

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***R. v. Six Accused Persons***,
2008 BCSC 212

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Regina

v.

Six Accused Persons

Before: The Honourable Mr. Justice Davies

Ruling on Constitutional Validity of s. 184.4 of *Criminal Code*

Counsel for the Crown:	J.C. Bellows, Q.C. S.P. Lakshman A.S. Burton T.A. Shaw
Counsel for the Attorney General of Canada (January 15, 2008, only):	C.J. Tobias
Counsel for an Accused:	S.R.A. Buck A.D. Srivastava
Counsel for an Accused:	R.C. Claus
Counsel for an Accused:	B.V. Bagnall
Counsel for an Accused:	I. Donaldson, Q.C. N. Mason T.L. Chamberlain
Counsel for an Accused:	K.S. Westlake, Q.C.
Counsel for an Accused:	T.B. Doust
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INTRODUCTION

[1] This ruling concerns applications by the accused who challenge the constitutional validity of s. 184.4 of the ***Criminal Code***, R.S.C. 185, c. C-46 (the ***Code***)

and its use in gathering evidence that the Crown seeks to adduce at the trial of the accused.

[2] Because of the subject matter of those applications, the challenge was also concerned with:

1. the facts and circumstances of the implementation of s. 184.4 of the **Code** by the police in the investigation of the charges faced by the accused; and
2. applications concerning the validity of subsequent judicial authorizations granted under s. 186 of the **Code** that were used by the police to intercept private communications.

[3] The Crown has proceeded by way of direct indictment in this case and the accused have elected to be tried by judge and jury but a jury has not yet been empanelled.

[4] Section 648 of the **Code** provides that in a jury trial:

no information concerning any part of the trial which is not present shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.

[5] Accordingly, my reasons for the whole of the constitutional challenge and the related applications have been published under the mandatory publication ban imposed by s. 648 of the **Code**. Those reasons and other reasons on prior rulings I have made in this case will remain subject to that mandatory ban until a verdict is rendered by the jury empanelled to try this case.

[6] The constitutional rulings in this case are, however, important not only to these proceedings but also to: the administration of justice; the conduct of the police in any future use they may seek to make of s. 184.4 of the **Code**; and, to Parliament, which must have a reasonable opportunity to consider and react to those constitutional rulings.

[7] In those unique circumstances, I have determined that an excerpt from my ruling that is concerned only with the question of the constitutional validity of s. 184.4 of the **Code** must be released for publication. In order to ensure that s. 648 of the **Code** continues to serve the purposes for which it is intended (that being that jury verdicts are to be based only upon admissible evidence heard in open court) and to avoid any tainting of any jury pool or any prejudice to a fair trial, I have, in these reasons and this excerpt, made no reference to the name of any accused, the name of any alleged victim or witness or the specific circumstances of the crimes alleged.

[8] The following excerpt is taken from the original ruling without modification starting at page 47 of that ruling.

A. THE CONSTITUTIONAL VALIDITY OF S. 184.4 OF THE CODE

[110] For ease of reference, I repeat the provisions of s. 184.4 of the **Code** which provide:

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.

[111] The accused submit that s. 184.4 of the **Code** contravenes s. 52(1) of the **Constitution Act, 1982** which provides:

The Constitution of Canada is the Supreme Law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[112] Counsel for the accused submit that s. 184.4 of the **Code** contravenes the fundamental freedoms guaranteed by s. 7, 8 and 11(d) of the **Charter** and is not saved by the provisions of s. 1 of the **Charter**. They submit that it is accordingly of no force or effect and that evidence obtained by its implementation in this case is presumptively inadmissible against them as having been illegally obtained. They seek a declaration of the constitutional invalidity of s. 184.4, as well as remedies precluding the admission of evidence obtained by its use.

[113] Sections 7, 8 and 11(d) of the **Charter** provide:

- (7) Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
- (8) Everyone has the right to be secure against unreasonable search and seizure.
- (11) Any person charged with an offence has the right
 - (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[114] Section 1 of the **Charter** provides:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[115] I am told by all counsel that this is the first case where the provisions of s. 184.4 have been considered in the constitutional context.

[116] They have also advised me that they are aware of only three decisions of any courts in Canada that have considered s. 184.4 of the **Code** in any context.

[117] In *R. v. Khela*, 2004 BCSC 38, McKinnon J. considered s. 184.4 only to the extent that the accused challenged the *bona fides* of the police in invoking s. 184.4 in that case. Although there was some discussion about the purposes of s. 184.4 and the burden upon the police of proving compliance with the section before any evidence that was obtained pursuant to it could be admitted at trial, McKinnon J. specifically stated:

The applicants at bar made it clear that they were not seeking *Charter* remedies insofar as s. 184.4 was concerned, only with respect to the general admissibility of P37 under s. 186.

[118] I also understand that in *R. v. Jotakoun and Pham* (unreported May 9, 1995), (B.C.S.C.) to which McKinnon J. referred in *Khela*, Vickers J., while assessing the admissibility of cellular phone records of conversations captured by police after seizing a cellular phone, concluded that such interceptions had to be authorized by law. In canvassing the various sections of the **Code** that might authorize the interceptions, Vickers J. looked at s. 184.4, but given the absence of urgency or serious harm concluded that s. 184.4 could not authorize the interceptions in that case.

[119] Finally, in *R. v. Gyles* (May 16, 2003), Docket 6098/02, [2003] O.J. No. 1922, 2003 CarswellOnt 6649 (S.C.J.) (QL), Wein J., in *obiter dicta*, commented upon the possibility that in exigent circumstances contemplated by s. 184.4 lower than usual standards might apply in relation to the acceptance of the reliability of information provided by informants.

[120] It is common ground that in determining whether an enactment contravenes s. 52(1) of the **Constitution Act, 1982** by reason of its alleged contravention of fundamental freedoms guaranteed by the **Charter**, the Court must first interpret the provisions of that enactment.

[121] The parties depart, however, on what they say is the proper interpretation of the provisions of s. 184.4.

[122] The accused submit that interpretation of the section must lead to the conclusion that it is both overly broad and vague, and that it also fails to comply with established constitutional principles and safeguards that allow the state to infringe upon its citizens privacy rights but only when such principles and safeguards are observed.

[123] The Crown submits that if it is correctly interpreted, s. 184.4 of the **Code** is neither overly broad nor vague and also that it properly balances the need of the state to

prevent crime and prevent harm to victims of crime in exigent circumstances against competing privacy rights and does so within established constitutional parameters.

[124] The accused and the Crown also depart in their submissions concerning the starting point for the interpretation of the provisions of s. 184.4 of the **Code**.

[125] The Crown submits that in assessing the constitutional validity of s. 184.4 of the **Code**, the Court should assume a situation where the law has been properly applied. It says the facts of the case which give rise to the constitutional challenge may inform the constitutional debate, but that any failure of the police to properly implement s. 184.4 in this or any other case does not establish that the section is unconstitutional. Mr. Shaw submits that operational deficiencies do not dictate a finding of constitutional invalidity because if s. 184.4 is correctly implemented in exigent circumstances in accordance with its terms, its operation will pass constitutional muster. In making those submissions, the Crown relies heavily upon the majority decision in **Little Sisters Book and Art Emporium v. Canada (Minister of Justice)**, [2000] 2 S.C.R. 1120, 2000 SCC 69 [**Little Sisters**].

[126] In **Little Sisters**, the Supreme Court of Canada determined that notwithstanding that customs officials had systematically applied Customs legislation that banned the importation of material deemed obscene (within the provisions of the **Code**) in a discriminatory manner contrary to s. 2 (b) of the **Charter**, the Customs legislation itself was not unconstitutional because it was capable of being enforced in a non-discriminatory way.

[127] In reaching that conclusion, Binnie J.(for the majority) said at ¶71:

My colleague Iacobucci J. accepts the propositions that "[t]his Court's precedents demand sufficient safeguards in the legislative scheme itself to ensure that government action will not infringe constitutional rights" (para. 204), and because "the legislation makes no reasonable effort to ensure that it will be applied constitutionally to expressive materials" (para. 211), Code 9956 should be struck from the Customs Tariff. I do not think there is any constitutional rule that requires Parliament to deal with Customs' treatment of constitutionally protected expressive material by legislation (as the appellants contend) rather than by way of regulation (as Parliament contemplated in s. 164(1)(j)) or even by ministerial directive or departmental practice. Parliament is entitled to proceed on the basis that its enactments "will be applied constitutionally" by the public service.

[128] He went on to state that the initial question to be decided was (at ¶73):

[W]hether the Customs legislation itself contains procedures that infringe *Charter* rights, as in *Morgentaler*, or whether the problem here is implementation, aggravated by administrative constraints such as limited budgets and lack of qualified personnel, as found by the trial judge.

[129] In further disagreeing with the dissenting view expressed by Iacobucci J., (on behalf of himself, Arbour and LeBel JJ.) Binnie J. also said (at ¶82):

Iacobucci J. argues that Parliament was constitutionally required to spell out a more rights-protective regime in the Act itself, but in my view, for the reasons given below, it was open to Parliament in creating this type of government machinery to lay out the broad outline in the legislation and leave its implementation to regulation by the Governor in Council or departmental procedures established under the authority of the Minister. A failure at the implementation level, which clearly existed here, can be addressed at the implementation level.

[130] In result, the majority determined that although the impugned Customs legislation contravened s. 2(b) of the **Charter**, it was saved by operation of s. 1 of the **Charter** except to the extent that a clause placing a reverse onus on importers to establish that goods were not obscene had to be struck down.

[131] Counsel for the accused submit that the majority analysis in **Little Sisters** is of little, if any, assistance to the determination of the constitutional validity of s. 184.4 of the **Code**. They emphasize that **Little Sisters** was not concerned with s. 8 **Charter** principles that have developed over many years of analysis and was concerned with delegation of regulatory powers rather than with constitutional statutory interpretation in the criminal law context.

[132] I agree in part with the submissions of both the Crown and the defence concerning the extent to which **Little Sisters** should govern my approach to statutory interpretation in this case. Specifically, I agree with the Crown that in interpreting s. 184.4 of the **Code** I should assume that peace officers who may invoke its use will act in compliance with the conditions and constraints placed upon them by the terms of the section. In other words, I should assume that they will not act capriciously or oppressively in breach of fundamental rights as occurred in **Little Sisters**.

