Court File No. 29670

SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N :

HER MAJESTY THE QUEEN

Applicant

- and -

WALTER TESSLING

Respondent

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION,
ATTORNEY GENERAL OF QUÉBEC, and
ATTORNEY GENERAL OF ONTARIO

Interveners

FACTUM OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

(Rule 42, *Rules of the Supreme Court of Canada*)

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Table of Contents

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PART VII—STATEMENT OF THE FACTS

A. CCLA's Position on the Parties' Statement of Facts

1. The Intervener, the Canadian Civil Liberties Association (the "CCLA"), accepts the facts as set out in the decision of the Court of Appeal for Ontario.[1]

[1] *R. v. Tessling* (2003), 171 C.C.C. (3d) 361 at paras. 2-23 (Ont. C.A.) [hereinafter *Tessling*] CCLA's Book of Authorities ("CBA"), Tab 1

B. CCLA's Interest in the Appeal

2. The CCLA is a national organization with more than 6,500 members across Canada. The CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties and to defend, extend, and foster the recognition of those rights and liberties. An important aspect of the principle mandate of the CCLA includes the promotion and legal protection of individual freedom against unreasonable state intrusion. The CCLA has a distinct awareness and understanding of the state's impact on civil liberties, having argued for and defended the rights of individuals on many occasions both prior to and since the advent of the *Charter*.[2]

3. The CCLA's principle mandate is to promote and protect fundamental rights and liberties. Arising out of this mandate, the CCLA has a special interest and concern in ensuring that the law adequately protects the privacy rights of individuals from unreasonable intrusion by the state and that these rights and those under the *Charter* are not eroded by the state's use of surveillance technology.[3]

C. Overview

4. This Appeal addresses the ability of the state to employ surveillance technology to gather information about the activities taking place inside of a private dwelling-house. The Appellant takes the position that it is unnecessary for the state to obtain prior judicial authorization for the use of Forward Looking Infrared ("FLIR") technology. The CCLA takes the position that this type of conduct is contrary to the rights guaranteed by s. 8 of the *Canadian Charter of Rights and Freedoms*[4], which protects individuals from unreasonable

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[2] Affidavit of A. Alan Borovoy, Intervener's Motion Record, Tab 2, at paras. 3 - 4
[3] *Ibid*, at paras. 10, 11, and 18.
[4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 8 [hereinafter *Charter*]

searches and seizures by the state. Surveillance technology, which reveals information about the activities taking place in a private home, should presumptively require prior judicial authorization.

PART VIII—POINTS IN ISSUE

5. The key issues raised by this appeal are:

(a) Is the use of FLIR technology by the State for the purpose of determining what activities are taking place in a private dwelling-house a search under s. 8 of the *Canadian Charter of Rights and Freedoms*?

(b) Does such use of the FLIR, without prior judicial authorization, amount to an unreasonable search and seizure under s. 8 of the *Canadian Charter of Rights and Freedoms*?

PART IX—ARGUMENT

A. General Principles

6. In considering the issues raised by this Appeal, it is important to consider the principles applicable to unreasonable search and seizure.

(i) Purpose of Section 8 of the *Charter*

7. Section 8 of the *Charter* protects the right of an individual to be free from unreasonable search and seizure by the state. The right has been described as the "right to be left alone" from state intrusion.[5] This Court has emphasized the importance of this right by

[5] *R. v. Duarte*, [1990] 1 S.C.R. 30 at 44 [hereinafter *Duarte*], CBA, Tab 2

stating that, "privacy is at the heart of liberty in a modern state" and "is essential for the well-being of the individual".[6]

8. In protecting an individual's privacy interest, the court must balance the right of the individual to be free from unreasonable search and seizure against the state's legitimate interest in law enforcement. A system of prior judicial authorization is one of the key instruments by which our society strikes the appropriate balance between these competing interests.[7]

(ii) Legal Definition of "Search"

9. In resolving the issue of whether the use of FLIR constitutes a search within the meaning of s. 8, it is not necessary to resort to a dictionary definition of a "search".[8] This Court has articulated the legal definition of a search for the purposes of constitutional analysis on numerous occasions. A least where a residence is concerned, a "search" involves state conduct which intrudes upon an individual's reasonable expectation of privacy.[9]

B. Constitutionally Protected Privacy Interests within the Home

10. It is the CCLA's position that when individuals close their doors and draw their curtains, or otherwise retreat into the sanctity of their homes, they have a presumptive right to be free from warrantless searches. Therefore, it is respectfully submitted that any surveillance technology used by the state to erode the protection afforded by the walls of an individual's private home presumptively violates s. 8 of the *Charter.*

