

**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-

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PART I – OVERVIEW AND CONCISE STATEMENT OF THE FACTS

1. This appeal raises questions about the constitutional safeguards necessary to tolerate the use of warrantless wiretap surveillance. In *R. v. Duarte*, La Forest J. explained the danger to our civil liberties occasioned by permitting the State to surreptitiously intercept and record private communications without proper safeguards:

The regulation of electronic surveillance protects us from ... the ... insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words. ... The reason for this protection is the realization that if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private.¹

2. Section 184.4 of the *Criminal Code* authorizes a very broad group of persons to perform highly invasive warrantless searches, to prevent a nebulous class of offences, without any form of accountability, either by judicial oversight or subsequent notice to the target.

3. Every court that has considered the constitutionality of s. 184.4 has found it to be invalid as drafted. Courts have differed primarily as to whether the defects are so serious that the appropriate remedy is to strike down the section² rather than to read in missing safeguards.³

4. The CCLA will argue:

- (a) that s. 184.4 of the *Criminal Code* does not sufficiently limit the circumstances in which warrantless wiretaps are available because:
 - (i) the expression “immediate necessity” is too vague; warrantless wiretaps should be permitted only in cases of “last resort necessity”;
 - (ii) 184.4 fails to require that the consent of one party should always be sought when practicable;
 - (iii) warrantless wiretaps should only be used to monitor conversations between direct victims and offenders; and

¹ *R. v. Sanelli (sub nom. R. v. Duarte)*, [1990] 1 S.C.R. 30, at paras. 21-22, per LaForest J.

² As in British Columbia and Quebec: *R. v. Tse*, 2008 BCSC 211; *R. v. Hernandez*, 2008 BCSC 1475; *R. v. Sipes*, 2009 BCSC 285; *R. v. Brais*, 2009 QCCS 1212.

³ As in Ontario: *R. v. Riley* (2008), 234 C.C.C. (3d) 181 (S.C.J.); *R. v. Deacon*, [2008] O.J. No. 5756 (S.C.J.), *R. v. Moldovan*, 2009 CarswellOnt 6468 (S.C.J.).

- (iv) s. 184.4 fails to require that warrantless wiretaps only be used to prevent serious harm to persons, as opposed to harm to property, and fails to appropriately limit the persons who may use warrantless wiretaps;
 - (b) that s. 184.4 is constitutionally deficient in that it does not contain any after the fact notice requirement and any requirement of subsequent judicial oversight; and
 - (c) that in light of the foregoing serious constitutional deficiencies, s. 184.4 of the *Criminal Code* must be struck down.
5. The CCLA accepts the facts as found by the learned trial judge.

PART II – ISSUES

6. The CCLA will limit its submissions to issue “d”, as set out at p. 10 of the Appellant’s Factum: whether s. 184.4 violates s. 8 of the *Charter*. The CCLA adopts the reasoning in the court below as to s. 1 of the *Charter* and therefore will not repeat that analysis in this Factum.

PART III - ARGUMENT

ISSUE #1: SECTION 184.4 DOES NOT SUFFICIENTLY LIMIT THE CIRCUMSTANCES IN WHICH WARRANTLESS WIRETAPS ARE AVAILABLE

A. Warrantless wiretaps must be used only as a last resort

7. Section 184.4(b) provides that warrantless wiretaps must be “immediately necessary”. The CCLA respectfully submits that an explicit requirement of “last resort” necessity is constitutionally required in the case of a warrantless wiretap. Specifically, “last resort” necessity requires that the police consider and exhaust all reasonably available less invasive measures before taking this extraordinary step.

8. “Last resort necessity” is similar to “investigative necessity”, which is required for wiretap warrants under s. 186 of the *Criminal Code*. Specifically, both standards require the police to consider and exhaust all reasonably available alternatives. However, “last resort necessity” differs from “investigative necessity” in that the latter focuses on whether the wiretap is necessary *for the purposes of the police investigation* whereas that former focuses on whether the warrantless wiretap *is necessary to prevent serious harm*. Thus, although similarly strict, these two standards are not identical.

