



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Tse, 2012 SCC 16

**DATE:** 20120413

**DOCKET:** 33751

**BETWEEN:**

**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 -

**Attorney General of Canada, Attorney General of Ontario,**

**Attorney General of Quebec, Criminal Lawyers' Association (Ontario),**

**British Columbia Civil Liberties Association and**

**Canadian Civil Liberties Association**

Intervenors

**CORAM:** McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 103):

Moldaver and Karakatsanis JJ. (McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Cromwell JJ. concurring)

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R. v. TSE

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*Appellant*

v.

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Nhan Trong Ly,  
Viet Bac Nguyen,  
Huong Dac Doan,  
Daniel Luis Soux and  
Myles Alexander Vandrick**

*Respondents*

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**Indexed as: R. v. Tse**

**2012 SCC 16**

File No.: 33751.

2011: November 18; 2012: April 13.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA

*Constitutional law — Charter of Rights — Search and seizure — Interception of private communications — Police intercepting communications without authorization pursuant to s. 184.4 of Criminal Code on grounds interceptions were immediately necessary to prevent serious harm to person or property and judicial authorization not available with reasonable diligence — Whether s. 184.4 contravenes right to be free from unreasonable search and seizure pursuant to s. 8 of the Charter — Whether provision saved under s. 1 — Canadian Charter of Rights and Freedoms, ss. 1 and 8 — Criminal Code, R.S.C. 1985, c. C-46, ss. 184.4, 185, 186 and 188.*

This appeal concerns the constitutionality of the emergency wiretap provision, s. 184.4 of the *Criminal Code*. In this case, the police used s. 184.4 to carry out unauthorized warrantless interceptions of private communications when the daughter of an alleged kidnapping victim began receiving calls from her father stating that he was being held for ransom. Approximately 24 hours later, the police obtained a judicial authorization for continued interceptions, pursuant to s. 186 of the *Code*. The trial judge found that s. 184.4 contravened the right to be free from unreasonable search or seizure under s. 8 of the *Charter* and that it was not a reasonable limit under

s. 1. The Crown has appealed the declaration of unconstitutionality directly to this Court.

*Held:* The appeal should be dismissed.

Section 184.4 permits a peace officer to intercept certain private communications, without prior judicial authorization, if the officer believes on reasonable grounds that the interception is immediately necessary to prevent an unlawful act that would cause serious harm, provided judicial authorization could not be obtained with reasonable diligence. In principle, Parliament may craft such a narrow emergency wiretap authority for exigent circumstances. The more difficult question is whether the particular power enacted in s. 184.4 strikes a reasonable balance between an individual's right to be free from unreasonable searches or seizures and society's interest in preventing serious harm. To the extent that the power to intercept private communications without judicial authorization is available only in exigent circumstances to prevent serious harm, this section strikes an appropriate balance. However, s. 184.4 violates s. 8 of the *Charter* as it does not provide a mechanism for oversight, and more particularly, notice to persons whose private communications have been intercepted. This breach cannot be saved under s. 1 of the *Charter*.

The language of s. 184.4 is sufficiently flexible to provide for different urgent circumstances that may arise, and it is far from vague when properly construed. While it is the only wiretapping power that does not require either the

consent of one of the parties to the communication or judicial pre-authorization, a number of conditions and constraints are embedded in the language of s. 184.4 that ensure that the power to intercept private communications without judicial authorization is available only in exigent circumstances to prevent serious harm. Police officers may only use this authority if they believe “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”. Each of these requirements provides a legal restriction on the use of s. 184.4. The provision imports an objective standard — credibly based probability for each of the requirements. The conditions incorporate implicit and strict temporal limitations and the onus rests with the Crown to show, on balance, that the conditions have been met. As time goes by it may be more difficult to satisfy the requirement that an authorization could not have been obtained with reasonable diligence, the situation is urgent or it is immediately necessary to prevent serious harm.

Section 188 provides a streamlined process for obtaining a temporary authorization in circumstances of urgency that can be accessed expeditiously with a view to limiting within reason, the length of time that unauthorized interceptions under s. 184.4 may lawfully be continued. It 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 188 should be construed in a manner that promotes an efficient and expeditious result and effective judicial oversight. Section 188 applications, which are designed to provide short-term judicial authorization in urgent circumstances may be conducted orally as this would expedite the process and further Parliament's objective in enacting the provision. Even though applications may be conducted orally and are less cumbersome and labour-intensive than written applications, they still take time, so the need for unauthorized emergency interceptions under s. 184.4 remains.

Section 184.4 recognizes that on occasion, the privacy interests of some may have to yield temporarily for the greater good of society — here, the protection of lives and property from harm that is both serious and imminent. The stringent conditions Parliament has imposed to ensure that the provision is only used in exigent circumstances, effect an appropriate balance between an individual's reasonable expectation of privacy and society's interest in preventing serious harm. To that extent, s. 184.4 passes constitutional muster. In its present form however, s. 184.4 contains no accountability measures to permit oversight of the police use of the power. It does not require that "after the fact" notice be given to persons whose private communications have been intercepted. Unless a criminal prosecution results, the targets of the wiretapping may never learn of the interceptions and will be unable to challenge police use of this power. There is no other measure in the *Code* to ensure specific oversight of the use of s. 184.4. In its present form, the provision fails to meet the minimum constitutional standards of s. 8 of the *Charter*. An

accountability mechanism is necessary to protect the important privacy interests at stake and a notice provision would adequately meet that need, although Parliament may choose an alternative measure for providing accountability. The lack of notice requirement or some other satisfactory substitute renders s. 184.4 constitutionally infirm. In the absence of a proper record, the issue of whether the use of the section by peace officers, other than police officers, renders this section overbroad is not addressed.

The objective of preventing serious harm to persons or property in exigent circumstances is pressing and substantial and rationally connected to the power provided under s. 184.4. It is at the proportionality analysis of *R. v. Oakes* that the provision fails. The obligation to give notice to intercepted parties would not impact in any way the ability of the police to act in emergencies. It would, however, enhance the ability of targeted individuals to identify and challenge invasions to their privacy and seek meaningful remedies. Section 184.4 of the *Code* is constitutionally invalid legislation. This declaration of invalidity is suspended for 12 months to allow Parliament to redraft a constitutionally compliant provision.

### **Cases Cited**

**Applied:** *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Duarte*, [1990] 1 S.C.R. 30; *R. v. Oakes*, [1986] 1 S.C.R. 103; **approved:** *R. v. Riley* (2008), 174 C.R.R. (2d) 250; **considered:** *R. v. Riley* (2008), 174 C.R.R. (2d) 288; *R. v. Godoy*, [1999] 1 S.C.R. 311; *R. v. Feeney*, [1997] 2 S.C.R. 13; *R. v. Mann*, 2004 SCC

52, [2004] 3 S.C.R. 59; **referred to:** *Brais v. R.*, 2009 QCCS 1212 (CanLII); *R. v. Deacon*, [2008] O.J. No. 5756 (QL); *R. v. Moldovan*, [2009] O.J. No. 4442 (QL); *R. v. Zundel*, [1992] 2 S.C.R. 731; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *R. v. Wiggins*, [1990] 1 S.C.R. 62; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Prosper*, [1994] 3 S.C.R. 236; *R. v. Silveira*, [1995] 2 S.C.R. 297; *R. v. Grant*, [1993] 3 S.C.R. 223; *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992; *Smith v. Jones*, [1999] 1 S.C.R. 455; *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, [2000] 2 S.C.R. 519; *R. v. McCraw*, [1991] 3 S.C.R. 72; *R. v. Galbraith* (1989), 49 C.C.C. (3d) 178; *R. v. Laudicina* (1990), 53 C.C.C. (3d) 281; *R. v. Finlay and Grellette* (1985), 52 O.R. (2d) 632; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

### **Statutes and Regulations Cited**

Bill C-30, *An Act to enact the Investigating and Preventing Criminal Electronic Communications Act and to amend the Criminal Code and other Acts*, 1st Sess., 41st Parl., 2011-2012.