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[6] *R. v. Dyment,* [1988] 2 S.C.R. 417 at 427-428 [hereinafter *Dyment*], Respondent's Book of Authorities ("RBA"), Tab 12
[7] *Hunter v. Southam,* [1984] 2 S.C.R. 145 at 160 [hereinafter *Hunter v. Southam*], RBA, Tab 23
[8] Ironically, the state conduct in this case constitutes a search even if one resorts to the Oxford Dictionary definition as referred to in the Appellant's Factum at paragraph 26.
[9] *Hunter v. Southam, supra,* at note 7, at 159-160, RBA, Tab 23

11. The right to be free from unreasonable search and seizure, or to be “left alone”, has for centuries taken on special meaning in the context of a private dwelling-house. This Court has consistently stated that the privacy interest associated with a private home is one of the most sacred rights in a free and democratic society. As this Court in *R. v Silveria* stated:

> It is surprising that nearly four hundred years after *Semayne's Case* (1604), 5 Co. Rep 91, 77 E.R. 194, there should be any debate about the matter. That case firmly enunciated the principle that "a man's home is his castle", and that even the King himself had no right to invade the sanctity of the home without the authority of a judicially issued warrant. That principle has remained ever since as a bulwark for the protection of the individual against the state. It affords the individual a measure of privacy and tranquility against the overwhelming power of the state; see also *Entick v. Carrington* (1765), 19 Tr. 1029. It is a fundamental precept of a free society."[10]

12. It has been generally held in Canadian constitutional jurisprudence, that the state is not permitted to use surveillance technology to obtain information about the activities taking place inside of a private dwelling-house, in the absence of prior judicial authorization or exigent circumstances.[11] This jurisprudence is consistent with the principles set out by this Court in the seminal decision on unreasonable search and seizures, *Hunter v. Southam Inc.*

13. As a matter of law, s. 8 of the *Charter* protects against the warrantless gathering of information from within a private residence even where the police do not enter the residence. This includes a situation in which the state attempts to obtain information be peeking through a window.[12] Indeed, the search remains unconstitutional even if, on peering through the window, the police fail to obtain any information.

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[10] *R. v. Silveria*, [1995] 2 SCR 297 at 319, per Justice La Forest (dissenting), CBA, Tab 3

[11] The only exceptions are the common law cases in British Columbia related to the use of FLIR devices which are at issue in this case. See: *R. v. Campbell* (September 19, 2001, unreported) Docket – 112057T Victoria (B.C.S.C.), CBA, Tab 4; *R. v. Rugg*, [2003] B.C.J. No. 2965 (B.C.S.C.), CBA, Tab 5; and *R. v. Federink*, [2003] B.C.J. No. 3026 (B.C.S.C.), CBA, Tab 6. It is important to note that in *R. v. Watters* (December 19, 2003, unreported) Docket - 118739 Victoria (B.C.S.C.) cited in *R. v. Federink*, the Court followed Abella, J.A.’s decision in *Tessling* and held that the warrantless search of a home using the FLIR violated s. 8 of the *Charter*.

[12] See *R. v. Kokesch*, [1990] 3 S.C.R. 3 [hereinafter *Kokesch*], RBA, Tab 22

14. Armed with increasingly sophisticated surveillance technology, police are able to obtain information regarding activities taking place inside a private home; in this case, by gathering infra-red rays emanating from heat sources inside the residence. The very reason that law enforcement directed FLIR at the residence was to gather information on whether a marijuana growing operation was taking place *inside* the individual's private home.[13]

15. As correctly stated by Abella, J.A. in the Court of Appeal for Ontario, "it is impossible to ignore the fact that those surface emanations have a direct relationship to what is taking place inside the home".[14] In such cases, the state surreptitiously employs FLIR technology to determine whether certain activities are taking place inside a private dwelling.

16. The reasonable expectation of privacy regarding activities in the home does not disappear simply because technological advances are capable of penetrating the walls upon which people rely to ensure their residential privacy. Nor is this expectation diminished simply because information penetrates, seeps or leaks through the walls. So long as the human senses cannot readily detect it, there remains a reasonable expectation of privacy in relation to such information.

17. The infrared light emanating from a private dwelling house is capable of revealing what type of activities are occurring within the home, and also reveals details of the individual's personal lifestyle. Constable J.C. Robichaud testified that the device is able to detect many different sources of heat including a wood burning stove, a fireplace, a sauna, or a car engine running.[15] Therefore, this device is capable of detecting a spectrum of private and *lawful* activities occurring within the home.