[133] On the other hand, I also agree with the position advanced by the accused that the way in which s. 184.4 of the **Code** has been interpreted and implemented by the police in this and in other cases is relevant to interpretation issues concerning allegations that the section is constitutionally both vague and overly broad. Further, as I will later discuss, I also agree with the submissions of defence counsel that s. 184.4 of the **Code** must be interpreted in the context of those principles that emerge from the jurisprudence that has specifically addressed the constitutionality of search-and-seizure legislation generally and wiretap legislation in particular.

[134] With those considerations in mind, I now turn to what I consider to be the correct interpretation of s. 184.4 of the **Code** having regard to the defence allegations of unconstitutional vagueness and over-breadth.

(1) Is s. 184.4 void for vagueness?

[135] The defence argument that s. 184.4 of the **Code** is void for vagueness focuses primarily upon its alleged contravention of s. 7 of the **Charter**. They say that a law that is vague breaches s. 7 because it renders indefinite and unpredictable the conditions under which the state may interfere with fundamental freedoms. In this case, they submit that the unlawful interception of private communications would not only result in a breach of an accused person's s. 8 **Charter** right to be free from unreasonable search

or seizure, but could also lead to an unfair trial in breach of s. 11(d), and thus a breach of s. 7 arising from a deprivation of liberty caused by the breach of principles of fundamental justice.

[136] In making their submissions, the accused rely primarily upon **R. v. Nova Scotia Pharmaceutical Society**, [1992] 2 S.C.R. 606, 74 C.C.C. (3d) 289 [**Nova Scotia Pharmaceutical**]; **Ontario v. Canadian Pacific Ltd.**, [1995] 2 S.C.R. 1031, 99 C.C.C. (3d) 97 [**Canadian Pacific**]; and **R. v. Morales**, [1992] 3 S.C.R. 711, 77 C.C.C. (3d) 91.

[137] In **Nova Scotia Pharmaceutical**, the Court succinctly stated the doctrine of constitutional vagueness in the following terms at p. 643:

The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern State, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

[138] The Crown does not take issue with that proposition. It submits, however, that if judicial interpretation of the impugned legislation is possible, vagueness issues do not arise. In support of that proposition the Crown relies on the observation of the Court in **Canadian Pacific** (at ¶47) that:

In undertaking vagueness analysis, a court must first develop the full interpretive context surrounding an impugned provision. This is because the issue facing a court is whether the provision provides a sufficient basis for distinguishing between permissible and impermissible conduct, or for ascertaining an "area of risk". This does not necessitate an exercise in strict judicial line-drawing because, as noted above, the question to be resolved is whether the law provides sufficient guidance for legal debate as to the scope of prohibited conduct. In determining whether legal debate is possible, a court must first engage in the interpretive process which is inherent to the "mediating role" of the judiciary (*Nova Scotia Pharmaceutical Society, supra*, at p. 641). Vagueness must not be considered in abstracto, but instead must be assessed within a larger interpretive context developed through an analysis of considerations such as the purpose, subject matter and nature of the impugned provision, societal values, related legislative provisions, and prior judicial interpretations of the provision. Only after exhausting its interpretive role will a court then be in a position to determine whether an impugned provision affords sufficient guidance for legal debate.

[Emphasis in original.]

[139] Statutory interpretation is thus at the heart of the vagueness inquiry in this case and should not be considered in the abstract. Rather, it must be considered in the context of the legislation at issue, the interests of society that are engaged by the legislation, any judicial interpretation of the same or similar provisions, and to at least a limited extent the evidence adduced on this *voir dire* concerning how the police have themselves interpreted the powers granted by s. 184.4 of the **Code**. I refer to evidence

concerning how the police have themselves interpreted the powers granted not because it is determinative of those powers, but because it informs the debate as to whether the provisions are so vague that they cannot be reasonably interpreted.

[140] In this interpretive inquiry and analysis, I must start with an examination of the stated legislative purpose behind the enactment of s. 184.4 and related provisions of Part VI of the **Code** when that legislation was introduced in Parliament on February 23, 1993. See: *House of Common Debates*, XIII (February 25, 1993).

[141] In introducing Bill C-109, The Honourable Perrin Beatty on behalf of the Minister of Justice for Canada stated (at 1645) that:

Mr. Speaker, I am pleased to speak in support of Bill C-109, as it includes two specific provisions related to privacy which I believe this country needs. The first deals with electronic surveillance and is used by the police. The second is the interception of radio-based communications.

The changes being proposed by my colleague, the Minister of Justice, to part VI and part XV of the Criminal Code respond to a series of Supreme Court decisions which significantly affect the way police and other agents of the state can do their jobs.

[142] Three decisions of the Supreme Court of Canada referred to by the Minister were **R. v. Duarte**, [1990] 1 S.C.R. 30, 53 C.C.C. (3d) 1 [**Duarte**]; **R. v. Wiggins**, [1990] 1 S.C.R. 62, 53 C.C.C. (3d) 476; and **R. v. Wong**, [1990] 3 S.C.R. 36, 60 C.C.C. (3d) 460.

[143] After summarizing those decisions and one other, the Minister stated (at 1650):

As a result of these four cases and the recommendations made by the courts, the Minister of Justice is proposing the following amendments to the Criminal Code: first to provide for a statutory authority for an electronic lifeline to permit police and others in potentially dangerous situations to have their conversations surreptitiously intercepted by backup teams; second to provide for a warrant procedure for police and others to intercept communications with the consent of a participant to a conversation, to gather evidence or information relevant to suspected criminal activity on reasonable grounds; third, to provide for warrant procedures so the police and other enforcement officials can use video and other surveillance technology such as electronic tracking devices; fourth, to provide protection from civil or criminal liability for individuals assisting in the execution of authorizations or warrants; fifth, to provide for warrants and orders to engage in activities or obtain information or co-operation which would otherwise constitute an unreasonable search or seizure; sixth, to streamline the evidentiary and procedural regime applicable to evidence gathered through electronic surveillance.

The primary purpose of these amendments is to permit the use of technology by police forces in the performance of their duties, but only in

a way that does not contravene the Canadian Charter of Rights and Freedoms.

The amendments would have the effect of simplifying the rules of admissibility of evidence. They would also increase the effectiveness of both the police and Crown prosecutors, in accordance with the recommendations of the Supreme Court.

We are talking about the resources police officers need to perform their duties satisfactorily.

[144] The Minister then went on to address amendments to the **Code** that would ensure that privacy protection would extend to communications by radio in addition to telephone communications. Of most particular concern was the extension of the protection of privacy in communications by cellular telephones. In doing so, he reiterated the Government's goal of ensuring the protection of privacy rights. He stated (at 1700):

First of all, these amendments will deem all encrypted radio-based telephone communications to be private and protected by the full strength of the law.

Second, the proposed changes to the Criminal Code will prohibit malicious and profit-motivated interception of any radio-based telephone communication. Anyone who deliberately intercepts communications with the intention of harm or any other motive of securing a financial advantage would be subject to prosecution.

Third, with a limited number of exceptions, the disclosure or subsequent use of any intercepted radio-based telephone communication would be prohibited without the consent of a party to it.

Anyone who contravenes these provisions can be punished on summary conviction with a fine of not more than \$25,000 and/or one year in jail in the case of an individual, or with a fine not exceeding \$75,000 in the case of a corporation.

Finally, the Radiocommunication Act will be amended to allow private right of action. Any victim of such wrongdoing will have the right to take the perpetrator to court for damages. This provision will give a clear civil recourse for individuals who suffer damages because of unauthorized interception.

I am convinced that these provisions for protection, prevention and prosecution, when taken together will offer the most effective solution to the complex issue of privacy.

[145] Perhaps surprisingly, there was no direct reference by the Minister when introducing Bill C-109 to the purposes behind or the goals expected to be achieved by the inclusion of what became s. 184.4 of the **Code**.

[146] However, subsequent proceedings before the House of Commons Legislative Committee and before the Senate Standing Committee on Legal and Constitutional Affairs after the introduction of Bill C-109 do shed some light on the legislative intent

behind s. 184.4. Those subsequent proceedings also evidence concerns expressed by some witnesses about many of the same issues that are now raised by the accused in this constitutional challenge including, in particular, concerns about lack of internal or external oversight of the actions of individual peace officers and other issues of police accountability in the context of the invasion of privacy.

[147] At the end of that consideration of the now impugned provisions, Parliament did not amend s. 184.4 of the **Code** to address those or other concerns relating to the possibility of unfettered invasions of privacy by state agents. It appears that Parliament accepted that, as drafted, s. 184.4 had sufficient internal limitations to preclude arbitrary actions by individual police officers. More specifically, in an appearance before the Senate Standing Committee on Legal and Constitutional Affairs on June 15, 1993, The Honourable Pierre Blais, then Minister of Justice and Attorney General of Canada, addressed the rationale behind s. 184.4 of the **Code** as drafted and ultimately enacted. At 48:15 to 48:16 of the report of those proceedings he stated:

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

Think about the case of a hijacker who holds up an airplane on an airport runway, or a disturbed person who holds his wife and children hostage and threatens to kill them; is it reasonable in these cases, to refuse policemen the right to try and find out what is going on until they can find a judge and meet the strict requirements of the procedure that involves collecting elements of proof? No, not when every minute counts. I feel that this provision is necessary to ensure public safety. Moreover, I do not think the Charter should be an obstacle to those who wish to save lives or prevent serious damage to property.

(Standing Senate Committee on Legal and Constitutional Affairs, *Fifth and Final Proceedings On: Examination of Bill C-109, An Act to Amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, 34th Parl., No. 48 at 48:15 and 48:16 (June 15, 1993) The Honourable Pierre Blais Minister of Finance and Attorney General of Canada)

[148] My review of all of the legislative material filed by the Crown on this application leads me to conclude that Parliament's intention in enacting s. 184.4 of the **Code** was to allow a peace officer facing exigent circumstances of apprehended serious harm to persons or property to attempt to prevent that harm by intercepting communications without judicial authorization if the officer apprehended that both the exigency and potential for serious harm were such that the lapse of time required to obtain judicial authorization could increase the risk of the occurrence of the apprehended harm.