Bill C-31, *An Act to amend the Criminal Code, the Corruption of Foreign Public Officials Act and the Identification of Criminals Act and to make a consequential amendment to another Act*, 2nd Sess., 40th Parl., 2009.

Bill C-50, *An Act to amend the Criminal Code (interception of private communications and related warrants and orders)*, 3rd Sess., 40th Parl., 2010.

*Canadian Charter of Rights and Freedoms*, ss. 1, 7, 8.

*Criminal Code*, R.S.C. 1970, c. C-34, s. 178.11(2)(a) [ad. 1973-74, c. 50, s. 2].



*Criminal Code*, R.S.C. 1985, c. C-46, ss. 2 “peace officer”, 21, 22, Part VI [am. 1993, c. 40], 183, 184(1), 184.1 to 184.4 [ad. *idem*, s. 4], 185, 186, 188 [am. *idem*, s. 8], 189, 195, 196, 722(4).

*Protection of Privacy Act*, S.C. 1973-74, c. 50.

## Authors Cited

Canada. Senate. Standing Senate Committee on Legal and Constitutional Affairs. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 44, 3rd Sess., 34th Parl., June 2, 1993, p. 44:10.

Canada. Senate. Standing Senate Committee on Legal and Constitutional Affairs. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 48, 3rd Sess., 34th Parl., June 15, 1993, p. 48:16.

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

APPEAL from a decision of the British Columbia Supreme Court (Davies J.), 2008 BCSC 211, 235 C.C.C. (3d) 161, 180 C.R.R. (2d) 24, [2008] B.C.J. No. 1764 (QL), 2008 CarswellBC 1948, declaring s. 184.4 of the *Criminal Code* to be unconstitutional. Appeal dismissed.

*Trevor Shaw and Samiran Lakshman*, for the appellant.

*Simon R. A. Buck and Dagmar Dlab*, for the respondent Yat Fung Albert Tse.

*Brent V. Bagnall*, for the respondent Nhan Trong Ly.

*Howard Rubin, Q.C., and David Albert*, for the respondent Viet Bac Nguyen.

*Kenneth S. Westlake, Q.C.*, for the respondent Huong Dac Doan.

*Ian Donaldson, Q.C.*, for the respondents Daniel Luis Soux and Myles Alexander Vandrick.

*Cheryl J. Tobias, Q.C., and Nancy Dennison*, for the intervener the Attorney General of Canada.

*Michal Fairburn and Grace Choi*, for the intervener the Attorney General of Ontario.

*Brigitte Bussièrès and Gilles Laporte*, for the intervener the Attorney General of Quebec.

*Joseph S. Wilkinson and Fredrick Schumann*, for the intervener the Criminal Lawyers' Association (Ontario).

*Roy W. Millen and Laura M. Cundari*, for the intervener the British Columbia Civil Liberties Association.

*Christopher A. Wayland and H. Michael Rosenberg*, for the intervener the Canadian Civil Liberties Association.

The judgment of the Court was delivered by

MOLDAVER AND KARAKATSANIS JJ. —

## I. Overview

[1] This appeal concerns the constitutionality of the emergency wiretap provision, s. 184.4 of the *Criminal Code*, R.S.C. 1985, c. C-46. The trial judge found that the provision contravened the right to be free from unreasonable search or seizure under s. 8 of the *Canadian Charter of Rights and Freedoms* and that it was not a reasonable limit under s. 1 (2008 BCSC 211, 235 C.C.C. (3d) 161). The Crown has appealed the declaration of unconstitutionality directly to this Court.

[2] Section 184.4 permits a peace officer to intercept certain private communications, without prior judicial authorization, if the officer believes on reasonable grounds that the interception is immediately necessary to prevent an unlawful act that would cause serious harm, provided judicial authorization could not be obtained with reasonable diligence.

[3] In this case, the police used s. 184.4 to carry out unauthorized warrantless interceptions of private communications when the daughter of an alleged kidnapping victim began receiving calls from her father stating that he was being held for ransom. Approximately 24 hours later, the police obtained a judicial authorization for continued interceptions, pursuant to s. 186 of the *Code*.

[4] The trial judge, Davies J., concluded that the section breached s. 8 of the *Charter* due to the “total absence of the constitutional safeguards” generally found in other sections of Part VI of the *Code*. Davies J. was particularly concerned about the lack of any requirement for officers (i) to give notice to those persons whose communications had been intercepted and (ii) to report their use of s. 184.4 to senior, independent law enforcement officials, the executive branch of government or to Parliament.<sup>1</sup>

[5] In *R. v. Riley* (2008), 174 C.R.R. (2d) 250 (Ont. S.C.J.) (“*R. v. Riley (No. 1)*”),<sup>2</sup> Dambrot J. also considered the constitutionality of s. 184.4 and found that the lack of any requirement for police to give notice to the targets of the interception rendered the section constitutionally infirm. He read in the notice provisions set out in s. 196 of Part VI.<sup>3</sup>

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<sup>1</sup> Davies J.’s decision was followed in Quebec in *Brais v. R.*, 2009 QCCS 1212 (CanLII).

<sup>2</sup> Note that in this decision, *R. v. Riley (No. 1)*, Dambrot J. considered only the constitutional validity of s. 184.4 (see para. 3). The remaining issues of the case were dealt with in separate reasons: *R. v. Riley* (2008), 174 C.R.R. (2d) 288 (Ont. S.C.J.) (“*R. v. Riley (No. 2)*”).

<sup>3</sup> Dambrot J.’s decision was followed by two other Ontario cases: *R. v. Deacon*, [2008] O.J. No. 5756 and *R. v. Moldovan*, [2009] O.J. No. 4442 (QL)(S.C.J.).

[6] Both judges were concerned that the provision could be accessed by peace officers as defined in s. 2 of the *Code*. The wide variety of people included in that definition raised concerns about overbreadth.

[7] Both judges also considered the availability of judicial authorizations under other sections in Part VI of the *Code*; they differed, however, in their views about the procedural requirements of s. 188, a provision that addresses judicial authorization in urgent circumstances. Because s. 184.4 is restricted to urgent situations that do not permit officers, with reasonable diligence, to obtain an authorization under any other provision of this Part, the availability of s. 188 bears significantly upon the scope of the warrantless emergency wiretap provision in s. 184.4.

[8] The key issue before us is whether the power created in s. 184.4 of the *Code* strikes an appropriate constitutional balance between an individual's right to be secure against unreasonable searches or seizures and society's interest in preventing serious harm. The main concerns raised by the parties relate to (1) the overbreadth of the definition of peace officer; (2) the interrelationship between ss. 184.4 and 188; (3) the lack of notice to the object of the interception; and (4) the lack of a reporting obligation.

[9] The respondents also raised other *Charter* challenges but the focus of the submissions and the decision below was on the s. 8 analysis. The submission that s.