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[13] Information sworn by Constable J.C. Robichaud on May 5, 1999 in support of a warrant to search the residence of Walter Tessling, Appellant's Appeal Record, Exhibit 2, Tab 9
[14] *Tessling, supra*, at note 1, at para. 62, CBA, Tab 1
[15] Transcript of Evidence, December 4, 2000, p. 55, Appellant Record, Tab 6

18. The range of information captured by FLIR includes generic, as well as intimate, details of individuals' lifestyles and activities. Many such activities are tied to the function and character of a private dwelling. The home is a unique retreat that allows people to shelter themselves, their lifestyles, and their activities from the prying eyes and ears of others, including those of the state. Absent a warrant or exigent circumstances, individuals should not be vulnerable to the state monitoring these activities in their home. The state must generally obtain a warrant before it may employ surveillance technology to monitor, for example, whether or when individuals take showers, cook meals, or have saunas.

C. Use of Sense-Enhancing Surveillance Technology

19. If there is a constitutionally protected privacy interest with respect to activities within the home, it follows that the capturing of information which reveals those activities through the use of sense-enhancing surveillance technology is a "search".

20. Surreptitious electronic surveillance of an individual by an agency of the state engages the right to be free from unreasonable search and seizure guaranteed by s. 8 of the *Charter*. As La Forest, J. held in *R v. Duarte* (speaking for a unanimous court on this point):

> If one is to give s. 8 the purposive meaning attributed to it by *Hunter v. Southam Inc.*, one can scarcely imagine a state activity more dangerous to individual's privacy than electronic surveillance and to which, in consequence, the protection accorded by s. 8 should be more directly aimed…[16]

21. The serious threat to privacy posed by surveillance technology has led both this Court and the United States Supreme Court to continually raise concerns regarding the use of such investigative techniques without prior judicial authorization. It was accepted in *Duarte* that, "Electronic surveillance is the greatest leveler of human privacy ever known" and the Court

[16] *Duarte, supra,* at note 5, at 43, CBA, Tab 2

recognized that it is unacceptable in a free society that the agencies of the state be free to use electronic surveillance at their sole discretion.[17]

22. It is appropriate to assume that an individual has a reasonable expectation of privacy over activities taking place within the sanctity of the home, particularly those activities that cannot be readily detected by normal human senses. Individuals should not have to build houses of ever-more sophisticated material to keep the surveillance technology of the state at bay.

23. As La Forest, J. stated, in *R. v. Wong,* it is important that the *Charter* be interpreted in a fashion that will secure the right to privacy in the face of rapidly advancing technology:

> "… the broad and general right to be secure from unreasonable search and seizure guaranteed by s.8 is meant to keep pace with technological development, and, accordingly, to ensure that we are ever protected against unauthorized intrusions upon our privacy by the agents of the state, whatever technological form the means of invasion may take."[18]

D. The CCLA's Position is Supported by Canadian Jurisprudence

24. The CCLA's position is supported by additional Canadian authorities. In *R. v. Wise*, this Court considered the constitutionality of monitoring an individual's motor vehicle with a tracking device in the absence of prior judicial authorization. The minimal intrusion and low level of information obtained by the device was described as follows:

> It must be remembered that the tracking device used in this case was unsophisticated and indeed simplistic. It did not provide a visual record of the movement or position of the vehicle. Nor was it able to pick up and record conversations in the vehicle. Rather, it was capable of giving only a very rough idea of the vehicle's location. Certainly, it could not be said that the device was capable of tracking the location of a vehicle at all times.[19]

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[17] *Ibid,* at 44
[18] *R. v. Wong*, [1990] 3 S.C.R. 36 at 44 [hereinafter *Wong*], RBA, Tab 7
[19] *R. v. Wise,* [1992] 1 S.C.R. 527 at 534 [hereinafter *Wise*], CBA, Tab 7

25. Nonetheless, it was held that the surveillance technology at issue, namely, the electronic monitoring of public movements of the Appellant's vehicle, in the absence of judicial authorization, was unconstitutional. Thus, an investigative technique which is even less intrusive than the use of FLIR requires prior judicial authorization.