[149] The issue that must be decided on this constitutional challenge is whether the means chosen by Parliament to meet that objective does so in a manner that does not infringe upon constitutionally protected fundamental rights.

[150] That inquiry commences with the interpretation of the provisions of s. 184.4 of the **Code** in the context of the constitutional vagueness issues raised by the accused. It must answer this question: Are the powers granted to peace officers by s. 184.4 of the **Code** sufficiently ascertainable through meaningful debate and judicial interpretation that it can be determined whether the invocation of s. 184.4 by a peace officer in any given circumstance is (or was) within the prescribed limits of the section? In other words: Does the section prevent arbitrary (and thus unconstitutional) law enforcement?

[151] To answer that question it is necessary to examine the words and phrases used in the section in the context of its purpose and the constitutional issues raised by the accused. It is also necessary to bear in mind that when doing so, even when it is criminal legislation that is impugned under the **Charter**, the Court should start with a presumption of constitutionality. See: **Application under s. 83.28 of the Criminal Code (Re); R. v. Bagri**, [2004] 2 S.C.R. 248 at ¶34 and 35, 2004 SCC 42 in which Iacobucci and Arbour JJ., for the majority, stated:

[34] 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. This is the prevailing and preferred approach to statutory interpretation: see, e.g., *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193, at para. 21; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, 150 C.C.C. (3d) 321, 194 D.L.R. (4th) 1, at para. 33; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, 212 D.L.R. (4th) 1, at para. 26. The modern approach recognizes the multi-faceted nature of statutory interpretation. Textual considerations must be read in concert with legislative intent and established legal norms.

[35] Underlying this approach is the presumption that legislation is enacted to comply with constitutional norms, including the rights and freedoms enshrined in the *Charter*: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 367. This presumption acknowledges the centrality of constitutional values in the legislative process, and more broadly, in the political and legal culture of Canada. Accordingly, where two readings of a provision are equally plausible, the interpretation which accords with Charter values should be adopted: see, *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at p. 1078, 59 D.L.R. (4th) 416; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at p. 660, 74 C.C.C. (3d) 289, 93 D.L.R. (4th) 36; *R. v. Lucas*, [1998] 1 S.C.R. 439, 123 C.C.C. (3d) 97, 157 D.L.R. (4th) 423, at para. 66; and *Sharpe, supra*, at para. 33.

[152] Counsel for the accused submit that various words and phrases in s. 184.4 are so vague, ambiguous, or undefined that they enable arbitrary law enforcement. They focus in particular on the phrases "the urgency of the situation", "reasonable diligence", "unlawful act", and "serious harm".

[153] In answer, on behalf of the Crown, Mr. Shaw submits that the totality of the internal limits on police authority found within s. 184.4 of the **Code** are not only capable

of ascertainment by meaningful debate but can also be judicially interpreted to achieve constitutional compliance.

[154] Those competing submissions require an interpretation not only of the words and phrases individually but in context of the whole of s. 184.4 and the Parliamentary objective in enacting the legislation.

[155] I have determined that the vagueness analysis can be most usefully undertaken by first considering the impugned phraseology as found within ss. 184.4(a) and (b) and then assessing them within the context of not only s. 184.4 as a whole, but also as part of Part VI of the **Code**. I will then address ss. 184.4(c) because of submissions made by Crown Counsel as to its proper interpretation.

(a) Subsection 184.4(a)

[156] Subsection 184.4(a) of the **Code** provides that a peace officer may intercept private communications without prior judicial authorization when 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 Part VI.

[157] I agree with the submission of the Crown that 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.

[158] Counsel for the accused submits that the phrase “urgency of the situation” is ambiguous to the extent that it could be interpreted to refer to two different types of urgency. One definition of urgency could refer to the external circumstances that could give rise to the harm. Another could refer to the availability of other means of investigation.

[159] I do not accept such a bifurcated analysis when the section is read as a whole. I am satisfied that the phrase “urgency of the situation” must be interpreted as referring both to the external circumstances of the event requiring police intervention as well as to the availability of other means of investigation. Viewed that way, the “urgency of the situation” is circumscribed by the need for a peace officer’s apprehension of imminent serious harm and further constrained by the statutory requirement that the exigency of the situation is such that the peace officer must also reasonably believe that the harm could not be prevented by a reasonably diligent attempt to obtain prior judicial authorization. I find that so interpreted the phrase “urgency of the situation” is not constitutionally vague.

[160] Also, while the accused submit that the concept of “reasonable diligence” is also vague, I do not agree.

[161] Firstly, I reach that conclusion because reasonableness is a concept which finds expression and is given meaning or definition by many concepts in the criminal law. It is, for example, well established that for a police officer to be acting reasonably in arresting

an individual without warrant he or she must have both objective and subjective grounds for believing that the person has committed a crime. Also, the fundamental criminal law concept of proof beyond a reasonable doubt is not only capable of definition, but is necessarily interpreted by judges and juries on a daily basis in Canada. The Supreme Court of Canada has also repeatedly held that reasonable is capable of interpretation within the legislative context in which it is used and the facts of any given case. See for example: **Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)**, [2004] S.C.R. 76 ¶28, 2004 SCC 4; **R.B. v. Children's Aid Society of Metropolitan Toronto**, [1995] 1 S.C.R. 315 ¶92, 122 D.L.R. (4th) 1; and **R. v. Bernshaw**, [1995] 1 S.C.R. 254 ¶98, 95 C.C.C. (3d) 193.

[162] Secondly, the concept of reasonable diligence has received judicial consideration and been deemed capable of definition in a number of circumstances in which the courts have ascribed meaning to the phrase in the context in which it is used. See, for example: **R. v. McMartin**, [1964] S.C.R. 484 at 491-93, [1965] 1 C.C.C. 142, in the context of applications to admit fresh evidence on appeal; and **R. v. Brydges**, [1990] 1 S.C.R. 190 at 204, 53 C.C.C. (3d) 330 as well as **R. v. Prosper**, [1994] 3 S.C.R. 236 at 269-70, 92 C.C.C. (3d) 353, in the context of an accused person's assertion of s. 10(b) **Charter** rights. All of those cases lead to the conclusion that the meaning to be attributed to reasonable diligence will be dependent upon not only the context of the requirement, but also upon an evaluation of competing societal values.

[163] I have concluded that reasonable diligence under ss. 184.4(a) of the **Code** should be construed to conform with the s. 8 **Charter** right of individuals to be free from unreasonable search or seizure by ensuring the exercise of a very high standard of diligence in keeping with the fundamental privacy interests that are at stake.

[164] Although I am satisfied that the phrases urgency of the situation and reasonable diligence are neither so vague or incapable of definition that they render s. 184.4 of the **Code** constitutionally invalid, one issue that does give me serious concern goes to the question of how a peace officer contemplating the use of s. 184.4 will be able to comply with its terms.

[165] The concern I have is this: A peace officer confronted with objectively and subjectively exigent circumstances that could result in serious harm must confront the question of how long it will likely take to obtain prior judicial authorization to intercept private communications using due diligence and whether the time required is such that the serious harm may not be prevented if an emergency intercept is not undertaken. It is, however, obvious that the peace officer can never know at the outset with any precision how long the exigent circumstances will continue (as, for example, in a hostage-taking situation with ransom demands) and therefore cannot know with any degree of certainty whether a prior judicial authorization can in fact with reasonable diligence be obtained before the harm sought to be prevented may occur.

[166] In my view, the only way a peace officer can comply with the provisions of s. 184.4 of the **Code** is to, upon determining that the urgency of the situation is such that a judicial authorization could not, with reasonable diligence, be obtained before the harm sought to be prevented could occur:

1. implement s. 184.4 of the **Code** to intercept only those private communications that may be lawfully intercepted pursuant to ss. 184.4(c); and
2. immediately, and with the least delay possible in the circumstances, also take all steps necessary to obtain a judicial authorization under Part VI of the **Code**.

[167] For ease of reference, I will in future call that process the constitutionally compliant implementation process because in my view it is necessary to comply with the provisions of s. 184.4 as enacted and avoid the type of arbitrary law enforcement that would contravene s. 7 of the **Charter**.

[168] In formulating the constitutionally compliant implementation process I have used the phrase immediately and with the least delay possible in the circumstances to ensure that there is no arbitrary or unsanctioned waiting period before acting to regularize the interception of private communications pursuant to those constitutional parameters that I will later discuss. I also, however, recognize that a myriad of circumstances such as (but not necessarily limited to) for example: the extent of resources available to the police to investigate the emergency (for example, in remote areas); the time of day or week during which the exigent circumstances may arise; other exigencies that may arise during the investigation; and, the availability of judicial resources may impact upon the length of time that it may reasonably take to obtain a judicial authorization.

[169] I am satisfied by the totality of the evidence adduced on this application that in most cases of exigency warranting the implementation of s. 184.4 of the **Code** the usual practise that should be followed is to immediately seek a judicial authorization under s. 188 of the **Code** while at the same time preparing an application under s. 186. That process would both minimize the delay in obtaining the constitutionally required judicial oversight and also allow more time for the more complex task of preparing the necessary affidavit in support of a s. 186 application. While I make that observation based upon the evidence in this case, for the reasons I have addressed in the preceding paragraph I do not go so far as to say that it should be followed in all cases. The circumstances of the exigencies must govern the appropriate practise in any given case provided that the practise followed is within the parameters of the constitutionally compliant implementation process I have formulated.

[170] The constitutionally compliant implementation process is, in my opinion, also consistent with the stated objectives of legislation expressed by the Minister of Justice to which I earlier referred, *i.e.*, that this provision enables them [a peace officer] to try to intercept communications in order to find out what is going on if this can save lives, until they are able to obtain authorization . (My emphasis.)

[171] Simply put, when a peace officer cannot know for how long the emergency situation requiring the implementation of s. 184.4 of the **Code** will last he or she cannot delay pursuing a judicial authorization by saying it would take too long because the officer cannot know that to be the case. Any delay before proceeding with a judicial authorization and any delay in pursuing such application with such diligence as the circumstances reasonably allow would lead to arbitrary law enforcement.

