

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA)**

B E T W E E N :

HER MAJESTY THE QUEEN

Appellant

- and -

**YAT FUNG ALBERT TSE, NHAN TRONG LY, VIET BAC NGUYEN,
HUONG DAC DOAN, DANIEL LUIS SOUX, and MYLES ALEXANDER VANDRICK**

Respondents

- and -

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PART I: STATEMENT OF FACTS

A. Overview

1. While s.8 of the *Charter* typically requires that state intrusions into privacy are done on the basis of prior judicial authorization, such an approach is not always accompanied by the luxury of time. When emergencies that threaten to result in serious harm arise, the police are duty-bound and expected to act quickly, decisively, and tirelessly in efforts to prevent or stop that harm. There is a long line of authority from this Court recognizing that the reach of s.8 protection is legitimately informed by the existence of the potential for serious and immediate harm. Properly interpreted, s. 184.4 of the *Criminal Code*, and the ability to intercept private communications without prior judicial authorization, is really nothing more than a well-balanced and moderate approach to what this Court has repeatedly said are the powers available to the police at common law.

B. Facts

2. The Attorney General of Ontario accepts the facts as set out by the parties and has none to add.

PART II: POINTS IN ISSUE

Issue #1: *Did the trial judge correctly interpret s.184.4 of the Criminal Code?*
No.

Issue #2: *Does s. 184.4 infringe ss.7, 8, or 11(d) of the Charter?*
Only s.8 of the *Charter* is engaged in this appeal and it is not infringed.

Issue #3: *If s.184.4 breaches s.8, is it saved by s.1 of the Charter?*
If s.8 is breached, it is saved under s.1 of the *Charter* for the same reasons it is said to provide for a “reasonable” search.

Issue #4: *If s.184.4 breaches s.8, and is not saved by s.1, 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?*
If the Court finds s.8 is breached, and s.184.4 is not saved by s.1, the appropriate remedy is to suspend the declaration of constitutional invalidity for a period of a year to allow Parliament sufficient time to remedy the problem(s) identified by this Court.

PART III: BRIEF OF ARGUMENT

A. The Common Law Power and Duty to Prevent Harm

3. At its core, s.184.4 of the *Criminal Code* is a statutory acknowledgement of a common law power, so that where serious harm to a person or property may come to bear, the police are in a position to make efforts to intervene before irreversible tragedy strikes. This Court has recognized that in the face of legitimate and imminent concerns for safety, significant constitutional rights are sometimes limited, and even suspended, in order to effectively address those concerns.¹ What follows is a brief review of some of this Court’s jurisprudence, addressing common law powers of the police to act quickly where serious harm may result from a failure to do so. The common law powers entrusted to the police in the following urgent circumstances are statutorily reflected in s.184.4 of the *Criminal Code*. The common law power to act in urgent circumstances, even where it means ss. 7, 8, 9, and 10 *Charter* rights may be adversely impacted, are not only captured by the spirit of s.184.4 of the *Code*, but demonstrate why it can be said that the trial judge overshot the constitutional mark in this case.

- *The Right to Counsel and Safety Considerations*

4. Upon detention, including investigative detention, everyone must be informed “immediately” of their right to counsel. Section 10(b) contains both informational and implementational components. Despite the critical importance of the right to counsel, it can be overtaken in circumstances where the police possess a legitimate concern about safety. As noted by Chief Justice McLachlin and Madam Justice Charron in *Suberu*, barring a s.1 *Charter* justification, the only exception to the right to counsel being provided in the context of an investigative detention is where there exist legitimate “concerns for officer or public safety”.

5. Moreover, as early as this Court’s judgment in *Bartle*, and more recently reinforced in *Willier*, there has been a recognition that where a detainee has expressed a desire to exercise her right to counsel, a reasonable opportunity to do so must be provided, unless “urgent and dangerous

¹While s.184.4 of the *Code* addresses “serious harm to any person or to property”, and while serious harm to property is a significant concern in and of itself, the reality is that any “serious harm to property” will be linked to a potential for serious harm to a person, such as a bomb threat. As such, and for ease of reference, this factum often uses language focussed on serious harm to people.

circumstances” exist. It is for the police to determine, on a case-by-case basis, when the circumstances are sufficiently urgent or dangerous to justify the suspension of the indisputably important right to counsel.

R. v. Suberu, [2009] 2 S.C.R. 460 at paras. 2, 42

R. v. Bartle, [1994] 3 S.C.R. 173 at para. 18

R. v. Willier, [2010] 2 S.C.R. 429 at para. 29

- *Detention and Safety Considerations*

6. Where the police are acting in urgent circumstances, the need for individualized suspicion is not necessary in order to detain individuals for investigation. In these circumstances, like those that prevailed in *Clayton*, this Court acknowledged that bearing in mind all of the circumstances, the police may do what is “reasonably necessary” to address the real and present threat to safety. As noted by Madam Justice Abella:

This means balancing the seriousness of the risk to public or individual safety with the liberty interests of members of the public to determine whether, given the extent of the risk, the nature of the stop is no more intrusive of liberty interests than is reasonably necessary to address the risk.