9. The CCLA submits that that a standard of last resort is the appropriate requirement for so serious an invasion of privacy as a warrantless wiretap, especially when one has regard to

the following important factors:

- (a) “investigative necessity” is constitutionally mandated for judicially authorized wiretaps pursuant to s. 186.1. *A fortiori* a similarly strict standard should be required for warrantless wiretaps pursuant to s. 184.4;
- (b) a requirement of last resort necessity is consistent with the English approach and with the American legislation out of which s.184.4 arose; and
- (c) requiring last resort necessity effectively reconciles expediency and privacy without impairing police officers’ ability to respond.

(a) Investigative necessity is required for wiretap warrants

10. This Court has suggested that “investigative necessity” is a constitutional minimum to justify a wiretap warrant. In *R. v. Araujo*, LeBel J. held that “... the investigative necessity requirement embodied in s.186(1) is one of the safeguards that made it possible for this Court to uphold those parts of the Criminal Code on constitutional grounds.”⁴ In reaching this conclusion, LeBel J. rejected the lesser standard of authorizing wiretaps where they are “most efficacious”, because that approach “has the potential to subvert the safeguards of privacy interests that are an essential component of the regulation of wiretapping in the Criminal Code.”⁵ Not only did this approach stray from the provisions of s. 186(1), it also struck at the privacy rights that this section protects, and “would rightly send a chill down the spine of every freedom-loving Canadian.”⁶ Subsequently, in *obiter* in *R. v. B. (S.A.)*, Arbour J. affirmed the constitutional requirement of investigative necessity in the context of wiretap authorizations under s. 186.⁷

11. The CCLA submits that the 9-0 decisions of this Court in *Araujo* and *B. (S.A.)* supersede the decision of Sopinka J. in *R. v. Garofoli* insofar as he expressed a different view of the constitutional minimums for the authorization of a wiretap.⁸ Sopinka J. suggested that what is now s. 186(1)(a) codified the full extent of the constitutionally mandated safeguards, namely that “it would be in the interests of the administration of justice” to issue the authorization. However, Sopinka J.’s conclusion immediately follows his approving reference to a passage in Justice La Forest’s reasons in *Duarte*, in which the latter describes how both ss. 186(1)(a)

⁴ *R. v. Araujo*, [2000] S.C.R. 992, at para. 26, per LeBel J.

⁵ *Id.*, at para. 38.

⁶ *Id.*, at para. 39.

⁷ *R. v. B. (S.A.)*, [2003] 2 S.C.R. 678, at paras. 53-54, per Arbour J.

⁸ *R. v. Garofoli*, [1990] 2 SCR 1421, at p. 1443-1445, per Sopinka J.

and (b) (the latter of which contains the requirement of investigative necessity) contribute to the constitutionality of a wiretap authorization.

12. Indeed, it is instructive that, in the context of other highly sensitive and intrusive searches, like searches of press and law offices, this Court has emphasized that such searches may be conducted only where they are “a necessity of last resort”.⁹

13. The CCLA notes that, in a substantially different context, some courts have decided that last resort necessity is not a constitutional requirement for a wiretap. These decisions were summarized and explained by the New Brunswick Court of Appeal in *R. v. Doiron*.¹⁰ In that case, Deschênes J.A. upheld the constitutionality of s. 186(1.1), which provides an exception to the general requirement of showing the investigative necessity of a wiretap under s. 186 for certain offences, such as organized crime and terrorism offences. The CCLA respectfully submits that the courts in *Doiron* and its predecessors misinterpreted *Araujo, B.(S.A.)*, and the other jurisprudence upon which they relied, resulting in incorrect decisions.¹¹

14. Moreover, it must be remembered that s. 186(1.1), like s. 186, concerns wiretaps *with judicial preauthorization*. Judicial preauthorization is a formidable safeguard.¹² that is obviously missing in the context of a warrantless wiretap. Accordingly, it is all the more important that the remaining safeguards be sufficiently robust.

15. If investigative necessity (which includes a “last resort” component) is a constitutional minimum *when seeking a wiretap authorization* then, *a fortiori*, something akin thereto must be required for warrantless wiretaps.

(b) Persuasive English and US cases require last resort necessity for warrantless wiretaps

16. *Araujo* mirrors the English and American authorities. Both the Birkett Commission’s report of 1957 and Lord Diplock’s report of 1981 expressly adopted a standard of last resort necessity for wiretap authorizations.¹³ The Supreme Court of the United States adopted last

⁹ *R. v. National Post*, 2010 SCC 16, at para. 87, per Binnie J. See also *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C.S.C.).