[172] My interpretation of ss. 184.4(a) of the **Code** that requires a peace officer to act in accordance with the constitutionally compliant implementation process leads to the obvious conclusion that any policy decision of a police agency that suggests that an officer should wait any prescribed period of time before seeking judicial authorization is arbitrary, an issue I will address more fully when considering the implementation process followed by the police in this case in the next part of this ruling.

(b) Subsection 184.4(b)

[173] I will next address the vagueness issues raised by the accused concerning ss. 184.4(b), which provides that a peace officer invoking s. 184.4 to intercept private communications must believe 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 .

[174] I am satisfied that the impugned phraseology in ss. 184.4(b), although somewhat imprecise, does not render s. 184.4 unconstitutionally vague or authorize arbitrary law enforcement when read in the context of the whole of the section and the harm which Parliament intended to address.

[175] Although reference is made in the subsection to an unlawful act rather than to defined offences, I am of the opinion that properly interpreted the phrase unlawful act can only refer to offences enumerated in s. 183 of the **Code**. That is so because it is only in respect of such enumerated offences that any Part VI authorization to intercept private communications could be obtained. Since ss. 184.4(a) requires as a precondition to its use the reasonable belief that the urgency of the situation is such that an authorization under Part VI could not be obtained without reasonable diligence, it cannot be the case that by using the phrase unlawful act Parliament intended to allow the unauthorized interception by the police of communications for which a judicial authorization could not be obtained.

[176] I accordingly find as a matter of statutory interpretation that an unlawful act referred to in ss. 184.4(b) is limited to an offence enumerated in s. 183 of the **Code**. So interpreted, the phrase unlawful act is not constitutionally vague. I do, however, leave for later discussion issues of alleged over-breadth that may arise even with that interpretation of unlawful act in the context of the legislation as a whole.

[177] I also find that the phrase serious harm as used in ss. 184.4(b) is not constitutionally vague. The concept of serious harm has received judicial consideration in numerous cases. See, for example, **R. v. McCraw**, [1991] 3 S.C.R. 72 at 79-80, 66 C.C.C. (3d) 517 [**McCraw**] interpreting the phrase serious bodily harm , which interpretation would, in my view, apply equally to ss. 184.4(b) and the concept of serious harm to any person . Although not so directly on point, the reasoning in **McCraw**, calling on the ordinary dictionary meaning of seriousness as including grave , grievous or attendant with danger , is also capable of being applied when considering the concept of serious harm to property .

(c) Subsection 184.4(c)

[178] I must address the proper interpretation of ss. 184.4(c), not only because it is relevant to the implementation of s. 184.4 by the police in this case, but also because of an interpretation of ss. 184.4(c) urged upon me by Crown Counsel.

[179] Subsection 184.4(c) determines those communications that can be intercepted by a peace officer in exigent circumstances. Specifically, it allows interception of private communications where:

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

[180] The Crown has submitted that victim and intended victim should be interpreted to include family members of the person who is the subject of the threat of harm and goes so far as to submit that calls between such related victims could be lawfully intercepted pursuant to s. 184.4 of the **Code**.

[181] I am unable to agree with that submission.

[182] The interpretation suggested by the Crown distorts the plain language of that subsection and also fails to read ss. 184.4(c) to accord with the provisions of ss. 184.4(b), which allows resort to the emergency powers in ss. 184.4(b) only to prevent an unlawful act that would cause immediate serious harm. Read as the Crown suggests, ss. 184.4(c) would not only allow the interception of communications between any number of alleged undefined victims, but would also not require that an intercepted communication involve the alleged perpetrator.

[183] In my opinion, the emergency powers granted to peace officers by s. 184.4 only were intended by Parliament to allow the prevention of serious harm to the actual victim or intended victim of the apprehended harm by enabling the interception of private communications that could identify the perpetrator of the crime or at least his or her location so that the police could then take necessary steps to protect the victim from the anticipated harm. Any investigative benefit to the state arising from the interception of the communications in the ultimate prosecution of the perpetrator were intended only as a by-product of the real intent of the section, *i.e.*, the prevention of serious physical harm in exigent circumstances.

[184] I am also satisfied that the interpretation of ss. 184.4(c) suggested by the Crown would introduce an element of vagueness into the legislation that would allow arbitrary and virtually unfettered police action in the investigation of crime.

[185] In my view, a plain reading of ss. 184.4(c) limits the communications that can be intercepted to those between the perpetrator of the anticipated serious harm and the actual victim or intended victim of that harm. In my opinion, that is the proper interpretation to be placed on ss. 184.4(c). It does not extend to the interception of communications of family members of the actual victim or intended victim threatened by the infliction of serious harm unless those family members are the recipients of calls from the actual or intended victim or perpetrator. I do, however also find that the definition of perpetrator should be read as being broad enough to include aiders or

abettors of an actual perpetrator. I reach that conclusion by way of interpretation of the parties to the offence provisions of s. 21 and 22 of the **Code**.

[186] I turn next to the arguments of the accused related to the alleged over-breadth of s. 184.4 of the **Code**.

(2) Is s. 184.4 of the Code overly broad?

[187] Although they are closely related as constitutional concepts, the doctrines of vagueness and over-breadth are different. In **R. v. Heywood**, [1994] 3 S.C.R. 761 at 792-93, 94 C.C.C. (3d) 481, Cory J. (for the majority) explained the concepts in the following terms:

Overbreadth and vagueness are different concepts, but are sometimes related in particular cases. As the Ontario Court of Appeal observed in *R. v. Zundel* (1987), 58 O.R. (2d) 129, at pp. 157-58, cited with approval by Gonthier J. in *R. v. Nova Scotia Pharmaceutical Society*, *supra*, the meaning of a law may be unambiguous and thus the law will not be vague; however, it may still be overly broad. Where a law is vague, it may also be overly broad, to the extent that the ambit of its application is difficult to define. Overbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective. In the case of vagueness, the means are not clearly defined. In the case of overbreadth the means are too sweeping in relation to the objective.

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

[188] The accused submit that s. 184.4 of the **Code** overreaches its objectives in many significant ways. Specifically, they say the means chosen by Parliament to address the prevention of imminently possible serious harm to persons or property are overly broad in the context of constitutionally protected privacy rights because:

1. there are no limits on the length of time for which the state may invade privacy without judicial approval or oversight;
2. there are no requirements for any notice of an interception to any person whose private communications have been intercepted;
3. there is no prescribed method of reporting to any civilian agency or Parliament the fact of the use of s. 184.4 of the **Code** or the frequency of resort to it;

4. as enacted, s. 184.4 could apply to a very broad class of unlawful acts that could not reasonably give rise to the types of harm that Parliament intended to address;
5. a very broad class of individuals (statutorily defined peace officers) are entitled to engage the section without internal approval or oversight; and
6. as interpreted by the Crown and as implemented by the R.C.M.P. in this case, ss. 184.4(c) would enable the police to intercept the communications of a virtually unlimited number and class of persons.

[189] Although these over-breadth concerns were advanced under s. 7 and 11(d) of the **Charter**, I have concluded that in all material respects they are more appropriately considered as part of the s. 8 analysis upon which I am about to embark.

[190] I reach that conclusion because:

1. many of the arguments raised concerning alleged over-breadth are answered by the interpretative conclusions I have already reached in determining allegations of vagueness;
2. what is at issue in these proceedings is first and foremost an evidence-gathering provision which engages the fundamental right of accused persons to be free from unreasonable search and seizure under s. 8 of the **Charter**;
3. constitutional considerations and norms have emerged over the years in relation to search and seizure legislation in the context of privacy considerations under s. 8 of the **Charter** that are far more specific and germane to the issues now raised in relation to s. 184.4 of the **Code** than those relating to s. 7 and 11(d) of the **Charter**; and
4. generally speaking, if an evidence-gathering provision is found to be unconstitutional as breaching the fundamental right of accused persons to be free from unreasonable search and seizure, a similar constitutional result would likely certainly apply under s. 7 or 11(d) **Charter** considerations.

[191] Alternatively, if I am wrong in those conclusions, in my opinion, the over-breadth issues raised by the accused are more appropriately considered under a s. 1 **Charter** analysis that will be necessary if I determine that s. 184.4 of the **Code** is unconstitutional because it breaches any **Charter** provision.

[192] I will accordingly now consider the s. 8 **Charter** issues raised by the accused.

(3) Does s. 184.4 of the Code contravene the right to be free from unreasonable search and seizure under s. 8 of the Charter?

[193] Consideration of this question must start with the decision of the Supreme Court of Canada in **Duarte**.

[194] As I have previously noted, **Duarte** was one of the decisions that was the impetus to the implementation of Bill C-109 to amend those provisions of the **Code** relating to interception of private communications that the Supreme Court had determined to be constitutionally unsound.

[195] The Crown submits that in those circumstances, as part of Bill C-109 and now Part VI of the **Code**, s. 184.4 should be given additional constitutional respect as part of a dialogue between the Court and Parliament to correct prior constitutional deficiencies in the **Code**'s wiretap provisions.

[196] I do not agree with that submission. My reading of the wiretap legislation that existed before the amendments to the **Code** that were introduced as part of Bill C-109 leads me to conclude that there was no provision similar to the present s. 184.4 of the **Code**. In those circumstances, it cannot be said that Parliament was reacting to judicial authority in relation to the subject matter of the section. Although it was part of the amendments to Part VI, s. 184.4 of the **Code** was new legislation and in those circumstances, arguments about its provisions being part of a dialogue are misconceived.

[197] Before turning to my analysis of s. 184.4 under s. 8 of the **Charter** and the constitutional principles enunciated by La Forest J. for a unanimous Court in **Duarte**, I must, however, first observe (as I said during the hearing of argument in this case) that I accept without hesitation that in truly exigent circumstances involving the very real potential for serious harm to persons or property, it may be necessary for state agents to interfere with individual rights of privacy to attempt to prevent that harm from actually occurring.

