-189 paras. 72, 75

11. During the preparation of the affidavit, on Sunday, additional ransom demands were intercepted. Police learned of a delivery arranged by a certain "BB" with Michael Li in Toronto. As a result, they intercepted the "BB" number and arranged for a local surveillance team. This all transpired before 7:20 p.m. when the s. 186 application was granted by Justice Pitfield. The affidavit in support of the application was 39 pages long.

*R. v. Tse*, *supra*, p. 189-90, para. 75
Affidavit for D. Carr, at pp. 20, para. 30 at *Record*, vol. II, pp. 98-136

12. Over the 22 hour period from Saturday night (when s. 184.4 was invoked) to Sunday evening (when the s. 186 order was granted) approximately 50 calls were intercepted. In all, under s. 184.4, police intercepted three numbers. A fourth line ["Q"] was added just before the judicial authorization but no calls were made on that line before the s. 186 order took effect. At the time of the constitutional application, the Crown was proposing to introduce 21 calls.

*R. v. Tse*, *supra*, pp. 189-192, paras. 75, 77; p. 251, para. 311; p. 256, para. 339-40
Exhibit A, appendix A, at *Record*, vol. II, p. 145, Affidavit at vol. II, p.108, 117

13. The investigation continued with interceptions being made under judicial

authorizations. Another ransom demand was made. Eventually, on March 19, 2006, the captives were able to escape while being transferred to another location.

*R. v. Tse, supra,* p. 195, para. 92; p. 200, para. 104

**C. Additional facts on the constitutional application**

14. In addition to the evidence relating to this kidnapping, the Appellant filed further affidavit, documentary and statistical evidence relevant to the constitutional challenges and to s. 1 of the *Charter*. This included seven affidavits from police forces across Canada about their practice regarding s. 184.4. Collectively, the affidavits cover the conduct of almost 25,000 police officers. The affidavits from the municipal forces alone represent the police practices covering a population of seven million people.

> Exhibit "M", [*Sureté du Québec*] p. 2, para. 2 at *Record*, vol. II, p. 154 [5,300 officers]; [*Montréal*] p. 2, para. 2 at vol. II, p. 174 [4,200]; [*Ontario Provincial Police*] p. 1, para. 1 at vol. III, p. 36 [5,400]; [*Toronto*] p. 2, para. 1, at vol. III, p. 42 [5,622]; [*Peel*] p. 1, para. 1 at vol. III, p. 47 [1,800]; [*Calgary*] p. 1, para. 2 at vol. III, p. 50 [1,400]; [*Edmonton*] p. 1, para. 2 at vol. III, p. 54 [1,200]

> Exhibit "M", [*Montréal*] at p. 2, para. 2, at *Record*, vol. II, p. 174 [1.8 million]; [*Toronto*] at p. 2, para. 2 at vol. III, p. 42 [2.3 m]; [*Peel*] at p. 1, para. 2 at vol. III, p. 47 [1.2 m]; [*Calgary*] at p. 1, para. 2 at vol. III, p. 50 [1 m]; [*Edmonton*] at p. 1, para. 2 at vol. III, p. 54 [1 m]. [References to the English translations where applicable]

15. These affidavits demonstrate implicitly or explicitly that the police have understood the wording of s. 184.4 to be exceptional in nature. Their policies and practices reflect this.

> Exhibit "M", [*Sureté du Québec*] at p. 3, para. 5 at *Record*, vol. II, p. 155 ["exceptional measure"]; [*Montréal*] at p. 5-6, para. 9 at vol. I, p. 177 [*Ontario Provincial Police*] at p. 5, para. 9 at vol. III, p. 40; [*Calgary*] at p. 2, para. 5 at vol. III, p. 51 and RCMP policies, *supra*, under para 9

16. Remarkably, while this evidence forms a critical part of the record, it was only referred to by Justice Davies sporadically or in passing. He dismissed it as "of dubious

value" in terms of determining how many s. 184.4 cases made their way before a judge because of varying implementation policies (when, in fact, there is remarkable uniformity in implementation across Canada). Elsewhere, he found the evidence tended to confirm proper use of s.184.4.

> *R. v. Tse, supra*, at p. 205, para. 133, p. 207, para. 139, p. 231, para. 228, p. 243, para. 271, p. 234, para. 235-236

***1. Serious nature of cases where s. 184.4 is invoked***

17. Notwithstanding the Respondents' argument below that the term in s. 184.4 "serious harm" is void for vagueness and "unlawful act" is too broad, the evidence is that police services across the country apply s. 184.4 consistently to kidnapping/hostage situations or even more serious offences:

> Exhibit "M", [*Montréal*] sub-exhibit B at *Record*, vol. II, p. 181-208 **[murder, kidnapping, conspiracy to kidnap, hostage-taking, confinement, robbery]**; [*Toronto*] at p. 2, para. 6, p. 3, 4 at vol. III, p. 42-45 **[kidnapping, child abduction, serious assaults with danger of severe injury]**; [*Ontario Provincial Police*] p. 2-3, para. 3 at vol. III, p. 37-38. **[hostage-taking and barricaded person with firearm, escape and homicide]**; [*Peel*], p. 2, para. 8 at vol. III, p. 48 **[kidnap situations with ransom, death threats or violence having already occurred]**; [*Calgary*] at p. 2, para. 6 at vol. III, p. 51 **[only life and death situations, extortions, murder, hostage taking]**; [*Edmonton*] at p. 1, para. 4 at vol. III, p. 54 **[kidnap or hostage situation]**; [*Sureté du Québec*] – sub-exhibit "A" at vol. II, p. 156 **["serious" crime]**

18. At the national level, while the frequency of almost all forms of crime is dropping, the number of kidnappings and unlawful confinements has been steeply on the rise. Between 1996 and 2006, the rate of kidnapping/forcible confinement increased by 108%. This is true within British Columbia as well. The statistics indicate an increase of kidnapping incidents from 5 per 100,000 in 2000 to 9 per 100,000 in 2006. This statistic receives no explicit consideration in the reasons below.

> *Juristat* at p. 9 at *Record*, vol. IV, p. 10, 17

### *2. Short duration of the interception*

19. The uniform evidence on this appeal is that s. 184.4 interceptions are of short duration, generally under 24 hours and often only a few hours in length.

> Exhibit "M", [*Sureté du Québec*] at p. 3, para. 6 at *Record*, vol. II, p. 155 **[usual duration less than 12 hours]**; [*Montréal*] at p. 6, para. 9 at vol. II, p. 178 **[of 28 cases in five years only two longer than 24 hours; many are a matter of a few hours or less:** file # 2002-023, 032; 2003-021; 2004-005, 017, 022, 043; 2005-006, 2006-021, 022]; [*Toronto*]. at p. 5, para. 7 at vol. III, p. 45 **[mostly over within a couple of hours]**; [*Peel*] at p. 2, para. 7 at vol. III, p. 48 **[typically about 24 hours]**; [*Edmonton*] at p. 2, para. 6 at vol. III, p. 55 **[from 45 minutes to 24 hours]**; Transcript, *Laporte*, p. 82, ll. 25-46, at *Record*, vol. II, p. 35.1 **[a couple over 24 hours, some a few hours]**

20. The RCMP policy in British Columbia ("E" Division) set a presumptive 24-hour limit in s. 184.4 cases after which the recording apparatus ceases to record. Sgt. Laporte testified he might extend this automatic timer where work had been done towards completing an application for judicial interception; however, that was not frequent.

> Transcript, Laporte, p. 85, ll. 14-35, p. 82, ll. 9-47 at *Record*, vol. II, pp. 35.1, 36
> Exhibit "A", *RCMP policy*, E.7.d.3.2.,4. at *Record*, vol. II, pp. 43, 45, 79
> *R. v. Tse*, *supra* at pp. 183-184, para. 50, p. 188-189, para. 73, pp. 252-253, para. 316-323, p. 255, para. 334, p.288, para. 454(8)

### *3. Restrained implementation of s. 184.4*

21. There is also a certain uniformity in the way in which s. 184.4 is interpreted and implemented, despite the provision being used infrequently and its terms not having been subject to direct judicial interpretation or comment until this case. In particular, the common points of practice relate to:

- how quickly the police start preparing application for judicial authorization once s. 184.4 is invoked

> Exhibit "M", [*Peel*] at p. 2, para. 6 vol. III, p. 48 **[writer notified immediately and application started]**; [*Ontario Provincial Police*] at p. 3, para. 5 at vol. III, p. 38 **[writer assigned once decision made and starts work]** [*Edmonton*] at p. 1, para. 4

at vol. III, p. 54 **[writer assigned to start preparing application]**; [*Toronto*] at p. 2, para. 5 at vol. III, p. 42 **[writing commences upon s. 184.4 decision being made]**; [*Calgary*] at p. 2, para. 7 at vol. III, p. 51 **[immediately begin drafting s. 188 or s. 186 application]**; [*Montréal*] at p. 6, para. 9 at vol. II, p. 178 **[if investigation not unfolding rapidly]**; [*Sureté du Québec*] at sub-exhibit A, p. 3, item 1.5 **[within hours or next day if at night]**.