Detention in these circumstances strikes at the heart of individual liberty interests, much like intercepting under s.184.4 of the *Code* strikes at the heart of privacy interests. Yet safety concerns permit the police to take steps that are “reasonably necessary” to address the real and present risk of harm.

R. v. Clayton, [2007] 2 S.C.R. 725 at para. 31

R. v. Mann, [2004] 3 S.C.R. 59 at paras. 34, 39

- *Searching and Safety Considerations*

7. In *Mann*, this Court recognized a police power to search incident to investigative detention where the police have reasonable grounds to suspect that there exists a genuine risk to police or public safety: “the officer must believe on reasonable grounds that his or her own safety, or the safety of others, is at risk”. In other words, a reasonably held suspicion that safety is at risk, can justify the pat-down search of an individual who is not under arrest.

R. v. Mann, *supra*, at para. 40

See also: *R. v. Kang-Brown*, [2008] 1 S.C.R. 456 at para. 22

- *Home Entry and Safety Considerations*

8. In *Godoy*, this Court acknowledged that where the police have a concern about the safety of a home occupant (like in circumstances where a 911 hang-up call has been received), they have the power to fulfill their duties to ensure those safety concerns are addressed. As such, in these circumstances, the police possess the power to enter a dwelling place - a person's castle - for the sole purpose of addressing the potential risk to safety. As noted by Chief Justice Lamer: "While there is no question that one's privacy at home is a value to be preserved and promoted, privacy cannot trump the safety of all members of the household" and, as such, entry without warrant is justified to address the immediate and pressing risk of harm.

R. v. Godoy, [1999] 1 S.C.R. 311 at para. 21

- *Strip Searching and Safety Considerations*

9. In *Golden*, this Court recognized the common law power to conduct a strip search in certain circumstances. Madam Justice Arbour held that such searches should take place at a police facility unless there exists a demonstrated need to urgently search for "weapons or objects that could be used to threaten the safety of the accused, arresting officers or other individuals" at the scene of the arrest. Surely being strip searched in a less than private environment, for the purpose of addressing legitimate and pressing safety concerns, comes close (if not surpasses) the privacy interests engaged by s.184.4 of the *Code*.

R. v. Golden, [2001] 3 S.C.R. 679 at para. 102

- *Solicitor-Client Privilege As a Principle Of Fundamental Justice and Safety Considerations*

10. Solicitor-client privilege is a principle of fundamental justice under s.7 of the *Charter*. Yet, in circumstances where public safety is at risk, in the sense that there exists a "clear and imminent risk of serious bodily harm or death to an identifiable person or group", solicitor-client privilege can

and should give way. In rare circumstances where this threshold test is met, something as sacrosanct as solicitor-client privilege, a class privilege, is overtaken for the greater good.²

Smith v. Jones, [1999] 1 S.C.R. 455 at paras. 18, 84
Maranda v. Richer, [2003] 3 S.C.R. 193 at paras. 41, 52
Juman v. Doucette, [2008] 1 S.C.R. 157 at para. 40
R. v. Duarte, [1990] 1 S.C.R. 30

B. Section 184.4 of the *Criminal Code* and Preventing Harm

11. The above cases demonstrate that the risk of serious and imminent harm is properly taken into account when calibrating the reach of constitutional rights. These cases reflect this Court's recognition of the fact that where safety is at risk, reasonable attempts by law enforcement to intercept that risk are not only laudable, but constitutionally acceptable. As recently noted by this Court in *Nasogaluak*, the "police engage in dangerous and demanding work and often have to react quickly to emergencies". Canadians expect nothing less of law enforcement. Section 184.4 is a statutory reflection of this approach.

R. v. Nasogaluak, [2010] 1 S.C.R. 206 at para. 35
R. v. Asante-Mensah, [2003] 2 S.C.R. 3 at para. 73
R. v. Golub (1997), 117 C.C.C. (3d) 193 (Ont. C.A.) at para. 44

12. The reality is that the power to intercept private communications to stop or prevent serious harm exists at common law.³ Just like the police can set up a roadblock and search vehicles in appropriate circumstances, because a young child has just been abducted from a school ground, so

²Although not constituting a class privilege, this Court has also recognized that exigent circumstances can justify a search of the media in situations where reasonable alternative sources have not been exhausted: *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421 at para. 29.