184.4 violates s. 7 of the *Charter* because it is both vague and overbroad, is addressed below in the determination of the scope of s. 184.4.

[10] For the reasons set out below, we have reached the following conclusions. Section 184.4 contains a number of legislative conditions. Properly construed, these conditions are designed to ensure that the power to intercept private communications without judicial authorization is available only in exigent circumstances to prevent serious harm. To that extent, the section strikes an appropriate balance between an individual's s. 8 *Charter* rights and society's interests in preventing serious harm.

[11] However, in our view, s. 184.4 falls down on the matter of accountability because the legislative scheme does not provide any mechanism to permit oversight of the police use of this power. Of particular concern, it does not require that notice be given to persons whose private communications have been intercepted. For this reason, we believe that s. 184.4 violates s. 8 of the *Charter*. We are further of the view that the breach cannot be saved under s. 1 of the *Charter*. Accordingly, we would declare the section to be unconstitutional. By way of remedy, we have concluded that the declaration should be suspended for a period of 12 months to afford Parliament sufficient time to bring the section into conformity with the *Charter*.

[12] In the absence of a proper record, we do not address the issue of whether the use of the section by peace officers, other than police officers, renders this section overbroad.

## II. Issues

[13] This appeal raises the following issues:

- A. Is an unauthorized interception of private communications in exigent circumstances constitutional?
- B. What is the scope of s. 184.4?
- C. What authorizations are available to police with reasonable diligence in urgent situations? In particular, what is the scope of s. 188?
- D. Does s. 184.4 lack accountability measures or specific limitations, in breach of s. 8 of the *Charter*?
- E. If s. 184.4 breaches the *Charter*, is it saved by s. 1? If not, what is the appropriate remedy?

## III. Analysis

[14] Section 184.4 reads as follows:

### **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.

A. *Is an Unauthorized Interception of Private Communications in Exigent Circumstances Constitutional?*

[15] Section 8 of the *Charter* provides: “Everyone has the right to be secure against unreasonable search or seizure.”

[16] In the landmark decision *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court determined that a warrantless search is presumptively unreasonable. The presumed constitutional standard for searches or seizures in the criminal sphere is judicial pre-authorization: a prior determination by a neutral and impartial arbiter, acting judicially, that the search or seizure is supported by reasonable grounds, established on oath (pp. 160-62 and 167-68). As Dickson J. noted, at p. 161:

I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure.

[17] The importance of prior judicial authorization is even greater for covert interceptions of private communications, which constitute serious intrusions into the privacy rights of those affected. In *R. v. Duarte*, [1990] 1 S.C.R. 30, La Forest J. explained, at p. 46:



. . . if the surreptitious recording of private communications is a search and seizure within the meaning of s. 8 of the *Charter*, it is because the law recognizes that a person's privacy is intruded on in an unreasonable manner whenever the state, without a prior showing of reasonable cause before a neutral judicial officer, arrogates to itself the right surreptitiously to record communications that the originator expects will not be intercepted by anyone other than the person intended by its originator to receive them, to use the language of the *Code*. [Emphasis in original.]

La Forest J. found that “as a general proposition, surreptitious electronic surveillance of the individual by an agency of the state constitutes an unreasonable search or seizure under s. 8 of the *Charter*” (p. 42).

[18]        However, there is a long line of authority from this Court recognizing that the reach of s. 8 protection is legitimately circumscribed by the existence of the potential for serious and immediate harm. Exigent circumstances are factors that inform the reasonableness of the search or authorizing law and may justify the absence of prior judicial authorization. For example, in *R. v. Godoy*, [1999] 1 S.C.R. 311, where the issue was whether the *Charter* precluded warrantless entry into private premises in response to 911 calls, this Court stated: “. . . the importance of the police duty to protect life warrants and justifies a forced entry into a dwelling in order to ascertain the health and safety of a 911 caller” (para. 22). See also *R. v. Feeney*, [1997] 2 S.C.R. 13 (warrantless entry into a home in hot pursuit), and *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 (warrantless pat-down searches incidental to arrest to protect officer and public safety). Thus, in principle, it would seem that Parliament may craft a narrow emergency wiretap authority for exigent circumstances to prevent

serious harm if judicial authorization is not available through the exercise of reasonable diligence.

[19] The more difficult question is whether the particular power enacted in s. 184.4 constitutes an unreasonable search or seizure contrary to s. 8 of the *Charter*. Does s. 184.4 strike a reasonable balance between an individual's right to be free from unreasonable searches or seizures and society's interest in preventing serious harm?

B. *What Is the Scope of Section 184.4?*

(1) Approach to Interpretation

[20] The modern principle of statutory interpretation requires that the words of the legislation be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: E. A. Driedger, *Construction of Statutes*, (2nd ed. 1983), at p. 87. Underlying this approach is the presumption that legislation is enacted to comply with constitutional norms, including the rights and freedoms enshrined in the *Charter*. “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”: R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 461. Accordingly, where legislation is permitting of

two equal interpretations, the Court should adopt the interpretation which accords with *Charter* values: *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 771; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 35.

[21] In this case, the constitutional lens must take into account the privacy interests of anyone whose communications may be intercepted, and the interests of public safety, including the right to life, liberty and security of the person who is in danger of serious harm. Lamer C.J. observed in *R. v. Godoy* that “dignity, integrity and autonomy” are values underlying a privacy interest; however, 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” (para. 19).

## (2) Scheme of Part VI of the Act

[22] Entitled “Invasion of Privacy”, Part VI of the *Code* makes it an offence under s. 184(1) to intercept private communications. Sections 185 and 186 set out the general provisions governing the application and the granting of judicial authorizations for the interception of private communications. Section 188 permits temporary authorizations (for up to 36 hours) by specially appointed judges, on the application of specially designated peace officers, if the urgency of the situation requires interception of private communications before an authorization could, with reasonable diligence, be obtained under s. 186.

[23] In addition to the prerequisites for and conditions of authorized interceptions, there are a number of after-the-fact provisions that build accountability into the process. Section 195 requires an annual statistical report to Parliament concerning the use of s. 186 and s. 188 authorizations and resulting prosecutions. Section 196 sets out the obligations of the responsible Minister of the Crown to subsequently give notice in writing to the person who was the object of the interception pursuant to a s. 186 authorization. Under s. 189, an accused must be given notice of any interception intended to be produced in evidence.

[24] When the first comprehensive wiretap legislation in Canada, the *Protection of Privacy Act*, S.C. 1973-74, c. 50, came into force in 1974, there was no emergency wiretap provision like s. 184.4. Wiretaps were permitted without judicial authorization only with the consent of a party, under then s. 178.11(2)(a) of the *Code*. Following the constitutional challenge to that section in *R. v. Duarte* and *R. v. Wiggins*, [1990] 1 S.C.R. 62, Parliament introduced the current Part VI in 1993, with a number of additional provisions that permit interceptions in special situations (S.C. 1993, c. 40).

[25] Two of the new provisions introduced in 1993 are specifically preventative in nature. Section 184.4 is the emergency power to intercept for the purpose of preventing serious harm. Section 184.1 permits interception with a person's consent in order to prevent bodily harm to that person. These are the only two sections that permit interceptions without a specific time limit and without

judicial authorization. In addition, s. 184.2 provides for judicial authorization with consent of one of the persons being intercepted for up to 60 days; under s. 184.3 such authorizations can be obtained by means of telecommunication. None of the interceptions under these special sections is subject to the s. 195 reporting or the s. 196 notice requirements.