- the exceptional nature of s. 184.4 accompanied by approval from higher authority

  Exhibit "M", [*Sureté du Québec*] at sub-exhibit A, p. 2 at vol. II, p. 157 **[head of department]**; [Montréal] at p. 2, para. 4 at vol. II, p. 174 **[Surveillance Section chief]**; [*Ontario Provincial Police*] at p. 3, para. 4 at vol. III p. 38 **[Incident Commander: Inspector or Supertintendant]**; [*Toronto*] at p. 2, para. 3 at vol. III, p. 42 **[Chief of Police or Unit Commander – Intelligence]**; [*Peel*] at p. 2. para. 5 at vol. III, p. 48 **[D/Sgt. with Intelligence Unit]**; [*Calgary*] at p. 1, para. 3 at vol. III, p. 50 **[review by three member Electronic Surveillance Unit]**; [*Edmonton*] at p. 1, para. 4 at vol. III, p. 54 [like OPP]. Under October 2006 R.C.M.P. kidnap policy, Exhibit "N", *RCMP policy*, at vol. III, pp. 101, 182 **[A/Comm., C/Supt or Supt.]**

On this last factual point, Justice Davies – while highlighting that implementation of s. 184.4 does not require superior officer approval - concluded: "the evidence from those police forces that was adduced on this application tends to indicate the responsible use of the powers of s. 184.4 by senior officers in those forces".

*R. v. Tse, supra*, at p. 234, para. 236
*R. v. Tse* [s.24(2)], *supra*, at para. 23

22. Though Justice Davies struck down the law in British Columbia and was followed in a Quebec case, three Ontario decisions upheld the provision subject to reading-in notice to intercepted parties and being prepared to restrict the types of peace officers who could implement s. 184.4. Justice Davies' declaration of invalidity has been suspended pending the appeal to this Court or legislative action. This appeal comes straight from the trial court under s. 40 of the *Supreme Court Act*.

*R. v. Brais*, [2009] R.J.Q. 1092 (S.C.)
*R. v. Riley* (no. 1) (2008), 174 C.R.R.(2d) 250 (Ont. S.C.),
*R. v. Deacon*, 2008 CarswellOnt 9130 (S.C.)
*R. v. Moldovan*, 2009 CarswellOnt 6468 (S.C.)

## PART II - QUESTIONS IN ISSUE

A. Did the trial judge correctly interpret s. 184.4 of the C*riminal 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 III - ARGUMENT

### A. Burden of proving C*harter* violation rests with the Respondents

23. The burden of demonstrating that s. 184.4 violates the *Charter* rests with the accused Respondents. They argued below that because the interceptions were warrantless, s. 8 was presumed violated. However, because s. 184.4 applies to exigent circumstances, there is actually no *Charter* presumption against it. This has been repeatedly asserted by this Court:

> *Absent exigent circumstances*, there is a requirement of prior authorization by a judicial officer as a pre-condition to a valid seizure for the criminal law purposes: see *Hunter, supra.*[italics added]
>
> *R. v. Colarusso*, [1994] 1 S.C.R. 20 at p. 53c-d
>
> the law is clear that warrantless searches are presumptively unreasonable, *absent exigent circumstances* [italics added]
>
> *R. v. Tessling*, [2004], 3 S.C.R. 432 at p. 448, para. 33 [citing *Hunter*]
> *R. v. Feeney*, [1997], 2 S.C.R. 13 at pp. 48-50, para. 46-47

According to *Hunter* itself, a warrant is only constitutionally mandated where it was "feasible" to get one. Justice Dickson (as he then was) wrote:

> I recognize that it may not be reasonable in every instance to insist on prior authorization order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure.
>
> *Hunter v. Southam Inc.* [1984], 2 S.C.R. 145 at p. 161a

It is true that in *Wong* this Court once summarized wiretap law as follows: "unauthorized electronic audio surveillance violates s. 8 of the *Charter*", referring back to *Duarte*. However, in *Tessling*, Justice Binnie, wrote:

> I do not read this passage as entrenching a free-standing prohibition on electronic or other technologies without a warrant.

*R. v. Wong*, [1990] 3 S.C.R. 36 at p. 43h-44a [paraphrasing *Duarte*]
*R. v. Tessling, supra*, at p. 447, para. 30
R. v. *Gesy* (1998), 57 C.R.R.(2d) 178 (Sask. Q.B.) at p. 185
*R. v. Riley* (no. 2), (2008) 174 C.R.R.(2d) 288 at pp. 306-08, para. 71-77 [finds presumption against Crown but in the context of a s. 24(2) argument]

In light of *Colarusso*, *Tessling* and *Hunter*, there is no presumption against s. 184.4 because it only applies in exigent circumstances. The Respondents bear the initial burden under s. 8.

24. Even if *Wong* and *Duarte* were somehow read as reversing the normal constitutional onus, they are distinguishable. *Wong* considered unregulated use of video surveillance into private areas. Likewise *Duarte* was dealing with warrantless "one party consent" interceptions at a time when there were no legislative restrictions other than consent. The Court was contrasting such interceptions with judicially authorized wiretaps:

> The real question, as I see it, is [...] whether the police should be *entirely free* to determine whether circumstances justify recourse to participant surveillance and, having so determined, be allowed an *unlimited discretion* in defining the scope and duration of participant surveillance. This Court is accordingly called on to decide whether the risk of warrantless surveillance may be imposed on all members of society at the *sole discretion* of the police. [*emphasis* added]

*R. v. Duarte*, [1990] 1 S.C.R. 30 at p. 42f-i. See also p. 44c-g ("sole discretion" & "at the whim of the State"), p. 45a; 52d-f ("sole discretion"), p. 46j ("no restriction" & "absolute discretion"), p. 47 h-j ("the state is free to record [...] without constraint"), p. 48 i-j ("free to conduct [...] random fishing expeditions"); p. 56 f-g ("makes irrelevant the entire scheme")
*R. v. Riley* (no. 1), *supra*, p. 264, para. 37

25. In contrast, s. 184.4 imposes a number of restrictions on the police relating to *who* can be tapped *when* and in *what* situations. It does not provide the police with an "entirely free" hand or an "unlimited discretion" but restricts it with references to "serious harm", immediate necessity and the availability of judicial authorizations in Part VI.

26. There is another reason why this legislation should benefit from a presumption of constitutionality. As this Court explained:

> This presumption acknowledges the centrality of constitutional values in the legislative process, and more broadly, in the political and legal culture of Canada
>
> *Re Application under s. 83.28 of the Criminal Code,* [2004], 2 S.C.R. 248 at pp. 269-70, para. 35 [citation omitted from quote]
> *R. v. Mills*, [1999] 3 S.C.R. 668 at p. 711, para. 56
> *Ontario v. Canadian Pacific,* [1995] 2 S.C.R. 1031 at pp. 1058-59, para. 21

In this case, the bill enacting s. 184.4 is a concrete example of that "centrality of constitutional values" because it was passed to respond to *Charter* decisions by this Court. Bill C-109 was passed after the decisions in *Duarte*, *Wong*, and *Wiggins*, a series of cases on constitutionally permissible electronic surveillance.

> *R. v. Duarte, supra* [one party consent recordings]
> *R. v. Wong, supra* [video surveillance]
> *R. v. Wiggins,* [1990] 1 S.C.R. 62 [informer body pack]

27. Bill C-109 responded to those decisions by providing for judicial scrutiny of State sponsored one-party intercepts before they take place (s. 4); increased privacy protections for cellular calls (s. 1(1), (4)); new offences for eavesdropping (s. 4). It enacted the general warrant provisions to give the judiciary control over a wide range of invasions of privacy (s. 15) including video surveillance as well as judicial number recorder warrants (s. 18).