[198] The Supreme Court of Canada has recognized that in truly exigent circumstances the fundamental s. 8 **Charter** right to be free from unreasonable search and seizure must at times give way to state interests in the prevention of harm and also to the interests of those individual citizens who may be the victims of harm even when privacy expectations are at their highest. I note in particular the decisions of the Supreme Court of Canada in:

1. **R. v. Feeney**, [1997] 2 S.C.R. 13, 115 C.C.C. (3d) 129 [**Feeney**]: permitting entry by the police without warrant into a dwelling house to arrest a fleeing accused in cases of hot pursuit;
2. **R. v. Godoy**, [1999] 1 S.C.R. 311, (1998) 21 C.R. (5th) 205 [**Godoy**]: determining that the police could enter a dwelling house to investigate a 9-1-1 call without a warrant, not only due to state interest in the prevention of apprehended harm but also due to the interests of the person who had initiated the 9-1-1 call to whom the police owed a duty to investigate a potential emergency; and
3. **R. v. Mann**, [2004] 3 S.C.R. 59, 2004 SCC 52, [**Mann**]: in cases of real concern for officer safety (thus the protection of life), pat down searches incidental to arrest may be appropriate.

[199] Thus, I begin my analysis of the constitutionality of s. 184.4 in accordance with the constitutional standards addressed by the Court in **Duarte** by recognizing the legitimacy of Parliament's stated goal of attempting to prevent reasonably apprehended

serious harm to persons or property and recognizing also that in truly exigent circumstances the privacy rights of individuals may be overridden by such concerns.

[200] In *Duarte*, the Court was concerned with the constitutional validity of then ss. 178.11(2)(a) of the **Code** that allowed the interception of private communications without prior judicial authorization provided that one party to the conversation consented to that authorization. Usually the person consenting was an undercover police officer. In determining that the section breached the fundamental s. 8 **Charter** right to be free from unreasonable search and seizure, the Court examined what it determined to be appropriate safeguards to the interception of private communications of then Part IV.1 of the **Code** that rendered those provisions constitutionally valid. La Forest J., for the Court, stated (at 54-56):

The appellant raises the additional point that dispensing the police from the requirement to seek a warrant for conducting participant surveillance effectively allows the police to do indirectly what Part IV.1 of the *Code* prohibits them from doing directly. Faced with the choice of having to seek a warrant, and being able to proceed without one, it can reasonably be expected that they will, circumstances permitting, elect to proceed without one.

Here, the police, acting without any judicial authorization, wired an apartment for a period of some two years, installed listening devices in another location, and employed an automobile location beeper. In circumstances such as these, where the police have evidence of a conspiracy and have elicited the services of an informer, can there be any compelling reason to suggest that the interests of justice would not be better served by requiring the police to attend before a superior court judge to obtain an authorization as opposed to letting the police be the sole arbiters of the scope of the investigation and its duration?

It is worth noting, in this regard, the basis for the conclusion of Martin J.A. in *R. v. Finlay, supra*, that Part IV.1 of the *Code* is constitutional. While he was ready to accept that the interception of private communications does constitute a search and seizure within the meaning of those terms as they are used in the Charter, he concluded that such searches and seizures, when authorized in accordance with the requirements of Part IV.1 of the *Code*, would ordinarily be reasonable precisely and solely because the provisions and safeguards of Part IV.1 preclude the police from embarking on fishing expeditions in the hope of uncovering evidence of crime.

With regard to these safeguards it is worth remembering that Part IV.1 of the *Code*:

- (a) stipulates that authorizations for electronic surveillance are only to be given on a showing that there is no real practical alternative (s. 178.13(1)); in other words, as put by the Ontario Court of Appeal in *R. v. Playford* (1987), 40 C.C.C. (3d) 142 at p. 185, 63 O.R. (2d) 289, 61 C.R. (3d) 101: "... it is treated as a last resort investigative mechanism", and can only be obtained for investigation of the most serious offences in the *Code* (s. 178.1);

- (b) sets strict time-limits on authorizations (s. 178.13(2)(e));
- (c) prescribes that a judge may include any conditions and restrictions that he considers advisable in the public interest;
- (d) authorizes renewals only on a showing of cause and a detailing of all interceptions made prior to the request for the authorization and the number of previous authorizations;
- (e) mandates that notification be given to the person whose communications have been intercepted (s. 178.23(1));
- (f) requires the Solicitor General of Canada to prepare a comprehensive report on all electronic surveillance conducted pursuant to authorizations (s. 178.22(1));
- (g) engages the responsibility of the Attorney General of the province in which the application is sought, or of the Solicitor General (or duly appointed agents) (s. 178.12(1)); and
- (h) provides that authorizations may only issue on the order of a superior court judge (s. 178.12(1)).

If the constitutionality of Part IV.1 of the *Code* is predicated on the numerous safeguards designed to prevent the possibility that the police view recourse to electronic surveillance as a humdrum and routine administrative matter, it would seem anomalous that participant surveillance, which leaves to the sole discretion of the police all the conditions under which conversations are intercepted, should be held to meet the definition of "reasonable" in the context of s. 8 of the Charter. I think that the appellant makes a good point when he submits that the large-scale police investigative activity using participant surveillance for monitoring and recording private conversations effectively bypasses any judicial consideration of the entire police procedures and thereby makes irrelevant the entire scheme in Part IV.1 of the *Code*.

[201] While I recognize that not all of those safeguards need necessarily be present in every case to render the interception of private communications constitutionally permissible, the fact remains that absent such safeguards the constitutionality of legislation allowing the interception of private communications will be compromised.

[202] My inquiry into the constitutional validity will accordingly focus on the existence or lack of such safeguards under s. 184.4 of the **Code** in the context of s. 8 of the **Charter**, bearing in mind Parliament's legitimate concerns to prevent serious harm in exigent circumstances. In undertaking that inquiry, I will examine each of the posited safeguards in the context of: the evidence on this *voir dire*; my previous determination of the appropriate interpretation of the provisions of s. 184.4 of the **Code**; the concerns with respect to alleged over-breadth raised by the accused; and, the expressed intention of Parliament in enacting the impugned provisions.

(a) *Electronic surveillance as a last resort investigative mechanism only for the most serious offences in the Code*

[203] In my view, a reasonable apprehension of the risk of serious harm occurring to persons or property ameliorates the last resort concerns in *Duarte*. Further, both s. 186 and s. 188.1 of the **Code** permit the issuance of judicial authorization to intercept private communications in cases of demonstrated urgency without the need to establish investigative necessity as a precondition to issuance.

[204] As to the most serious offence limitation, as I have previously discussed, in my opinion unlawful act in ss. 184.4(c) of the **Code** must be interpreted to include only those offences enumerated in s. 183 of the **Code**. That interpretation especially in conjunction with the need for apprehension of serious harm will limit the application of the use of s. 184.4 to the most serious offences in the **Code** in compliance with this constitutional safeguard.

[205] I must, however, observe that as a matter of potential over-breadth it is difficult to apprehend that some of the offences enumerated in s. 183 of the **Code** could result in the type of exigency with which Parliament was concerned in enacting s. 184.4 of the **Code**.

(b) *Strict time limits on authorizations*

[206] As I have earlier discussed, s. 184.4 has no time limits for the interception of communications other than those must be read in by way of interpretation to ensure the constitutionally compliant implementation process I have previously formulated in para. 166 of this ruling.

[207] Read and implemented in that way, although there would be no strict time limits upon the interception of communications under s. 184.4 of the **Code**, the duration of its use would be practically limited to a very short period appropriate to the legitimate exigency concerns that Parliament sought to address in enacting the impugned provisions.

[208] As I will later discuss, I am also satisfied that the continued validity of any authorization issued under s. 184.4 of the **Code** would terminate either upon the issuance of a judicial authorization under Part VI, or with the refusal of a judicial authorization at the time the application is made. In the latter circumstance, it would terminate by reason of a judicial ruling that the circumstances did not warrant a continuation of the interception of the private communications.

[209] I must, however, observe that it is fundamental to my determination that the absence of strict time limits on the authorization does not impact upon the constitutionality of s. 184.4 that it must be interpreted and implemented in accordance with the constitutionally compliant implementation process that I have formulated.

(c) *Judicially imposed conditions and restrictions deemed advisable in the public interest*

[210] Obviously s. 184.4 of the **Code** provides no such safeguard. I am, however, satisfied that the existence of exigent circumstances giving rise to a reasonable

apprehension of serious harm will be properly balanced with this need if the interception of communications is limited to very short periods by the constitutionally compliant implementation process discussed in the preceding paragraphs which will allow judicial consideration of the situation at the earliest possible time that is reasonable in the circumstances.

(d) *Authorizes renewals only on a showing of cause, the detailing of all interceptions made prior to the request for authorization and the number of previous authorizations*

[211] This safeguard is not applicable to s. 184.4 of the **Code** because there are no renewal provisions for its implementation.

[212] I must, however, observe that I find it troubling in this case that during the currency of the first judicial authorization issued pursuant to s. 186 (which I will later discuss) the police contemplated the use of s. 184.4 a second time to intercept the communications of persons not identified in the s. 186 authorization. While the investigators determined that there was insufficient evidence of a connection between the alleged victims and perpetrators to engage s. 184.4, it remains disturbing that they contemplated its use when the alleged kidnapping had been unsolved for a number of days and a very broad judicial authorization was allowing the interception of not only the communications of the alleged suspects but also many others, including even the extended family of the alleged victims.

[213] In my view, the fact that the police considered the use of s. 184.4 of the **Code** either to complement or supplement a subsisting s. 186 judicial authorization highlights concerns of the lack of oversight and accountability inherent in s. 184.4 that I will later discuss.

(e) *Mandates that notification be given to the persons whose communications have been intercepted*

[214] Section 184.4 of the **Code** has no notification requirements. Although the Crown submits that in most cases where s. 184.4 is implemented the persons whose communications have been intercepted will receive *de facto* notification by way of the prosecution of the underlying offence, that submission fails to recognize that the communications of persons other than the alleged perpetrator may have been intercepted. It also fails to address situations where, for whatever reason, the police may have erred in their assessment of the need to intercept private communications, intercepted more communications than those to which they were lawfully entitled or over a longer period of time, or those that were intercepted under circumstances which did not result in a prosecution.

[215] In any or all of those circumstances, the police would be answerable to no one. Further, the fact that there is no obligation to disclose surreptitious invasions of privacy to those persons whose communications have been intercepted removes an important safeguard to the potential abuse of power that can arise without accountability.