[26] To summarize, Part VI sets out a broad spectrum of wiretapping provisions. Sections 185 and 186 set out the standard requirements for wiretapping. Section 188 permits designated officers to seek authorizations from designated judges for interceptions limited to 36 hours when the “urgency of the situation” requires it. Accountability requirements apply to these powers. They do not apply to the special circumstance provisions in ss. 184.1, 184.2 and 184.4 that involve consent or exigent circumstances.

[27] Section 184.4, the emergency power to intercept, is the only section that does not require either consent of a party or pre-authorization. However, it is clearly available only on an urgent basis to prevent harm that is both serious and imminent. While s. 184.4 does not contain a time limitation, each interception is limited to urgent situations where there is an immediate necessity to prevent serious harm and judicial pre-authorization is not available with reasonable diligence. As discussed below, these prerequisites create strict inherent time restrictions.

(3) Intention of Parliament

[28] It is clear from the overall context of the provisions in Part VI of the *Code* that Parliament intended to limit the operation of the authority under s. 184.4 to genuine emergencies. Evidence before the Standing Senate Committee on Legal and Constitutional Affairs was that this emergency power was necessary for “hostage takings, bomb threats and armed standoffs”; to be used “only if time does not permit obtaining an authorization”; and for “very short period[s] of time during which it may be possible to stop the threat and harm from occurring”: *Proceedings of the Standing Committee on Legal and Constitutional Affairs*, No. 44, 3rd Sess., 34th Parl., June 2, 1993, at p. 44:10. The Minister of Justice noted that these are situations where “every minute counts” and that the provision was “necessary to ensure public safety”: *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No. 48, 3rd Sess., 34th Parl., June 15, 1993, at p. 48:16. The evidence filed before the trial judge noted that kidnappings, child protection and hostage taking form a substantial backdrop for the use of s. 184.4 by police.

(4) The Language of Section 184.4

[29] The respondents submitted that the terms “the urgency of the situation”, “reasonable diligence”, “unlawful act” and “serious harm” were vague and overbroad.

[30] For the reasons that follow, we disagree. While s. 184.4 is sufficiently flexible to provide for different urgent circumstances that may arise, it is far from vague when properly construed. As Gonthier J. held for the Court in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, enactments are not expected to

“predict the legal consequences of any given course of conduct in advance” (p. 639). Rather, they are to provide meaningful guidance about the circumstances in which they can be applied.

[31] A number of conditions and constraints are embedded in the language of s. 184.4. As noted by the trial judge, each of these conditions significantly restricts the availability of this section. These conditions incorporate implicit and strict temporal limitations.

[32] Section 184.4(a) provides that peace officers may only use this authority if they believe “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.”

(a) “*Reasonable Grounds*”

[33] Belief “on reasonable grounds” imports both a subjective and objective element. The officers must have subjective belief in the grounds justifying the actions taken and those grounds must be objectively reasonable in the circumstances. The constitutional balance between the reasonable expectation of privacy and the legitimate needs of the state in detecting and preventing crime requires an objective standard — credibly based probability: *Hunter v. Southam*, at pp. 166-67; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, at paras. 75-79.

(b) “*Urgency of the Situation*”

[34] Davies J. construed the phrase “urgency of the situation” as follows:

. . . the phrase “urgency of the situation” cannot be read in isolation. It must be read in conjunction with the requirement that the peace officer has reasonable grounds to believe not only that the circumstances are exigent (by reason of an apprehension of the occurrence of imminent serious harm under ss. 184.4(b)), but also with the requirement to believe that prior judicial authorization could not be obtained with reasonable diligence. [para. 157]

We agree with this interpretation. As time goes by, it may be more difficult to satisfy the requirement that an authorization could not have been obtained with reasonable diligence, or that the situation is urgent and the need is immediate.

(c) “*Reasonable Diligence*”

[35] The term “reasonable diligence” is used in this Court’s jurisprudence and is directly tied to other constitutional rights.<sup>4</sup> This Court has acknowledged that exigent circumstances could permit a warrantless search where it is not “feasible” (see *Hunter v. Southam*, at pp. 160-61; *R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 94) or where it is “impracticable” (see *R. v. Grant*, [1993] 3 S.C.R. 223, at p. 241) to obtain prior judicial authorization. Davies J. noted that “reasonable diligence” under s. 184.4(a) of the *Code* should be construed to conform with the s. 8 *Charter* right to

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<sup>4</sup> For instance, in the context of an accused exercising his 10(b) *Charter* right, this Court held in *R. v. Prosper*, [1994] 3 S.C.R. 236, at p. 281, that “reasonable diligence” in the exercise of the right to counsel will depend on the context.



be free from “unreasonable” search or seizure (para. 163). He 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 judicial authorization under Part VI “immediately, and with the least delay possible in the circumstances” (para. 166).

[36] In *R. v. Riley (No. 1)* Dambrot J. noted, at para. 23, that the “reasonable diligence” requirement “increases in significance as time goes on” and that in order to continue intercepting under s. 184.4 once intercepting has begun, “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).

[37] There are any number of reasons why judicial authorization may not be feasible or may not be immediately available. The urgency of the underlying unlawful act and potential harm may require the full attention of the police. In addition, there may be logistical reasons such as the availability of a judge or designated judge or designated police officer; the time required to ready an application and access the judge; and the time for the judge to consider the matter and reach a decision.

[38] We do not say that police must proceed in every case with an immediate application for judicial authorization. Each case will depend on its own circumstances. However, if the police have not proceeded to seek the appropriate

authorization when circumstances allow, they risk non-compliance if they continue intercepting under s. 184.4.

(d) “*An Authorization*” “*Under Any Other Provision of This Part*”

[39] The requirement that an authorization not be available raises the very real issue of the accessibility and availability of judicial authorizations under Part VI of the *Criminal Code*. Davies J. suggested that police must seek an authorization under s. 188 at the same time they start preparing a s. 186 application. He contemplated an oral application under s. 188. In *R. v. Riley (No. 2)*, Dambrot J. concluded that s. 188 was not available without a written affidavit (para. 50).

[40] The Crown seeks guidance for the police about what steps are possible under the other provisions in the *Code*. This issue also bears on the constitutional analysis of the impact of s. 184.4 upon privacy interests. Obviously, the greater the availability of an authorization under s. 188, the more circumscribed the authority to proceed unauthorized under s. 184.4. For the reasons set out below, we conclude that s. 188 is available for urgent situations without the requirement of a written affidavit. This does not, however, obviate the need for unauthorized emergency interceptions under s. 184.4.

(e) “*Immediately Necessary*”

[41] Section 184.4(b) authorizes wiretapping if

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; . . .

[42] In *R. v. Riley (No. 1)* (para. 17), Dambrot J. observed that the “fundamental prerequisite to unauthorized interception is the requirement that it be immediately necessary”. In his view, the phrase “immediately necessary” connoted both a temporal and an analytical component. We agree. This requirement ensures that unauthorized interceptions are available only when there are reasonable grounds to believe that the threat of serious harm is *immediate* and only when it is *necessary* to prevent serious harm. Thus, the threat must be imminent and it must be likely that interception will be an effective means of preventing the unlawful act.