> Bill C-109, 3rd Session, 34th Parliament passed as
> *An Act to amend the Criminal Code, the Crown Liability Act and Proceedings Act and the Radiocommunication Act*, S.C. 1993, c. 40

28. Through Bill C-109, Parliament introduced a broad and measured piece of legislative reform. It expanded the scope of privacy protection while recognizing certain exigent circumstances that did not require pre-authorization. To single out s. 184.4 is to upset a

graduated scheme of electronic interception that now includes full s. 186 authorizations, telewarrants under s. 184.3 and 36-hour applications under s. 188. Section 184.4 does not stand alone as some extreme State intrusion, rather it is a final, limited residual power within a spectrum of wiretap provisions otherwise grounded in judicial pre-authorization.

29. Instead of considering this context, the trial judge took as a baseline *Duarte*'s summary of the requirements for s. 186 (the full, judicial wiretap section), even if he acknowledged not all of the requirements might apply. The *Duarte* summary became a constitutional template against which s. 184.4 was to be judged: one-by-one the characteristics of s. 186 were compared to s. 184.4 and the emergency provision was found lacking. It was an exercise which both misinterpreted *Duarte* and condemned s. 184.4 almost in advance to unconstitutionality.

*R. v. Tse, supra*, pp. 222-32, para. 200-30
*R. v. Riley* (no. 1), *supra*, pp. 262-4, para. 36-37

**B. Presumption of proper implementation**

30. The trial judge did start off correctly, presuming s. 184.4 had been properly implemented for the purpose of the *Charter* analysis (subject to it being too vague or broad to be applied at all). It must be assumed that the law enforcement will respect s. 184.4 when assessing its constitutionality.

*Little Sisters Book and Art Emporium v. Canada*, [2000] 2 S.C.R. 1120 at p. 1170, para. 77, p. 1172, para. 82 See also: p. 1153-54 para. 39-40, p. 1155, para. 44, p. 1169, para. 73 and, *contra* in dissent, p. 1225, para. 204
*Reference re Education Act (Que.)*, [1993] 2 S.C.R. 511 at p. 565a-b, para. 124
*R. v. Tse, supra*, at p. 204, para. 126, p. 205, para. 132

## C. Proper interpretation of the provision and void for vagueness argument

31. The other important aspect of assessing the constitutionality of legislation is that it be "properly interpreted". Therefore, one of the initial tasks of the constitutional arbiter is to interpret the terms of the section under attack. This interpretative exercise also serves to rebut the argument that the provision is void for vagueness under s. 7.

> *R. v. Tse, supra*, at p. 203, para. 120 ["common ground" between the parties]
> *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610 at p. 623-627, para. 18-31 [example of interpretation steps]

32. Section 184.4 imposes a series of linked statutory preconditions:

- reasonable grounds to believe an **urgent situation** exists;
- reasonable grounds to believe in the **immediate necessity** to wiretap to prevent an unlawful act;
- reasonable grounds to believe that the **unlawful act** in question would cause **serious harm**; and,
- with **reasonable diligence**, a Part VI authorization cannot be obtained.

In addition, there are restrictions on whose lines can be intercepted.

> *R. v. Tse, supra*, p. 213, para. 159 ["urgency of the situation"], para. 160 ["reasonable diligence"], p. 217, para. 176 ["unlawful act"], para. 177 ["serious harm"]

33. This Court set down the general approach to vagueness in *Nova Scotia Pharmaceutical Society*:

> It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk [...] some conduct will fall along the boundaries of that area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective.

> *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606 at p. 639 d-f
> *Canadian Foundation for Children v. Canada,* [2004] 1 S.C.R. 76 at pp. 99-100, para. 27-29 ["reasonable" test not vague]

Furthermore, vagueness is not determined in the abstract but in the context of the legislation itself, the interest of society engaged and judicial interpretations of the same or similar terms. Applying that doctrine to each of its elements, s. 184.4 is not void for vagueness.

> *R. v. Nova Scotia Pharmaceutical Society, supra* at p. 639-40
> *Ontario v. Canadian Pacific Ltd, supra*, at pp. 1070, 1090-91, para. 47, 79
> *R. v. Heywood,* [1994] S.C.R. 761 at p. 784h – 789g
> *B.(R.) v. Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315 at p. 377, para. 92
> *R. v. Tse, supra*, pp. 206-07, para. 136-37

### *1. An authorization not available through "reasonable diligence"*

34. Under s. 184.4(a) an emergency interception is not permitted where an authorization is available upon "reasonable diligence". Justice Davies correctly found that "reasonable diligence" is not impermissibly vague but erred when interpreting its meaning. In part fueled by constitutional concerns, he read it as requiring officers to "immediately, and with the least delay possible in the circumstances, also take all steps necessary to obtain a judicial authorization". Further, it appears that they must work on two applications simultaneously on top of monitoring the s. 184.4 interceptions and pursuing investigative leads:

> The usual practice that should be followed is to immediately seek a judicial authorization under s. 188 of the *Code* while at the same time preparing an application under s. 186.

> *R. v. Tse, supra*, p. 214, para. 163, p. 215, para. 166(2), 169
> *R. v. Riley* (no. 1), *supra*, 274, para. 73

35. However, as noted in both *Riley* (no. 2) and *Moldovan*, there may be instances where a s. 186 authorization is available as expeditiously as a s. 188 order, making resort to s. 188 is redundant. Other situations may be close to resolution making work on a Part VI application a formalistic waste of time. The evidence before the trial judge was that many s. 184.4 interceptions last only a few hours.

*R. v. Riley* (no. 2), *supra*, p. 318, para. 117
*R. v. Moldovan, supra*, at para. 61
References under para. 19, *supra*

36. The term "reasonable diligence" suggests a general appreciation of the situation and the availability of other Part VI options. Exigent circumstances are fast moving and tax existing decision-making processes, chains of command and investigative resources. There are inevitable trade-offs between efforts to rescue the victims and assigning officers to prepare applications for judicial authorization. The term "diligence" was designed to give those engaged in such efforts both a constraint and some necessary flexibility in making decisions upon which lives may depend. In its place, the trial judge's interpretation mandates a presumptive allocation of investigative resources towards immediate drafting.

37. The term "reasonable diligence" has long been interpreted by the courts in different contexts. Looking across the diverse ways in which the phrase is employed, some general principles can be discerned:

- the obligation of "reasonable diligence" changes in situations of immediate need where the preferred solution will not always be available;

*R. v. Brydges*, [1990] 1 S.C.R. 190 at p. 204a-d [s. 10(b)]

- the obligation of "reasonable diligence" may be met even if "further efforts could have been made" where there is some reason that those efforts were not made;

*R. v. McMartin*, [1964] S.C.R. 484 at p. 490-491 [fresh evidence]

- "Reasonable diligence" is context-dependant and may turn on the availability of state resources (including the fact events occur on the weekend) - it does not require attempting every possible solution, no matter how remote.

*R. v. Prosper,* [1994] 3 S.C.R. 236 at p. 269g-270i, para. 35-37
*R. v. Tse, supra*, p. 214, para. 162 [adopting above]

38. That said, there are a number of things that "reasonable diligence" is not. It does not require extreme measures or driving officers to the point of exhaustion and to the mistakes that inevitably accompany such exhaustion. It allows for limited police resources to be focused, in the short-term, on resolving the urgent situation and preventing the victims from being harmed. Reasonable diligence "does not require that the officer take extraordinary or heroic steps to secure a judicial authorization as soon as humanly possible."

*R. v. Moldovan, supra*, at para. 75

39. An analogy might be made to "investigative necessity" in s. 185. The Court in *Araujo* avoided absolutist definitions of that term and settled on there being "*practically speaking*, no other reasonable alternative method of investigation" [emphasis added].

*R. v. Araujo*, [2000] 2 S.C.R. 992 at p. 1005, para. 22, p. 1007, para. 26, p. 1011, para. 35
*R. v. Jamieson* (2002), 166 C.C.C.(3d) 501 (B.C.C.A.) at p. 515, para. 33
*R. v. Clayton,* [2007] 2 S.C.R. 725 at p. 744, para. 31, pp.750-751, paras. 51-53

40. The Appellant recognizes that the "reasonable diligence" test does not set a fixed expiry date for s. 184.4 interceptions. Nonetheless, this phrase imports a real time limit for securing a judicial authorization. If, upon periodic reconsideration of the issue, an authorization becomes feasible then one must be prepared. Resort to s. 184.4 comes to an end upon that authorization being decided. The advantage of the "reasonable diligence" duty is that, unlike a fixed deadline, it produces continuous pressure to seek a judicial authorization. As Justice Dambrot remarked in *Riley* (no. 1), it is a duty that "increases in significance as time goes on."

