S.C.C. File No. 33751

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

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Appellant)

and

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

RESPONDENTS
(Respondents)

and

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THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
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TABLE OF CONTENTS

Page

PARTS I & II: OVERVIEW & POSITION ON QUESTIONS IN ISSUE 1

PART III: STATEMENT OF ARGUMENT 1

A. A Combination of Safeguards is Required Given the Nature of s. 184.4 1

B. A Clear Time Limit on s. 184.4 is Necessary to Prevent its Misuse 5

C. The Class of Officers Empowered to Use s. 184.4 must be Narrowed 6

D. Reporting and Notice Are Compatible and Important Safeguards 8

E. Conclusion: s. 184.4 can be Construed to be Constitutional 9

PART IV: SUBMISSIONS CONCERNING COSTS 10

PART V: REQUEST FOR ORAL ARGUMENT AND POSITION 10

PART VI: TABLE OF AUTHORITIES 11

PART VII LEGISLATIVE PROVISIONS RELIED ON 12

PARTS I & II: OVERVIEW & POSITION ON QUESTIONS IN ISSUE

1. Much like *R. v. Duarte*, this appeal is concerned with the protection accorded by s. 8 of the *Canadian Charter of Rights and Freedoms* against surreptitious electronic recording of individuals' conversations in the absence of judicial authorization. The key distinction between *Duarte* and the present appeal is that the provision at issue here, s. 184.4 of the *Criminal Code*, R.S.C. 1985, c. C-46 (*"Code"*), only applies in situations of such urgency that obtaining prior judicial authorization is not feasible. When such circumstances are present, s. 184.4 confers extraordinarily invasive powers on a broad class of peace officers. The intervener British Columbia Civil Liberties Association ("BCCLA") submits that clear limits on this discretion are necessary for it to pass *Charter* scrutiny.

2. The BCCLA's position is that:

(a) the class of "peace officers" empowered to conduct an emergency wiretap under s. 184.4 must be narrowed;

(b) the length of an emergency wiretap must be limited in accordance with the purpose of s. 184.4; and

(c) notice and reporting regarding s. 184.4 wiretaps must be required to ensure police accountability.

3. This position recognizes that, while exigency may make prior judicial authorization impossible for a short time, it does not necessitate an elimination of all safeguards. Quite the contrary: the absence of a warrant makes it all the more imperative that s. 184.4 not confer an unfettered discretion, in accordance with the general scheme of the *Code* and this Court's prior jurisprudence on section 8 of the *Charter*.

PART III: STATEMENT OF ARGUMENT

A. A COMBINATION OF SAFEGUARDS IS REQUIRED GIVEN THE NATURE OF S. 184.4

4. Section 184.4 is an exceptional power. There is no requirement for judicial authorization prior to use. No notice is provided to the individuals whose conversations are secretly recorded, and which may be stored for an indeterminate time. There is no

apparent limit on the duration of a s. 184.4 wiretap. There are no accountability measures whatsoever. The resulting combination of these features means that s. 184.4 can be used by a broad class of persons to surreptitiously record conversations without anyone ever knowing. Absent judicial limits along the lines proposed here, the BCCLA submits that s. 184.4 would empower an unacceptable destruction of privacy.

5. Section 8 of the *Charter* provides that “everyone has the right to be secure against unreasonable search or seizure.” Section 8 protects reasonable expectations of privacy. The test for analyzing an alleged infringement of s. 8 requires the court to determine:

(a) first, does the person who is subject to the search have a reasonable expectation of privacy in the circumstances? and

(b) second, does the search or seizure constitute an unreasonable intrusion on that right of privacy?

R. v. Edwards, [1996] 1 S.C.R. 128 at para. 33, BCCLA Book of Authorities (“BCCLA BA”) tab 7

6. With regard to the first aspect of the test, individuals clearly have an expectation of privacy regarding their telephone conversations. In *R. v. Duarte*, La Forest J. for the majority of the Court held that “one can scarcely imagine a state activity more dangerous to individual privacy than electronic surveillance and to which, in consequence, the protection accorded by s. 8 should be more directly aimed”. In *R. v. Wong*, La Forest J. for the majority of the Court commented that one hallmark of a free society is that everyone can carry out their daily lives “without running the risk that their words will be recorded at the sole discretion of agents of the state”. Thus the first part of the *Edwards* test is clearly met here: s. 184.4 authorizes a “search” within the meaning of s. 8.