26. In the recent decision, *R.* v. *Lam*, the Court of Appeal for Alberta applied the reasoning of Abella J.A. in *Tessling.* The Court held that the use of sense-enhancing investigative tools to see inside a locker, such as a drug sniffing dog, does not eliminate an individual's expectation of privacy within that locker.[20] In *Lam*, the Crown asserted similar arguments to those being advanced by the Appellant in the case at bar. The Crown argued that, while the accused had a reasonable expectation of privacy with respect to the luggage placed in the locker, there was no reasonable expectation of privacy in the smells emanating from her bags into the public area. Conrad J.A., speaking for a unanimous court, rejected this position and stated, "this argument ignores the obvious point that the police were using the police dog to sniff around the locker for the sole purpose of seeing into Dinh's luggage – a protected privacy interest".[21]

27. The walls of a home are intended to safeguard personal and private information. It would be perverse to allow the state, without a warrant, to employ those very walls in order to invade that privacy interest. The above authorities expressly adopt an approach which recognizes that an expectation of privacy is not abandoned simply because the state has the ability to detect the information using surveillance technology.

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[20] *R.* v. *Lam* (2003), 178 C.C.C. (3d) 59 [hereinafter *Lam*], CBA, Tab 8
[21] *Ibid,* at 70

E. The CCLA's Position is Supported by the American Jurisprudence

28. In *Kyllo v. United States*, the United States Supreme Court held that the use of FLIR technology to detect heat emanating from a private home without a warrant is an unlawful search and a violation of the Fourth Amendment.[22]

29. The Court recognized that it is foolish to assert that the degree of privacy of individuals has been entirely unaffected by the advancement of technology. There is a minimum reasonable expectation of privacy that exists with respect of the interior of homes. The state use of sense-enhancing technology to gather information regarding the interior of the home, which could not otherwise have been obtained without physical intrusion into a constitutionally protected area, erodes this minimum expectation of privacy and constitutes a search.[23]

30. Like the Appellant, the dissent in *Kyllo* was comforted by what is, in the CCLA's respectful submission, a false distinction between "off-the-wall" and "through-the-wall" surveillance. The majority of that Court noted that, if one can legitimately claim that: "a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house".[24] The majority rejects such an approach, in part, on the basis that its adoption would undermine the constitutional requirement that the authorities must obtain warrants in order to wiretap conversations in a residence.

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[22] *Kyllo v. United States*, 121 S.Ct.. 2038 (2001) [hereinafter *Kyllo*], CBA, Tab 9

[23] *Ibid* at 2043

[24] *Ibid* at 2044

31. At paragraph 30 of the Appellant's factum, it is argued that in *Dow Chemical Co. v. United States*, the United States Supreme Court held that the use of a FLIR camera does not constitute a search or seizure of constitutionally protected information. However, the Court in *Dow Chemical* expressly distinguished an industrial plant from "a private home, where privacy expectations are most heightened."[25] As the Court in *Kyllo* emphasizes, state intrusion into the sanctity of the home requires prior judicial authorization.

G. Warrantless Use of FLIR is an Unreasonable Search under S. 8 of the *Charter*

32. In this case, the state conducted a search of the Respondent's home without a warrant. A warrantless search is *prima facie* unreasonable unless the party seeking to justify the search can rebut this presumption of unreasonableness. In order to rebut this presumption, the state must establish that:

(i) the search was authorized by law;

(ii) the law that authorized the search is reasonable; and

(iii) the search was conducted in a reasonable manner.

33. In order for a warrantless search to be reasonable, all three conditions must be met. It is only then that the state may be able to demonstrate that its legitimate interest in law enforcement trumps the established privacy interest of the individual. The failure to satisfy all three of these conditions renders the search unreasonable. [26]

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[25] *Dow Chemical Co. v. United States* 106 S.Ct. 1819 (1986), n. 4 at 1826 [hereinafter *Dow Chemical*], CBA, Tab 10

[26] *R. v. Collins*, [1987] 1 S.C.R. 265 at 278 [hereinafter *Collins*], CBA, Tab 11

34. In this case the search was not authorized by law. It enjoyed neither common law sanction nor prior judicial authorization. In the circumstances, the use of the FLIR was, therefore, an unreasonable search.

35. It is the CCLA's position that the general warrant provision in the *Criminal Code of Canada*[27] already provides the legal mechanism to obtain prior judicial authorization for the use of FLIR technology. Indeed, law enforcement officials in Ontario have previously obtained prior judicial authorization for FLIR devices through the general warrant provisions of the *Criminal Code*.[28]

36. The general warrant provision is indicative of Parliament's will that investigative techniques involving surveillance technology directed at residential privacy are to be governed by a system of prior judicial authorization.[29] Such an approach ensures that there is a balancing of society's interest in both law enforcement and privacy protection.