*R. v. Tse, supra*, p. 225, para. 206
*R. v. Riley* (no. 1), *supra*, p. 258, para. 23

41. One type of authorization that may be available upon "reasonable diligence" is a 36-hour judicial application under s. 188. The trial judge held this out as a possibility, suggesting even that a ten minute presentation would be sufficient. Such an abbreviated application does not reflect the understood procedure on *ex parte* applications, whether it be proper sourcing or full and frank disclosure. If there is little difference between the requirements of s. 186 and s. 188, then there is little by way of time saved.

> *R. v. Tse, supra*, pp. 254-55, para. 330 [s. 188], pp. 249-250, para. 300-02 [one-party consent wiretap discounted on the facts]
> *R. v. Riley* (no. 2), *supra*, at p. 302, para. 50
> *R. v. Moldovan, supra,* at para. 69
> *R. v. Jamieson*, *supra*, at p. 516, para. 34 [telewarrant has all the requirements of standard warrant].
> *R. v. Araujo*, *supra,* at p. 1015, para. 46

***2. "Serious harm" would be caused by the unlawful act***

42. The "serious harm" threshold is a meaningful and significant legal restriction on s. 184.4. This Court has made "serious harm" a threshold in at least four circumstances:

- the level of potential harm required to vitiate consent in sexual cases;

  *R. v. Cuerrier*, [1998] 2 S.C.R. 371 at pp. 434-436, para. 135, 137, 139

- the test for setting aside solicitor-client privilege on public safety grounds;

  *Smith v. Jones*, [1999] 1 S.C.R. 455 at p. 490, para. 86

- the level of harm needed in cases of warrantless apprehension of children without violating s. 7 of the *Charter*;

  *W.(K.L.) v. Winnipeg Child & Family Services*, [2000] 2 S.C.R. 519 at p. 584, para. 117

- the "grave or substantial" threshold for assault causing bodily harm.

  *R. v. McCraw* [1991] 3 S.C.R. 72 at pp. 80g–81h

This threshold is also consistent with the evidence of police practice surrounding s. 184.4 – it invariably involves serious *Criminal Code* offences like kidnapping or murder.

### *3. "Unlawful act" that would cause the harm*

43. The "serious harm" threshold imposes a strict limitation on the broader notion of "unlawful act". The Appellant submits that "unlawful act" is further restricted by the context of Part VI. The trial judge agreed that "unlawful act" has to be interpreted to include only those offences listed in s. 183 of the *Criminal Code* because otherwise "reasonable diligence" in seeking an authorization makes no sense. Such authorizations are only available for s. 183 offences so the s. 184.4 "unlawful act" must also be on the s. 183 list. Unfortunately, this limitation was not sufficient for the trial judge who ultimately found that the s. 183 list fell short of "full constitutional compliance". However, even the broad list in s. 183 is restricted because of the overriding "serious harm" test. In *Riley* (no. 1), the court did not even find it necessary to limit the application of s. 184.4 to s. 183 offences, holding instead that the "serious harm" threshold was sufficient.

> *R. v. Tse, supra*, p. 217, para. 175-76, pp. 242, para. 265(1),
> F. Bobiasz (2 June 1993), *Proceedings of the Standing Senate Committee of Legal and Constitutional Affairs*, Issue no. 44, at p. 44:15 at Record, vol. V, p.32; Sgt. M. Logar (8 June 1993), Issue no. 46, at p. 46:38 at vol. V, p. 49; P. Blais (15 June 1993), Issue no. 48, at p. 48:15 at vol. V, p. 72;
> *R. v. Heywood,* [1994] 3 S.C.R. 761 at p. 787i-788c
> *R. v. Riley* (no. 1), *supra*, p. 258, para. 21

### *4. "Urgency of the situation" to be established*

44. The "urgency of the situation" test is not void for vagueness. A criteria is not vague because it is flexible or will apply differently to different situations. In *Golden*, "urgency" was chosen as the precondition for highly intensive strip searches by this Court. The same word when used by Parliament does not become unconstitutionally vague. In *Morales*, the Court held "exact predictability of dangerousness is not constitutionally mandated" in bail matters. The Appellant submits the same applies to urgency under s. 184.4.

*Canadian Foundation for Youth, supra* at p. 100, para. 28
*R. v. Morales,* [1992] 3 S.C.R. 711 at p. 738i-j
*R. v. Golden,* [2001] 3 S.C.R. 679 at p. 735, para. 102
*R. v. Tse, supra*, p. 213, para. 158-59

### *5. Specified targets of the interceptions*

45. As an additional restriction on its use, s. 184.4(c) specifies that interceptions are limited to two separate categories of calls:

- to/from "the person who would perform the act that is likely to cause the harm"
- to/from "the victim [...] of the harm" or "the intended victim of the harm"

The trial judge correctly held that secondary parties were included within the perpetrator category. Our criminal law does not to distinguish between direct perpetrators and indirect aiders: both are parties under s. 21 or s. 22. In this context, a criminal act can be "performed" by any combination of direct action or aiding and abetting.

*R. v. Tse, supra*, pp. 219-220, para. 185

46. Similar considerations apply to the victims who can be intercepted. They must include the recipient of a death threat (the "intended victim") but may also include family members who are traumatized into paying a ransom or who would be affected by the serious harm done to their relative. The trial judge ruled against inclusion of such family members on a "plain reading" of the provision, but surely most observers would correctly identify the parents who lose their child to an abductor or who receive threat to that child's well-being as victims in their own right.

*R. v. Tse, supra*, pp. 218-19, para. 180-85
*R. v. Riley* (no. 1), *supra*, p. 260, para. 29

## D. Overbreadth arguments subsumed by s. 8

47. The trial judge in this case properly recognized that the overbreadth arguments advanced under s. 7 (and s. 11(d) it seems) - were more appropriately made under s. 8 of the *Charter*. The Appellant will therefore deal with them principally under that heading.

> *R. v. Tse, supra*, pp. 219-21, para. 187-191
> *R. v. Rodgers,* [2006] 1 S.C.R. 554 at p. 574, para. 23
> *R. v. Mills, supra,* at p. 726, para. 88
> *R. v. Lavallee, Rackel & Heintz*, [2002] 3 S.C.R. 209 at pp.238-239, para. 34-35
> *R. v. Heywood, supra,* at p. 793h-j, para. 51
> *R. v. Godoy,* [1999] 1 S.C.R. 311 at pp. 321-322, para. 19

48. However, it should be noted that even an independent s. 7 analysis of s. 184.4 fails to produce a *Charter* violation. In *W.(K.L.)*, this Court held that child welfare statutes that authorized the removal of children from their parents without judicial authorization did not violate s. 7 if they adopted the "serious harm" threshold also found in s. 184.4.

> *W.(K.L.), supra,* at pp. 577-578, para. 103-104, p. 584, para. 117
> *Chaoulli c. Québec*, [2005] 1 S.C.R. 791 at p. 850, para 123 (per McLachlin C.J.C, Major and Bastarache JJ.) ["serious" impact] and p. 879, para 200 (per Binnie, LeBel and Fish JJ.)

49. The Court stated that even relatively short delays caused by diverting resources away from preventing the harm towards seeking judicial approval were not required by s. 7:

> While the delays associated with prior *ex parte* authorization are not as significant as those associated with a prior hearing, they would still leave children at risk of serious, or even life-threatening, harm for at least a number of hours, or even days. [...]
>
> Moreover, a requirement to obtain prior judicial authorization in such situations will tend to divert the resources of the child protection authorities away from their duty to protect children at risk of serious harm, toward the process of obtaining prior judicial determinations of whether a child is in need of protection or not.
>
> *W.(K.L.), supra*, at pp. 580-581, para. 109-10

These same factors are at play under s. 184.4 and justify it under the *Charter*.

**E. Victims' s. 7 rights must be considered under s. 184.4**

50. Consideration of the Respondents' s. 7 claim is not complete without considering a competing s. 7 claim from those saved from serious harm by s. 184.4. In *W.(K.L.)*, the Court recognized that the rights of the potential victims of abuse (the children involved) had to be considered when assessing the constitutionality of the absence of judicial authorization.