R. v. Duarte, [1990] 1 S.C.R. 30 at 43, Book of Authorities of the Respondent Tse (“Tse BA”) tab 3
R. v. Wong, [1990] 3 S.C.R. 36 at 46, BCCLA BA tab 12

7. The second aspect of the s. 8 test is whether the search is unreasonable. A warrantless search is *prima facie* unreasonable. In *Hunter v. Southam*, the Court held

that the purpose of s. 8 can only be served by a system of prior authorization, not one of subsequent validation. Section 184.4 provides neither. In *R. v. Duarte*, La Forest J. held 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."

> *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 160-168, Tse BA tab 2
> *R. v. Duarte*, *supra* at 42-43, 46, Tse BA tab 3

8. A reasonable balance must be struck between police officers' need to use wiretap powers, and the right of all Canadians to be left alone.

> *R. v. Duarte*, *supra* at 44-46, Tse BA tab 3
> See also *R. v. Wong*, *supra* at 44-48, BCCLA BA tab 12
> *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432 at paras. 17-18, Appellant's Book of Authorities ("ABA"), tab 53

9. Virtually all other wiretap provisions have at least one of the following safeguards: a clear time limitation, a requirement for judicial authorization, or an accountability mechanism. Indeed, apart from s. 184.1, the other wiretap provisions in the *Code* require prior authorization by a judge, rather than a justice of the peace as is permitted in respect of other warrants. This heightened level of scrutiny is appropriately proportionate to the invasion of privacy inherent in the secret recording of individuals' conversations.

> See *e.g. Code* ss. 184.2, 184.3, 185, 186, 188, ABA tab 69; s. 487, BCCLA BA tab 2

10. Under the *Canadian Security Intelligence Service Act*, a wiretap requires a warrant issued by a Federal Court judge. Under the *National Defence Act*, only the Minister of National Defence can authorize a wiretap, and the Communications Security Establishment Commissioner audits Ministerial wiretap orders.

> *Canadian Security Intelligence Service Act,* R.S.C. 1985, c. C-23, ss. 2, 21, BCCLA BA tab 1
> *National Defence Act*, R.S.C. 1985, c. N-5, s. 273.65, BCCLA BA tab 3

11. In *R. v. Duarte*, the Court held that the interception of private communications where one party consented to the interception, without prior judicial authorization, infringed s. 8 of the *Charter*. The Court contrasted the unfettered nature of that power with the long list of conditions usually associated with a *Code*-authorized wiretap:

(a) Electronic surveillance must be authorized by a judge;

(b) Authorizations are only granted where the applicant shows that there is no real practical alternative. They are treated as a last resort investigative mechanism, and can only be obtained in respect of the most serious offences in the *Code*;

(c) There are strict time-limits on authorizations;

(d) A judge may include any conditions and restrictions that he or she considers advisable in the public interest;

(e) Renewals are only authorized on a showing of cause and a detailing of all interceptions made prior to the request;

(f) Notification must be given to the person whose communications have been intercepted;

(g) The Solicitor General of Canada must prepare a comprehensive report on all electronic surveillance conducted pursuant to authorizations; and

(h) The responsibility of the Attorney General of the province in which the application is sought, or of the Solicitor General is engaged.

R. v. Duarte, *supra* at 55-56, Tse BA tab 3

12. Not all of these safeguards are necessarily required to render the interception of private communications constitutionally compliant, but <u>none</u> of these conditions are incorporated into s. 184.4. As such, the extraordinary nature of the provision requires a narrow construction.

13. Moreover, as noted above the only meaningful difference between the provision at issue in *Duarte* and s. 184.4 is urgency. That being so, in order to be constitutional s. 184.4 must be interpreted in a manner that is consistent with this Court's prior

jurisprudence, modified only to the degree necessary to address that urgency. BCCLA submits that, at minimum, this interpretation must include clear time limits, restricting s. 184.4 wiretaps to police, and reporting requirements. We address each of these points in turn below.

B. A CLEAR TIME LIMIT ON S. 184.4 IS NECESSARY TO PREVENT ITS MISUSE

14. The Appellant submits at para. 40 of its factum that there is a "reasonable diligence" test implicit in s. 184.4, such that "if, upon periodic reconsideration of the issue, an authorization becomes feasible then one must be prepared." The BCCLA submits that this does not provide a sufficiently clear guideline. "Periodic" and "feasible" are inherently subjective and variable, giving no guidance to those exercising the power, nor any real protection to those subject to it.

