

**BC CIVIL LIBERTIES ASSOCIATION SUBMISSION**  
**TO THE STANDING COMMITTEE ON JUSTICE AND HUMAN RIGHTS**  
*Bill C-55, Response to the Supreme Court of Canada Decision in R. v. Tse Act*  
Speaking Notes: March 6, 2013  
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**Introduction**

Good afternoon. My name is Raji Mangat. I am Counsel at the B.C. Civil Liberties Association. The BCCLA is a non-partisan, non-profit organization based in Vancouver, BC. The Association frequently appears before this Committee. Today, I am pleased to be here to speak with you about Bill C-55. Thank you for this opportunity.

The Committee is to be congratulated for taking on the substance matter of the recent Supreme Court of Canada decision concerning warrantless wiretaps. The BCCLA supports the Committee's work in carefully and narrowly framing the process for the use of these exceptional powers and we agree with many of the amendments.

The BCCLA is pleased to see that Bill C-55 will limit the use of s. 184.4 to police officers. This is a sensible and necessary amendment that supports the rationale behind the provision – as providing a means by which law enforcement can prevent serious and imminent harm on an urgent basis. On that note, the BCCLA is also pleased that Bill C-55 limits the application of warrantless wiretapping to circumstances in which the goal is to prevent the commission of an offence.

The addition of a notice requirement to individuals who have been subjected to warrantless wiretapping brings section 184.4 in line with other provisions in the Code. The notice requirement provides transparency and serves as an essential check on this extraordinary power to intercept communications without judicial authorization. The reporting requirement in Bill C-55 is also a welcome amendment as it will enhance police accountability. Together, the notice and reporting requirements bolster accountability and oversight in the use of warrantless wiretapping.

**Time limit on warrantless wiretap necessary**

I appear before you today, however, to alert you to an inadvertent oversight in the amendments that may have unintended consequences. The absence of clear timelines for the use of warrantless wiretaps suggests that there is a genuine risk that we may see this provision used to create a parallel wiretapping regime. As the Committee's intention with these amendments is to provide the police with a stop-gap measure by which to prevent serious harm in urgent circumstances, and not to create an alternative to the normal

wiretapping regime, it will be clear to the Committee that the provision requires the inclusion of a maximum time limit for the duration of a warrantless wiretap.

Section 184.4 is unique. It is only one of two sections in the Criminal Code that permit interception of private communications without a specific time limit and without judicial authorization. The only other provision that allows for this – s. 184.1 – permits it only with a person's consent in order to prevent bodily harm to that person. So, section 184.4 is truly exceptional: It allows for the interception of private communications without judicial authorization, at the sole discretion of officers, prior to any offence or unlawful act having been committed.

As currently drafted, Bill C-55 grants police officers a broad and invasive power to intercept private communications for an indeterminate period of time. Bill C-55 does not provide guidance to police officers about how long they are permitted to exercise this extraordinary power. The type of emergency situation contemplated here, one that is so urgent that the police have no time to seek any other form of warranted interception, not even a telephone warrant under s. 184.3, is one that will necessarily be brief. If it truly to be used in exigent circumstances, then by nature it's duration must be short.

No time limit capping the use of s. 184.4 means that the interception could be indefinite and still be perceived as lawful. For there to exist a power to intercept which is supposed to be based on exigent circumstances, but that provides no upper limit on how long that interception may continue would inadvertently undermine the normal regime already in place for wiretapping.

A wiretap is by its nature indiscriminate. It captures all communications taking place on the tapped device, including any and all manner of private, personal and possibly even privileged, confidential communications, communications that have no bearing on the serious harm that is sought to be prevented, communications with third parties who have no knowledge of the offence that may be committed, yet who retain a significant interest in their privacy being protected.

Interceptions under s. 184.4 are preventive and therefore in some manner, speculative. We must remember that they are sought without judicial oversight and are intended to be used in those narrowest of circumstances where the police must act immediately, with no time to spare. They are the warrant equivalent of the police entering a home in hot pursuit of a suspect. But unlike "hot pursuit", there is no inherent time limitation to the use of the wiretap. Moreover, they carry the risk of capturing all sorts of highly personal communications. A limit to the discretionary power conferred by s. 184.4 is necessary to protect privacy rights.

Clear wording providing a time limitation on the use of the provision is necessary to support the Committee's vision of a carefully and narrowly crafted process for the use of warrantless wiretaps. Other wiretap provisions in the Code, such as section 184.3(6) and s. 188(2), both of which require prior judicial authorization, limit the interception to a maximum of 36 hours. In evidence at the lower court in *R. v. Tse*, the RCMP's E Division was stated to have a policy whereby warrantless interception was limited to 24 hour use. A warrantless interception should be more limited in duration than one for which prior authorization must be sought. In cases where there is no warrant, it is all the more imperative that the power not be exercised indefinitely.

An inadvertent result of the lack of a time limit in the legislation is that it could result in the *de facto* operation of two parallel wiretap regimes: one in which prior judicial authorization is sought, and one in which the need for a warrant is disposed of in "urgent circumstances." As the Committee is aware, the Criminal Code already consists of a thorough regime governing the interception of private communications. A time limit to the use of the warrantless wiretap provision would make clear that after the urgent circumstances in which police officers are appropriately allowed to make use of these special powers, they are required to revert back to the normal regime for continued interception.

### **Conclusion**

The BCCLA urges the Committee to explicitly adopt a 24-hour maximum time limit on the use of warrantless wiretaps as this will support the Committee's efforts to craft legislation that appropriately empowers the police to use these powers only in the exigent circumstances in which their use is intended and that sufficiently protects the privacy rights of Canadians.

Thank you for your time.