> *W.(K.L.), supra*, at p. 552, para. 48

According to *Moldovan*, an officer using s. 184.4 is "obliged to consider the s. 7 rights of the victims to life, liberty and security of the person." The accused's right to privacy must be balanced against that claim:

> Put another way, assuming the interception of a number of his phone calls over a very brief period violated the applicant's rights, when weighed against the potential harm to the victims' rights to life, liberty and security of the person, the decision to protect the rights of the latter at the expense of the rights of the former seems obviously correct.
>
> *R. v. Moldovan, supra*, para. 174-75

51. The balancing required is not privacy against some abstract s. 7 right to safer communities through effective policing. What is at stake is the "security of the person" of victims saved from serious harm or death by s. 184.4. Protecting their s. 7 rights is not some collateral benefit from the operation of s. 184.4, rather it is its very objective. As between the security of the victim and the privacy of the intercepted, this Court has already held that the victim's security is the closest to the core values of the *Charter*.

> *R. v. Godoy, supra,* pp. 321-322, para. 19. See also p. 321, para. 18, pp. 323-325, para. 22-23

## F. The general approach to s. 8 of the *Charter*

52. The Appellant submits that s. 184.4 is not an unreasonable search and seizure law. It strikes the correct balance between privacy, the victim's *Charter* right to be protected from harm and the suppression of crime. Generally speaking, the trial judge failed to appreciate the cumulative restrictions within s. 184.4 and focused too much on matters of status (which "peace officers" carried out the interception) or issues arising *after* the interceptions had ended (reports to third parties and Parliament). This focus on peripheral matters deflected his analysis away from applying this Court's extensive jurisprudence on s. 8 in exigent circumstances, all of which points to the constitutionality of s. 184.4.

*R. v. Tessling, supra,* p. 443-44, para. 17-18
*R. v. Feeney, supra,* p. 47, para. 44

53. To start with the s. 8 record, there is extensive evidence before this Court of police policy and practice respecting s. 184.4. These policies are not "law" under the s. 8 analysis. However, they are evidence that the wording of s. 184.4 has made clear the limited use to which the provision was destined. They serve to rebut the suggestion that the statutory language is so loose or its powers so vast that it will lead to widespread abuse or arbitrariness in its application.

*Little Sisters, supra,* at p. 38, para. 85

54. Section 184.4 itself has layers of restrictions surrounding the urgency of the situation, the immediate necessity to prevent serious harm and the unavailability of an authorization. All of these criteria are governed by a "reasonable grounds" requirement that imports objectivity and constrains each term it applies to. Parliament has carefully constructed a "fail-safe" emergency clause that is reasonable under s. 8 of the *Charter*.

*R. v. Hurrell*, (2002), 166 C.C.C.(3d) 343 (Ont. C.A.), at p. 361-362, para. 45

55. Furthermore, s. 184.4 is primarily a preventative power. Parliament should be given greater latitude here than it might for a provision designed to incriminate. In *Hernandez*, Justice Silverman correctly concluded that interceptions "under 184.4 require somewhat of a different analysis than the traditional type of authorization".

*R. v. Hernandez,* 2008 CarswellBC 2342 (S.C.) at para. 89
*R. v. Brais, supra,* at p. 1102, para. 25 [adopting *Hernandez*]
*R. v. Rodgers, supra*, at p. 580, para. 35
*R. v. Hurrell, supra,* at p. 359-361, para. 36-44
*R. v. Godoy, supra,* at p. 320, para. 15
*R. v. Jamieson, supra,* p. 516-517, para. 36

## G. Section 184.4 consistent with other exigent search powers

56. That "different analysis" should be guided by *Charter* decisions dealing with other warrantless searches in emergency circumstances. Those decisions demonstrate that the wording in s. 184.4 passes constitutional muster.

### *1. Section 184.4 consistent with "hot pursuit" cases*

57. In *Feeney*, this Court held that entry into dwelling houses to effectuate an arrest required prior judicial authorization. However, the majority recognized an exception if police were in hot pursuit. In that situation: "the privacy interest must give way to the interest of society in ensuring adequate police protection. This Court explicitly held this to be true in *R. v. Macooh.*" *Macooh* adopted the following definition of hot pursuit:

> Generally, the essence of fresh pursuit is that it must be continuous pursuit conducted with *reasonable diligence,* so that pursuit and capture along with the commission of the offence may be considered as forming part of a single transaction.

*R. v. Macooh,* [1993] 2 S.C.R. 602 at p. 817c-d [emphasis added]
*R. v. Feeney, supra*, at p. 149, para. 47

58. The temporal limitation on hot pursuit is the exercise of "reasonable diligence" by law enforcement in the conduct of their investigations. Judicial control over whether the police were acting with reasonable diligence is after the fact (if a trial takes place). Just as in s. 184.4, the Court imposed no set deadline on when these exceptional powers expire.

*R. v. Macooh, supra*, at p. 818g-i

59. A number of the justifications offered in *Macooh* for such "hot pursuit" arrests apply to emergency wiretaps as defined in s. 184.4. Both involve what the Court called "significant danger" to third parties, both involve the fact that "evidence of the offence [...] may be lost" and, in both, the person of interest may "continue to commit the offence" if not stopped. In a further parallel, the reasoning in *Macooh* applied whether the unlawful act involved was an indictable or summary conviction offence. In exigent circumstances, the legal categorization of the unlawful act is inconsequential. Under s. 184.4, this is especially true because the unlawful acts involved must meet the serious harm threshold.

*R. v. Macooh, supra*, at p. 815j – 816f, p. 819b-d

### *2. Entries after 911 calls consistent with s. 184.4*

60. Section 184.4 is further validated by the Court's cases on warrantless police entries to respond to emergencies calls. *Godoy* held that such entries do not violate s. 8. At a policy level, the Court recognized the high privacy interest in the sanctity of the home, but held that:

> The interest of the person who seeks assistance by dialling 911 is closer to the core of the values of dignity, integrity and autonomy than the interest of the person who seeks to deny entry to police who arrive in response to the call for help.

*R. v. Godoy, supra,* pp. 321-322, para. 19. See also p. 321, para. 18, pp. 323-325, para. 22-23,
*R. v. Mills, supra,* at p. 726, para. 88

### *3. Strip searches and other searches incident to detention*

61. Like wiretapping, strip searches are recognized as intrusive and deserving of special limitations. In *Golden*, the Court declined to impose for strip searches the warrant requirement it mandated in *Feeney*. In addition, strip searches can be conducted outside a police station in exigent circumstances:

> Such exigent circumstances will only be established where the police have reasonable and probable grounds to believe that it is *necessary* to conduct the search in the field rather than at the police station. Strip searches conducted in the field could only be justified where there is a demonstrated *necessity* and *urgency* to search for weapons or objects that could be used to *threaten the safety of the accused, the arresting officers or other individuals.* The police would also have to show why it would have been unsafe to wait and conduct the strip search at the police station rather than in the field. [emphasis added]
>
> *R. v. Golden, supra* at pp. 734-35, para. 102

Despite the obvious differences between strip searches and emergency wiretaps, the consistent use of "necessity" and "urgency" thresholds, coupled with shared safety concerns, strongly suggest that Parliament has formulated in s.184.4 a test consistent with existing constitutional thresholds.

62. Likewise, in *Mann* and *Clayton*, the Court found warrantless pat-down searches and vehicle stops were constitutional in dangerous situations where they were "reasonably necessary".

> *R. v. Mann*, [2004] 3 S.C.R. 59 at p. 79, para. 40
> *R. v. Clayton*, *supra* at p. 744, para. 30

Time and time again, in justifying exigent search powers, this Court has chosen language that is identical or parallel to the restrictions found in s. 184.4. It is difficult to reconcile a finding of unconstitutionality with this jurisprudence without straying into factors outside of the proper scope of s. 8. Unfortunately, this is precisely what the trial judge did when constitutionally mandating internal police reporting or reports to Parliament.

*R. v. Tse, supra*, p. 228, para. 223

## H. Exclusionary rule not required by *Charter*

63. It has been suggested that to be constitutional s. 184.4 must also provide that evidence gathered under it cannot be used to incriminate. However, other exigent search powers validated by this Court do not mandate the exclusion of evidence gathered. In fact, they are justified on the basis of preserving that evidence for later use.