15. This Court has previously considered warrantless powers to search dwelling houses in exigent circumstances, to forcibly enter private premises in response to a 911 call, and to enter dwellings in "hot pursuit" of a suspect. Unlike these physical searches, which are immediately obvious to those impacted, a wiretap is surreptitious. Moreover, a physical search is a single event, whereas a s. 184.4 wiretap may extend for a discretionary period of time. By way of example, the s. 184.4 wiretap in *R. v. Riley* lasted for four days.

> *R. v. Grant*, [1993] 3 S.C.R. 223 BCCLA BA tab 10
> *R. v. Godoy*, [1999] 1 S.C.R. 311 BCCLA BA tab 9
> *R. v. Feeney*, [1997] 2 S.C.R. 13 BCCLA BA tab 8
> *R. v. Riley* (2008), 234 C.C.C. (3d) 181, 174 C.R.R. (2d) 288 (Ont. S.C.J.) at para. 33 ABA tab 48

16. In the present case, the evidence at trial indicated that R.C.M.P. E-Division (British Columbia) has a written policy limiting a s. 184.4 wiretap to 24 hours. The BCCLA submits that a 24-hour time-limit is required to make the s. 184.4 search a reasonable one. Section 188 of the *Code* empowers a judge to authorize an emergency wiretap for up to 36 hours. Likewise, a telephone authorization for participant surveillance under s. 184.3 of the *Code* lasts up to 36 hours. Presumably, the <u>warrantless</u> wiretap power in s. 184.4 must be more restricted than these judicially-authorized surveillance powers.

R. v. Tse, 2008 BCSC 211, 235 C.C.C. (3d) 161 at para. 73, ABA tab 54

17. In the court below, Davies J. held at para. 275 that officers must "immediately, and with the least delay possible in the circumstances, also take all steps necessary to obtain a judicial authorization". Such a requirement leaves no doubt in officers' minds that they must immediately seek judicial authorization upon exercising the authority granted by s. 184.4. A 24-hour limitation is consistent with this obligation.

18. The Appellant argues that requiring police to immediately commence work to seek judicial authorization will divert resources that could be used to prevent harm. That argument cannot succeed, as it could be made in all instances where a warrant is required. Like solicitor-client privilege, judicial oversight must be seen as a positive aspect of law enforcement, not an impediment to it.

Hunter v. Southam, supra at 161, Tse BA tab 2
Lavallee, Rackel & Heintz v. Canada (Attorney General), 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 36, BCCLA AB tab 6
See *e.g. R. v. Hernandez*, 2008 BCSC 1475, [2008] B.C.J. No. 2125 (QL) at para. 41, ABA tab 29

19. Under the Appellant's suggested interpretation, the use of s. 184.4 could continue to be "immediately necessary" for an indefinite period of time. Neither the statute nor the Appellant offers useful guidance to officers in this regard. It is up to this Court to do so.

See *R. v. Riley, supra* at paras. 72-73, ABA tab 48

20. In light of the invasiveness of electronic surveillance, limiting the discretionary power conferred by s. 184.4 provides the necessary balance to protect *Charter* rights to the greatest extent possible, even in emergency circumstances.

C. THE CLASS OF OFFICERS EMPOWERED TO USE S. 184.4 MUST BE NARROWED

21. The range of individuals authorized to invoke s. 184.4 is very broad. "Peace officers" as defined in s. 2 of the *Code* include mayors, reeves and fisheries guardians. These are civilian positions with no mandatory qualifications, training or oversight.

R. v. Riley, supra at para. 44, ABA tab 48

22. Parliament did not consider the implications of this definition in any substantive way when it adopted s. 184.4. Read as a whole, the legislative debates and committee proceedings indicate that Parliament generally understood that this power would be used by police.

> Appellant's Factum, para. 78
> *Record* at Vol. V, pp. 14, 40, 60

23. BCCLA submits that, for the purposes of s. 184.4, the definition of "peace officer" should be limited to "police officers". The qualifications and training required of the police, and the internal structures of police forces, provide a degree of protection against an inappropriate use of s. 184.4 by an individual police officer. Surely if a mayor, reeve or fisheries guardian were aware of an imminent threat to persons or property, the proper response would be to contact the police, who are trained and equipped to deal with such circumstances. Canadians deserve absolute privacy from warrantless electronic surveillance by anyone other than the police, in keeping with the general prohibition in s. 184 of the *Code*.