¹⁰ *R. v. Doiron*, 2007 NBCA 41, at paras. 34-43, per Deschênes J.A., leave to appeal to S.C.C. ref’d, 2007 CarswellNB 586 (S.C.C.); see also *R. v. Doucet*, 2003 CanLII 33399 (QC C.S.), per Levesque J.C.S., *R. v. Pangman (W.G.) et al.*, 2000 MBQB 85 (CanLII) (rendered before *Araujo*).

¹¹ See N.J. Whitling, “Wiretapping, Investigative Necessity, and the Charter”, 46 *Crim. L.Q.* 89 (2002).

¹² *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 160, per Dickson J., as he then was.

¹³ Rt. Hon. Lord Diplock, “The Interception of Communications in Great Britain” Cmnd 7873; “Report of the

resort necessity as a constitutional requirement when interpreting Title III of the *Omnibus Control and Safe Streets Act of 1968*, upon which the wiretap provisions of Part VI.1 of the Canadian *Criminal Code* are based.¹⁴ Indeed, LeBel J. noted in *Araujo* that the U.S. had adopted investigative necessity as requirement for compliance with the Fourth Amendment.¹⁵ These authorities are very helpfully summarized and analyzed in N.J. Whitling's article titled "Wiretapping, Investigative Necessity, and the Charter".¹⁶

(c) *Last resort necessity appropriately reconciles expediency and privacy*

17. Requiring the police to consider and exhaust reasonably available less intrusive alternatives serves not only to protect the rights of the targets, but also the rights of innocent third parties, whose communications may be intercepted by a warrantless wiretap.

18. In *R. v. Thompson*, this Court held that the harmful effect on third parties rendered a wiretap unconstitutional under s. 8. In that case, the police eavesdropped on public payphones used by both the accused and the public. Sopinka J stressed that these members of the public were entitled to *Charter* protection:

... the extent of invasion into the privacy of these third parties is constitutionally relevant to the issue of whether there has been an "unreasonable" search or seizure. To hold otherwise would be to ignore the purpose of s. 8 of the *Charter* which is to restrain invasion of privacy within reasonable limits. A potentially massive invasion of the privacy of persons not involved in the activity being investigated cannot be ignored simply because it is not brought to the attention of the court by one of those persons. Since those persons are unlikely to know of the invasion of their privacy, such invasions would escape scrutiny, and s. 8 would not fulfill its purpose.¹⁷

19. Sopinka J. recognized that "in some cases the possibility of invasion of privacy of innocent persons may become so great that it requires explicit recognition along with the interests of the investigation of crime."¹⁸

20. In his 1981 Report, Lord Diplock reasoned that last resort necessity is required to protect the innocent third parties whose privacy will necessarily be infringed by wiretaps:

Committee of Privy Councillors appointed to inquire into the interception of communications", Cmnd. 283, as cited in Whitling, *infra* note 16 at p. 91.

¹⁴ *Berger v. New York*, 388 U.S. 41 (1967), *Katz v. United States*, 29. 389 U.S. 347 (1967), as cited in Whitling, *infra* note 16 at p. 97.

¹⁵ *Araujo*, *supra* note 4, at para. 32.

¹⁶ N.J. Whitling, "Wiretapping, Investigative Necessity, and the Charter", 46 *Crim. L.Q.* 89 (2002).

¹⁷ *R. v. Thompson*, [1990] 2 SCR 1111 at p. 1143. See also *R. v. Edwards*, [1996] 1 SCR 128 at para. 39.

¹⁸ *Thompson*, *supra* note 17 at p. 1144.

Communication, however, is a two-way traffic. If the correspondence of the criminal or wrong-doer is to be examined or what he says over the telephone is to be overheard, it is unavoidable that some letters to and from innocent correspondents and some conversations with innocent telephone callers dealing with their private affairs may be disclosed to the authority on whose behalf the interception was made. This is why the policy for the last 30 years at least has been that recourse to the interception of postal or telephone communications as a means of obtaining information should be had only as a last resort.¹⁹

21. Consistent with these principles, the CCLA submits that, in articulating the minimum standards of warrantless wiretaps, this Court should require police to consider reasonably available alternatives that are less invasive, not just of the privacy interests of the parties, but also of the privacy interests of relevant third parties.