*R. v. Tse, supra*, p. 218, para. 183
*R. v. Riley* (no. 1), *supra*, p. 282, para. 103-104
*R. v. Grant,* [1993] 3 S.C.R. 223 at p. 243a-b
*R. v. Duong* (2002), 162 C.C.C.(3d) 250 (B.C.C.A.) at p. 250, para. 22,
*R. v. McCormack* (2000), 143 C.C.C.(3d) 260 (B.C.C.A.) at pp. 267-68, para. 19-22
*R. v. Belnavis* (1996), 107 C.C.C.(3d) 195 (Ont. C.A.) at p. 215f-h, affirmed other grounds [1997] 3 S.C.R. 341

Creating a rule automatically excluding s. 184.4 interceptions (as some sort of *Charter* after-the-fact protection) would reverse Parliament's repeal of the old exclusionary rule found in Part VI and truncate the *Charter* by denying the prosecution access to s. 24(2). It is simply too far from the existing structure of analysis to be accepted.

*R. v. Shalala* (2000), 224 N.B.R. (2d) 118 (C.A.) at p. 171, para. 70
*R. v. Riley* (no. 3) (2009), 184 C.R.R.(2d) 209 (Ont. S.C.)

## I. In context, the definition of "peace officer" is not too broad

64. The trial judge expressed "concerns" that s. 184.4 empowered a "very broad class of individuals" under the s. 2 definition of "peace officer". However, on the evidence before him, only police officers had used s. 184.4. He did not have to rule on this issue.

> *R. v. Tse, supra*, p. 220, para. 188(5), p. 237, para. 241-42
> *R. v. Riley* (no. 1), *supra*, pp. 266-67, para. 44-45, pp. 280, para. 95, pp. 286-87, para. 118-19

In any event, the mere fact that s. 184.4 gives discretion to different classes of peace officers to implement an interception is not inherently unconstitutional. As was stated in *Little Sisters*:

> Parliament is constitutionally able to confer broad powers on the police and Justice Department officials under the *Criminal Code* without establishing a specific institutional framework to deal with out-of-court *Charter* sensitive activities.
>
> *Little Sisters, supra*, at p. 1194, para. 134

65. Justice Davies' conclusion that it was "highly unlikely that Parliament ever anticipated that any persons other than trained police officers" would use s. 184.4 is contradicted by the very wording of the s. 2. By incorporating s. 2 in s. 184.4, Parliament properly recognized that not every serious emergency would fit neatly within the range of standard policing.

> *R. v. Tse, supra*, p. 233, para. 234

66. It is easy to envisage how different "peace officer" categories might require s. 184.4. For instance, a "pilot in command of an aircraft" might be able to foil a terrorist attack by intercepting passenger cellphone traffic that uses the airplane's communication relay. Surely, in those circumstances, his use of the provision would not be unconstitutional provided the

statutory conditions were met. Emergencies arise in a wide variety of circumstances and the prevention of harm is more important than questions of law enforcement taxonomy. For the purposes of s. 8, what is important is that all peace officers must have reasonable grounds for each of the significant thresholds contained in s.184.4 (an unlawful act causing serious harm, immediate necessity, etc.).

67. Justice Davies' concern also failed to appreciate that the list of potential "peace officers" is limited by this Court's jurisprudence. In *Nolan*, the powers of the military police were at issue. Though he was not dealing with a *Charter* point, Dickson C.J.C wrote:

> I would therefore conclude that the definition of "peace officer" in s. 2 of the Criminal Code serves only to grant additional powers to enforce the criminal law to persons *who must otherwise operate within the limits of their statutory or common law sources of authority.* [italics added]
>
> *R. v. Nolan,* [1987] 1 S.C.R. 1212 at p. 1225

Therefore, s. 184.4 does not indiscriminately permit all "peace officers" to conduct warrantless wiretaps, only those operating within the limits of their pre-existing powers.

68. The definition of "peace officer" was not Justice Davies' only concern. He felt that s. 184.4 did not mandate "supervision of individual peace officers" or "internal approval" by senior officers. It lacked some form of reporting to individuals he variously described as "senior government officials who act independently of the police", "senior, independent law enforcement officials", "senior law enforcement official in the Provincial or Federal Governments", or "the executive branch of government charged with the responsibility for law enforcement and civilian oversight of police actions".

*R. v. Tse, supra*, pp. 228-229, para. 223, p. 234, para. 235-37, p. 236, para. 240(6)(b)

69. The Appellant agrees with *Riley* (no. 1), where Justice Dambrot found that it would be "unnecessary" and "difficult in the extreme" for mandate superior officer supervision. Justice Dambrot found a constitutional requirement that s. 184.4 intercepts be reported to the executive branch was "unconvincing", "entirely anomalous" and without precedent.

> *R. v. Riley* (no. 1), *supra*, pp. 267-68, para. 46-47, p. 284, para. 110-11, p. 285-86, para. 114-15

70. Justice Davies' ruling runs contrary the judiciary's long-standing reluctance to interfere in the operational decision-making of the police. Furthermore, his requirements fail to take into account the myriad of command structures and accountability mechanisms within the various law enforcement agencies in Canada. It is true that certain sections of the *Criminal Code* single out particular classes of police officers (for instance, those designated under s. 188) but this is a far cry from making their participation, or the intervention of outside supervisory authorities, a *Charter* requirement under s. 8.

> P. Ceyssens, *Legal Aspects of Policy* (September 2009 update) at pp. 1-27, 1-28
> P. C. Stenning, *Legal Status of the Police* (1981) at pp. 90-92
> *R. v. Riley* (no. 1), supra at p. 268, para. 47, p. 284, para 111, p. 285, para. 113

**J. Notice to third parties not a constitutional requirement**

71. Section 196 sets out a scheme for notifying persons intercepted under s. 186 judicial authorizations. With respect to s. 184.4, Justice Davies found that the absence of a notice provision was of "particular concern". He found that such notice "would engage *ex post facto* scrutiny by an independent judicial officer" and ensure "police accountability".

> *R. v. Tse, supra*, p. 232, para. 229, p. 236, para. 240(6)(a)
> *R. v. Riley* (no. 1), *supra*, pp. 278-79, para. 89
> *Criminal Code*, s. 196 – no explicit reporting requirement for s. 184.1 [agent body-pack], s. 184.2 and 184.3 [consent interceptions] and s. 188 [36 hour applications]

However, excluding s. 184.4 from s. 196 was a reasonable policy choice:

- because of the nature of the emergencies involved, and the reasonable diligence test for seeking an authorization, the period of interception will be short, reducing the intrusion on privacy that would be the subject of notice;
- because of the urgency with which s. 184.4 is implemented, the intercepted parties may be difficult to identify which makes the implementation of the notice procedure less effective;
- section 184.4 is limited to intercepting the lines of perpetrators and victims, who are also the persons mostly likely to be involved as accused or witnesses at any trial and will thereby receive notice of the interception as a practical matter.

At the same time, notice is a weak way of vindicating s. 8 privacy rights because:

- by definition, notice is after-the-fact of the interception;
- there is no obvious remedial scheme under s. 196;
- since the accused get notice of the interceptions under s. 189(5), the effect of s. 196 notice would be felt by non-accused parties who have a significantly lessened *Charter* interest in wiretap materials.

  *Michaud v. Quebec,* [1996] 3 S.C.R. 3 at p. 15, para. 5. See also p. 46, para. 50, p. 45 para. 49; p. 43, para. 46, p. 47, para. 52, p. 48, para. 53

Given all this, the trial judge's finding that a notice provision "would dramatically impact upon police accountability and compliance" cannot be sustained. Justice Davies found general compliance with s. 184.4 across Canada and there was no s. 196 evidence that could be extrapolated back to s. 184, so the dramatic impact he forecast is without foundation.

*R. v. Tse, supra*, p. 240, para. 256 [compare to p. 234, para. 236]

72. Through notice, Justice Davies has attempted to expand s. 8 from protecting individuals against unreasonable state instrusions to a positive obligation to inform individuals of past police searches. This is something qualitatively different. Those with the most at stake under s. 8, the accused, already receive notice or disclosure of the interceptions and that is sufficient in this context.

73. It has been held that a failure to comply with s. 196 does not render the interception illegal. Therefore, it is difficult to see how the fact that s. 196 does not cover s. 184.4 renders that section *unconstitutional.*

R.W. Hubbard, P.M. Brauti, S.K. Fenton, *Wiretapping and Other Electronic Surveillance: Law and Procedure* (March 2011 update) at pp. 6-35 to 6-40.2
*R. v. Welsh* (1977), 32 C.C.C.(2d) 363 (Ont. C.A.) at p. 370
*R. v. Riley* (no. 1), *supra,* at p. 278, para. 89

74. The same arguments apply to the absence of s. 184.4 in year-end reports by the federal and provincial Attorneys General under s. 195. Justice Davies felt extending such reports to s. 184.4 would foster "potential" oversight and "constitutitional and police accountability". Whatever the purpose of s. 195 reports, they are a far cry from privacy protections granted individuals under s. 8. The court in *Riley* (no. 1) correctly found that the reporting requirement in *Tse* was "misconceived" and "constitutionally unsound".