³One might reasonably ask, if all of these powers to intervene in circumstances of real and present risk of harm exist at common law, why would Parliament feel compelled to legislate in the area of private communications? If the police can enter a home, suspend the facilitation of the right to counsel, and search vehicles to address imminent serious harm, why can't they intercept communications under their common law powers to address that harm? Aside from the fact that Parliament has periodically seen fit to legislate in relation to common law search powers arising from urgent circumstances (ss. 117.02, 487.11, and 529.3 of the *Code*, and s. 11(7) of the *Controlled Drugs and Substances Act*) there is a reason why legislation was actually required for purposes of intercepting private communications without authorization. Section 184.4 of the *Code* ensures that the offence provision within s.184, for intercepting private communications where no consenting party is a present, is not breached by the police when they intercept in the face of concerns for serious harm.

too may the police intercept private communications in frantic efforts to retrieve that same child.⁴ The purpose of s.184.4 was addressed when Bill C-109, containing what would become s.184.4, was introduced. In evidence heard before the Standing Senate Committee on Legal and Constitutional Affairs, the situations identified as requiring this emergency power were “hostage taking, bomb threats and armed standoffs”. The intent to limit the operation of the provision to genuine emergencies was captured in the following evidence:

it permits the authorities to start intercepting communications only if time does not permit obtaining an authorization. It is designed to cover that very short period of time during which it may be possible to stop the threat and harm from occurring. Rather than waiting to contact a judge and supply the necessary information, proposed s.184.4 would permit immediate response provided reasonable grounds exist and providing it is an emergency situation.

Standing Senate Committee on Legal and Constitutional Affairs, *Proceedings*, 34th Parl., 3rd Sess. No. 44 (2 June 1993) at 44:10

13. The then Minister of Justice, in an appearance before the Standing Committee, made the following comments, shedding further light on the intent of Parliament when enacting this provision:

In cases where, because of the urgency of the situation, policemen must intervene to prevent serious injury to a person or the destruction of property (and they have an opportunity to do so), this provision enables them to try to intercept communications in order to find out what is going on if this can help save lives, until they are able to obtain authorization.

Standing Senate Committee on Legal and Constitutional Affairs, *Proceedings*, 34th Parl., 3rd Sess., No. 48 (15 June 1993) at 48:15-48:16

14. The Minister of Justice of the day further noted that “every minute counts” when concerns about serious harm arise. Nothing could be more true than when a child is taken from his or her home and community. As noted in the evidence from the court below, kidnappings and child abductions form a substantial backdrop for the use of s.184.4. When children go missing, the clock ticks faster and louder every minute the child remains unaccounted for. In a report of the Attorney

⁴Of course, the extent of the roadblock, as the extent of interceptions, would be informed by the totality of the circumstances of the individual case, and the interference with *Charter* rights only justified by what is “reasonably necessary” to address the perceived serious harm. *R. v. Clayton*, *supra*.

General of Washington, it is noted that within a 24 hour period of being taken, 88.5 percent of abducted children are killed. As such:

Hours and even minutes are critical in an abducted child investigation. While the murder of an abducted child is rare, immediate reporting of the abduction and swift investigative measures may ensure the child is recovered alive. ... Police should concentrate their investigative resources as quickly as possible once a child is reported missing. Swift action by law enforcement will increase the odds that a child is found alive

Brown, K.M., et al, *Investigative Case Management For Missing Children Homicides: Report II*, May 2006, Cooperative Agreement, 98-MC-CX-0001, [http://www.atg.wa.gov/uploadedFiles/Another/Supporting_Law_Enforcement/Homicide_Investigation_Tracking_System_\(HITS\)/Child_Abduction_Murder_Research/CMIPDF.pdf](http://www.atg.wa.gov/uploadedFiles/Another/Supporting_Law_Enforcement/Homicide_Investigation_Tracking_System_(HITS)/Child_Abduction_Murder_Research/CMIPDF.pdf) pp. 12-14

Brown, K. et al, *Child Abduction Murder: An Analysis of the Effect of Time and Distance Separation Between Murder Incident Sites on Solvability*, J Forensic Sci, January 2007, Vol. 52, No. 1, pp. 137, 141

Hanfland, K.A. et al, *Case Management for Missing Children Homicide Investigation*, May 1997, <https://www.ncjrs.gov/pdffiles1/pr/201316.pdf>, pp. 15-17

15. While no one would reasonably dispute the profound s. 8 *Charter* interest linked to private communications, in the same vein, it cannot be suggested that legitimate emergencies do not arise where every minute and, indeed, every second counts. Properly interpreted, s. 184.4 of the *Criminal Code* strikes a reasonable balance between protecting individual privacy interests while, at the same time, providing the police with the tools that they need to address these rare, but *bona fide* emergencies.

Affidavit of Janine Crowley, Appellant's Record, Vol. 3, pp. 42-45

Affidavit of Daniel Rajsic, Appellant's Record, Vol. 3, pp. 37-38

Affidavit of Winston Fullinfaw, Appellant's Record, Vol. 3, p. 48

R. v. Moldovan, [2009] O.J. No. 4442 (Sup. Ct.)

R. v. Deacon, [2008] O.J. No. 5756 (Sup. Ct.)

C. Why Section 184.4 Is Clear and Constitutionally Compliant

i. Overview

16. Before a legislative provision can be assessed for constitutional compliance, its meaning must be gleaned through an application of the principles of statutory construction. Of course, if a statute's meaning cannot be gleaned, non-*Charter* compliance is the least of its problems, owing to

the fact that it would be found unacceptably vague. While s. 184.4 is sufficiently flexible to provide for the myriad urgent circumstances that may arise that require its use, it is far from vague. As Mr. Justice Gonthier held in *Nova Scotia Pharmaceutical Society*, enactments are not expected to “predict the legal consequences of any given course of conduct in advance.” Rather, they are to provide meaningful guidance about the circumstances in which they can be applied. Section 184.4 provides this guidance. Properly understood, s. 184.4 is an effective and constitutionally compliant tool in the hands of law enforcement, permitting them to make best efforts to intervene in circumstances of imminent serious harm.