37. The Appellant and some judicial authorities[30] have argued that imposing a condition of prior judicial authorization for FLIR technology would deny the state an important investigative tool. This argument is based on the position that if, prior to using FLIR on a residence, the authorities were required to convince a judge on a standard of reasonable and probable grounds, the authorities would be in an equally good (or bad) position to obtain a conventional search warrant. Instead, the authorities wish to use FLIR devices to gather evidence in support of search warrant applications.

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[27] *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 487.01 [hereinafter *Criminal Code*]
[28] See: *R. v. Martin*, [1995] O.J. No. 4603 (Ont. Prov. Ct.), CBA, Tab 12
[29] Steve Coughlan, "General Warrants at the Crossroads: Limit or Licence?" (2003), 10 C.R. (6th) 269 at 277, CBA, Tab 13
[30] *R. v. Rugg*, *supra*, at note 11, at para. 24, CBA, Tab 5

38. The Appellant is arguing that in order to invade the privacy of the home on foot, the state requires reasonable and probable grounds, but, in order to perform such an invasion by technology, there is no such requirement. It is the CCLA's submission that these two forms of invasion constitute a distinction without adequate difference. In both cases, residential privacy is lost. The CCLA is not suggesting that the state be denied the use of either of these investigative techniques. Rather, the issue is whether the state must obtain prior judicial authorization before such techniques are employed and homes are searched.

39. Nor is Parliament necessarily confined to the standards in s. 487.01 of the *Criminal Code*. In some circumstances, it may be open to Parliament to employ a lower standard to the extent that the investigative technique at issue is significantly less intrusive than a wiretap or physical search.[31] Although we are not endorsing such an approach here, it is useful to note that the range of statutory warrant standards is indicative of Parliament's role in striking different balances in different contexts.

H. Section 24(2) of the *Charter* and the Exclusion of Evidence

40. The CCLA takes no position regarding the s. 24(2) beyond the assertion that the state use of electronic surveillance to gather information about the activities inside a private dwelling house is a serious breach of the *Charter*, particularly in light of the existing jurisprudence.

[31] *Hunter v. Southam, supra*, at note 7, at 167, RBA, Tab 23

PART X—ORDER SOUGHT

41. The CCLA respectfully submits that the Court rule that the warrantless use of FLIR technology to monitor activities taking place within a private home is a violation of s. 8 of the *Charter*.

42. The CCLA seek leave of this Court to present oral argument at the hearing of this Appeal.

43. The CCLA seeks no costs in the intervention, and requests that the Court not award costs against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 24, 2004

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PART XI—TABLE OF AUTHORITIES

PART XII—STATUTORY PROVISIONS

Section 8 – *Canadian Charter of Rights*

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

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

Section 487.01 – *Criminal Code of Canada*

487.01 (1) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if

(*a*) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;

(*b*) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and

(*c*) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done

Limitation — (2) Nothing in subsection (1) shall be construed as to permit interference with the bodily integrity of any person.

Search or seizure to be reasonable — (3) A warrant issued under subsection (1) shall contain such terms and conditions as the judge considers advisable to ensure that any search or seizure authorized by the warrant is reasonable in the circumstances.

Video surveillance — (4) A warrant issued under subsection (1) that authorizes a peace officer to observe, by means of a television camera or other similar electronic device, any person who is engaged in activity in circumstances in which the person has a reasonable expectation of privacy shall contain such terms and conditions as the judge considers advisable to ensure that the privacy of the person or of any other person is respected as much as possible.

Other — (5) The definition "offence" in section 183 and sections 183.1, 184.2, 184.3

provisions to apply

and 185 to 188.2, subsection 189(5), and sections 190, 193 and 194 to 196 apply, with such modifications as the circumstances require, to a warrant referred to in subsection (4) as though references in those provisions to interceptions of private communications were read as references to observations by peace officers by means of television cameras or similar electronic devices of activities in circumstances in which persons had reasonable expectations of privacy.

Notice after covert entry

(5.1) A warrant issued under subsection (1) that authorizes a peace officer to enter and search a place covertly shall require, as part of the terms and conditions referred to in subsection (3), that notice of the entry and search be given within any time after the execution of the warrant that the judge considers reasonable in the circumstances.

Extension of period for giving notice

(5.2) Where the judge who issues a warrant under subsection (1) or any other judge having jurisdiction to issue such a warrant is, on the basis of an affidavit submitted in support of an application to vary the period within which the notice referred to in subsection (5.1) is to be given, is satisfied that the interests of justice warrant the granting of the application, the judge may grant an extension, or a subsequent extension, of the period, but no extension may exceed three years.