22. Furthermore, a requirement of last resort necessity only requires that the police consider whether effective less intrusive alternatives are *reasonably* available. The last resort standard will not block access to warrantless wiretaps in cases of true exigency.

B. The target's consent must be sought where practicable

23. As is clear from La Forest J.'s decision in *Duarte*, the potential for abuse is particularly present where a wiretap is used to intercept private conversations in a completely surreptitious manner – ie, where neither party to the conversation is aware that the state is listening. This concern is attenuated if one of the parties is aware that the conversation is being intercepted and consents. In certain circumstances, for example if the target is a third party and is cooperative, there may be no reason whatsoever why his or her consent could not be obtained. Indeed, the facts of the case at bar provide an excellent example.

24. As Davies J. recognized, “a one party consent authorization might have been more readily and expeditiously available than an authorization under s. 188 or s. 186 of the *Code*”.²⁰ Yet, in the case at bar, the police did not consider the possibility of obtaining the consent of the persons who were wiretapped. This case provides a good example of why it should be mandatory for the police to consider obtaining consent, and to attempt to do so, *where practicable*.

¹⁹ Rt. Hon. Lord Diplock, “The Interception of Communications in Great Britain” Cmnd 7873, at pp. 3-4, reproduced in Whitling, *supra* note 16 at p. 96 [emphasis added].

²⁰ Para. 307.

C. Warrantless wiretaps cannot be used to intercept purely third party calls

25. Courts have been unanimous in rejecting the Appellant's argument²¹ that the word "victim" in s. 184.4(c) should be read broadly to authorize the wiretapping of persons who are only indirectly affected by the harmful activity, such as family members who may be traumatized. As Dambrot J. held in *Riley*:

I agree with Davies J. that the word victim must be read narrowly. It does not, for example, include those, such as family members, who might be psychologically harmed by physical harm done to the direct victim, although in another context such a broad reading might be appropriate.²²

26. In *R. v. Deacon*, Trafford J. reached the same conclusion²³ as did the Court in *Moldovan*, albeit in *obiter*.²⁴

27. This interpretation of s. 184.4(c) is consistent with both the principles of statutory interpretation and with the requirements of s. 8 of the *Charter*. To read the section as suggested by the Crown would substantially widen the ambit of what is supposed to be a very narrow and exceptional warrantless interception power. Moreover, it would leave to the discretion of the police, without judicial oversight, the call as to who counts as a "victim", without providing the police with a clear and workable definition of same. The potential for abuse is manifest.

28. Section 184.4 authorizes the interception of communications only where one of the parties is the victim or the alleged perpetrator of the offence. In turn, communications to third parties may be intercepted (1) only where there are reasonable grounds to believe that the third party will receive a communication from either the victim or the perpetrator, and (2) only where the victim or the perpetrator is a party to the call that is intercepted.

D. Warrantless wiretaps may be used only by the police, and only to prevent serious harm to persons

29. The CCLA submits that warrantless wiretaps can only be reasonable where they are necessary to prevent serious harm to persons, not merely harm to property. In this regard, the CCLA argues for a more restrictive approach than that taken in the court below.

²¹ See Appellant's Factum, para. 46.

²² *Riley*, *supra* note 3 at para. 29.

²³ *Deacon*, *supra* note 3, at para. 93.

²⁴ *Moldovan*, *supra* note 3, at para. 142.

30. Davies J. interpreted the term “unlawful act” as it is used in s. 184.4 to mean the list of offences in s. 183 for which any interceptions under Part VI of the *Criminal Code* may be authorized. However, s. 183 contains a number of offences, such as mischief and unlawful possession of a tobacco product, to take but two examples, which cannot justify so serious a breach of the reasonable expectation of privacy. To the extent that s. 184.4 permits wiretaps for offences with so little potential for serious harm, it leaves too much discretion in the hands of the police and does not contain the prophylactic safeguards required by s. 8 of the *Charter*.

31. Furthermore, s. 184.4 authorizes an unreasonable search to the extent that it permits wiretapping to prevent serious harm to property rather than persons. The CCLA submits that s. 184.4 cannot be invoked to prevent offences like possession of counterfeit money, secret commissions, forgery, or theft from mail, all of which appear in s. 183, and all of which endanger only property. So serious an infringement of the reasonable expectation of privacy cannot be justified to prevent crimes to property.