R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 at pp. 638-40
Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Markham, Ont.: Butterworths, 2002 at pp. 385-86

ii. Context and Ordinary Meaning

17. When elucidating the meaning of a provision, a purposive approach should be applied and Parliament’s object and purpose in enacting the provision must be taken into account. In addition, the interpretative exercise requires that the “natural meaning” of the statute be found by assessing it against the act as a whole. Context is important. If the natural meaning of the words are such that they meet the objective of the act, then the interpretation to be offered the provision will be clear. As Chief Justice McLachlin held in *Russell*: “the words in question should be considered in the context in which they are used, and read in a manner consistent with the purpose of the provision and the intention of the legislature”.

R. v. Russell, [2001] 2 S.C.R. 804 at para. 32
R. v. Heywood, [1994] 3 S.C.R. 761 at p. 784
R. v. Hasselwander, [1993] 2 S.C.R. 398
R. v. Adams, [1995] 4 S.C.R. 707 at p. 719
See also: *R. v. Z.(D.A.)*, [1992] 2 S.C.R. 1025 at p. 1042

iii. Section 8 of the Charter as an Interpretative Aid and for Compliance

18. Finally, constitutional and *Charter* values provide an informative context in which legislation is enacted and against which it should be assessed. As noted in *Sullivan and Driedger on the Construction of Statutes*: “For centuries courts have interpreted legislation to comply with common law values, not because compliance was necessary for validity, but because the values themselves

were considered important. This reasoning applies with even greater force to entrenched constitutional values.” Where legislation is permitting of two equal interpretations, Madam Justice McLachlin (as she then was) observed in *Zundel*, that “the Court should adopt the interpretation which accords with the *Charter* and the values to which it gives expression”.

Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, *supra*, at pp. 367-68

R. v. Zundel, [1992] 2 S.C.R. 731 at p. 771

Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016 at paras. 107-108

19. Like British Columbia, Ontario says that the constitutional lens through which s.184.4 should be interpreted, and against which it should be considered, must take into account both the privacy interests of anyone who may be intercepted and the rights of victims who may benefit by virtue of the operation of s.184.4. The right to life, liberty and security of the person must be balanced against the privacy interest asserted. As noted in *Godoy*, while “dignity, integrity and autonomy” are values underlying a privacy interest, the interests of a person in need of police assistance are “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*, at para. 19

R. v. Plant, [1993] 3 S.C.R. 281 at p. 292

R. v. Moldovan, [2009] O.J. No. 4442 (Sup. Ct.) at paras. 174-75

20. While we typically think of rights to life, liberty and security of the person as a s.7 right, in a case where search powers are considered, it is more properly understood as being subsumed within the s.8 reasonableness analysis. What constitutes a “reasonable” expectation of privacy in one context, may well be modified in another, depending on whether urgent safety considerations apply. As such, there is no need to reach beyond a s.8 analysis in this case as the calibration of “reasonableness” under s.8 accommodates all relevant constitutional considerations.

R. v. Lavallee, Rackel & Heintz, [2002] 3 S.C.R. 209 at paras. 34-35

R. v. B.(S.A.), [2003] 2 S.C.R. 678 at para. 35

R. v. Mills, [1999] 3 S.C.R. 668 at para. 88

iv. The Three Components of Section 184.4

- 184.4 (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”

21. The “reasonable grounds to believe” standard, the fulcrum around which s. 184.4 turns, is the gold standard for constitutional compliance. This Court has defined it as meaning credibly based or reasonable probability. It operates on both a subjective and objective basis. An officer must have subjective belief in her grounds justifying the actions taken and those grounds must be objectively reasonable in the circumstances. As noted in the review of jurisprudence above, there exist common law police powers in urgent circumstances that operate on a lesser standard than reasonable grounds to believe.

Hunter v. Southam, [1984] 2 S.C.R. 145 at pp.

R. v. Kang-Brown, *supra*, *per* Binnie J. at paras. 75-79

22. Section 184.4 cannot be utilized unless the police reasonably believe that the situation is so urgent, that they cannot with “reasonable diligence” obtain an authorization. The urgency of the situation is tied to the fact that serious harm may result if the police do not act then and there. The concept of acting with “reasonable diligence” is not new to the police or the legal community at large. It is a term so well understood that it is found sprinkled throughout this Court’s jurisprudence and is directly tied to other constitutional rights. For instance, a detainee who wishes to exercise the right to counsel, must pursue that right with “reasonable diligence”. The police are expected to determine when a detainee is not exercising “reasonable diligence” in pursuit of their s.10(b) right. Surely they can be expected to determine when the urgency of a situation demands they act before they can, with reasonable diligence, make an application that falls directly within their area of expertise.