[216] This case is illustrative of some of those concerns, especially given the broad interpretation given to the concept of victim of the harm in ss. 184.4(c) applied by the police and urged upon me by the Crown that I have previously discussed and rejected

as a reasonable interpretation. To this day, many of the persons whose communications were intercepted by the police are unlikely to know of that invasion of their privacy. That circumstance is exacerbated by the police having engaged in the automatic monitoring of all calls to the telephones they had identified as being appropriate for interception. Any discovery by third parties of the police having intercepted their private communications would be fortuitous.

[217] Requirements to notify persons whose private communications have been intercepted of the fact of that interception afford an important constitutional and accountability safeguard to the potential abuse of state power in invading the privacy of its citizens.

[218] 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.

[219] I am accordingly satisfied that the failure of s. 184.4 of the **Code** to provide notification of surreptitious interception of private communications to those persons whose communications are intercepted is a serious impediment to the constitutional validity of s. 184.4.

(f) *Requires the preparation of a comprehensive report to Parliament of all electronic surveillance*

[220] Not all wiretap provisions of the **Code** mandate the preparation of a report to Parliament by the Solicitor General advising of the extent to which electronic surveillance has been utilized by the state.

[221] Significantly, however, s. 195(1) of the **Code** does require that reports of judicial authorizations granted under either s. 186 or s. 188.1 of the **Code** be sent to Parliament. Since it will generally be those alternative provisions of Part VI that would be invoked by the state to intercept private communications following the implementation of s. 184.4 of the **Code** by a peace officer, it is surprising that Parliament should require reports in judicially authorized circumstances but not when there is no requirement for judicial oversight.

[222] If the intention of Parliament in requiring the provision of reports is to oversee the frequency and circumstances of the interception of private communications by the police, the failure to provide a similar reporting requirement under s. 184.4 of the **Code** removes the potential for that oversight. As with the failure to require notification of those intercepted of the fact of an interception, the lack of any reporting requirement undermines both constitutionality and police accountability.

(g) *Engages the Attorney General of the province in which the application for an authorization is brought or the Solicitor General of Canada (or duly appointed agents)*

[223] Due to the exigency considerations at the heart of s. 184.4 of the **Code**, the constitutional safeguard of a requirement to engage senior government officials who act independently of the police may not be practical while the exigent circumstances are manifest. However, as with the failure to provide any mechanism for reporting upon the extent of the utilization of s. 184.4 to Parliament after the emergency no longer exists, the lack of any requirement to account to senior, independent law enforcement officials undermines police accountability.

(h) Provides that authorizations may only issue on the order of a Superior Court Judge

[224] The necessity for prior judicial authorization for the interception of private communications was the defining constitutional safeguard in **Duarte**.

[225] La Forest J. analyzed the importance of the insertion of a neutral judicial officer to prevent arbitrary law enforcement and the potential abuse of constitutionally protected rights in the following terms (at 11-13):

The rationale for regulating the power of the state to record communications that their originator expects will not be intercepted by anyone other than the person intended by the originator to receive it (see definition section of Part IV.1 of the *Code* [s. 178.1, definition "private communication"]) has nothing to do with protecting individuals from the threat that their interlocutors will divulge communications that are meant to be private. No set of laws could immunize us from that risk. Rather, the regulation of electronic surveillance protects us from a risk of a different order, i.e., not the risk that someone will repeat our words but the much more insidious danger inherent in allowing the state, in its unfettered discretion, to record and transmit our words.

The reason for this protection is the realization that if the state were free, at its sole discretion, to make permanent electronic recordings of our private communications, there would be no meaningful residuum to our right to live our lives free from surveillance. The very efficacy of electronic surveillance is such that it has the potential, if left unregulated, to annihilate any expectation that our communications will remain private. A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning. As Douglas J., dissenting in *United States v. White, supra*, put it, at p. 756: "Electronic surveillance is the greatest leveler of human privacy ever known." If the state may arbitrarily record and transmit our private communications, it is no longer possible to strike an appropriate balance between the right of the individual to be left alone and the right of the state to intrude on privacy in the furtherance of its goals, notably the need to investigate and combat crime.

This is not to deny that it is of vital importance that law enforcement agencies be able to employ electronic surveillance in their investigation of crime. Electronic surveillance plays an indispensable role in the detection of sophisticated criminal enterprises. Its utility in the

investigation of drug related crimes, for example, has been proven time and again. But, for the reasons I have touched on, it is unacceptable in a free society that the agencies of the state be free to use this technology at their sole discretion. The threat this would pose to privacy is wholly unacceptable.

It thus becomes necessary to strike a reasonable balance between the right of individuals to be left alone and the right of the state to intrude on privacy in the furtherance of its responsibilities for law enforcement. Parliament has attempted to do this by enacting Part IV.1 of the *Code*. An examination of Part IV.1 reveals that Parliament has sought to reconcile these competing interests by providing that the police must always seek prior judicial authorization before using electronic surveillance. Only a superior court judge can authorize electronic surveillance, and the legislative scheme sets a high standard for obtaining these authorizations. A judge must be satisfied that other investigative methods would fail, or have little likelihood of success, and that the granting of the authorization is in the best interest of the administration of justice. I share the approach of Martin J.A. in *R. v. Finlay, supra*, at p. 70 *et seq.* C.C.C., p. 554 *et seq.* D.L.R., that this latter prerequisite imports as a minimum requirement that the issuing judge must be satisfied that there are reasonable and probable grounds to believe that an offence has been, or is being, committed and that the authorization sought will afford evidence of that offence. It can, I think, be seen that the provisions and safeguards of Part IV.1 of the *Code* have been designed to prevent the agencies of the state from intercepting private communications on the basis of mere suspicion.

In proceeding in this fashion, Parliament has, in my view, succeeded in striking an appropriate balance. It meets the high standard of the Charter which guarantees the right to be secure against unreasonable search and seizure by subjecting the power of the state to record our private communications to external restraint and requiring it to be justified by application of an objective criterion. The reason this represents an acceptable balance is that the imposition of an external and objective criterion affords a measure of protection to any citizen whose private communications have been intercepted. It becomes possible for the individual to call the state to account if he can establish that a given interception was not authorized in accordance with the requisite standard. If privacy may be defined as the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself, a reasonable expectation of privacy would seem to demand that an individual may proceed on the assumption that the state may only violate this right by recording private communications on a clandestine basis when it has established to the satisfaction of a detached judicial officer that an offence has been or is being committed and that interception of private communications stands to afford evidence of the offence.

This, it seems to me, flows inexorably from the principles enunciated in *Hunter v. Southam Inc., supra*. In that case, this court (p. 106 C.C.C., p. 650 D.L.R.) made the important point that the

"assessment of the constitutionality of a search and seizure ... must focus on its 'reasonable' or 'unreasonable' impact on the subject of the search or the seizure, and not simply on its rationality in furthering some valid government objective." Applying this standard, it is fair to conclude that 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*.

[My emphasis.]

[226] Section 184.4 of the **Code** obviously fails to provide any constitutional safeguard arising from an independent assessment of the reasonableness or otherwise of a peace officer's implementation of the section to intercept private communications. As with the lack of other constraints on the use of state power to invade privacy, the reason for that lack of judicial accountability arises from the exigency of the situation faced by the officer.

[227] I have, in part, previously addressed these concerns when interpreting ss. 184.4(a) by determining that to preclude arbitrary law enforcement, s. 184.4 must be interpreted and implemented in accordance with the constitutionally compliant implementation process that I have discussed at length in this ruling and the particulars of which I have detailed in para. 166. If the peace officer complies with that obligation, the application of the safeguard of judicial neutrality will only be delayed. It will not be entirely removed in those cases where the implementation of s. 184.4 is resolved by either the granting or denial of an authorization under another section of Part VI of the **Code**.

[228] If, however, for some reason, the exigent situation that gave rise to the implementation of s. 184.4 resolves before an application for an authorization under another section of Part VI is considered by a judge, there will be no opportunity for independent assessment of the actions of the police. The evidence adduced by the Crown on this application establishes that such a result may not be uncommon depending on the length of time that is required in the circumstances to obtain a judicial authorization. I must, however, also note that the data filed is of dubious value because of the many varying implementation policies followed by different police forces in Canada and the fact that to my knowledge few, if any, follow the constitutionally compliant implementation process that I have formulated. Doing so will almost certainly reduce the number of instances where the police actions are not subject to judicial scrutiny.

[229] If such situations of early resolution do, however, occur, I am satisfied that a requirement for the giving of notice to those whose communications were intercepted would often engage *ex post facto* scrutiny by an independent judicial officer at the request of the person whose communications were intercepted. While the possibility of there being no judicial scrutiny of police actions in some cases is a serious constitutional impediment, I do not see how Parliament's legitimate goal of preventing serious harm in

exigent circumstances can be attained without such a possibility. The key to constitutional validity is, however, the minimization of any lack of judicial scrutiny by ensuring that the delay in applying for a judicial authorization once s. 184.4 of the **Code** is implemented is no greater than inherently necessary to the exigency.

[230] In addition, it seems to me that if, in addition to notice provisions, s. 184.4 of the **Code** included at least some of the other accountability safeguards considered in **Duarte**, the possible lack of judicial scrutiny in a very limited number of cases would be significantly ameliorated.

[231] I will return to my conclusions with respect to the constitutional validity of s. 184.4 of the **Code** in respect of the s. 8 **Charter** issues after addressing the one overbreadth issue raised by the accused under s. 7 and s. 11(d) of the **Charter** that I have not already addressed in either the interpretation of s. 184.4 of the **Code** or in my consideration of **Duarte**.

[232] That issue concerns the very broad class of individuals (statutorily defined peace officers) who are entitled to use s. 184.4 of the **Code** to intercept private communications without approval or oversight.

(4) Is the definition of peace officer in s. 184.4 of the Code so broad that the section is unconstitutional?