[43] However, the word “necessary” does not in our view require that unauthorized interception is the *only* effective means — or even the *most* effective means available to police. Section 184.4 is not available *only* as a last resort. To conclude otherwise would be to introduce an element of uncertainty that would undermine the effective use of this power by police to prevent serious harm in exigent circumstances. In a kidnapping, for example, the police may be able to pursue a number of additional effective investigative means, such as canvassing possible witnesses or using dogs to follow a scent. While the phrase “immediately necessary” ensures that this power is not available unless there is an emergency, it does not require police to exhaust all other investigative means. The section does not preclude

police from pursuing all effective means available to them if they otherwise meet the strict conditions of s. 184.4.

[44] This threshold differs from that found under s. 186 of the *Criminal Code*, which requires that there be “no other reasonable alternative method of investigation, in the circumstances of the particular criminal inquiry” (*R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 29 (emphasis in original)). That is not surprising since s. 184.4 serves to prevent imminent serious harm, whereas s. 186 is an evidence-gathering tool.

(f) “*Unlawful Act*”

[45] In addressing the respondents’ vagueness argument, the trial judge held that the “unlawful act” referred to in s. 184.4(b) is limited to an offence enumerated in s. 183 of the *Code* (para. 175). Davies J. reasoned that since the section requires as a precondition to its use the reasonable belief that an authorization could not be obtained with reasonable diligence, Parliament cannot have intended to allow the unauthorized interception by the police of communications for which a judicial authorization could not be obtained.

[46] We disagree. There may be situations that would justify interceptions under s. 184.4 for unlawful acts not enumerated in s. 183. We prefer the conclusion of Dambrot J. in *R. v. Riley (No. 1)* that the scope of the unlawful act requirement is sufficiently, if not more, circumscribed for constitutional purposes, by the

requirement that the unlawful act must be one that would cause serious harm to persons or property (para. 21). No meaningful additional protection of privacy would be gained by listing the unlawful acts that could give rise to such serious harm. The list of offences in s. 183 is itself very broad; however, Parliament chose to focus upon an unlawful act that would cause serious harm. We see no reason to interfere with that choice.

(g) “*Serious Harm*”

[47] As noted by the appellant, the serious harm threshold is a meaningful and significant legal restriction on s. 184.4 and is part of this Court’s jurisprudence in a number of different contexts: see *Smith v. Jones*, [1999] 1 S.C.R. 455, at para. 86 (the test for setting aside solicitor-client privilege on public safety grounds); *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, [2000] 2 S.C.R. 519, at para. 117 (the level of harm needed in cases of warrantless apprehension of children without violating s. 7 of the *Charter*); and *R. v. McCraw*, [1991] 3 S.C.R. 72, at pp. 80-81 (the “grave or substantial” threshold required for threats of serious bodily harm under former s. 264.1(1)(a) of the *Code*). As disclosed in the police affidavits filed at trial, this threshold is also consistent with the police practice surrounding s. 184.4 and its use for *Criminal Code* offences like kidnapping, hostage taking and other serious offences.

[48] In the application before the trial judge, the Crown filed seven affidavits from police forces across Canada, representing about 25,000 police officers regarding

their practices under s. 184.4. Although the affidavits demonstrate that police forces have varying implementation policies, they reflect an understanding that this provision is exceptional in nature. The trial judge found on the evidence that many forces require, as a matter of policy, approval by very senior officers and that the senior officers had exercised these powers responsibly (paras. 235-36).

(h) “*Serious Harm . . . to Property*”

[49] The respondents argue that this power is overbroad in scope because it could be used to justify the invasion of privacy for serious harm to insignificant property. We disagree. The text and context of the provision show that the assumption that underlies the respondents’ argument is not well founded. We adopt the statements of Dambrot J. in *R. v. Riley (No. 1)*:

Serious, as it applies to property, implies not only a significant degree of harm, but also harm to property of significance, such as a bridge, a building, or a home. In each of these cases, if there is a significant degree of harm, then the harm would inevitably have serious consequences. Neither the phrase “serious harm to any person or to property”, nor the context, leave it open to wiretap without a warrant to prevent an act that will likely have trivial consequences. [para. 20]

(5) Objects of the Interception: “the Victim, or Intended Victim”

[50] Section 184.4(c) further limits the scope of emergency wiretapping by permitting the interception of a private communication only if either the originator or

the intended recipient of the communication 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”.

[51] It is accepted that the perpetrator would include aiders and abettors, as parties to an offence under s. 21 or s. 22 of the *Criminal Code*. The trial judge in this case (paras. 180-85), as in *R. v. Riley (No. 1)* (para. 29), found that victim or intended victim was restricted to those who were direct victims of the serious harm.

[52] The Crown seeks a broad and expansive interpretation of “victim” or “intended victim” to include family members who would be affected by the serious harm done to a relative. The Attorney General of Ontario supports this interpretation and points to the definition of victim for the purposes of victim impact statements in s. 722(4) of the *Code* which includes “a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence”.

[53] The Crown argues that such a broad interpretation is warranted because an overly narrow interpretation of the word “victim” limits the potential effectiveness of s. 184.4 and the ultimate goal of protecting the public. The Attorney General of Ontario argues that a narrow interpretation would lead to the absurd situation where the communications of a 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. However, it is unnecessary to broaden the definition of victim in order to address such a situation. In the case of a kidnapped child, the police may well have reasonable grounds to believe that the abductor will call the parents for ransom and

could thus set up the capacity to intercept a call. Crown counsel advised that in such circumstances, live monitoring of the parents' communications would ensure that only those communications involving the perpetrator or the victim are in fact listened to or recorded.

[54] We agree with the trial judge that an interpretation of victim to include those who suffer emotional loss if the threatened harm were to materialize would cast the net too broadly. It would introduce far more uncertainty and scope for the exercise of subjective judgment by the police. Section 184.4(c) qualifies victim as the victim or intended victim of the serious harm. Parliament narrowed the purview of the provision in this way in an obvious recognition of the need to restrict the invasion of privacy while permitting police to address threats of serious harm.

(6) The Breadth of the Definition of "Peace Officer"

[55] Section 184.4 authorizes a "peace officer" to intercept private communications without judicial authorization in certain narrowly prescribed emergency circumstances. A "peace officer" is defined in s. 2 of the *Criminal Code*.

[56] The definition of "peace officer" includes a wide variety of people, including mayors and reeves, bailiffs engaged in the execution of civil process, guards and any other officers or permanent employees of a prison, and so on. Concern is expressed that the list of persons who may invoke s. 184.4 is too broad and that this could lead to the provision's misuse, especially in the absence of any



accountability requirements. (See the reasons of Davies J., at paras. 234-37, and those of Dambrot J. in *R. v. Riley (No. 1)*, at para. 44.)

[57] We, too, have reservations about the wide range of people who, by virtue of the broad definition of “peace officer”, can invoke the extraordinary measures permitted under s. 184.4. The provision may be constitutionally vulnerable for that reason. That said, we lack a proper evidentiary foundation to determine the matter. Any conclusion must await a proper record. The case at hand involves police officers and no one questions their right to invoke s. 184.4.

(7) Conclusion: Scope of Section 184.4

[58] This is the only wiretapping power in Part VI that does not require either consent of one of the parties to the communication or judicial pre-authorization; however, Parliament incorporated objective standards and strict conditions which ensure that unauthorized interceptions are available only in exigent circumstances to prevent serious harm. The onus, of course, rests with the Crown to show on balance that the conditions have been met.