*R. v. Tse, supra*, p. 228, para. 220-22
*R. v. Riley* (no. 1), *supra*, pp. 285-86, para. 114-15

## K. Section 11(d) – fair trial right not engaged

75. The Appellant has difficulty seeing a fair trial violation in this case. The absence of a statutory obligation to document s. 184.4 wiretaps has been correctly rejected as a *Charter* violation. If notes or records are lacking, this is a matter of proof that may hinder the Crown's case for admitting the interceptions but does not create its own constitutional breach. Police have note-taking policies and each case will depend on its facts.

> *R. v. Deacon*, *supra* at para. 96
> *R. v. Riley* (no. 1), *supra*, pp. 269-270, para. 53-54
> *R. v. Moldovan, supra*, para. 134
> *R. v. La*, [1997] 2 S.C.R. 680 at pp. 690-91, para. 20
> *R. v. Gesy, supra,* at p. 186-87
>
> Exhibit "A", *RCMP policy* at para. E.7.b.2.,5., E.7.d.3.1. at *Record*, vol. II, p. 43, 94-96; *Exhibit "M"*, [*Sureté du Québec*] at sub-exhibit B, p. 5, item 1.5, at vol. II, p. 162 or 172; [*Montréal*] at p. 4, para. 7 at vol II, pp. 176, 180-208 [s. 184.4 registry]

## L. Section 1 argument

76. The Appellant submits that s. 184.4 does not violate s. 7, 8 or 11(d) of the *Charter*. The standard of review is correctness. Alternatively, it is submitted that the section is saved by s. 1. The trial judge erred in finding it was not. It may well be that it is exceptional to find that legislation that violates s. 7 or s. 8 is demonstrably justified; however, s. 184.4 is just such an exception. First, Bill C-109 is the result of a "dialogue" between the courts and Parliament in which its *Charter* implications were considered. Second, because the primary objective of s. 184.4 is preventative, the legislation is entitled to greater deference than traditional criminal law.

> *R. v. Lavallee, supra,* at p. 247, para. 46
> *R. v. Tse, supra*, at p. 239-40, para. 255-56

### *1. Bill C-109 as "dialogue" legislation*

77. According to the parliamentary record and academic commentary, Bill C-109 (which included s. 184.4) was introduced in response to a number of decisions from this Court. Justice Davies correctly pointed out that no provision like s. 184.4 existed before the bill. However, the fact that the scheme included a new, constrained emergency wiretap power does not remove the "dialogue" aspect from the bill. That legislation responds to rulings does not necessarily bolster its constitutionality. However, this Court has recognized that Parliament may respond differently than it would have to a *Charter* breach.

> P. Beatty, House of Commons Debates (February 25, 1993), p. 16491 at *Record*, vol. V, p. 6
> *Canada v. JTI, supra*, at pp. 621-22, para. 11
> *R. v. Mills, supra*, at p. 689, para. 20, p. 744, para. 125, at p. 748 para. 133
> P.W. Hogg and A.A. Bushell, *"The Charter Dialogue Between Courts and Legislatures"* (1997), 35 Osgoode Hall L.R. 75 at p. 89-90
> *R. v. Tse, supra*, p. 221, para. 196

78. House of Commons and Senate committees considered s. 184.4 in detail. Indeed, many arguments for and against the constitutionality made in this case were placed before the committees voting on the legislation. In the end, informed of the public safety and *Charter* considerations, Parliament adopted a measured solution in a difficult field.

> A. Borovoy, *Proceedings of the Standing Senate Committee of Legal Constitutional Affairs*, Issue no. 46, p. 46:14 at *Record*, vol. V, p.43 **[absence of notice to intercepted parties]**;M. Fuerst, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-109*, Issue no. 4, p. 4:10 at vol. V, p. 14 and A. Bryant, *Proceedings of the Standing Senate Committee of Legal Constitutional Affairs*, Issue 47, p. 47:19 at vol. V, p. 60 **[absence of records about the use of s. 184.4]**;Sen. Neiman, *Proceedings of the Standing Senate Committee of Legal Constitutional Affairs*, Issue no. 46, p. 46:11, at vol. V, p. 40, A. Bryant, Issue no. 47, p. 47:19 at vol. V, p. 60, M. Fuerst, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-109*, Issue no. 4, p. 4:10 at vol. V, p. 14 **[problems associated with the use of the term "peace officer"]**; Sgt. M. Logar, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-109*, Issue no. 4, p. 4:20, at vol. V, p. 18, *Proceedings of the Standing Senate Committee of Legal*

*Constitutional Affairs*, Issue no. 46, p. 46:38, 42 at vol. V, pp. 49, 53 **[internal restrictions within s. 184 and existence of police records]**; Sgt. M. Logar, *Proceedings of the Standing Senate Committee of Legal Constitutional Affairs*, Issue no. 46, p46:46-47 at vol. V, p. 55-56 **[time needed even to complete s. 188 application]**; S. Newark, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-109*, Issue no. 4, p. 4:29, at vol. V, p. 23, F. Bobiasz, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-109*, Issue no. 5, p. 5:28-29, at vol. V, p. 27-28, *Proceedings of the Standing Senate Committee of Legal Constitutional Affairs*, Issue no. 44, p. 44:16, at vol. V, p. 33 and Sgt. M. Logar, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-109*, Issue no. 4, p. 4:21, at vol. V, p. 19, *Proceedings of the Standing Senate Committee of Legal Constitutional Affairs*, Issue no. 46, p. 46:38 at vol. V, p. 49 **[the criminal trial as providing s. 184.4 accountability]**; Sgt. M. Logar, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-109*, Issue 4, p. 4:21 at vol. V, p. 19, *Proceedings of the Standing Senate Committee of Legal Constitutional Affairs*, Issue no. 46, p. 46:42 at vol. V, p. 53 **[other methods of accountability, internal discipline, public complaint mechanisms and civil lawsuits]**

**2. Section 184.4 is primarily preventative legislation and there are competing *Charter* rights to be considered**

79. Within s. 1, legislative provisions fall along a spectrum. At one end of the spectrum are statutes where the state confronts the accused as a "singular antagonist". In those cases, the review of legislation under s. 1 tends to be stricter. At the other end of the spectrum is legislation where Parliament has to mediate between a diverse set of interests where it will be easier to demonstrate that the provision is a reasonable limit.

*Irwin Toy v. Quebec (Attorney General),* [1989] 1 S.C.R. 927 at p. 993d-994g

80. Though found in the *Criminal Code*, s. 184.4 belongs to the second category. It is clearly preventative and balances the caller's privacy with the victim's "security of person" under s. 7. When "victim" calls are intercepted, the State is not in an adversarial relationship with them. Further, since the focus is preventative throughout, the relationship to the potential pepetrators is not adversarial under s. 184.4 in the same sense it is when the police apply for a s. 186 authorization with the intention of building a case. In that light, Parliament

should be granted particular latitude in the formulation of the s. 184.4.

*R. v. Butler,* [1992] 1 S.C.R. 452, at p. 504j – 505d

### 3. Application of the *Oakes* test

81. Taking these points into account, the Appellant submits that the legislation satisfies the *Oakes* test. To start, s. 184.4 easily passes both the pressing objective and rational connection tests. The protection of people from serious harm is a pressing police and societal objective. The constitutional record also readily establishes the rational connection between intercepting communications and preventing harm.

*R. v. Tse, supra*, p. 238, para. 247-48, p. 239, para. 252 [pressing objective and rational connection tests]
*R. v. Oakes,* [1986] 1 S.C.R. 103 at pp. 138h-139f, para. 69-70
*R. v. Smith* [1987] 1 S.C.R. 1045 at p. 1081g-h

82. The requirements of s. 184.4 limit *who* can be tapped, *when* they can be tapped (urgency and necessity), *why* they can be tapped (to prevent serious harm) and *what* the police should consider as an alternative under the umbrella of "reasonable diligence". In other words, there is not an aspect of what is transpiring that is not regulated in some way by the section. Of course, it is possible to imagine, for each aspect of s. 184.4, a different or more restrictive test. But that misses the cumulative effect of each of s. 184.4's preconditions. When that is done, they fall within Parliament's "margin of appreciation" under s. 1.