[233] Section 2 of the **Code** provides a very wide definition of the term peace officer . It includes:

- (a) a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer and justice of the peace,
- (b) a member of the Correctional Service of Canada who is designated as a peace officer pursuant to Part I of the *Corrections and Conditional Release Act*, and a warden, deputy warden, instructor, keeper, jailer, guard and any other officer or permanent employee of a prison other than a penitentiary as defined in Part I of the *Corrections and Conditional Release Act*,
- (c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process,
- (d) an officer within the meaning of the *Customs Act*, the *Excise Act* or the *Excise Act, 2001*, or a person having the powers of such an officer, when performing any duty in the administration of any of those Acts,
- (d.1) an officer authorized under subsection 138(1) of the *Immigration and Refugee Protection Act*,
- (e) a person designated as a fishery guardian under the *Fisheries Act* when performing any duties or functions under that Act and a person designated as a fishery officer under the *Fisheries Act* when performing any duties or functions under that Act or the *Coastal Fisheries Protection Act*,

- (f) the pilot in command of an aircraft
 - (i) registered in Canada under regulations made under the *Aeronautics Act*, or
 - (ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft registered in Canada under those regulations,while the aircraft is in flight, and
- (g) officers and non-commissioned members of the Canadian Forces who are
 - (i) appointed for the purposes of section 156 of the *National Defence Act*, or
 - (ii) employed on duties that the Governor in Council, in regulations made under the *National Defence Act* for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers;

[234] It is difficult to envisage the type of exigency that would require the implementation of s. 184.4 of the **Code** by many of those who are defined as peace officers. Without denigrating from the importance of the duties that each of those persons might be called upon to perform in their roles as peace officers, it is in my view highly unlikely that Parliament ever anticipated that any persons other than trained police officers actively engaged in the investigation of crimes that have the potential to cause serious harm to persons or property would invoke the provisions of s. 184.4 to invade privacy without judicial oversight.

[235] Perhaps even more surprising is the lack of any requirement in s. 184.4 of the **Code** mandating supervision of individual peace officers who are entitled to use such broad invasive powers. That such lack of accountability is unacceptable is, in fact, recognized by the many police forces who filed evidence on this application that as a matter of policy require very senior officers in their respective forces to approve the use of s. 184.4 of the **Code**.

[236] However, although the evidence from those police forces that was adduced on this application tends to indicate the responsible use of the powers of s. 184.4 by senior officers in those forces, the fact remains that, as enacted, s. 184.4 of the **Code** does not mandate internal approval or supervision.

[237] Such lack of mandatory internal approval or supervision coupled with the lack of any mandatory reporting obligations to any senior law enforcement official in the Provincial or Federal Governments (as addressed in **Duarte**) makes it impossible to know with any certainty the extent to which s. 184.4 may have been used in the past or in what circumstances by forces, agencies, or individual peace officers other than those that filed evidence on this hearing.

[238] I also contrast the provisions of s. 184.4 of the **Code** concerning the broad class of individuals who may invoke its powers with those who may apply for an emergency judicial authorization to intercept private communications under s. 188(1) of the **Code**. That section permits only a peace officer designated in writing by the Minister of Public Safety and Emergency Preparedness or the Attorney General of a Province to make such emergency applications.

**(5) Conclusion concerning the constitutional validity of
s. 184.4 of the Code**

[239] After considering all of the evidence adduced on this hearing in the context of my findings concerning the intentions and objectives of Parliament in enacting s. 184.4 of the **Code** and my consideration of all of the submissions of all counsel, I have concluded that s. 184.4 as enacted breaches s. 52 of the **Constitution Act, 1982** by reason of its contravention of the fundamental freedom to be free from unreasonable search and seizure guaranteed by s. 8 of the **Charter**.

[240] I reach that conclusion for the following reasons:

1. I have determined from my review of all of the legislative material filed by the Crown on this application that Parliament's intention in enacting s. 184.4 of the **Code** was to allow a peace officer facing exigent circumstances of apprehended serious harm to persons or property to attempt to prevent that harm by intercepting communications without judicial authorization if the officer apprehended both that the exigency and potential for serious harm to persons or property were such that the lapse of time required to obtain judicial authorization could increase the risk of the occurrence of the apprehended harm.
2. I have determined that the provisions of s. 184.4 of the **Code** are capable of interpretation in such a way that they are not constitutionally vague so as to permit the state to interfere with fundamental freedoms in indefinite or unpredictable circumstances. That determination is, however, dependent upon:
 - (a) the interpretation of an unlawful act as being limited to offences enumerated in s. 183 of the **Code**;
 - (b) an interpretation of ss. 184.4(c) of the **Code** that limits the communications that can be intercepted to those between the perpetrator of the anticipated serious harm and the actual victim or intended victim of that harm.
 - (c) an interpretation that requires peace officers to follow the constitutionally compliant process I have formulated, so that upon determining that the urgency of the situation is such that a judicial authorization could not, with reasonable diligence, be obtained before the harm sought to be prevented could occur a peace officer must:
 - (i) implement s. 184.4 of the **Code** to intercept only those private communications that may be lawfully intercepted pursuant to ss. 184.4(c); and

- (ii) immediately, and with the least delay possible in the circumstances, also take all steps necessary to obtain a judicial authorization under Part VI of the **Code**.
3. Although those interpretive considerations result in a determination that s. 184.4 of the **Code** as enacted is not so vague that it allows arbitrary law enforcement, I find that even if peace officers do act under s. 184.4 within the bounds of those interpretive constraints, the section does not meet constitutional standards for the interception of private communications even in exigent circumstances.
4. That is so primarily because of the virtually total absence of the constitutional safeguards necessary to balance the interests of the state in preventing harm and prosecuting crime with its obligation to protect s. 8 **Charter** rights as discussed in and established by **Duarte**.
5. While the existence of exigent circumstances and the need to protect citizens and their property from the infliction of serious harm must allow the state greater leeway in the invasion of privacy rights than is normally the case, exigency cannot be used to excuse the elimination of those constitutional safeguards that are not impacted by the imperatives of an emergency.
6. Of particular concern with respect to the absence of such constitutional safeguards under s. 184.4 are:
 - (a) The lack of any requirement for notice to those persons whose communications have been intercepted. The provision of such notice at some time after the interceptions have been made and the exigent circumstances are at an end and once any ongoing investigation of the offence has concluded would not in any way prevent the police from acting to attempt to prevent the anticipated harm and would provide a mechanism for review and would aid in ensuring police accountability; and
 - (b) The lack of any requirement by a peace officer who may use s. 184.4 of the **Code** to report to the executive branch of government charged with the responsibility for law enforcement and civilian oversight of police actions or to Parliament. The provision of such a report at some time after the conclusion of the interception and the conclusion of any ensuing investigation would not in any way prevent the police from acting to attempt to prevent the anticipated harm and would provide an ongoing supervisory power of review and would further help to ensure police accountability.

[241] I do not find that s. 184.4 of the **Code** breaches either s. 7 or s. 11(d) of the **Charter** because the interpretation of s. 184.4 that I have decided must apply to its use answers concerns raised respecting alleged constitutional vagueness and over-breadth other than concerns relating to the broad definition of peace officer .

[242] As to that issue, while I remain concerned about the scope of that definition and am of the view that it could be significantly more restrictive without interfering with Parliament's legitimate intentions in enacting s. 184.4, I cannot on the evidence

adduced on this application determine whether any particular person, officer, or class of persons now included within the statutory definition of peace officer in s. 2 of the **Code** should be excluded. That is an issue that should be addressed by Parliament.

(6) Application of s. 1 of the Charter

[243] My determination that s. 184.4 of the **Code** as enacted is not constitutionally valid requires that I next proceed to determine whether that constitutional invalidity is permissible by reason of the application of the provisions of s. 1 of the **Charter**.

[244] In **R. v. Oakes**, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321 [**Oakes**], the Supreme Court of Canada enunciated the well known two-stage analysis for the determination of whether otherwise unconstitutional legislation is justifiable under s. 1 of the **Charter**. The questions that must be answered are:

1. Whether the objective that the limit on a protected freedom that the legislation is designed to serve must be sufficiently important to override a constitutionally protected right.
2. Whether the party invoking s. 1 (in this case the Crown) has established that the means chosen to obtain the objective are reasonably and demonstrably justified in a free and democratic society.

[245] The second inquiry requires that the Court be satisfied of three things, those being that:

1. The measures designed to meet the legislative objective (in this case, s. 184.4 of the **Code**) must be rationally connected to the objective.
2. The means used should impair as little as possible the right or freedom in question.
3. There must be proportionality between the effect of the measures which limit the **Charter** right or freedom and the legislative objective of the limit on those rights. This involves balancing the invasion of rights guaranteed by the **Charter** against the objective to which the limitation of those rights is directed.

[246] I have previously determined that Parliament's intention in enacting s. 184.4 of the **Code** was to allow a peace officer facing exigent circumstances of apprehended serious harm to persons or property to attempt to prevent that harm by intercepting communications without judicial authorization if the officer apprehended that both the exigency and potential for serious harm were such that the lapse of time required to obtain judicial authorization could increase the risk of the occurrence of the apprehended harm.

[247] There can, in my view, be no serious doubt that the objective of preventing serious harm to innocent citizens or their property in truly exigent circumstances is sufficiently important to override constitutionally protected privacy rights of those who would do such harm. I refer specifically to **Godoy**, **Feeney** and **Mann** as well as many other cases, including child protection cases where the prevention of harm in exigent

circumstances has been determined to be of sufficient concern to require that constitutionally protected rights give way to such objectives.

[248] I also have no doubt that the measures designed to meet the objective of attempting to prevent harm in exigent circumstances are rationally connected to that objective. The evidence led by the Crown on this hearing establishes to my satisfaction that the immediate interception of communications in circumstances of rapidly unfolding events in hostage taking and kidnapping situations may assist the police in locating either the potential victims of the serious harm or the location of those who would perpetrate such harm. In today's world where the use of cellular telephone communications in the commission of crimes is rampant, it will often be the case that the interception of the communications of those seeking to cause harm will be the best avenue of investigation available to the police.

[249] I am also satisfied that if the interception of communications could not occur until such time as judicial authorization was obtained, there is a risk that delay inherent to the judicial authorization process might hamper the ability of the police to prevent the serious harm.

[250] I must, however note, that I do not reach that conclusion on the basis of the evidence of the police in this case about the length of time necessary to obtain judicial authorization. As I will later discuss, I find that evidence to be unreliable in that it was based in whole or in part upon *ex post facto* rationalization, lack of knowledge about available judicial resources, lack of appreciation of the provisions, availability and utility of other provisions of Part VI of the **Code** in exigent circumstances, and also a misapprehension of the extent of information required to obtain judicial authorizations under such alternate provisions.