32. With regard to the range of persons who may initiate warrantless wiretaps, the CCLA submits that this decision is properly made only by persons generally tasked with the prevention of serious harm to persons, and not by “peace officers” broadly defined. As Dambrot J. found in *Riley*:

Parliament took a short cut in defining who could use the section by simply relying on the definition of peace officer in s.2. As a consequence, Parliament ran the risk of distorting the narrow circumstances in which the provision may be used — a core aspect of what otherwise may be used to justify this extraordinary power. For example, while there are historical reasons for the definition of peace officer to include mayors and reeves, and practical reasons for it to include pilots and bailiffs, there can be no reason to authorize any of them to use s.184.4.²⁵

33. The CCLA respectfully submits that the foregoing deficiencies alone suffice to justify the conclusion that s. 184.4 of the *Criminal Code* violates s. 8 of the *Charter*. In addition to these deficiencies, however, the CCLA also submits that s. 184.4 is constitutionally deficient by reason of the complete absence of any requirement of after the fact notice to targets and of any kind of judicial oversight.

²⁵ *Riley*, *supra* note 3, at para. 44.

ISSUE #2: SECTION 184.4 CONTAINS NO NOTICE REQUIREMENT AND NO REQUIREMENT OF JUDICIAL OVERSIGHT

34. The CCLA submits that Davies J. correctly concluded that the lack of an *ex post facto* notice requirement in s. 184.4 is unconstitutional. As Dambrot J. explained in *Riley*:

Absent this requirement, and absent notice under s.189, targets of interception would not likely know that their privacy had been invaded, and would have no opportunity to attempt to vindicate their rights if the wiretapping was not lawful. In the case of an accused, this might mean that he or she was unaware that there was exculpatory evidence in existence, although the Crown's disclosure obligations should preclude this from happening. In the case of a person who is not charged with an offence, it may be that an action for damages for unlawful interception of private communications, or an application for a remedy pursuant to s. 24(1) of the *Charter* is available to them. Alternatively, they may wish to seek the destruction of any recording of their intercepted private communications.²⁶

35. Without notice to the target, where practicable, there is no guarantee of accountability on the part of the police. Persons affected by such a wiretap may never know of its existence. In turn, we risk the sort of society that La Forest J. sought to avoid in *Duarte*. In *Riley*, Dambrot J. read into s. 184.4 the notice requirements of s. 196, finding that “[w]ith respect to s.184.4, it is a safe assumption that if Parliament had been aware that it was necessary to enact a notice provision in order for the present s.184.4 to be constitutional, it would have done so. It is also a fair inference that if Parliament had enacted a notice provision for s.184.4, that provision would have resembled s.196.”²⁷

36. The CCLA submits that s. 196 provides a pragmatic approach to the giving of notice. This section requires that notice be given in writing to persons affected by a wiretap within 90 days after the wiretap authorization, subject to certain extensions to protect the integrity of the investigation. The CCLA submits that this sort of notice regime is a constitutional minimum.

37. The CCLA further submits that the judiciary must also play an important supervisory role. Accordingly, within a reasonable time after a warrantless wiretap has been executed, the police should be required to bring any intercepted communications, together with the evidence relied upon to justify the warrantless wiretap, to a judge or justice for an *ex post facto* review of whether the interceptions complied with s. 184.4. Upon a finding of failure to comply with s. 184.4, the police would be obliged to immediately destroy any records of the

²⁶ *Riley*, *supra* note 3, at para. 84.

²⁷ *Id.*, at para. 93.

intercepted communications. Such minimal judicial supervision would not prohibit the police from responding in emergency situations. The impossibility of judicial *preauthorization* should not be an excuse to eliminate judicial review entirely.