[59] The provision imports an objective standard — credibly based probability for each of the requirements embedded in the section. The conditions incorporate implicit and strict temporal limitations. As time goes by it may be more difficult to satisfy the requirement that an authorization could not have been obtained with reasonable diligence, the situation is urgent or it is immediately necessary to prevent

serious harm. Only private communications in which the originator or the intended recipient is either the perpetrator or the victim (or intended victim) of the serious harm may be intercepted. We conclude that properly interpreted the section is not vague or overbroad as it relates to police officers and the prerequisites restrict the availability of this section to genuine emergency circumstances.

*C. What Authorizations Are Available to Police With Reasonable Diligence in Urgent Situations? In Particular, What Is the Scope of Section 188?*

[60] Section 188(1) and (2) provides:

**188.** (1) Notwithstanding section 185, an application made under that section for an authorization may be made *ex parte* to [a specially designated judge by a specially designated peace officer] 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.

(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.

Section 186(1)(b) reads as follows:

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

...

(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.

[61] As we have explained, s. 184.4 is an emergency provision. It does away with the need to obtain prior judicial authorization in circumstances of dire emergency; it does not do away with the need to obtain a judicial authorization altogether. On the contrary, as was pointed out above, once s. 184.4 has been invoked, the police must, where possible, move with all reasonable dispatch to obtain a judicial authorization under Part VI of the *Code*.

[62] Once the police have begun intercepting private communications under s. 184.4, the speed with which they can obtain the follow-up judicial authorization plays a role in assessing whether s. 184.4 passes constitutional muster. The importance of a process that enables the police to move quickly is self-evident. By alleviating the need for prior judicial authorization, s. 184.4 departs from the presumptive constitutional standard that applies to searches or seizures in the criminal law domain. Hence, the need for a process that can be accessed expeditiously with a view to limiting, within reason, the length of time that unauthorized interceptions under s. 184.4 may lawfully be continued. That, in our view, is where s. 188 of the *Code*, properly interpreted, comes into play. It provides a streamlined process for obtaining a temporary authorization in circumstances of urgency.

[63] The standard process that must be followed to obtain a third-party wiretap authorization is set out in ss. 185 and 186. In broad terms, s. 185 requires, among other things, that an application be made to a judge in writing and that it be accompanied by an affidavit. The affidavit must address six identified matters, including the facts relied on to justify the authorization; the particulars of the offence under investigation; the type of private communications proposed to be intercepted; the names, addresses and occupations of persons whose private communications may assist in the investigation; the background and history of any prior applications and so on.

[64] The preparation of a s. 185 affidavit can be a daunting, labour-intensive task. Leaving aside the time needed to collate the pertinent information, the requirement that such information be reduced to writing in the form of an affidavit can significantly increase the length of the process, perhaps by hours, or even days. Added to this is the time a judge may need to review and digest the contents of the affidavit once it has been submitted. And if, after reading the affidavit, the judge is not satisfied, further affidavit material may be required, adding more delay to an already time-consuming and labour-intensive process.

[65] That is the backdrop against which s. 188 of the *Code* must be construed. The provision addresses situations where a wiretap authorization is needed on an urgent basis. It 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*. While the section incorporates the so-called “investigative necessity” requirements of s. 186(1)(b) of the *Code*, where the conditions of s. 184.4 have been met, the police should have little difficulty satisfying the third branch of the paragraph which contemplates emergency situations (see *R. v. Araujo*, at para. 27).

[66] For present purposes, a critical question that arises in relation to s. 188 is whether the application seeking an authorization and the information presented in support of it must be in writing, as required under s. 185, or whether the process can be conducted orally. The answer will help determine the amount of time needed to obtain a s. 188 authorization.

[67] The controversy arises from the opening words of s. 188(1) which read as follows:

**188.** (1) Notwithstanding section 185, an application made under that section for an authorization may be made *ex parte* . . . .

**188.** (1) Par dérogation à l'article 185, une demande d'autorisation visée au présent article peut être présentée *ex parte* . . .

[68] In *R. v. Galbraith* (1989), 49 C.C.C. (3d) 178, the Alberta Court of Appeal held that since s. 178.15 (now s. 188 as amended) made no mention of the need for an affidavit, an emergency authorization could be granted on the basis of

*viva voce* evidence under oath, probably memorialized in some way. The words “under that section” were added subsequent to this decision (S.C. 1993, c. 40, s. 8).

[69] In *R. v. Riley (No. 2)*, Dambrot J. considered the issue and concluded, at para. 50, that in view of the addition of the words “under that section” following *Galbraith*, oral applications were not permitted under s. 188; rather, the process must be conducted in writing in accordance with the requirements of s. 185. He reasoned, at para. 50, “that s. 188 does not create a separate emergency authorization, but merely modifies the procedure for a s. 186 authorization in an emergency. If an emergency application is still an application made under s. 185, then the affidavit requirement in that section would appear to apply to it.”<sup>5</sup>

[70] In the instant case, Davies J. took a different view of the matter. Although he did not analyse the issue, it is apparent from his reasons at paras. 330 and 331 that he endorsed the practice of oral applications under s. 188. According to Crown counsel who appeared on behalf of the appellant, oral applications under s. 188 are routine in British Columbia and this method of proceeding has become standard practice.

[71] In argument before this Court, no one supported the view that applications under s. 188 must be in writing. On the contrary, the broad consensus

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<sup>5</sup> Although *Galbraith* was initially followed in Ontario (see *R. v. Laudicina* (1990), 53 C.C.C. (3d) 281 (H.C.J.)), more recent authorities have adopted Dambrot J.’s analysis in *R. v. Riley (No. 2)* (see *R. v. Deacon*, at para. 109 and *R. v. Moldovan*, at para. 61).

was that s. 188 applications should be conducted orally as this would serve to expedite the process and further Parliament's objective in enacting the provision.

[72] We think that is the correct approach. Section 188 is clearly designed to provide a short-term judicial authorization in urgent circumstances. It should be construed in a manner that promotes an efficient and expeditious result and effective judicial oversight. We do not read the opening words of s. 188(1) as mandating a process under that provision that mirrors the "in writing" process required under s. 185. It cannot be that the reference to s. 185 is meant to incorporate all its requirements. Such an interpretation is inconsistent with the purpose of a more streamlined process and with the language of s. 188. Importing all the requirements of s. 185 would make the opening words "[n]otwithstanding section 185" meaningless. Beyond that, the words "under that section" are at best ambiguous and can simply be interpreted as referring to the type of application (a third-party wiretap application) contemplated by s. 185. Moreover, the French version reads "*visée au présent article*" (under *this* section).

[73] The fact that applications may be conducted orally under s. 188 does not however obviate the need for unauthorized emergency interceptions under s. 184.4. While oral applications may be less cumbersome and labour-intensive than applications in writing, they still take time. The notion that oral applications can be

commenced and completed in a matter of minutes, as the trial judge in the instant case seems to have suggested,<sup>6</sup> is in our respectful view highly unrealistic.

[74] Even with the benefit of an oral application, it is impossible to predict with any accuracy the length of time that it will take, in any given case, to collate the information needed to make a s. 188 application, convey it to a designated officer, locate a designated judge and communicate the pertinent information to that judge. Whatever length of time the process may take, measured against a standard of reasonable diligence, precious time may be lost, thereby exposing people and property to precisely the type of harm that s. 184.4 was enacted to prevent.