*R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713 at p. 768h-i, 783a-c
*R. v. Laba,* [1994] 3 S.C.R. 965 at p. 1009a-e
*R. v. Riley* (no. 1), *supra*, p. 262, para. 35

## M. Submissions on alternative constitutional remedies

83. In the event that s.184.4 is not saved by s.1, the Appellant asks this Court to consider remedies short of what Justice Davies did – striking out the entire provision. Section 52 of the *Constitution Act, 1982* renders unconstitutional laws invalid, but only "to the extent of the inconsistency". The objective of s. 52 is to vindicate *Charter* values while minimizing judicial intervention in the legislative sphere. This is particularly true where the provision fails under the minimal impairment test (which would be the case here). The key is whether alternatives remedies are modest and still consistent with the provision's purpose.

> *Schachter v. Canada* [1992] 2 S.C.R. 679 at p. 695g-h, 706c-d
> *R. v. Laba, supra,* at p. 1012g-h
> *R. v. Grant, supra,* at p. 243i – 245e

### *1. "Reading in" a notice requirement to intercepted persons*

84. It is submitted that s. 184.4 could be incorporated *mutatis mutandi* into the notice scheme that already exists for s. 186 authorizations under s. 196(1) by adding into that subsection the following words in bold:

> 196. (1) 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 **or a peace officer acting under s. 184.4** 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 **or after the start of an authorization under s. 184.4**, 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.

Justice Dambrot in *Riley* (no. 1) simply read in a notice subsection using similar wording instead of striking down s. 184.4. This is not an elaborate exercise that would represent "an unacceptable intrusion into Parliament's legislative domain."

*R. v. Riley* (no. 1), *supra*, at p. 252, para. 4, p. 280, para. 95, pp. 286-87, para. 118-19

***2. "Reading down" the definition of "peace officer" as it applies to s. 184.4***

85. If this Court is convinced that the statutory pre-conditions for interception are insufficient to be in conformity with the *Charter* given the definition of "peace officer", the Appellant suggests that that definition in s. 2 be limited (as it applies to s. 184.4) to "police officers, police constables". In *Riley* (no. 1), the Court was prepared to sever down the definition of "peace officer" and this would be a possible alternative remedy.

*R. v. Riley* (no. 1), *supra*, p. 252, para. 4, p. 280, para. 95, pp. 286-87, para. 118-19
*R. v. Schachter, supra* at 713a-b
*R. v. Wilson* (1993), 86 C.C.C.(3d) 145 (B.C.C.A.) at p. 162c-g

86. Of course, these alternative remedies need only be considered if they serve to correct *Charter* breaches. The irony is that when the trial judge had the opportunity to make these changes on an interim basis, he declined to do so. Justice Davies formulated an interim "constitutionally compliant implementation process" so that law enforcement could continue to use s. 184.4 despite it being struck down (pending parliamentary action). This process contains a number of elements (primarily relating to seeking a judicial authorization) but does not include notices to intercepted persons, reports to Parliament or restrict which "peace officers" can use s. 184.4 – the major constitutional flaws he identified. If these changes were truly needed to render s. 184.4 *Charter*-worthy, then surely they should have been part of the "constitutionally compliant implementation process" set out in his Reasons. It all suggests that, even for the trial judge, s. 184.4 can operate constitutionally without them. If that is the case, then, the section should not have been invalidated in the first place.

*R. v. Tse, supra*, p. 215, para. 167-68, p. 225, para. 206, p. 231, para. 227, pp. 229-30, para. 236, p. 242, para. 264, pp. 244-45, para.275(6)

## PART IV - SUBMISSIONS CONCERNING COSTS

87. The Appellant does not seek costs and resists the imposition of costs.

## PART V- NATURE OF ORDER SOUGHT

88. That the Appeal be allowed and that s. 184.4 be declared constitutional. In the alternative, that such interpretative remedies be applied under s. 52 so that the provision remains constitutional.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Trevor Shaw
Counsel for the Appellant

per Samiran Lakshman
Counsel for the Appellant

Dated this 29th day of June 2011 at Vancouver, B.C.

## PART VI – TABLE OF AUTHORITIES

**Para.**

**TEXTS**

## STATUTES

## VII – LEGISLATIVE PROVISIONS RELIED UPON

### *Criminal Code* Provisions in the Book of Authorities

CONSTITUTION ACT, 1982

SCHEDULE B

CONSTITUTION ACT, 1982

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

*Guarantee of Rights and Freedoms*

Rights and freedoms in Canada

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

*Legal Rights*

Life, liberty and security of person

**7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

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

Proceedings in criminal and penal matters

**11.** Any person charged with an offence has the right

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

## PART VII

## GENERAL

Primacy of Constitution of Canada

**52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(*a*) the *Canada Act 1982*, including this Act;

(*b*) the Acts and orders referred to in the schedule; and

(*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

## LOI CONSTITUTIONNELLE DE 1982

## ANNEXE B

## LOI CONSTITUTIONNELLE DE 1982

## PARTIE I

## CHARTE CANADIENNE DES DROITS ET LIBERTÉS

Attendu que le Canada est fondé sur des principes qui reconnaissent la suprématie de Dieu et la primauté du droit :

### *Garantie des droits et libertés*

Droits et libertés au Canada

**1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

### *Garanties juridiques*

Vie, liberté et sécurité

**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

**8.** Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives. Fouilles, perquisitions ou saisies

**11.** Tout inculpé a le droit : Affaires criminelles et pénales

*d*) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;

## PARTIE VII

## DISPOSITIONS GÉNÉRALES

**52.** (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit. Primauté de la Constitution du Canada

(2) La Constitution du Canada comprend : Constitution du Canada

*a*) la *Loi de 1982 sur le Canada*, y compris la présente loi;

*b*) les textes législatifs et les décrets figurant à l'annexe;

*c*) les modifications des textes législatifs et des décrets mentionnés aux alinéas *a*) ou *b*).

(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle. Modification

APPENDIX "A"

Supreme Court of Canada | Cour suprême du Canada

March 25, 2011 | Le 25 mars 2011

**ORDER**
**MOTION**

**ORDONNANCE**
**REQUÊTE**

**HER MAJESTY THE QUEEN v. YAT FUNG ALBERT TSE, NHAN TRONG LY, HUONG DAC DOAN, VIET BACK NGUYEN, DANIEL LOUIS SOUX AND MYLES ALEXANDER VANDRICK**
(No. 33751) (B.C.)

**THE CHIEF JUSTICE:**

**UPON APPLICATION** by the appellant for an order stating constitutional questions in the above appeal;

**AND THE MATERIAL FILED** having been read;

**IT IS HEREBY ORDERED THAT THE CONSTITUTIONAL QUESTIONS BE STATED AS FOLLOW:**

1. 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*?

2. 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*?

3. 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*?

4. 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*?

5. 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*?

6. 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*?

7. 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?

**À LA SUITE DE LA DEMANDE** de l'appelante visant à obtenir la formulation de questions constitutionnelles dans l'appel susmentionné;

**ET APRÈS AVOIR LU** la documentation déposée;

**LES QUESTIONS CONSTITUTIONNELLES SUIVANTES SONT FORMULÉES :**

1. L'article 184.4 du *Code criminel*, L.R.C. 1985, ch. C-46, contrevient-il à l'art. 7 de la *Charte canadienne des droits et libertés*?

2. Dans l'affirmative, s'agit-il d'une limite raisonnable prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte canadienne des droits et libertés*?

3. L'article 184.4 du *Code criminel*, L.R.C. 1985, ch. C-46, contrevient-il à l'art. 8 de la *Charte canadienne des droits et libertés*?

4. Dans l'affirmative, s'agit-il d'une limite raisonnable prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte canadienne des droits et libertés*?

5. L'article 184.4 du *Code criminel*, L.R.C. 1985, ch. C-46, contrevient-il à l'al. 11*d*) de la *Charte canadienne des droits et libertés*?

6. Dans l'affirmative, s'agit-il d'une limite raisonnable prescrite par une règle de droit et dont la justification peut se démontrer dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte canadienne des droits et libertés*?

7. Si l'article 184.4 du *Code criminel*, L.R.C. 1985, ch. C-46, contrevient à la *Charte canadienne des droits et libertés*, est-il nécessaire de le déclarer inopérant en vertu du par. 52(1) de la *Loi constitutionnelle de 1982* ou une réparation moindre peut-elle être accordée?

C.J.C.
J.C.C.