ISSUE #3: SECTION 184.4 MUST BE STRUCK DOWN

38. Section 184.4 must be struck down, rather than reinterpreted with provisions read in. In *Schachter v. Canada* Lamer C.J. explained that severance or reading in will only be possible in the “clearest cases”, in which the legislative intent is obvious, the extent of the intrusion into the legislative domain would be acceptable, and the cost of the scheme would not be significantly altered.²⁸

39. In *Riley*, Dambrot J. found that the constitutional defects in s. 184.4 were limited to the lack of a notice provision.²⁹ On this basis, he was able to read in rather than strike down. However, the constitutional defects identified by the CCLA are so numerous and serious that it is impossible to determine the means that Parliament would use to comply with the requirements of s. 8. More than mere tinkering is required. Accordingly, the provision should be struck down. In addition, society has an interest in clarity and transparency in legislative provisions particularly in a criminal context. A suspended declaration of invalidity would allow proper modifications to be brought to the provision.

PARTS IV & V – COSTS AND ORDER SOUGHT

40. The CCLA does not seek costs, requests that no costs be awarded against it. The CCLA respectfully submits that the appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of October, 2011.

Christopher A. Wayland per Michael Rosent
Christopher A. Wayland


H. Michael Rosenberg
Counsel for the Intervener, CCLA

²⁸ *Schachter v. Canada*, [1992] 2 S.C.R. 679, at 718-19, per Lamer C.J.

²⁹ *Riley*, *supra* note 3, at para. 93.

<i>R. v. Thompson</i> , [1990] 2 SCR 1111	18 and 19
<i>Re Pacific Press Ltd. and The Queen</i> (1977), 37 C.C.C. (2d) 487 (B.C.S.C.)	12
<i>Schachter v. Canada</i> , [1992] 2 S.C.R. 679	38

Government Reports

"Report of the Committee of Privy Councillors appointed to inquire into the interception of communications", Cmnd. 283	16
Rt. Hon. Lord Diplock, "The Interception of Communications in Great Britain" Cmnd 7873	16

Academic Articles

N.J. Whitling, "Wiretapping, Investigative Necessity, and the Charter", 46 <i>Crim. L.Q.</i> 89 (2002).	13 and 16
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PART VII – STATUTES

Criminal Code, R.S.C., 1985, c. C-46

Interception with consent

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

Application for authorization

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

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

Judge to be satisfied

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

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

Content and limitation of authorization

(4) An authorization given under this section shall

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

1993, c. 40, s. 4.

Interception in exceptional circumstances

184.4 A peace officer may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication 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.

1993, c. 40, s. 4.

185. (1) An application for an authorization to be given under section 186 shall be made ex parte and in writing to a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 and shall be signed by the Attorney General of the province in which the application is made or the Minister of Public Safety and Emergency Preparedness or an agent specially designated in writing for the purposes of this section by

- (a) the Minister personally or the Deputy Minister of Public Safety and Emergency Preparedness personally, if the offence under investigation is one in respect of which proceedings, if

any, may be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or

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

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

- (c) the facts relied on to justify the belief that an authorization should be given together with particulars of the offence,
- (d) the type of private communication proposed to be intercepted,
- (e) the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence, a general description of the nature and location of the place, if known, at which private communications are proposed to be intercepted and a general description of the manner of interception proposed to be used,
- (f) the number of instances, if any, on which an application has been made under this section in relation to the offence and a person named in the affidavit pursuant to paragraph (e) and on which the application was withdrawn or no authorization was given, the date on which each application was made and the name of the judge to whom each application was made,
- (g) the period for which the authorization is requested, and
- (h) whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

Exception for criminal organizations and terrorist groups

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

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

Extension of period for notification

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

Where extension to be granted

- (3) Where an application for an authorization is accompanied by an application referred to in subsection (2), the judge to whom the applications are made shall first consider the application referred to in subsection (2) and where, on the basis of the affidavit in support of the application for the authorization and any other affidavit evidence submitted in support of the application referred to in subsection (2), the judge is of the opinion that the interests of justice warrant the granting of the application, he shall fix a period, not exceeding three years, in substitution for the period mentioned in subsection 196(1).

Where extension not granted

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

R.S., 1985, c. C-46, s. 185; 1993, c. 40, s. 5; 1997, c. 18, s. 8, c. 23, s. 4; 2001, c. 32, s. 5, c. 41, ss. 6, 133; 2005, c. 10, ss. 22, 34.