Provisions to apply

(6) Subsections 487(2) and (4) apply, with such modifications as the circumstances require, to a warrant issued under subsection (1).

Telewarrant provisions to apply

(7) Where a peace officer believes that it would be impracticable to appear personally before a judge to make an application for a warrant under this section, a warrant may be issued under this section on an information submitted by telephone or other means of telecommunication and, for that purpose, section 487.1 applies, with such modifications as the circumstances require, to the warrant.

1993, c. 40, s. 15; 1997, c. 18, s. 42, c. 23, s. 13.

487.01 (1) Un juge de la cour provinciale, un juge de la cour supérieure de juridiction criminelle ou un juge au sens de l'article 552 peut décerner un mandat par écrit autorisant un agent de la paix, sous réserve du présent article, à utiliser un dispositif ou une technique ou une méthode d'enquête, ou à accomplir tout acte qui y est mentionné, qui constituerait sans cette autorisation une fouille, une perquisition ou une saisie abusive à l'égard d'une personne ou d'un bien :

a) si le juge est convaincu, à la suite d'une dénonciation par écrit faite sous serment, qu'il existe des motifs raisonnables de croire qu'une infraction à la présente loi ou à toute autre loi

fédérale a été ou sera commise et que des renseignements relatifs à l'infraction seront obtenus grâce à une telle utilisation ou à l'accomplissement d'un tel acte;

b) s'il est convaincu que la délivrance du mandat servirait au mieux l'administration de la justice;

c) s'il n'y a aucune disposition dans la présente loi ou toute autre loi fédérale qui prévoie un mandat, une autorisation ou une ordonnance permettant une telle utilisation ou l'accomplissement d'un tel acte.

Limite

(2) Le paragraphe (1) n'a pas pour effet de permettre de porter atteinte à l'intégrité physique d'une personne.

Fouilles, perquisitions ou saisies raisonnables

(3) Le mandat doit énoncer les modalités que le juge estime opportunes pour que la fouille, la perquisition ou la saisie soit raisonnable dans les circonstances.

Surveillance vidéo

(4) Le mandat qui autorise l'agent de la paix à observer, au moyen d'une caméra de télévision ou d'un autre dispositif électronique semblable, les activités d'une personne dans des circonstances telles que celle-ci peut raisonnablement s'attendre au respect de sa vie privée doit énoncer les modalités que le juge estime opportunes pour s'assurer de ce respect autant que possible.

Autres dispositions applicables

(5) La définition de « infraction » à l'article 183 et les articles 183.1, 184.2, 184.3 et 185 à 188.2, le paragraphe 189(5) et les articles 190, 193 et 194 à 196 s'appliquent, avec les adaptations nécessaires, au mandat visé au paragraphe (4) comme si toute mention relative à l'interception d'une communication privée valait mention de la surveillance par un agent de la paix, au moyen d'une caméra de télévision ou d'un dispositif électronique semblable, des activités d'une personne dans des circonstances telles que celle-ci peut raisonnablement s'attendre au respect de sa vie privée.

Avis

(5.1) Le mandat qui autorise l'agent de la paix à perquisitionner secrètement doit exiger, dans le cadre des modalités visées au paragraphe (3), qu'un avis de la perquisition soit donné dans le délai suivant son exécution que le juge estime indiqué dans les circonstances.

Prolongation

(5.2) Le juge qui décerne un mandat dans le cadre du paragraphe (1) ou un juge compétent pour décerner un tel mandat peut accorder une prolongation -- initiale ou ultérieure -- du délai visé au paragraphe (5.1), d'une durée maximale de trois ans, s'il est convaincu par l'affidavit appuyant la demande de prolongation que les intérêts de la justice justifient la prolongation.

Dispositions applicables

(6) Les paragraphes 487(2) et (4) s'appliquent, avec les adaptations nécessaires, au mandat décerné en vertu du paragraphe (1).

Télémandats

(7) Un mandat peut être décerné sous le régime du présent article sur le fondement d'une dénonciation transmise par téléphone ou autre moyen de télécommunication lorsque l'agent de la paix considère qu'il serait peu commode de se présenter en personne devant un juge; l'article 487.1 s'applique alors avec les adaptations nécessaires.

1993, ch. 40, art. 15; 1997, ch. 18, art. 42, ch. 23, art. 13.