> *Record* at Vol. II, pp. 43-96
> *R. v. Deacon*, [2008] O.J. No. 5756 (Ont. S.C.J.) at paras. 118-119, ABA tab 20

24. This interpretation does not mean the broad definition of "peace officers" is necessarily inappropriate in other contexts. Other electronic surveillance powers in the *Code* may be exercised by any peace officer who can justify the proposed action to a judge. Only the police should be entitled to proceed absent such judicial supervision.

> *R. v. Riley, supra* at para. 46, ABA tab 48

25. By way of example, the B.C. Court of Appeal has read down the categories of "peace officer" empowered by the provincial *Motor Vehicle Act* to randomly stop and question motorists, to police officers and a few other officials who enforce motor vehicle laws. The public deserves no less protection from warrantless electronic surveillance.

> *R. v. Wilson* (1993), 86 B.C.L.R. (2d) 103, 86 C.C.C. (3d) 145 (C.A.), ABA tab 59

D. REPORTING AND NOTICE ARE COMPATIBLE AND IMPORTANT SAFEGUARDS

26. In *R. v. Duarte*, the Court identified two key requirements upon which the constitutionality of electronic surveillance powers are generally predicated: the provision of notice to those targeted by the interception, and annual reporting by the Minister of Public Safety on all electronic surveillance conducted pursuant to authorizations.

R. v. Duarte, supra at 54-56, Tse BA tab 3

27. Neither safeguard exists here. It is entirely possible that secret electronic surveillance under s. 184.4 could occur without anyone other than those conducting it ever finding out. This affords officers an essentially unreviewable power (particularly if the authority is not confined to the police). In *Hunter v. Southam*, the Court held that a provision authorizing an unreviewable power "would clearly be inconsistent with s. 8 of the Charter."

Hunter v. Southam, supra at 166, Tse BA tab 2

28. Although an accused might eventually learn that his or her conversations had been intercepted and recorded, the surveillance net will inevitably be cast much wider than those who are charged. For non-accused persons, even if they happen to become witnesses at trial, they have no *Stinchcombe* right to disclosure. Moreover, an emergency wiretap may lead to no charges at all. Section 184.4 is framed as a <u>preventive</u> measure, not an <u>investigatory</u> one. Given the circumstances in which it is intended to be used, it is quite possible that no charges will be laid and therefore no disclosure will be required.

29. Indeed, s. 184.4 has no limitations akin to those set out in s. 184.1(2) and (3) on the use of s. 184.1(1) interceptions. Further, s. 193 of the Code authorizes officers to use information gleaned from a s. 184.4 wiretap in an investigation unrelated to the ostensible justification for the wiretap. Officers are also entitled by s. 193 to forward information acquired by wiretap to foreign law enforcement agencies, over which Canadian courts have no control.

30. As a result, BCCLA submits that anyone who exercises s. 184.4 authority must be required to notify those whose conversations have been recorded, to the extent that

the affected individuals can be identified. Such a requirement is consistent with the notification obligation imposed by s. 196 of the *Code* in respect of judicially-authorized interceptions. There is no defensible justification for not requiring such notice. Indeed, the lack of prior judicial authorization makes *ex post* notification all the more important.

> *R. v. Riley, supra* at paras. 84-85, ABA tab 48
> *R. v. Tse, supra* at paras. 214-218, ABA tab 54

31. The second necessary safeguard is a mechanism for review by the executive and public reporting, as required by s. 195 in respect of judicially-authorized surveillance operations. Public reporting enables independent assessments of the reasonableness of the implementation of s. 184.4 over the long term. Parliament can oversee the exercise of the powers that it has granted. Interested persons and groups such as the BCCLA can also scrutinize the use of s. 184.4, but only if they have information regarding its use. The BCCLA carefully reviews such reports to monitor the incursion on civil liberties by the exercise of state power. Participation in civil society in this manner is an important means by which the quality of democratic discourse in Canada is enhanced.

> See *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827 at paras. 70-72, BCCLA BA tab 5

32. Together, notification and reporting would provide important bulwarks against the risk of misuse of the otherwise unfettered power conferred by s. 184.4. Both requirements are consistent with the provisions of Bill C-50, a proposal by the government to amend the *Criminal Code*, which died on the order paper and has yet to be re-introduced, Moreover, neither notification nor reporting would hinder the use of that power, so there is no reason not to impose such requirements.