[251] Rather, I reach the conclusion that there is a risk that delay inherent to the judicial authorization process might hamper the ability of the police to prevent serious harm in truly exigent circumstances because, by the very nature of exigent circumstances it is not possible to determine whether any delay might preclude the prevention of harm or increase the risk of it occurring. The harm sought to be prevented could result during the time needed to locate a judge before whom an application could be made or while the application was being made.

[252] I thus have no hesitation in finding that the measures designed to meet the objective of attempting to prevent harm in exigent circumstances without the potential delay that could arise from a requirement to first obtain judicial authorization are rationally connected to that objective.

[253] I do not, however, reach the same conclusion with respect to the minimal impairment or proportionality tests under **Oakes**.

[254] I accept the Crown's submission that the objective of preventing serious harm in exigent circumstances may be entitled to greater leeway due to the fact that the type of emergency addressed by s. 184.4 of the **Code** should generally be short-lived and that Parliament's solutions should be given significant deference.

[255] The fact remains, however, remains that the solutions identified by Parliament in s. 184.4 fail to include any safeguards that could appropriately balance the invasion of

privacy countenanced by the implementation of the section while still not interfering in any way with its objectives.

[256] I refer specifically to the absence of any provisions requiring the giving of notice to those whose communications have been intercepted and the absence of any provisions requiring the peace officer or police force implementing the section to report to any civilian body concerning the number of times the section has been used or the circumstances of that use. Neither the giving of notice nor an obligation to report upon the use of the section would impact in any way upon the ability of the police to act in exigent circumstances. On the other hand, the inclusion of one or preferably both of such notice and reporting provisions would dramatically impact upon police accountability and compliance with the constitutional parameters established by **Duarte**.

[257] I also note, as I have previously, that if s. 184.4 of the **Code** is not interpreted and implemented in the way that I have determined to be necessary to ensure its constitutionality, it would also fail to meet the minimal impairment test.

[258] I accordingly conclude that the constitutional invalidity of s. 184.4 of the **Code** by reason of its contravention of s. 8 of the **Charter** cannot be justified under s. 1 of the **Charter**.

[259] The accused are accordingly entitled to a declaration that s. 184.4 as enacted is constitutionally invalid legislation.

[260] That determination requires that I also consider the appropriate constitutional remedy in the circumstances of this case.

(7) What is the appropriate constitutional remedy?

[261] In **Schachter v. Canada**, [1992] 2 S.C.R. 679 at 717-19, 93 D.L.R. (4th) 1 [**Schachter**], Lamer C.J., for the majority, summarized the means available to remedy a breach of s. 52 of the **Constitution Act, 1982**. In doing so, he said:

It is valuable to summarize the above propositions with respect to the operation of s. 52 of the *Constitution Act, 1982* before turning to the question of the independent availability of remedies pursuant to s. 24(1) of the *Charter*. Section 52 is engaged when a law is itself held to be unconstitutional, as opposed to simply a particular action taken under it. Once s. 52 is engaged, three questions must be answered. First, what is the extent of the inconsistency? Second, can that inconsistency be dealt with alone, by way of severance or reading in, or are other parts of the legislation inextricably linked to it? Third, should the declaration of invalidity be temporarily suspended? The factors to be considered can be summarized as follows:

(i) The Extent of the Inconsistency

The extent of the inconsistency should be defined:

- A. broadly where the legislation in question fails the first branch of the *Oakes* test in that its purpose is held not to be sufficiently pressing or substantial to justify infringing a *Charter*

right or, indeed, if the purpose is itself held to be unconstitutional -- perhaps the legislation in its entirety;

B. more narrowly where the purpose is held to be sufficiently pressing and substantial, but the legislation fails the first element of the proportionality branch of the *Oakes* test in that the means used to achieve that purpose are held not to be rationally connected to it -- generally limited to the particular portion which fails the rational connection test; or,

C. flexibly where the legislation fails the second or third element of the proportionality branch of the *Oakes* test

(ii) Severance/Reading In

Severance or reading in will be warranted only in the clearest of cases, that is, where each of the following criteria is met:

A. the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;

B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and,

C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.

(iii) Temporarily Suspending the Declaration of Invalidity

Temporarily suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option on the basis of one of the above criteria if:

A. striking down the legislation without enacting something in its place would pose a danger to the public;

B. striking down the legislation without enacting something in its place would threaten the rule of law; or,

C. the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

I should emphasize before I move on that the above propositions are intended as guidelines to assist courts in determining what action under s. 52 is most appropriate in a given case, not as hard and fast rules to be applied regardless of factual context.

[262] I have determined that s. 184.4 of the **Code** is constitutionally invalid under the minimal impairment and proportionality elements of the **Oakes** test.

[263] The Crown submitted that if I determined that s. 184.4 was constitutionally invalid due to lack of notice and/or accountability provisions under a **Duarte** analysis, I should then read into s. 184.4 those provisions I consider necessary to cure those constitutional deficiencies.

[264] That option is attractive and I would have been prepared to consider such a remedy were it not for the many issues in addition to lack of notice and accountability that exist in this case, as well as the interplay between s. 184.4 and other provisions of Part VI of the **Code**.

[265] In determining that s. 184.4 of the **Code** as enacted is constitutionally invalid under s. 8 of the **Charter** by reason of its lack of notice and accountability safeguards, I did not also find invalidity in relation to other concerns which do not reach the level of constitutional vagueness or over-breadth but which I believe should still be addressed to achieve full constitutional compliance. Those include:

1. the vast number of offences in s. 183 of the **Code** which could in theory engage the use of s. 184.4 but which do not appear to be offences that could give rise to the type of serious harm contemplated by Parliament;
2. the definition of peace officer in s. 2 of the **Code** which confers enormous power to invade privacy under s. 184.4 on such a broad and diverse class of individuals in addition to police officers engaged in the prevention and investigation of serious crimes which have the potential to result in serious harm to persons or property; and
3. the lack of any statutory requirement for institutional supervision of any peace officer invoking s. 184.4 of the **Code** by superior officers or officials.

[266] In my view, it is Parliament that must consider such concerns in light of whatever remedial action Parliament may consider appropriate to rectify those specific constitutional impediments to the validity of s. 184.4 of the **Code** under s. 8 of the **Charter** (lack of any notice or accountability) I have identified.

[267] Further, the specific notice or accountability provisions that Parliament may choose to add in curing the constitutional invalidity of s. 184.4 may also impact other provisions of Part VI in a way that I cannot now know and should not risk.

[268] I have accordingly determined that in the circumstances any reading in in which I might engage (other than by way of interpretation to achieve constitutional compliance with s. 7 of the **Charter**) would constitute an unacceptable intrusion into Parliament's legislative domain.

[269] It would be wrong for me to attempt to identify exactly what notice provisions should be enacted or what accountability provisions should be chosen. It would also be wrong for me to attempt to classify those specific offences that might possibly require the implementation of s. 184.4, dictate to Parliament those persons or classes of persons who should reasonably be empowered to implement s. 184.4, or mandate an internal

supervisory regime that I believe might appropriately address the concerns I have raised with respect to internal institutional accountability.

[270] All of those issues are inter-related and the appropriate forum for the resolution of such concerns must be Parliament which can resolve the issues in the context of the observations I have made, but also in the context of the specific harms it seeks to address and prevent and its determination of the appropriate way to achieve its goals within the constitutional parameters and conditions that I have identified.

[271] I also, however, recognize from the material filed by the Crown emanating from the various police organizations on whose behalf affidavits were filed and from the testimony of those senior R.C.M.P officers who testified on this hearing, that to make the declaration of constitutional invalidity that I have made without providing sufficient time for Parliament to respond to the constitutional impediments I have identified could seriously impede law enforcement and the prevention of harm before Parliament could act.

[272] Such a consequence would be as unacceptable to this Court as it would be to the police and to society as a whole.

[273] I have accordingly determined that the appropriate constitutional remedy is to stay the declaration of constitutional invalidity I have made for the longer of either 18 months or 30 days after the charges that are the subject of this proceeding have been resolved in this Court. The Attorney General for Canada shall also have liberty to apply to extend that stay period if necessary to ensure that Parliament can react appropriately to this declaration of constitutional invalidity.

[274] I wish to make it as clear as possible that in granting that stay for that very lengthy time I am doing so on the basis that my interpretation of the provisions of s. 184.4 of the **Code** will be observed by peace officers who implement that section after the publication of this ruling. Doing so will ameliorate the constitutional deficiencies I have identified to a sufficient extent that a stay of the declaration of constitutional invalidity is warranted.

(8) Constitutional Summary

[275] In summary:

1. Section 184.4 of the **Code** as enacted breaches s. 52 of the **Constitution Act, 1982** by reason of its contravention of the fundamental freedom to be free from unreasonable search and seizure guaranteed by s. 8 of the **Charter** and is not saved by application of the provisions of s. 1 of the **Charter**.
2. I declare that s. 184.4 of the **Code** as enacted is constitutionally invalid legislation.
3. That declaration of constitutional invalidity shall be stayed for the longer of either 18 months or 30 days after the charges that are the subject of this proceeding have been resolved in this Court.
4. The Attorney General for Canada shall have liberty to apply to extend that stay period.

5. In granting that stay for that very lengthy time, I expect that my interpretation of the provisions of s. 184.4 of the **Code** will be observed by peace officers who implement that section after the publication of this ruling.
6. That interpretation requires that:
 - (a) the unlawful acts to which s. 184.4 of the **Code** may apply are limited to the offences enumerated in s. 183 of the **Code**;
 - (b) the communications that can be intercepted pursuant to ss. 184.4(c) of the **Code** are those between the perpetrator (including any aiders or abettors) of the anticipated serious harm and the actual victim or intended victim of that harm; and
 - (c) any peace officer who implements s. 184.4 of the **Code** must, upon determining that the urgency of the situation is such that a judicial authorization could not, with reasonable diligence, be obtained before the harm sought to be prevented could occur:
 - (i) intercept only those private communications that may be lawfully intercepted pursuant to ss. 184.4(c); and
 - (ii) immediately, and with the least delay possible in the circumstances, also take all steps necessary to obtain a judicial authorization under Part VI of the **Code**.

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