Judge to be satisfied

186. (1) An authorization under this section may be given if the judge to whom the application is made is satisfied

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

Exception for criminal organizations and terrorism offences

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

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

Where authorization not to be given

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

Terms and conditions

- (3) Where an authorization is given in relation to the interception of private communications at a place described in subsection (2), the judge by whom the authorization is given shall include therein such terms and conditions as he considers advisable to protect privileged communications between solicitors and clients.

Content and limitation of authorization

- (4) An authorization shall

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

Persons designated

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

Installation and removal of device

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

Removal after expiry of authorization

- (5.2) On an ex parte application, in writing, supported by affidavit, the judge who gave an authorization referred to in subsection (5.1) or any other judge having jurisdiction to give such an authorization may give a further authorization for the covert removal of the electro-magnetic, acoustic, mechanical or other device after the expiry of the original authorization
- (a) under any terms or conditions that the judge considers advisable in the public interest; and
- (b) during any specified period of not more than sixty days.

Renewal of authorization

- (6) Renewals of an authorization may be given by a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 on receipt by him or her of an ex parte application in writing signed by the Attorney General of the province in which the application is made or the Minister of Public Safety and Emergency Preparedness — or an agent specially designated in writing for the purposes of section 185 by the Minister or the Attorney General, as the case may be — accompanied by an affidavit of a peace officer or public officer deposing to the following matters:
- (a) the reason and period for which the renewal is required,
- (b) full particulars, together with times and dates, when interceptions, if any, were made or attempted under the authorization, and any information that has been obtained by any interception, and
- (c) the number of instances, if any, on which, to the knowledge and belief of the deponent, an application has been made under this subsection in relation to the same authorization and on which the application was withdrawn or no renewal was given, the date on which each application was made and the name of the judge to whom each application was made,

and supported by such other information as the judge may require.

Renewal

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

R.S., 1985, c. C-46, s. 186;1993, c. 40, s. 6;1997, c. 23, s. 5;1999, c. 5, s. 5;2001, c. 32, s. 6, c. 41, ss. 6.1, 133;2005, c. 10, ss. 23, 34.

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

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

(b) the Attorney General of a province, in respect of any other offence in the province,

if the urgency of the situation requires interception of private communications to commence before an authorization could, with reasonable diligence, be obtained under section 186.

Authorizations in emergency

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

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

Definition of "Chief Justice"

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

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

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

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

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

(e) in the Provinces of Prince Edward Island and Newfoundland, the Chief Justice of the Supreme Court, Trial Division; and

(f) in Yukon, the Northwest Territories and Nunavut, the senior judge within the meaning of subsection 22(3) of the Judges Act.

Inadmissibility of evidence

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

R.S., 1985, c. C-46, s. 188; R.S., 1985, c. 27 (1st Supp.), ss. 25, 185(F), c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 10; 1992, c. 1, s. 58, c. 51, s. 35; 1993, c. 40, s. 8; 1999, c. 3, s. 28; 2002, c. 7, s. 140; 2005, c. 10, s. 34.

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 shall, within 90 days after the period for which the authorization was given or renewed or within such other period as is fixed pursuant to subsection 185(3) or subsection (3) of this section, notify in writing the person who was the object of the interception pursuant to the authorization and shall, in a manner prescribed by regulations made by the Governor in Council, certify to the court that gave the authorization that the person has been so notified.

Extension of period for notification

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

Where extension to be granted

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

- (a) the investigation of the offence to which the authorization relates, or
- (b) a subsequent investigation of an offence listed in section 183 commenced as a result of information obtained from the investigation referred to in paragraph (a),

is continuing and is of the opinion that the interests of justice warrant the granting of the application, the judge shall grant an extension, or a subsequent extension, of the period, each extension not to exceed three years.

Application to be accompanied by affidavit

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

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

Exception for criminal organizations and terrorist groups

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

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

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

R.S., 1985, c. C-46, s. 196; R.S., 1985, c. 27 (1st Supp.), s. 28; 1993, c. 40, s. 14; 1997, c. 23, s. 7; 2001, c. 32, s. 8, c. 41, ss. 8, 133; 2005, c. 10, s. 25.

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,
THE CRIMINAL LAWYERS' ASSOCIATION
(ONTARIO), THE BRITISH COLUMBIA
CIVIL LIBERTIES ASSOCIATION, THE
CANADIAN CIVIL LIBERTIES
ASSOCIATION

Interveners

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