R. v. McCrimmon, [2010] 2 S.C.R. 402 at para. 18

R. v. Ross, [1989] 1 S.C.R. 3 at pp. 10-11

R. v. Sinclair, [2010] 2 S.C.R. 310 at para. 108 (Binnie J. in dissent, but not on this point)

23. In the past, while using different language, this Court has acknowledged that the police can be entrusted with figuring out when it is not “feasible” or is “impracticable” to obtain prior

authorization. For instance, in the context of a s.24(2) discussion in *Silveira*, Justice Cory acknowledged that exigent circumstances could permit a warrantless search where it is not “feasible” to obtain prior judicial authorization.⁵ In *Grant*, warrantless searches were permitted where “exigent circumstances render obtaining a warrant impracticable”. While the language used in s. 184.4 is slightly different than that used by this Court in *Grant* and *Silveira*, the idea remains the same. The police must be left with the ability to determine when the urgency of the circumstances are such that they require action without prior judicial authorization. On a more general level, and as noted in *Feeney*, “it is best not to attempt to define conclusively every possible type of exigent circumstances”.

R. v. Silveira, [1995] 2 S.C.R. 297 at para. 96

R. v. Grant, [1993] 3 S.C.R. 223 at paras. 41, 44

R. v. Feeney, [1997] 2 S.C.R. 213 at para. 68

24. In this case, and its Ontario equivalent in *Riley*, both trial judges concluded that the only way to comply with the requirement of “reasonable diligence” is to ensure that once s.184.4 is being used, the police take all necessary steps to obtain a judicial authorization under Part VI of the *Code* with the least delay possible. Justice Davies insisted that the police “immediately, and ***with the least delay possible*** in the circumstances ... take all steps necessary to obtain a judicial authorization under Part VI of the *Code* [emphasis added]”. In *Riley*, Justice Dambrot put it this way: “the police are compelled to immediately put in motion an effort to obtain judicial authorization with dispatch, ***if that is possible***, or risk being out of compliance with s.184.4 [emphasis added]”. Ontario takes no real issue with how either court emphasized the need for the police to work toward seeking judicial authorization as quickly as possible. What is “possible” will be informed by the unique circumstances of each case.

R. v. Tse et al, Appellant’s Record, Vol. 1, pp.69-70, paras. 165-168

R. v. Riley, [2008] O.J. No. 2887 (Sup. Ct.) [*Riley #1*] at paras. 23, 73

25. Where Ontario does take some issue with the court below (and the *Riley* judgment), is in the comments about how an application for judicial authorization at the earliest opportunity can be made. Unfortunately, these judgments have injected uncertainty into the law respecting how the

⁵Dealing with this concept in the reverse, he held, exigent circumstances “cannot be permitted to operate where it is ***feasible*** to obtain prior judicial authorization for a search [emphasis added]”.

police can go about seeking an authorization at the earliest opportunity. If as a matter of statutory interpretation and constitutional imperative, the police are required to seek an authorization at the earliest *possible* opportunity (something Ontario accepts), then the police require clear guidance on what application process is available. *Tse* intimates that s.188 of the *Code* is available for a 10-minute oral application, while *Riley* suggests it is a lengthier process, operating on the basis of a sworn affidavit, and barely distinguishable from a full-blown s.185 wiretap authorization.

R. v. Tse et al., Appellant's Record, Vol. 1, pp. 70-71 at para. 169, pp. 127-28, para. 330

R. v. Riley, [2008] O.J. 2889 (Sup. Ct.) [*Riley* #2] at paras. 50-51

26. Section 188 of the *Code* permits a specially designated peace officer to seek a 36-hour wiretap authorization from a specially designated judge where the urgency of the situation requires the interception of private communications to commence before an authorization could “with reasonable diligence” be obtained under s.186 of the *Code*. Section 186 is a full-blown, third party wiretap authorization. To suggest that an officer could make an oral application to a designated judge in 10 minutes and establish the grounds for a wiretap authorization, with great respect to the court below, is wholly impractical and unreasonable. While an officer may be able to establish urgency in a matter of 10 minutes, for instance, expressing knowledge that a child has been kidnapped, to establish grounds for a wiretap authorization is another matter. Unless a s.188 judge is to become a rubber stamp for a s.184.4 process already in place, the police need to provide meaningful and properly sourced information. This is not a simple or fast task. Information needs to be gathered, police records need to be explored, suspects need to be assessed, victims need to be checked, friends and family need to be checked, an application and authorization need to be prepared, a designated judge has to be located, and a designated police officer has to be found. After all of that, and the judge and officer get together, an oath has to be administered and the officer must provide the properly sourced grounds for why an authorization, containing all appropriate terms and conditions, should issue. This is not a 10-minute task. In reality, and with respect, 10 minutes would not be sufficient even if the desired effect of s.188 of the *Code* was to rubber stamp the intercepts already underway with s.184.4 of the *Code*.