> Bill C-50, 40th Parl., ss. 7-8, Respondents Nguyen and Doan Factum, pp. 47-48

E. CONCLUSION: S. 184.4 CAN BE CONSTRUED TO BE CONSTITUTIONAL

33. On its face, s. 184.4 is clearly problematic. As a result, the Respondents and non-government interveners submit that s. 184.4 should be struck down, leaving to Parliament the opportunity to refashion an emergency wiretap power that is

constitutional. The BCCLA does not oppose that outcome, but submits that it is not the only option. The alternative is for this Court to apply the less intrusive techniques of reading in and reading down to eliminate the constitutional shortcomings in the provision. As set out above, s. 184.4 can accommodate a 24-hour time limitation, in keeping with ss. 184.3(6) and s. 188(2). Notification of affected parties and public reporting, consistent with existing requirements under ss. 195 and 196 of the *Code*, can also be read into s. 184.4. Finally, the definition of "peace officers" can be read down for purposes of s. 184.4 to ensure that warrantless electronic surveillance is only carried out by people who have police qualifications, training and supervision. These remedies, BCCLA submits, would address the most troublesome aspects of s. 184.4 in a balanced way, affording greater protection to individual privacy without sacrificing the needs of law enforcement. Moreover, there is no evidence that Parliament viewed the problematic aspects of s. 184.4 as integral to the legislative scheme.

> See *e.g. R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45 at paras. 121-128, BCCLA BA tab 11
> *United States of America v. Ferras*, 2006 SCC 33, [2006] 2 S.C.R. 77 at para. 44, BCCLA BA tab 13
> *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76 at paras. 19-43, BCCLA BA tab 4

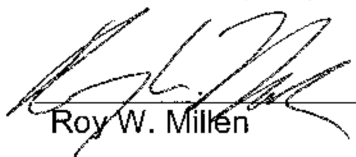
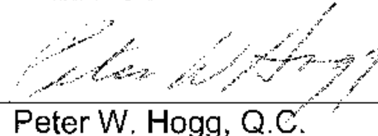
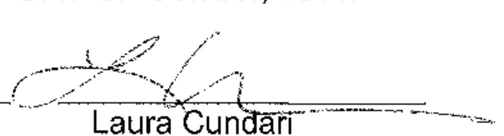
PART IV: SUBMISSIONS CONCERNING COSTS

34. The BCCLA does not seek costs with respect to the appeal, and respectfully requests that it not be ordered to pay costs other than any additional disbursements occasioned to the Appellant and Respondents by its intervention.

PART V: REQUEST FOR ORAL ARGUMENT AND POSITION

35. The BCCLA requests 10 minutes of oral argument to address issues arising from its factum and those of other interveners and parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd DAY OF October, 2011.

Roy W. Millen | Peter W. Hogg, Q.C. | Laura Cundari

PART VI: TABLE OF AUTHORITIES

Paragraph

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Harper v. Canada (Attorney General), 2004 SCC 33, [2004] 1 S.C.R. 827................... 31

Hunter v. Southam, [1984] 2 S.C.R. 145 .... 17, 18, 27

Lavallee, Rackel & Heintz v. Canada (Attorney General), 2002 SCC 61, [2002] 3 S.C.R. 209 18

R. v. Deacon, [2008] O.J. No. 5756 (Ont. S.C.J.)... 23

R. v. Duarte, [1990] 1 S.C.R. 30... 1, 6, 7, 8, 11, 26

R. v. Edwards, [1996] 1 S.C.R. 128 5

R. v. Feeney, [1997] 2 S.C.R. 13 15

R. v. Godoy, [1999] 1 S.C.R. 311 15

R. v. Grant, [1993] 3 S.C.R. 223 15

R. v. Hernandez, 2008 BCSC 1475, [2008] B.C.J. No. 2125 (QL) 18

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R. v. Sharpe, 2001 SCC 2, [2001] 1 S.C.R. 45 33

R. v. Tessling, 2004 SCC 67, [2004] 3 S.C.R. 432... 8

R. v. Tse, 2008 BCSC 211, 235 C.C.C. (3d) 161 .... 16, 30

R. v. Wilson (1993), 86 B.C.L.R. (2d) 103, 86 C.C.C. (3d) 145 (C.A.)........................... 25

R. v. Wong, [1990] 3 S.C.R. 36 .... 6, 8

United States of America v. Ferras, 2006 SCC 33, [2006] 2 S.C.R. 77......................... 33

PART VII LEGISLATIVE PROVISIONS RELIED ON

Paragraph

N/A