[75] In short, we believe that applications under s. 188 may be made orally. The evidence in support of an oral application should be given on oath or solemn affirmation. Moreover, like the court in *Galbraith*, we believe that the proceedings should be memorialized, by way of a verbatim recording or some other means. Doing so would ensure the existence of a full and accurate record. It would also shed light on the facts and circumstances that caused the authorities to invoke s. 184.4 in the first place, thereby ameliorating a concern raised by several of the parties and interveners that s. 184.4 does not require any form of record keeping.

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<sup>6</sup>Davies J. found that it was possible to “articulate the necessary facts to establish the need for an emergency wiretap authorization” in a “very limited time”. He referred to Corporal McDonald’s testimony at trial and his ability “to communicate, without prompting, not only his thought process but also his command of the facts upon which he based his decision [to implement s. 184.4,] in the courtroom in less than ten minutes” (para. 330).



[76] Some of the parties and interveners raised the prospect of obtaining s. 188 authorizations by telephone or other means of telecommunication, especially in circumstances where it would be impracticable for the applicant to appear in person before a judge. We would not foreclose that possibility. We can foresee situations, especially in remote areas of the country, where many hours might be lost in travel time while a designated agent makes his or her way to a designated judge. However, the issue was not fully argued before us and we refrain from commenting further on it.

[77] One final observation before leaving this subject. Section 184.4 is preventative in nature. It seeks to prevent the occurrence of offences that would cause serious harm to people or property. When s. 184.4 is invoked, it will generally be the case that an offence has been committed or is being committed. But that may not always be so. When no offence has been or is being committed, s. 188 cannot be accessed. It and s. 186 are evidence-gathering provisions and they can only be invoked where there are reasonable grounds to believe that an offence has been, or is being committed and that the proposed interceptions will afford evidence of that offence. (See *R. v. Finlay and Grellette* (1985), 52 O.R. (2d) 632 (C.A), at pp. 656-57, and *R. v. Duarte*, at p. 55.)

[78] Hence, in those rare cases where s. 184.4 is invoked but no crime has been or is being committed, s. 188 will be unavailable. In such cases, the inability of the police to access s. 188 should not be viewed as an obstacle to the use of s. 184.4.

(See *R. v. Riley (No. 1)*, where Dambrot J. addresses this issue, correctly in our view, at paras. 24-27.)

*D. Does Section 184.4 Lack Accountability Measures or Specific Limitations, in Breach of Section 8 of the Charter?*

[79] The respondents and several interveners submitted that the particular power enacted in s. 184.4 constitutes an unreasonable search or seizure contrary to s. 8 of the *Charter*, because it lacks accountability measures that allow for oversight of police conduct. Further, they variously submitted that a number of additional conditions or limitations were required for constitutional purposes.

[80] The issues raised include the following:

- (i) The lack of a notice requirement;
- (ii) The lack of a reporting requirement to Parliament;
- (iii) The lack of a record-keeping requirement; and
- (iv) The need to restrict the use that can be made of the interceptions.

(1) *The Lack of a Notice Requirement*

[81] Persons who have been targeted under s. 184.4, including victims and suspected perpetrators, may never become aware that their private communications have been intercepted. Section 184.4, in its present form, contains no “after-the-fact” notice requirement. That distinguishes s. 184.4 emergencies from other emergency

situations where a lack of prior judicial authorization has not proved fatal for s. 8 purposes. Davies J. recognized this distinction, correctly in our view, at para. 218 of his reasons:

The interception of private communications in exigent circumstances is not like situations of hot pursuit, entry into a dwelling place to respond to a 9-1-1 call, or searches incidental to arrest when [public] safety is engaged. In those circumstances, the person who has been the subject of a search will immediately be aware of both the circumstances and consequences of police action. The invasion of privacy by interception of private communications will, however, be undetectable, unknown and undiscoverable by those targeted unless the state seeks to rely on the results of its intentionally secretive activities in a subsequent prosecution.

[82] Accountability for police use of wiretapping without judicial authorization is important for s. 8 purposes. In *Hunter v. Southam*, Dickson J. explained that “[a] provision authorizing . . . an unreviewable power would clearly be inconsistent with s. 8 of the *Charter*” (p. 166). In the context of Part VI of the *Code*, apart from interceptions authorized under s. 184.1,<sup>7</sup> accountability is achieved by means of after-the-fact notice and reporting.

[83] After-the-fact notice should not be viewed as irrelevant or of little value for s. 8 purposes. In this regard, we agree with the observations of the intervener Criminal Lawyers’ Association (Ontario):

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<sup>7</sup> Section 184.1 deals with consent interceptions to prevent bodily harm. While it contains neither a notice provision nor a reporting obligation, accountability is achieved through strict rules that govern the use and destruction of communications that are intercepted pursuant to it.

. . . notice is neither irrelevant to s. 8 protection, nor is it a “weak” way of protecting s. 8 rights, simply because it occurs *after* the invasion of privacy. A requirement of after-the-fact notice casts a constitutionally important light back on the statutorily authorised intrusion. The right to privacy implies not just freedom from unreasonable search and seizure, but also the ability to identify and challenge such invasions, and to seek a meaningful remedy. Notice would enhance all these interests. In the case of a secret warrantless wiretap, notice to intercepted person stands almost alone as an external safeguard. [Emphasis in original; footnote omitted; Factum, at para. 31.]

[84] The jurisprudence is clear that an important objective of the prior authorization requirement is to prevent unreasonable searches. In those exceptional cases in which prior authorization is not essential to a reasonable search, additional safeguards may be necessary, in order to help ensure that the extraordinary power is not being abused. Challenges to the authorizations at trial provide some safeguards, but are not adequate as they will only address instances in which charges are laid and pursued to trial. Thus, the notice requirement, which is practical in these circumstances, provides some additional transparency and serves as a further check that the extraordinary power is not being abused.

[85] In our view, Parliament has failed to provide adequate safeguards to address the issue of accountability in relation to s. 184.4. Unless a criminal prosecution results, the targets of the wiretapping may never learn of the interceptions and will be unable to challenge police use of this power. There is no other measure in the *Code* to ensure specific oversight of the use of s. 184.4. For s. 8 purposes, bearing in mind that s. 184.4 allows for the highly intrusive interception of private communications without prior judicial authorization, we see that as a fatal defect. In

its present form, the provision fails to meet the minimum constitutional standards of s. 8 of the *Charter*.

[86] After-the-fact notice, such as that currently found at s. 196(1), is one way of correcting this deficiency; it may not be the only one. Other effective means are no doubt open to Parliament. We note, however, that on three prior occasions, the government has introduced legislation designed to incorporate a notice provision into s. 184.4, akin to the notice provision found in s. 196(1) of the *Code*.<sup>8</sup>

(2) *The Lack of a Reporting Requirement to Parliament*

[87] Section 195(1) of the *Code* requires that reports of judicial authorizations granted under either s. 186 or s. 188 of the *Code* be sent to Parliament. While other reasons may exist, one of the purposes served by s. 195 is to apprise Parliament of the frequency with which the police intercept private communications and the circumstances under which such interceptions are made.