27. On the other hand, the application process under s.188 should not be so onerous as to effectively neutralize its use. The approach to s.188 in *Riley* has this effect. By demanding an affidavit that addresses all of the criteria under ss. 185 and 186, as Mr. Justice Dambrot would have a s. 188 application made, makes it indistinguishable from a third party wiretap application (other than the absence of a designated Crown agent).

R. v. Moldovan, supra, at para. 61

R. v. Deacon, supra, at para. 109

28. Consistent with the principles of statutory construction reviewed above, s. 188 of the *Code* must be read within its ordinary meaning and the statutory scheme in which it resides. Reading the scheme as a whole, the Parliamentary intent is clear that s.188 was provided as a mechanism to permit quick access by a qualified peace officer, to a qualified judge, familiar with the operative statutory criteria, to achieve judicial oversight as quickly as possible in the circumstances. While it is important that the judicial oversight be based on sourced grounds, lest the process become the equivalent of a delegation of authority, the police cannot and should not be expected to present as complete a picture as the luxury of time may permit on a s.185 application. As such, they have to pull together enough reliable and properly sourced information to permit a designated judicial officer to make a reasonable assessment of the situation and of whether he or she will authorize the interception of private communications that would have already commenced under s.184.4. If a 36-hour authorization issues under s.188, the police are granted further time to prepare an affidavit to present on a full-blown s. 185 application (should the circumstances still require).

29. This Court is respectfully requested to comment on this issue as it has direct application to the meaning of s.184.4 and, in particular, the expectations on police to seek judicial authorization with “reasonable diligence”.

- 184.4 (b) 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 property

30. The court below took objection to the use of the term “unlawful act”. Elsewhere in Part VI the word “offence” is used and it is defined within s.183 with a long list of enumerated offences.

Ontario agrees with British Columbia that there is no need to define “unlawful act” because it is qualified by the notion of causing “serious harm”, another concept that is well understood within this Court’s jurisprudence. As such, tying the use of s.184.4 to an unlawful act that would cause serious harm to a person or property, makes it more inaccessible to the police than were it tied to the definition of “offence” within s.183. There are numerous unlawful acts contained within the definition of “offence” in s.183 that do not result in serious harm. As such, and as noted by Justice Dambrot in *Riley*, “the scope of the unlawful act requirement is sufficiently circumscribed for constitutional purposes by the requirement that the unlawful act would cause serious harm to persons or property”.

R. v. Riley, supra, at para. 21 [*Riley #1*]

R. v. Cuerrier, [1998] 2 S.C.R. 371 at paras. 135-39

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

31. Nonetheless, it should be recognized that in the not-too-distant past, Bills C-31 and C-50 have been introduced and have sought to replace the words “unlawful act” within s.184.4(b) with the word “offence”. Presumably this has been done in response to *Tse*. In the end, nothing much turns on this fact, provided the “serious harm” requirement is not decoupled from the “unlawful act” or “offence”.⁶

Bill C-50, 3rd Session, 40th Parliament, 59 Elizabeth II, 2010

Bill C-31, 2nd Session, 40th Parliament, 57-58 Elizabeth II, 2009

- 184.4 (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”

32. Mr. Justice Davies determined that the only people who can be intercepted under s.184.4 are the perpetrators of the harm (or anticipated harm) or the direct victims or intended victims of the harm. In relation to perpetrators, while he extended s.184.4(c) to parties under ss. 21 and 22 of the *Code*, it could not be used to capture the private communications of anyone other than the direct victim of harm. Mr. Justice Dambrot agreed in *Riley*. This is an overly restrictive interpretation of “victim” and fails to accord with the principles of statutory interpretation.

⁶It is perhaps of passing interest that there are a few offences that result in “serious harm” missing from the s.183 list of designated offences, the most notable being manslaughter.

R. v. Tse et al, Appellant's Record, Vol. 1, pp. 74-75, at paras. 180-85

33. The words “victim, or intended victim, of the harm” must be read against the important purpose for which s.184.4 was enacted. An overly narrow interpretation of the word “victim”, limits the potential effectiveness of s.184.4 and the ultimate goal of protecting the public. Moreover, the word “victim” is not as narrow as the courts below would suggest. Section 2 of the *Criminal Code* provides the following definition: “‘victim’ includes victim of an alleged offence”.

34. The term “victim” can include someone other than the direct subject of harm or intended harm. Section 33(2) of the *Interpretation Act* maintains that words in the singular include the plural and vice versa. Moreover, s. 722(4) of the *Criminal Code* defines the word “victim” for purposes of victim impact statements: victim “means a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence” and, where that person is dead, ill, or otherwise incapable of making a statement, “includes the spouse or common-law partner or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependent of that person”.⁷

R. v. Daley, [2002] N.B.J. No. 433 (Q.B.) at paras. 21-26

R. v. D., [2000] O.J. No. 4850 (Sup. Ct.) at para. 16

R. v. Greenhlagh, 2011 BCSC 511 paras. 24, 33

Interpretation Act, R.S.C., 1970, c. I-23, s.1, s. 33(2)

35. To limit the term “victim” within s.184.4 of the *Code* to the person who is the direct subject of the harm would be inconsistent with the principle of statutory construction that says a statute must be read in context. It would lead to the absurd situation where the parent of a child could not be intercepted in urgent circumstances involving the abduction of that child, in an effort to get the child back alive, but if the child were to be found dead, that same parent could be considered a “victim” for purposes of providing an impact statement under s.722 of the *Code*.⁸ While Parliament was right to limit the category of people who can be intercepted under s.184.4 of the *Code*, the interpretation

⁷Sections 672.5(16) and 745.63(2) latch onto this definition of “victim” as well.

⁸One might argue that by virtue of ss. 280-282 of the *Criminal Code*, that Parliament has specifically recognized parents and guardians as “victims” in these circumstances.

of “victim” should be provided a construction that accords with its definition elsewhere in the *Code* and is consistent with both the purpose of the provision and the constitutional right to be assisted through adequate police efforts when serious harm is threatened.

D. Other Constitutional Failings Raised by the Court Below Are Not Constitutional Failings At All

i. “Peace Officer”

36. It is correct to suggest that the term “peace officer” is afforded an exceptionally broad definition under s.2 of the *Code*. While British Columbia offers examples of where someone other than a police officer may need to resort to s.184.4 of the *Code*, and Ontario agrees, the constitutionality of a legislative scheme (and terms within that scheme) should not be determined in a factual vacuum. In a criminal case, where only police officers resorted to the use of s.184.4, the Court should not be invited to comment on the constitutionality of other peace officers resorting to the provision. It may be that in appropriate circumstances, and with a full factual record, litigants could establish an appropriate and “reasonable” use of the provision by those other than “police officers”. As such, this issue should be left to another day. One thing is for sure, there is no constitutional concern over police officers resorting to the provision. About this there is no dispute on appeal.

Re Same-Sex Marriage, [2004] 3 S.C.R. 698 at paras. 51-52

MacKay v. Manitoba, [1989] 2 S.C.R. 357 at p. 361

ii. Report to Parliament and the Public: Section 195 of the Criminal Code

37. The court below determined that the lack of a requirement that there be a report to Parliament at the end of each year about the use of s.184.4 of the *Code*, undermined both the constitutionality of the provision and failed to require sufficient accountability by the police. The trial judge interpreted s. 195 of the *Code* to mean that a report is prepared at the end of each year by the Solicitor General on the use of all ss. 186 and 188 authorizations.

38. This is an incorrect reading of s.195 of the *Code*. In addition to reporting on ss. 186 and 188 authorizations, by virtue of the combined effect of ss. 487.01(5) and 195, all non-consent video

warrants must also be reported upon. Section 195 requires the Minister of Public Safety and Emergency Preparedness to report to Parliament each year on matters falling under his or her jurisdiction. This constitutes all ss. 186 and 188 matters that are grounded in matters over which the federal government has jurisdiction. (The most frequent would be drug-related matters.) Under s. 195(5), the Attorney General of each province prepares an annual report in relation to ss. 186 and 188 matters over which he or she has jurisdiction. That report is not tabled in Parliament, but must be published or “otherwise [made] available to the public”.

See, for instance, *2009 Annual Report On the Use of Electronic Surveillance*: Ministry of the Attorney General of Ontario.

39. As it relates to the *Charter* finding here, there is no connection between a publicly available report and s.8 of the *Charter*. The purpose of s.8 of the *Charter* is to protect intrusions into personal privacy. Reports at the end of each calendar year have nothing to do with individual *Charter* rights. Moreover, it should be noted that not all wiretapping permitted or authorized under Part VI of the *Criminal Code* must be reported upon. Neither officer life-lines, permitted under s.184.1 of the *Code*, nor one-party consent authorizations pursuant to s.184.2 of the *Code* require a report. Note that s.184.2 was introduced as a direct response to *Duarte*, the very case relied upon by the trial judge to suggest that a report is a constitutional requirement. Whether a report about the exercise of emergency powers is a good idea or not, this is a matter that falls within the strict domain of Parliament and does not raise constitutional concerns.

R. v. Tse et al, Appellant’s Record, Vol. 1, at p. 89, paras. 200, 220-22

R. v. Riley, *supra*, at paras. 106-117 [*Riley #1*]

Hunter v. Southam, *supra*, at p. 160

40. Parliament may well think this is a good idea given that, in the past while, legislation has been twice introduced to add emergency s.184.4 intercepts to the reporting requirements of s.195.