[88] Section 184.4 requires no such reporting. The trial judge found this to be a constitutional deficiency. In his view, combined with the absence of a notice requirement, it eliminated without justification “the constitutional safeguards necessary to balance the interests of the state in preventing harm and prosecuting

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<sup>8</sup> Bill C-30 has been introduced in the House of Commons on February 14, 2012, and incorporates a s. 196.1 after-the-fact notice provision and a s. 195 “Annual Report to Parliament” requirement for s. 184.4 purposes. Its predecessor, Bill C-31, was introduced on May 15, 2009. It died on the Order Paper due to the prorogation of Parliament on December 30, 2009. The bill was reintroduced as Bill C-50 on October 29, 2010, but it too died on the Order Paper, in March 2011.

crime with its obligation to protect s. 8 *Charter* rights” (para. 240, subpara. 4). While exigent circumstances and the need to protect people and property from imminent serious harm could justify granting the state greater leeway than normal “in the invasion of privacy rights”, exigency could not be used “to excuse the elimination of those constitutional safeguards that are not impacted by the imperatives of an emergency” (para. 240, subpara. 5).

[89] Accountability on the part of those who intercept private communications under s. 184.4 without judicial authorization is an important factor in assessing the constitutionality of s. 184.4. As we have explained, the lack of a notice requirement or some other satisfactory substitute renders the provision constitutionally infirm. Added safeguards, such as the preparation of reports for Parliament, would certainly be welcome. As a matter of policy, a reporting regime that keeps Parliament abreast of the situation on the ground would seem to make good sense. That said, we do not see it as a constitutional imperative.

[90] While we accept that the reporting requirements in s. 195 of the *Code* can be described as a measure of accountability, we adopt the view of Dambrot J. in *R. v. Riley (No. 1)* (para. 117) that “a legislative reporting requirement such as s. 195 that does not provide for active oversight of wiretapping generally, far less any particular use of the wiretap provisions, cannot be a constitutional requirement of a reasonable wiretap power within the meaning of s. 8”.

### (3) *The Lack of a Record-Keeping Requirement*

[91] The respondents and some of the interveners submit that without a record-keeping requirement there is no ability to review the decisions of the police to invoke the provision.

[92] In our view, this is yet another aspect of ensuring accountability. While we have concluded that an accountability mechanism is necessary to protect the important privacy interests at stake, we are satisfied that a notice provision would adequately meet that need. In emergency situations of a kind that would justify the use of s. 184.4, the police will be focussed on the emergency and it would be impractical to require contemporaneous detailed record keeping in such situations.

(4) *The Need to Restrict the Use That Can Be Made of the Interceptions*

[93] It was submitted that s. 184.4 should include restrictions similar to those in s. 184.1 limiting the permissible use of the interceptions. Section s. 184.1 permits an agent of the state to intercept communications if the agent believes on reasonable grounds that there is a risk of bodily harm to a person who is a party to the communication and who consents to the interception. Section 184.1(2) makes interceptions admissible in evidence only in proceedings relating to bodily harm and s. 184.1(3) requires that the interceptions be destroyed if they do not relate to bodily harm. Obviously, Parliament struck a different balance with this provision. It requires consent of one of the parties to the communication and imposes restrictions upon its use. Further, it does not contain many of the conditions set out in s. 184.4, including the unavailability of judicial pre-authorization. As discussed above,

Parliament has built in a number of conditions to ensure that s. 184.4 is used only in exigent circumstances to prevent serious harm. While a statutory restriction on the use that can be made of the interception is not necessary for constitutional purposes, we make no comment on the admissibility of intercepted communications relating to matters that would not have justified the use of s. 184.4.

#### IV. Conclusion

[94] Section 184.4 is an emergency provision. It allows for extreme measures in extreme circumstances. It recognizes that on occasion, the privacy interests of some may have to yield temporarily for the greater good of society — here, the protection of lives and property from harm that is both serious and imminent. Parliament has included stringent conditions to ensure that the provision is only used in exigent circumstances. In our view, these conditions effect an appropriate balance between an individual's reasonable expectation of privacy and society's interest in preventing serious harm. To that extent, s. 184.4 passes constitutional muster.

[95] In its present form however, s. 184.4 contains no accountability measures. That, in our view, is fatal and constitutes a breach of s. 8 of the *Charter*.

##### A. *Section 1 Analysis*

[96] We must now address whether the provision is justified under s. 1 of the *Charter*. *R. v. Oakes*, [1986] 1 S.C.R. 103, established the two questions that must be



answered: (1) Does the impugned provision serve a pressing and substantial objective?; and (2) Are the means used to meet the objective proportional to the limit on the right?

[97] In our view, there is little doubt that the objective of preventing serious harm to persons or property in exigent circumstances is pressing and substantial. We also find that this objective is rationally connected to the power provided under s. 184.4.

[98] It is at the proportionality analysis that the provision fails. The obligation to give notice to intercepted parties would not impact in any way the ability of the police to act in emergencies. It would, however, enhance the ability of targeted individuals to identify and challenge invasions to their privacy and seek meaningful remedies. Parliament's goal of preventing reasonably apprehended serious harm could still be achieved by implementing this accountability mechanism.

[99] Because the provision fails to satisfy the second stage of the *Oakes* test, we conclude that s. 184.4 is unconstitutional.

#### B. *What is the Appropriate Remedy?*

[100] With respect to remedy, Lamer C.J. considered the means available to cure a breach of s. 52 of the *Constitution Act, 1982* in *Schachter v. Canada*, [1992] 2

S.C.R. 679. One such remedy involves reading in; another involves the suspension of the declaration for a period of time.

[101] While reading in a notice requirement may be one available option, it is not appropriate given our additional concern about the breadth of the term “peace officer”. In light of the record before us, we have not reached any conclusion as to the constitutionality of s. 184.4 as it applies to “non-police” peace officers. However, given that the section may be invoked by a wide variety of people, we do not foreclose the possibility that it may be vulnerable for that reason. Parliament may also wish to include a reporting requirement into the provision.

[102] For these reasons, we believe that the appropriate remedy is to declare s. 184.4 unconstitutional and leave it to Parliament to redraft a constitutionally compliant provision. In doing so, Parliament may wish to address the additional concerns we have expressed about the provision in its present form. We would suspend the declaration of invalidity for a period of 12 months to afford Parliament the time needed to examine and redraft the provision.

[103] We declare that s. 184.4 of the *Code* as enacted is constitutionally invalid legislation and suspend this declaration of invalidity for a period of 12 months. We therefore dismiss the appeal but set aside subparas. 1 through 6 of the trial judge’s order, found at para. 454 of his reasons.

*Appeal dismissed.*

*Solicitor for the appellant: Attorney General of British Columbia,  
Vancouver.*

*Solicitors for the respondent Yat Fung Albert Tse: Wilson, Buck, Butcher  
& Sears, Vancouver.*

*Solicitor for the respondent Nhan Trong Ly: Brent V. Bagnall,  
Vancouver.*

*Solicitor for the respondent Viet Bac Nguyen: Howard Rubin, Q.C.,  
Vancouver.*

*Solicitor for the respondent Huong Dac Doan: Kenneth S. Westlake,  
Q.C., Vancouver.*

*Solicitors for the respondents Daniel Luis Soux and Myles Alexander  
Vandrick: Donaldson's, Vancouver.*

*Solicitor for the intervener the Attorney General of Canada: Attorney  
General of Canada, Vancouver.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.*

*Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.*

*Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Lacy Wilkinson, Toronto; Stockwoods, Toronto.*

*Solicitors for the intervener the British Columbia Civil Liberties Association: Blake, Cassels & Graydon, Vancouver.*

*Solicitors for the intervener the Canadian Civil Liberties Association: McCarthy Tétrault, Toronto.*