Bill C-50, 3rd Session, 40th Parliament, 59 Elizabeth II, 2010

Bill C-31, 2nd Session, 40th Parliament, 57-58 Elizabeth II, 2009

iii. Notice to Those Intercepted

41. Section 196 of the *Criminal Code* requires that everyone who is an “object” of interception under a s. 186 *Criminal Code* authorization be notified within 90 days after the period of the authorization.⁹ By the combined effect of ss. 487.01(5) and 196, those who are the “object” of a video warrant must also be notified. The trial judge in this case (and the trial judge in *Riley*) determined that the lack of a notification requirement within s.196, as it relates to individuals who have been the subject of an emergency s.184.4 interception, breached s.8.

R. v. Tse et al, Appellant’s Record, Vol. 1, pp. 94-99, paras. 229, 240(6)(a)

R. v. Riley, *supra*, para. 89 [*Riley* #1]

42. The Attorney General of Ontario adopts British Columbia’s submissions as it relates to why the absence of a notice requirement does not engage s.8 concerns.¹⁰ Like the reporting requirements within s.196, while Parliament may have chosen to require notice be given to those intercepted under s.184.4, it is not a constitutional requirement. In terms of a s. 8 privacy analysis, the constitutional right is engaged at the time of interception and not after-the-fact when notice is given. While notice may well be something that people would like to have, it is not something they are constitutionally entitled to.

43. It should be noted, though, that Parliament has previously introduced legislation to make notice a requirement. Moreover, Ontario wishes to acknowledge that outside of the Part VI electronic surveillance scheme, where covert entries and searches of places are authorized under a s.487.01(1) general warrant, notice of the entry and search at some later date must be addressed as a term and condition to the warrant (see s.487.01(5.1)). Nonetheless, this notice provision reflects a parliamentary choice and does not suggest a constitutional right.

Bill C-50, 3rd Session, 40th Parliament, 59 Elizabeth II, 2010

Bill C-31, 2nd Session, 40th Parliament, 57-58 Elizabeth II, 2009

⁹Delay orders can be sought under this provision.

¹⁰See paras. 71-74 Factum of Appellant British Columbia.

E. Section 1 of the *Charter*

44. If this Court determines that s.184.4 breaches s.8 of the *Charter*, while acknowledging the exceptionally rare circumstances in which it could still be found to be justified under s.1, Ontario relies on British Columbia's submissions in this regard.

F. In the Alternative, What is the Remedy That Should Be Imposed?

45. As tempting as it may be to ask for a reading down and into the provision, depending on any breach that may be found, Ontario takes the position that should this Court conclude that an aspect of s.184.4 is unconstitutional and not saved by s.1, then the appropriate remedy is to suspend the declaration of invalidity for twelve months.

Schachter v. Canada, [1992] 2 S.C.R. 679 at p. 695, 706

46. Part VI of the *Criminal Code* is complex and inter-related. A tweak to one provision, may have an impact on another. Seemingly small changes may have profound implications for Attorneys General, law enforcement, and the courts. One example suffices. Were this Court to read into s.196 a notice provision, depending on how it was done, it would require administrative changes. The responsibility for s. 196 notice, in provincial matters, falls to the Attorneys General. Right now, the Attorneys General know who to notify because a designated Crown agent is involved in applications for authorizations that require notification (ss. 186 and 487.01(5) matters). An emergency wiretap under s.184.4 of the *Code* does not contemplate a role for the Attorney General. While it is good police practice, informed by protocol in some provinces, to seek the advice of Crown Counsel before or while invoking powers under s.184.4, there is no statutory requirement for the involvement of a Crown agent. As such, while Ontario would take no objection to effecting such notice should it be constitutionally required,¹¹ it is a matter that would benefit from consultation between the federal government, provincial Attorneys General and police.

47. Moreover, s.2 of the *Criminal Code*, *Protection of Privacy Regulations* would be directly impacted by any alteration to s.196 of the *Criminal Code*. Currently, that provision requires that an Attorney General who gives notice under s.196 "shall certify to the court that issued the

¹¹In Ontario, steps have already been taken to comply with the *Riley* judgment.

authorization that such notice was given by filing” with the court. Were this Court to determine that notice is required, thought would have to be given to this provision as well.

Criminal Code, Protection of Privacy Regulations, C.R.C., c.440, s.2.

48. This is one example of the complexities involved in any changes to the legislation. As such, should this Court conclude that any part of s.184.4 suffers from constitutional difficulties, it is requested that it suspend the declaration of constitutional invalidity for a period of a year.

PART IV: SUBMISSIONS ON COSTS

49. The Attorney General of Ontario makes no submissions as to costs.

PART V: ORDER REQUESTED

50. The Attorney General of Ontario respectfully submits that this Court find that s.184.4 of the *Criminal Code* is not void for vagueness, not overbroad, and is constitutional. In the alternative, if any constitutional difficulty is determined, Ontario requests that the declaration of invalidity be suspended for twelve months.

ALL OF WHICH is respectfully submitted by

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PART VII: STATUTORY PROVISIONS

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